

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1990

*Volume II*  
*Part Two*

*Report of the Commission  
to the General Assembly  
on the work  
of its forty-second session*

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UNITED NATIONS





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UNITED NATIONS  
New York, 1993



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1980*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session:

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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## CONTENTS

	<i>Page</i>
<b><i>Document A/45/10: Report of the International Law Commission on the work of its forty-second session (1 May-20 July 1990) .....</i></b>	<b>1</b>
<b>Check-list of documents of the forty-second session .....</b>	<b>111</b>



# DOCUMENT A/45/10\*

## Report of the International Law Commission on the work of its forty-second session (1 May-20 July 1990)

### CONTENTS

	<i>Page</i>
Abbreviations .....	4
Note concerning quotations .....	4
Multilateral conventions cited in the present volume .....	5
<i>Chapter</i>	<i>Paragraphs</i>
I. ORGANIZATION OF THE SESSION .....	1-19 7
A. Membership .....	2-3 7
B. Officers .....	4-5 7
C. Drafting Committee .....	6 7
D. Working Group established pursuant to the request contained in General Assembly resolution 44/39 .....	7 8
E. Secretariat .....	8 8
F. Agenda .....	9-10 8
G. General description of the work of the Commission at its forty-second session .....	11-19 8
II. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND .....	20-158 10
A. Introduction .....	20-26 10
B. Consideration of the topic at the present session .....	27-92 10
1. Complicity, conspiracy and attempt .....	33-76 11
(a) Questions of methodology .....	33-39 11
(b) Complicity .....	40-56 12
(c) Conspiracy .....	57-67 14
(d) Attempt .....	68-76 16
2. International illicit traffic in narcotic drugs .....	77-88 17
3. Breach of a treaty designed to ensure international peace and security .....	89-92 18
C. Question of the establishment of an international criminal jurisdiction .....	93-157 19
1. Terms of reference .....	94-102 19
2. Previous United Nations efforts in the field of an international criminal jurisdiction .....	103-115 20
3. Discussion of the question by the Commission at the present session .....	116-157 21
(a) General considerations .....	117-122 22
(b) Jurisdiction and competence .....	123-137 22
(i) Subject-matter .....	123-127 22
(ii) Competence and jurisdiction over persons .....	128-129 22
(iii) Nature of jurisdiction .....	130-134 23
(iv) Submission of cases .....	135-137 23
(c) Structure of the court .....	138-144 23
(i) Institutional structure .....	138-140 23
(ii) Composition of the court .....	141 23
(iii) Election of judges .....	142 23
(iv) Organs responsible for criminal prosecution .....	143 24
(v) Pre-trial examination .....	144 24
(d) Legal force of judgments .....	145-147 24
(e) Other questions .....	148-151 24
(i) Penalties .....	148-149 24
(ii) Implementation of judgments .....	150 24
(iii) Financing of the court .....	151 24
(f) Other possible international trial mechanisms .....	152-154 24
(g) Conclusions .....	155-157 24
(i) An international criminal court with exclusive jurisdiction .....	24
(ii) Concurrent jurisdiction between the international criminal court and national courts .....	25
(iii) An international criminal court having only review competence .....	25
	<i>Paragraph</i>
D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind	
1. Texts of the draft articles provisionally adopted so far by the Commission .....	158 25
2. Texts of draft articles 16, 18 and X, with commentaries thereto, provisionally adopted by the Commission at its forty-second session .....	28

\*Initially distributed as *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10.*

<i>Chapter</i>		<i>Page</i>
	CHAPTER II. ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND	
	PART I. CRIMES AGAINST PEACE	
	Article 16. International terrorism .....	28
	Commentary .....	28
	Article 18. Recruitment, use, financing and training of mercenaries .....	28
	Commentary .....	29
	PART ... CRIMES AGAINST HUMANITY	
	Article X. Illicit traffic in narcotic drugs .....	29
	Commentary .....	30
		<i>Paragraphs</i>
III.	JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY .....	159-243 31
	A. Introduction .....	159-164 31
	B. Consideration of the topic at the present session .....	165-242 31
	1. Part III of the draft: [Limitations on] [Exceptions to] State immunity .....	172-215 33
	Article 12 (Contracts of employment) .....	175-184 33
	Article 13 (Personal injuries and damage to property) .....	185-191 35
	Article 14 (Ownership, possession and use of property) .....	192-196 36
	Article 15 (Patents, trade marks and intellectual or industrial property) .....	197-198 36
	Article 16 (Fiscal matters) .....	199-201 37
	Article 17 (Participation in companies or other collective bodies) .....	202-203 37
	Article 18 (State-owned or State-operated ships engaged in commercial service) .....	204-207 37
	Article 19 (Effect of an arbitration agreement) .....	208-213 38
	Article 20 (Cases of nationalization) .....	214-215 39
	2. Part IV of the draft: State immunity in respect of property from measures of constraint .....	216-228 40
	Article 21 (State immunity from measures of constraint)	
	Article 22 (Consent to measures of constraint) <i>and</i>	
	Article 23 (Specific categories of property) .....	217-228 40
	3. Part V of the draft: Miscellaneous provisions .....	229-241 42
	Article 24 (Service of process) .....	229-231 42
	Article 25 (Default judgment) .....	232-234 43
	Article 26 (Immunity from measures of coercion) .....	235-236 44
	Article 27 (Procedural immunities) .....	237-238 44
	Article 28 (Non-discrimination) .....	239-241 44
	4. Settlement of disputes .....	242 45
	C. Points on which comments are invited .....	243 45
IV.	THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES .....	244-313 46
	A. Introduction .....	244-250 46
	B. Consideration of the topic at the present session .....	251-311 46
	1. General comments .....	255-258 47
	2. Comments on specific draft articles .....	259-303 47
	Article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses) .....	259-266 47
	Article 25 (Regulation of international watercourses) .....	267-274 48
	Article 26 (Joint institutional management) .....	275-290 49
	Article 27 (Protection of water resources and installations) <i>and</i>	
	Article 28 (Status of international watercourses and water installations in time of armed conflict)	291-303 50
	3. Annex I. Implementation of the articles .....	304-311 52
	C. Draft articles on the law of the non-navigational uses of international watercourses	
	1. Texts of the draft articles provisionally adopted so far by the Commission .....	312 54
	2. Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session .....	57
	PART IV. PROTECTION AND PRESERVATION	
	Article 22. Protection and preservation of ecosystems .....	57
	Commentary .....	57
	Article 23. Prevention, reduction and control of pollution .....	60
	Commentary .....	61
	Article 24. Introduction of alien or new species .....	63
	Commentary .....	63
	Article 25. Protection and preservation of the marine environment .....	64
	Commentary .....	64
	PART V. HARMFUL CONDITIONS AND EMERGENCY SITUATIONS	
	Article 26. Prevention and mitigation of harmful conditions .....	65
	Commentary .....	65
	Article 27. Emergency situations .....	66
	Commentary .....	66
		<i>Paragraphs</i>
	D. Points on which comments are invited .....	313 67
V.	STATE RESPONSIBILITY .....	314-413 68
	A. Introduction .....	314-319 68
	B. Consideration of the topic at the present session .....	320-412 68

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
1. General approach .....	322-343	69
2. Draft articles 8, 9 and 10 of part 2 .....	344-407	71
Article 8 (Reparation by equivalent) .....	344-377	71
Article 9 (Interest) .....	378-387	77
Article 10 (Satisfaction and guarantees of non-repetition) .....	388-407	78
3. The impact of fault on the forms and degrees of reparation .....	408-412	81
C. Draft articles on State responsibility		
PART 2. CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY		
Texts of the draft articles provisionally adopted so far by the Commission .....	413	82
VI. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC) .....	414-464	84
A. Introduction .....	414-421	84
B. Consideration of the topic at the present session .....	422-464	84
VII. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW .....	465-531	90
A. Introduction .....	465-468	90
B. Consideration of the topic at the present session .....	469-530	90
1. General approach and scope .....	473-483	91
(a) Activities involving risk and activities with harmful effects .....	473-477	91
(b) Further clarification of scope .....	478-483	92
2. Comments on specific articles of the outline proposed by the Special Rapporteur .....	484-525	93
(a) Chapter I. General provisions .....	484-488	93
Article 1 (Scope of the present articles) <i>and</i>		
Article 2 (Use of terms) .....	484-487	93
Article 3 (Assignment of obligations)		
Article 4 (Relationship between the present articles and other international agreements) <i>and</i>		
Article 5 (Absence of effect upon other rules of international law) .....	488	94
(b) Chapter II. Principles .....	489-493	95
Article 6 (Freedom of action and the limits thereto)		
Article 7 (Cooperation)		
Article 8 (Prevention) <i>and</i>		
Article 9 (Reparation) .....	489-491	95
Article 10 (Non-discrimination) .....	492-493	95
(c) Chapter III. Prevention .....	494-507	96
Article 11 (Assessment, notification and information) <i>and</i>		
Article 12 (Participation by the international organization) .....	495-496	96
Article 13 (Initiative by the presumed affected State)		
Article 14 (Consultations)		
Article 15 (Protection of national security or industrial secrets) <i>and</i>		
Article 16 (Unilateral preventive measures) .....	497-499	97
Article 17 (Balance of interests) .....	500-501	97
Article 18 (Failure to comply with the foregoing obligations)		
Article 19 (Absence of reply to the notification under article 11) <i>and</i>		
Article 20 (Prohibition of the activity) .....	502-507	98
(d) Chapter IV. Liability .....	508-519	99
Article 21 (Obligation to negotiate)		
Article 22 (Plurality of affected States) <i>and</i>		
Article 23 (Reduction of compensation payable by the State of origin) .....	511-514	100
Article 24 (Harm to the environment and resulting harm to persons or property)		
Article 25 (Plurality of States of origin)		
Article 26 (Exceptions) <i>and</i>		
Article 27 (Limitation) .....	515-519	101
(e) Chapter V. Civil Liability .....	520-525	102
Article 28 (Domestic channel)		
Article 29 (Jurisdiction of national courts)		
Article 30 (Application of national law)		
Article 31 (Immunity from jurisdiction)		
Article 32 (Enforceability of the judgment) <i>and</i>		
Article 33 (Remittances) .....	521-525	102
3. Liability for harm to the environment in areas beyond national jurisdictions (global commons) .	526-530	104
C. Points on which comments are invited .....	531	105
VIII. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION .....	532-567	106
A. Programme, procedures and working methods of the Commission, and its documentation .....	532-552	106
B. Cooperation with other bodies .....	553-555	108
C. Date and place of the forty-third session .....	556	109
D. Representation at the forty-fifth session of the General Assembly .....	557	109
E. International Law Seminar .....	558-567	109

## ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
ECE	Economic Commission for Europe
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research
WIPO	World Intellectual Property Organization
World Bank	International Bank for Reconstruction and Development

\*

\* \*

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

## NOTE CONCERNING QUOTATIONS

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

**MULTILATERAL CONVENTIONS  
CITED IN THE PRESENT VOLUME**

	<i>Source</i>
<b>HUMAN RIGHTS</b>	
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
<b>PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS</b>	
Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946)	Ibid., vol. 1, p. 15.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	Ibid., vol. 33, p. 261.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	Ibid., vol. 596, p. 261.
<b>LAW OF TREATIES</b>	
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
<b>LAW OF THE SEA</b>	
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.
<b>LIABILITY FOR DAMAGE CAUSED BY NUCLEAR AND OUTER SPACE ACTIVITIES</b>	
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) and Additional Protocol (Paris, 28 January 1964)	United Nations, <i>Treaty Series</i> , vol. 956, pp. 251 and 335.
Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963)	Ibid., vol. 1063, p. 265.
Convention on International Liability for Damage Caused by Space Objects (London, Moscow, Washington, 29 March 1972)	Ibid., vol. 961, p. 187.
<b>NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES</b>	
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	E/CONF.82/15 and Corr.2.
<b>MISCELLANEOUS PENAL MATTERS</b>	
International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	General Assembly resolution 44/34, annex.



## 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 forty-second session at its permanent seat at the United Nations Office at Geneva from 1 May to 20 July 1990. The session was opened by the Chairman of the forty-first session, Mr. Bernhard Graefrath.

#### A. Membership

2. The Commission consists of the following members:

Prince Bola Adesumbo AJIBOLA (Nigeria);  
Mr. Husain AL-BAHARNA (Bahrain);  
Mr. Awn AL-KHASAWNEH (Jordan);  
Mr. Riyadh Mahmoud Sami 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 DÍAZ GONZÁLEZ (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. Alain PELLET (France);  
Mr. Pemmaraju Sreenivasa RAO (India);  
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);  
Mr. Emmanuel J. ROUCOUNAS (Greece);  
Mr. César SEPÚLVEDA GUTIÉRREZ (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).

3. At its 2165th meeting, on 30 May 1990, the Commission elected Mr. Alain Pellet (France) to fill the

casual vacancy in the Commission created by the death of Mr. Paul Reuter.

#### B. Officers

4. At its 2149th meeting, on 1 May 1990, the Commission elected the following officers:

*Chairman:* Mr. Jiuyong Shi;  
*First Vice-Chairman:* Mr. Julio Barboza;  
*Second Vice-Chairman:* Mr. Juri G. Barsegov;  
*Chairman of the Drafting Committee:* Mr. Ahmed Mahiou;  
*Rapporteur:* Mr. Gudmundur Eiriksson.

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 chairman of the Commission<sup>1</sup> and the special rapporteurs.<sup>2</sup> The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2152nd meeting, on 4 May 1990, 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. Julio Barboza (Chairman), Prince Bola Adesumbo Ajibola, Mr. Husain Al-Baharna, Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Carlos Calero Rodrigues, Mr. Leonardo Díaz González, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Andreas J. Jacovides, Mr. Frank X. Njenga, Mr. Motoo Ogiso, Mr. Pemmaraju Sreenivasa Rao, Mr. Emmanuel J. Roucounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

#### C. Drafting Committee

6. At its 2150th meeting, on 2 May 1990, the Commission appointed a Drafting Committee composed of the following members: Mr. Ahmed Mahiou (Chairman), Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Juri G. Barsegov, Mr. Carlos Calero Rodrigues, Mr. Leonardo Díaz González, Mr. Francis Mahon Hayes, Mr. Abdul G. Koroma, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso, Mr. Stanislaw Pawlak, Mr. Edilbert Razafindralambo, Mr.

<sup>1</sup> Namely Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Bernhard Graefrath, Mr. Stephen C. McCaffrey, Mr. Doudou Thiam and Mr. Alexander Yankov.

<sup>2</sup> Namely Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Leonardo Díaz González, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso and Mr. Doudou Thiam.

César Sepúlveda Gutiérrez, Mr. Jiuyong Shi and Mr. Luis Solari Tudela. Mr. Gudmundur Eiriksson also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### **D. Working Group established pursuant to the request contained in General Assembly resolution 44/39<sup>3</sup>**

7. At its 2158th meeting, on 16 May 1990, the Commission established a Working Group pursuant to the request contained in General Assembly resolution 44/39 of 4 December 1989. The Working Group was composed as follows: Mr. Doudou Thiam (Chairman), Mr. Husain Al-Baharna, Mr. John Alan Beesley, Mr. Mohamed Bennouna, Mr. Leonardo Díaz González, Mr. Bernhard Graefrath, Mr. Jorge E. Illueca, Mr. Abdul G. Koroma, Mr. Stanislaw Pawlak, Mr. Pemmaraju Sreenivasa Rao and Mr. Emmanuel J. Roucounas. Mr. Gudmundur Eiriksson also participated in his capacity as Rapporteur of the Commission.

#### **E. Secretariat**

8. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Vladimir S. Kotliar, 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. Ms. Sachiko Kuwabara and Mr. Manuel Ramamontaldo, Senior Legal Officers, served as Senior Assistant Secretaries to the Commission and Ms. Mahnoush H. Arsanjani and Mr. Andrzej Makarewicz, Legal Officers, served as Assistant Secretaries to the Commission.

#### **F. Agenda**

9. At its 2150th meeting, on 2 May 1990, the Commission adopted the following agenda for its forty-second session:

1. Organization of work of the session.
2. Filling of a casual vacancy in the Commission (article 11 of the statute).
3. State responsibility.
4. Jurisdictional immunities of States and their property.
5. Draft Code of Crimes 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. Cooperation with other bodies.
11. Date and place of the forty-third session.
12. Other business.

10. The Commission considered all the items on its agenda. The Commission held 56 public meetings (2149th to 2204th meetings). In addition, the Drafting Committee of the Commission held 43 meetings, the Enlarged Bureau of the Commission held 4 meetings, the Planning Group of the Enlarged Bureau held 4 meetings and the Working Group established pursuant to the request contained in General Assembly resolution 44/39 (see para. 7 above) held 5 meetings.

#### **G. General description of the work of the Commission at its forty-second session**

11. At its forty-second session, the Commission devoted 17 meetings to the topic "Draft Code of Crimes against the Peace and Security of Mankind" (see chapter II).<sup>4</sup> The discussions were held on the basis of the eighth report (A/CN.4/430 and Add.1) submitted by the Special Rapporteur, Mr. Doudou Thiam, which contained in particular three draft articles dealing respectively with complicity, conspiracy and attempt (arts. 15-17), an article on illicit traffic in narcotic drugs as a crime against peace (art. X) and an article on illicit traffic in narcotic drugs as a crime against humanity (art. Y). The report also contained a section entitled "Statute of an international criminal court". At the conclusion of its discussions, the Commission referred to the Drafting Committee the revised texts of draft articles 15, 16, 17, X and Y submitted by the Special Rapporteur in the light of the debate. The Commission furthermore provisionally adopted, on the recommendation of the Drafting Committee, three draft articles on the topic, with commentaries thereto, for inclusion in chapter II of the draft, namely article 16 (International Terrorism), article 18 (Recruitment, use, financing and training of mercenaries) and article X (Illicit traffic in narcotic drugs). The Commission also discussed the question of an article on the breach of a treaty designed to ensure international peace and security (see chapter II, section B.3).

12. In the context of its consideration of the topic "Draft Code of Crimes against the Peace and Security of Mankind", the Commission established a Working Group (see para. 7 above) to consider the request addressed to it by the General Assembly in resolution 44/39 on the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed certain crimes. The results of the work carried out in this connection by the Commission are reflected in chapter II, section C, below.

13. The Commission devoted six meetings to the topic "Jurisdictional immunities of States and their property" (see chapter III).<sup>5</sup> The discussions were held on the basis of the third report (A/CN.4/431) submitted by the Special Rapporteur, Mr. Motoo Ogiso, which contained, for a number of the draft articles provisionally adopted on first reading, revised texts proposed by the Special Rapporteur. At the conclusion of its discussions, the Commission

<sup>3</sup> Entitled "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes".

<sup>4</sup> The topic was considered at the 2150th to 2159th, 2189th, 2192nd to 2194th and 2196th to 2198th meetings, held between 2 and 17 May, on 9 July and between 12 and 17 July 1990.

<sup>5</sup> The topic was considered at the 2158th to 2162nd and 2191st meetings held between 16 and 23 May and on 11 July 1990.

referred articles 12 to 28 to the Drafting Committee for their second reading, articles 1 to 11 *bis* having already been referred to the Committee at the previous session. The Commission received from the Drafting Committee a report containing draft articles 1 to 10 and 12 to 16 adopted by the Committee on second reading at the current session. It took note of that report and decided to defer action on it until its next session, at which time it intends to complete the second reading of the draft articles as a whole.

14. The Commission devoted eight meetings to the topic "The law of the non-navigational uses of international watercourses" (see chapter IV).<sup>6</sup> The discussions were held on the basis of (a) chapters II and III of the fifth report submitted by the Special Rapporteur, Mr. Stephen C. McCaffrey, at the forty-first session, in 1989,<sup>7</sup> which contained in particular two draft articles entitled "Relationship between navigational and non-navigational uses; absence of priority among uses" (art. 24) and "Regulation of international watercourses" (art. 25); (b) chapters I to III of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1), which contained in particular three draft articles entitled "Joint institutional management" (art. 26), "Protection of water resources and installations" (art. 27) and "Status of international watercourses and water installations in time of armed conflict" (art. 28), as well as annex I entitled "Implementation of the articles" and consisting of eight articles. At the conclusion of its discussions, the Commission referred draft articles 24 to 28, as well as draft article 3, paragraph 1, and draft article 4 of annex I, to the Drafting Committee. The Commission furthermore provisionally adopted, on the recommendation of the Drafting Committee, six draft articles on the topic, with commentaries thereto, namely article 22 (Protection and preservation of ecosystems), article 23 (Prevention, reduction and control of pollution), article 24 (Introduction of alien or new species) and article 25 (Protection and preservation of the marine environment), comprising part IV of the draft (Protection and preservation), and article 26 (Prevention and mitigation of harmful conditions) and article 27 (Emergency situations), comprising part V (Harmful conditions and emergency situations). Chapter IV of the Special Rapporteur's sixth report was not discussed by the Commission due to lack of time.

15. The Commission devoted nine meetings to the topic "State responsibility" (see chapter V).<sup>8</sup> The discussions were held on the basis of the second report submitted by the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, at the forty-first session, in 1989,<sup>9</sup> which contained in particular

three draft articles entitled "Reparation by equivalent" (art. 8), "Interest" (art. 9) and "Satisfaction and guarantees of non-repetition" (art. 10). At the conclusion of its discussions, the Commission referred draft articles 8 to 10 to the Drafting Committee.

16. The Commission devoted five meetings to the topic "Relations between States and international organizations (second part of the topic)" (see chapter VI).<sup>10</sup> The discussions were held on the basis of the fourth report submitted by the Special Rapporteur, Mr. Leonardo Díaz González at the forty-first session, in 1989,<sup>11</sup> which contained in particular 11 draft articles, namely articles 1 to 4 comprising part I (Introduction), articles 5 and 6 comprising part II (Legal personality) and articles 7 to 11 comprising part III (Property, funds and assets) of the draft. At the conclusion of its discussions, the Commission referred draft articles 1 to 11 to the Drafting Committee. The Special Rapporteur's fifth report (A/CN.4/432) was not discussed by the Commission due to lack of time.

17. The Commission devoted eight meetings to the topic "International liability for injurious consequences arising out of acts not prohibited by international law" (see chapter VII).<sup>12</sup> The discussions were held on the basis of the sixth report (A/CN.4/428 and Add.1) submitted by the Special Rapporteur, Mr. Julio Barboza, which contained in particular 33 draft articles, namely articles 1 to 5 comprising chapter I (General provisions), articles 6 to 10 comprising chapter II (Principles), articles 11 to 20 comprising chapter III (Prevention), articles 21 to 27 comprising chapter IV (Liability) and articles 28 to 33 comprising chapter V (Civil liability) of the draft. At the conclusion of its discussions, the Commission decided to revert at its next session to some policy and technical issues raised in the sixth report.

18. With respect to the topics "The law of the non-navigational uses of international watercourses" and "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission indicated issues on which expressions of views by Governments, either in the Sixth Committee of the General Assembly or in written form, would be of particular interest for the continuation of its work.<sup>13</sup>

19. Matters relating to the programme, procedures and working methods of the Commission, and its documentation were discussed in the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant observations and recommendations of the Commission are to be found in chapter VIII of the present report, which also deals with cooperation with other bodies and with certain administrative and other matters.

<sup>6</sup> The topic was considered at the 2162nd to 2167th, 2187th and 2188th meetings, held between 23 May and 1 June and on 5 and 6 July 1990.

<sup>7</sup> *Yearbook . . . 1989*, vol. II (Part One), p.91, document A/CN.4/421 and Add.1 and 2.

<sup>8</sup> The topic was considered at the 2168th to 2175th and 2185th meetings, held between 5 and 15 June and on 3 July 1990.

<sup>9</sup> *Yearbook . . . 1989*, vol. II (Part One), p.1, document A/CN.4/425 and Add.1.

<sup>10</sup> The topic was considered at the 2176th to 2180th meetings, held between 19 and 26 June 1990.

<sup>11</sup> *Yearbook . . . 1989*, vol. II (Part One), p. 153, document A/CN.4/424.

<sup>12</sup> The topic was considered at the 2179th, 2181st to 2186th and 2190th meetings, held on 22 June, between 27 June and 4 July and on 10 July 1990.

<sup>13</sup> See paragraphs 313 and 531 below.

## Chapter II

### DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

#### A. Introduction

20. By its resolution 177 (II) of 21 November 1947, the General Assembly 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; (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. At its first session, in 1949, the Commission appointed Mr. Jean Spiropoulos Special Rapporteur.

21. On the basis of the reports of the Special Rapporteur, the Commission, 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 Judgment of the Tribunal<sup>14</sup> and submitted those principles, with commentaries, to the General Assembly; then, at its sixth session, in 1954, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind<sup>15</sup> and submitted it, with commentaries, to the General Assembly.<sup>16</sup>

22. By its resolution 897 (IX) of 4 December 1954, the General Assembly, considering that the draft Code of Offences against the Peace and Security of Mankind formulated by the Commission raised problems closely related to that of the definition of aggression, and that the General Assembly had entrusted to a Special Committee 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.

23. By its resolution 3314 (XXIX) of 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression.

24. By its resolution 36/106 of 10 December 1981, the General Assembly 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.<sup>17</sup>

25. At its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic.<sup>18</sup> From its thirty-fifth session, in 1983, to its forty-first session, in 1989, the Commission received seven reports from the Special Rapporteur.<sup>19</sup>

26. At those sessions, the Commission took certain preliminary decisions regarding the content *ratione personae* and the content *ratione materiae* of the draft code.<sup>20</sup> It also referred to the Drafting Committee draft articles 1 to 11, 13 and 14 submitted in the Special Rapporteur's reports.<sup>21</sup> At its thirty-ninth to forty-first sessions, the Commission provisionally adopted articles 1 (Definition), 2 (Characterization), 3 (Responsibility and punishment), 4 (Obligation to try or extradite), 5 (Non-applicability of statutory limitations), 6 (Judicial guarantees), 7 (*Non bis in idem*), 8 (Non-retroactivity), 10 (Responsibility of the superior), 11 (Official position and criminal responsibility), 12 (Aggression), 13 (Threat of aggression), 14 (Intervention) and 15 (Colonial domination and other forms of alien domination), with commentaries thereto.<sup>22</sup>

#### B. Consideration of the topic at the present session

27. At the present session, the Commission had before it the eighth report of the Special Rapporteur on the topic

<sup>18</sup> For a detailed account of the historical background of the topic, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 10 *et seq.*, paras. 26-41.

<sup>19</sup> These reports are reproduced as follows:

First report: *Yearbook . . . 1983*, vol. II (Part One), p. 137, document A/CN.4/364;

Second report: *Yearbook . . . 1984*, vol. II (Part One), p. 89, document A/CN.4/377;

Third report: *Yearbook . . . 1985*, vol. II (Part One), p. 63, document A/CN.4/387;

Fourth report: *Yearbook . . . 1986*, vol. II (Part One), p. 53, document A/CN.4/398;

Fifth report: *Yearbook . . . 1987*, vol. II (Part One), p. 1, document A/CN.4/404;

Sixth report: *Yearbook . . . 1988*, vol. II (Part One), p. 197, document A/CN.4/411;

Seventh report: *Yearbook . . . 1989*, vol. II (Part One), p. 81, document A/CN.4/419 and Add.1.

<sup>20</sup> See *Yearbook . . . 1984*, vol. II (Part Two), p. 17, para. 65.

<sup>21</sup> For a detailed account of the Commission's work on the topic at its thirty-fifth to forty-first sessions, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 13 *et seq.*, paras. 42-69; *Yearbook . . . 1984*, vol. II (Part Two), pp. 11 *et seq.*, paras. 29-65; *Yearbook . . . 1985*, vol. II (Part Two), pp. 11 *et seq.*, paras. 34-101; *Yearbook . . . 1986*, vol. II (Part Two), pp. 41 *et seq.*, paras. 77-185; *Yearbook . . . 1987*, vol. II (Part Two), pp. 8 *et seq.*, paras. 25-67; *Yearbook . . . 1988*, vol. II (Part Two), pp. 57 *et seq.*, paras. 211-280; *Yearbook . . . 1989*, vol. II (Part Two), pp. 51 *et seq.*, paras. 83 *et seq.*

<sup>22</sup> For the texts of these articles, see section D.1 below.

<sup>14</sup> Hereinafter referred to as the "Nürnberg Principles" (*Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127).

<sup>15</sup> *Yearbook . . . 1954*, vol. II, pp. 150-152, document A/2693, paras. 49-54.

<sup>16</sup> The texts of the 1954 draft code and of the Nürnberg Principles are reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18, and p. 12, para. 45, respectively.

<sup>17</sup> Subsequently, in its resolution 42/151 of 7 December 1987, the General Assembly endorsed the Commission's recommendation that the title of the topic in English be amended. Thus the title of the topic in English now reads: "Draft Code of Crimes against the Peace and Security of Mankind".

(A/CN.4/430 and Add.1), which consisted of three parts. In part I, the Special Rapporteur dealt with the "related offences" or "other offences" which he had already discussed in his fourth report,<sup>23</sup> namely complicity, conspiracy and attempt. Part I also contained draft articles on those offences (articles 15, 16 and 17 on complicity, conspiracy and attempt, respectively), together with the Special Rapporteur's comments thereon.<sup>24</sup> With regard to complicity, the Special Rapporteur examined particularly the question of methodology and the place of complicity in the draft code, the problems arising from physical and intellectual acts of complicity, the question of the characterization of the acts of complicity, the distinction between the notions of perpetrator and accomplice and the question whether the act of complicity was committed before or after the principal act. With regard to conspiracy, the Special Rapporteur concentrated in his comments on the two degrees of conspiracy, namely agreement or concordance of intentions with a view to committing or executing a crime, and physical acts to carry out the crime planned. In connection with the latter aspect of conspiracy, the Special Rapporteur made a special study of the problems raised by the notions of individual responsibility and collective responsibility and, in particular, the problem of the responsibility of organizers. With regard to attempt, the Special Rapporteur examined the question of the possible application of that concept to crimes against the peace and security of mankind.

28. In part II of his eighth report, the Special Rapporteur responded to the Commission's request at its forty-first session that he prepare for the present session a draft provision on international drug trafficking.<sup>25</sup> Bearing in mind the views expressed by several members of the Commission at that session,<sup>26</sup> the Special Rapporteur thought it necessary to prepare two draft articles, one (art. X) making the international traffic in narcotic drugs a crime against peace and the other (art. Y) making it a crime against humanity.<sup>27</sup> The two articles were accompanied by comments dealing, in particular, with the constituent elements of the crime.

29. In part III of his report, dealing with the statute of an international criminal court, the Special Rapporteur followed the approach taken by the Commission in article 4 (Obligation to try or extradite) of the draft code, provisionally adopted on first reading.<sup>28</sup> He also responded to paragraph 2 of General Assembly resolutions 43/164 of

<sup>23</sup> *Yearbook . . . 1986*, vol. II (Part One), pp. 63 *et seq.*, document A/CN.4/398, paras. 89-145.

<sup>24</sup> Since the Commission has already provisionally adopted articles numbered 15, 16 and 18, the numbering proposed by the Special Rapporteur will eventually have to be changed.

<sup>25</sup> *Yearbook . . . 1989*, vol. II (Part Two), p. 65, para. 210.

<sup>26</sup> *Ibid.*, paras. 205-209.

<sup>27</sup> With regard to the numbering of the two articles, the Special Rapporteur pointed out in his report that it would be for the Commission to decide on their final position in the parts of the draft on crimes against peace and crimes against humanity.

<sup>28</sup> Paragraph 3 of article 4 states that the provisions of paragraphs 1 and 2 do not prejudice the establishment and the jurisdiction of an international criminal court. Moreover, the Commission indicated in the commentary (para. (5)) that paragraph 3 of the article dealt with the possible establishment of an international criminal court and showed that the jurisdictional solution adopted in article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court (*Yearbook . . . 1988*, vol. II (Part Two), pp. 67-68). See also section C below.

9 December 1988 and 44/32 of 4 December 1989 on the draft Code of Crimes against the Peace and Security of Mankind.<sup>29</sup> Part III, to which the Special Rapporteur ascribed a preliminary character, was in the nature of a "questionnaire-report", the purpose of which was to offer the Commission some choices between different solutions and to elicit responses. The choices related mainly to the following points concerning the possible establishment of an international criminal court: competence of the court, procedure for appointing judges, submission of cases to the court, functions of the prosecuting attorney, pre-trial examination, authority of *res judicata* by a court of a State, authority of *res judicata* by the court, withdrawal of complaints, penalties and financial provisions. For each of those points, the Special Rapporteur submitted one or more versions of provisions which might form part of the statute of an international criminal court.

30. The Commission considered the Special Rapporteur's eighth report at its 2150th to 2159th meetings, from 2 to 17 May 1990. After hearing the Special Rapporteur's introduction, the Commission considered draft articles 15, 16, 17, X and Y as contained in the report. At its 2159th meeting, the Commission decided to refer to the Drafting Committee the revised texts of those articles submitted by the Special Rapporteur in the light of the debate. The comments and observations of members of the Commission, including the Special Rapporteur, on the draft articles are summarized in paragraphs 33 to 88 below. With regard to part III of the report, dealing with the statute of an international criminal court, the Commission decided to set up a Working Group, the terms of reference and work of which are examined in detail in section C below.<sup>30</sup>

31. At its 2196th and 2197th meetings, on 16 and 17 July 1990, the Commission, after having considered the report of the Drafting Committee, provisionally adopted articles 16 (International terrorism), 18<sup>31</sup> (Recruitment, use, financing and training of mercenaries) and X (Illicit traffic in narcotic drugs).<sup>32</sup>

32. The texts of these articles, and the commentaries thereto, are reproduced in section D.2 of the present chapter.

## 1. COMPLICITY, CONSPIRACY AND ATTEMPT

### (a) *Questions of methodology*

33. In introducing part I of his eighth report, dealing with complicity, conspiracy and attempt, the Special Rapporteur pointed out that its subject-matter had already been discussed in detail during the consideration of his

<sup>29</sup> In paragraph 2 of those resolutions, the General Assembly noted the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft code and encouraged the Commission to explore further all possible alternatives on the question. See also section C below.

<sup>30</sup> The Commission considered the report of the Working Group at its 2189th, 2192nd to 2194th and 2196th meetings, on 9, 12 and 13, and 16 July 1990.

<sup>31</sup> With regard to article 17, see paras. 89-92 below.

<sup>32</sup> See footnote 85 below.

fourth report<sup>33</sup> at the Commission's thirty-eighth session, in 1986. Draft articles 15, 16 and 17, dealing respectively with complicity, conspiracy and attempt, were being presented in the light of that discussion.

34. During the Commission's consideration of draft articles 15 to 17, some general remarks on methodology were formulated, as well as more specific comments on each article which are summarized below.

35. In the opinion of some members, complicity, conspiracy and attempt should not be treated as separate offences in the draft code, since they constituted only forms of participation in the commission of a certain crime. Complicity, conspiracy and attempt were punishable only in connection with the principal crime and were therefore of an accessory character. Consequently, they should be placed in the part of the draft code dealing with general principles.

36. Moreover, some members took the view that none of those notions—complicity, conspiracy and attempt—could be dealt with in the abstract. Each of them should be examined in relation to each of the crimes covered by the draft code so as to determine, for example, what constituted attempted aggression or attempted genocide. Each crime had to be considered separately and it was necessary to determine to what extent and according to what modalities complicity, conspiracy and attempt were possible for each crime. In their view, instead of including the notions of complicity, conspiracy and attempt among the general principles, the Special Rapporteur should examine them case by case, to determine whether each crime considered could be the subject of complicity, conspiracy or attempt.

37. Other members supported the Special Rapporteur's approach of treating complicity, conspiracy and attempt as separate offences. One of these members, in particular, while having no objection to those notions appearing in the part of the code dealing with general principles, as suggested by other members, thought that they should also be retained as separate offences. Mentioning them among the general principles did not preclude their being included in the part dealing with specific offences, where each of those notions could be precisely defined in order to facilitate their application by the courts.

38. With regard to the above-mentioned observations, the Special Rapporteur stressed that the Commission should perhaps not dwell too long on methodological problems, important though they were. In that connection, it had been repeatedly suggested during the debate that the notions of complicity, conspiracy and attempt should have been placed in the part of the draft code dealing with general principles, rather than in the part dealing with specific offences. He added that some national criminal codes did indeed deal with complicity, conspiracy and attempt in the framework of general provisions. Other codes, however, adopted a different approach. The French Penal Code, for example, dealt with complicity in its specific provisions and with attempt in the general part. The Special Rapporteur also pointed out that, in the 1954 draft code prepared by the Commission, complicity was treated as a crime in paragraph (13) of article 2, not mentioned in the general provisions. And in the Nürnberg Principles, complicity was unequivocally characterized as

an international crime. Since the question was one of methodology, the Special Rapporteur saw no objection to its being settled by the Commission and, in particular, the Drafting Committee, which could select the most appropriate method.

39. As to the suggestion that each crime should be examined separately to determine whether the notions of complicity, conspiracy or attempt were applicable to it, the Special Rapporteur thought that that was an impossible task. The Commission should define the three notions and leave it to the competent courts to decide whether they were applicable in specific cases brought before them.

#### (b) *Complicity*

40. In his eighth report and in his introduction of draft article 15,<sup>34</sup> the Special Rapporteur pointed out that paragraph 2 extended the notion of complicity both to acts committed prior to the principal offence and to subsequent accessory acts. He observed that the notion of complicity was highly complex because of the nature of the acts constituting complicity, the plurality of possible accomplices and the problem of the chronological order of the acts committed. Acts of complicity were of two kinds: intellectual acts and physical acts. While it was comparatively easy to identify physical acts, the same was not true of intellectual acts. The Special Rapporteur drew particular attention to the difficulty of distinguishing between the perpetrator of a crime and his accomplice. If a superior officer consented to a criminal act and a subordinate carried it out, it was doubtful who was the intellectual author and who the accomplice.

41. The Special Rapporteur pointed out that the courts had tried to settle that issue in some of their judgments. In the *Yamashita* case, the United States Supreme Court had held that the order of a commanding officer, or his failure to give the appropriate instructions to his subordinates, could constitute an act of complicity. But the question had more often been settled by legislation. Thus, under a number of national laws, an order given by a superior, or the failure of that superior to give an order, were treated as acts of complicity.

42. The question also arose, as the Special Rapporteur observed, whether counsel or advice which led a person to commit an offence could be regarded as an act of complicity. In the view of the Special Rapporteur, that

<sup>34</sup> Draft article 15 submitted by the Special Rapporteur in his eighth report read:

#### "CHAPTER II

#### "ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

" . . .

#### "Article 15. *Complicity*

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

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

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

<sup>33</sup> See footnote 23 above.

would depend largely on the persuasive force of the advice and its effect on the offender's decision. Instigation or encouragement to commit an offence were regarded as acts of complicity by certain legal systems, but not by others.

43. The Special Rapporteur stressed that it was comparatively easy to distinguish between perpetrators and accomplices when dealing with a simple offence such as burglary in which the principal perpetrator was helped by an accomplice to climb over a wall. But where an offence was committed by a group of offenders or was a mass offence, it was difficult to draw the line and there was a school of thought which preferred to abandon the distinction between principal and accomplice and to treat all those involved in the crime as participants on the same footing. Many military tribunals had taken that position in their judgments. For instance, the Supreme Court of the British Zone had considered that the act of complicity and the principal act were both crimes against humanity and that, consequently, accomplices should be sentenced for having committed a crime against humanity and not for being accomplices in the commission of the crime.

44. As to the question of the time of commission of the offence, referred to in paragraph 2 of draft article 15, the Special Rapporteur pointed out that some legal systems, such as the common-law systems, far from limiting the definition of complicity to acts prior to or concomitant with the principal offence, extended it to subsequent acts. The Continental systems adopted, for the most part, a more restrictive approach. Some national laws, however, as well as the judgments of the French *Cour de cassation*, recognized that giving assistance after the commission of an offence could, in certain circumstances, constitute complicity.

45. Some members maintained that the Commission should not attempt to formulate a definition of complicity, or even of conspiracy, without first defining the criteria which characterized the perpetrator of a crime against the peace and security of mankind by giving a material definition of the perpetrator, taking into consideration specific elements of particular crimes. Only after that had been done would the Commission be in a position to decide whether it was advisable to define the notion of complicity in great detail.

46. Other members, however, did not think that that approach was strictly necessary, since criminal law did not generally define the perpetrator but rather the offence. The law started from the offences and proceeded to the perpetrators, to punish them according to the form of their participation. The Commission should not be too ambitious in that respect: some notions could not be defined with all the desired precision. Very often, in internal law, it was the judge who determined the role played by each of the accused and there was no reason why the position should be different at the international level. The Commission should provide some guidelines, but it would be for the judge, in each specific case, to determine the responsibility of each of the accused.

47. Some members thought that the traditional categories of criminal law, such as complicity, were easier to apply to war crimes than to crimes against peace or crimes against humanity. It was pointed out that war crimes were generally committed by individuals or groups on their own initiative, without the knowledge or participation of their

superiors. On the other hand, crimes such as aggression, intervention and apartheid raised different problems. Apartheid, for example, involved a Government and a whole people, since anyone living in South Africa knew how apartheid operated and anyone voting for a political party advocating apartheid supported that system. That was precisely the weak point of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: by applying automatically the notion of complicity of traditional criminal law, it unduly widened the circle of offenders. What was needed was to strike at the leaders and organizers, since it was impossible to prosecute a whole people.

48. Certain other members, however, did not find such a distinction acceptable and thought that it would be possible to devise a single article on complicity applicable to all the crimes covered by the draft code. While it was true that the existence of conventions on war crimes containing detailed provisions identifying the various possible offences would facilitate characterization of the acts and hence of complicity, there was no denying that the Hague and Geneva Conventions, detailed though they were, had sometimes proved to be imprecise.

49. Several members expressed the view that draft article 15 should be more elaborate than the text proposed, so as to identify more clearly the acts of complicity which ought to be covered by the code. In the opinion of one member, the definition given in article 15 should cover both physical acts of complicity, such as aid, assistance, provision of means, etc., and intellectual or "moral" acts, which should include instigating or provoking a criminal act or giving an order to commit it. Another member also mentioned instigation, assistance, counsel, order and direction as elements to be covered by the definition of the notion of complicity. Finally, another member proposed the following definition of the notion of complicity: "Any person who aids, abets, counsels or procures the commission of any of the crimes under this Code shall be liable to be tried or is guilty of that crime."

50. With regard to paragraph 2 of draft article 15, several members supported the Special Rapporteur's decision to include in the notion of complicity not only accessory acts prior to or concomitant with the principal offence, but also subsequent accessory acts. Other members expressed serious doubts on that point or requested clarification on particular points. Some considered that distinctions should be drawn. When acts subsequent to the crime were committed on the basis of an agreement or an understanding reached before or during its commission, they undoubtedly constituted acts of complicity. In the view of these members, the position was more complex in the case of an act committed after the crime but without any prior agreement. Such an act could, strictly speaking, constitute a separate criminal offence.

51. Lastly, some members of the Commission, referring to a passage in the Special Rapporteur's report, suggested that, in the case of crimes against the peace and security of mankind, it would be preferable to abandon the traditional perpetrator/accomplice dichotomy and adopt the broader notion of "participant", which covered both principal perpetrators and accomplices. In their view, the Commission should give careful attention to that solution and consider formulating a general provision on criminal participation, covering organizers, instigators, perpetrators

and accomplices. That provision could appear among the general principles and would apply, in principle, to all the crimes under the code, it being understood that the judge of the criminal court concerned would have to assess the exact role of the various participants in each case.

52. The Special Rapporteur referred to several of the comments made during the discussion. With regard to the definition of the "perpetrator" of a crime, he said that the absence of any definition of that term in a number of criminal codes, including the French, German and Finnish Codes, had not prevented the competent courts of the countries in question from functioning properly. In his view, it was for the courts to determine the meaning of that word. The term "perpetrator" was generally understood to mean a person who had committed a crime directly and physically. Although an attempt had been made to extend that notion to indirect perpetrators, for example, such persons were not perpetrators in the strict sense of the term, but accomplices.

53. In the Special Rapporteur's view, the link between the act and the perpetrator, as well as the classification of the perpetrator, should also be determined by the judge in each particular case. The perpetrators were to be sought among those vested with the power of command who used that power to commit a crime. It could also be said that the person responsible was the individual who used the power vested in him to commit a crime. The Commission's concern, however, was to provide not for the criminal responsibility of the State, but for that of natural persons acting in the performance of their duties. A war crime could obviously be committed by a soldier on the battlefield who used prohibited means of warfare to commit such a crime, or by an officer who ill-treated prisoners of war. It was accordingly necessary to identify, in each specific case, the persons who, by virtue of their functions or activities, were liable to commit the crime in question, which was essentially a matter for the judge to decide.

54. With regard to the proposals intended to tighten the notion of complicity, the Special Rapporteur pointed out that the greater the number of participants, the more difficult it was to define the notion of an accomplice, which had evolved from the traditional concept of an accomplice present when the crime was committed to that of an accomplice who took no direct part in its commission. A new category of accomplices had appeared, which was not based on the traditional concept: it comprised those who directed, planned or organized a crime in the perpetration of which they took no direct part. Persons in that category, who had often occupied high-ranking posts in the administrative, political or military hierarchy, and were sometimes judges, had been treated by the Nürnberg International Military Tribunal as accomplices. The Charter of the Nürnberg Tribunal<sup>35</sup> had limited the notion of an accomplice to that category. It had been argued during the Commission's debate that it was impossible to prosecute a whole people, but in the case of the Third Reich the Nürnberg Charter had referred to the leaders, organizers and accomplices.

55. The Special Rapporteur considered that complicity included both physical acts and intellectual or "abstract"

acts. Thus aiding or abetting the principal perpetrator constituted an identifiable physical act, whereas counsel, instigation, promises, threats or provocation were abstract acts the existence of which was sometimes difficult to establish.

56. Taking into account some of the observations made during the discussion, the Special Rapporteur submitted to the Commission a revised version of draft article 15.<sup>36</sup>

### (c) Conspiracy

57. In his eighth report and in his introduction of draft article 16,<sup>37</sup> the Special Rapporteur pointed out that the article comprised two elements: first, agreement, that is the concordance of wills or an agreement between two or more individuals to commit a crime; and secondly, physical acts performed to carry out the crime planned. Paragraph 1 made the agreement as such a crime, independently of any physical act. The object of that paragraph was dissuasion.

58. Paragraph 2 raised the delicate question of possible collective responsibility; that was why he had proposed two alternatives. The first specified that criminal responsibility attached not only to the perpetrator, but also to any individual who ordered, instigated or organized a common plan or who participated in its execution. The second alternative, which was based on the concept of individual responsibility, provided that each participant would be punished according to his own participation, without regard to participation by others. The Special Rapporteur pointed out that the Nürnberg Tribunal had

<sup>36</sup> The revised text of draft article 15 submitted by the Special Rapporteur at the 2157th meeting read:

#### "Article 15. Complicity

"1. Participation in the commission of a crime against the peace and security of mankind constitutes the crime of complicity.

"2. The following are acts of complicity:

"(a) aiding, abetting or provision of means to the direct perpetrator, or making him a promise;

"(b) inspiring the commission of a crime against the peace and security of mankind by, *inter alia*, incitement, urging, instigation, order, threat or abstention, when in a position to prevent it;

"[(c) aiding the direct perpetrator, after the commission of a crime, to evade criminal prosecution, either by giving him refuge or by helping him to eliminate the evidence of the criminal act.]"

<sup>37</sup> Draft article 16 submitted by the Special Rapporteur in his eighth report read:

#### "Article 16. Conspiracy

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

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

"2. FIRST ALTERNATIVE

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

"2. SECOND ALTERNATIVE

"Each participant shall be punished according to his own participation, without regard to participation by others."

<sup>35</sup> Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

limited the application of the principle of collective responsibility for conspiracy to crimes against peace. In the case of war crimes and crimes against humanity, the Tribunal had preferred the principle of individual responsibility. In the Special Rapporteur's view, more recent events showed that major crimes could no longer be regarded as acts committed by isolated individuals. Modern criminologists, while still persistently attached to the principle of personal criminal responsibility, tended to draw increasingly broad consequences from the collective nature of an offence.

59. Several members of the Commission supported the Special Rapporteur's inclusion in the draft code of a separate provision on the notion of conspiracy. It was argued that, in international criminal law, conspiracy was understood to mean a form of perpetration of certain international crimes. According to the Charters of the International Military Tribunals, participation in a common plan or conspiracy aimed at the preparation, initiation or waging of a war of aggression was a punishable offence. Similarly, conspiracy to commit genocide was punishable under article III (b) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Those members did not endorse the solution adopted by the Nürnberg Tribunal, which had limited the notion of conspiracy to crimes against peace, whereas the Commission, in the 1954 draft code, had extended its application to all crimes against the peace and security of mankind. Genocide and apartheid, which were directed not against a State, but against ethnic, religious, racial, tribal or cultural groups, were precisely the type of crimes that could not be perpetrated by single individuals, but only by constituted groups, generally with the participation of a State, cooperating within the framework of a conspiracy having a common criminal objective. It was also pointed out that the notion of conspiracy, as applied to crimes such as aggression, referred to acts that were normally preparatory. Some national laws had chosen to make conspiracy a separate punishable offence. For example, in certain countries the mere possession of plates intended for printing false banknotes constituted a crime, even if those plates had not been used in any way. Similarly, in certain countries the mere possession of firearms was an offence. Moreover, many national laws punished as a separate crime the mere fact of participating in a common plan to perpetrate a crime, even if no crime had been committed. One member suggested that the creation or institution of the crime of conspiracy in national penal systems seemed to have evolved as a matter of public policy, due to the seriousness or frequency of the underlying crime or the difficulty of taking criminal proceedings against individual perpetrators, and the same process might be envisaged on the international plane.

60. Some of the members who supported the inclusion in the draft code of a separate provision on conspiracy thought that the article should contain additional elements for a better definition of that notion, such as the criminal intent (*mens rea*) of each participant, agreement with another person and the attempt to execute the crime.

61. Other members believed that it was not really necessary to include in the draft code a provision on conspiracy separate from that on complicity, since the two notions were very close to each other and often overlapped. In their view, conspiracy should be regarded

simply as an aspect of participation in a crime. It was pointed out in that connection that, while it was true that the Convention on the Prevention and Punishment of the Crime of Genocide treated complicity and conspiracy separately, other instruments, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, dealt with them together.

62. With regard to the two alternative texts submitted by the Special Rapporteur for paragraph 2 of article 16, several members thought that the Commission should avoid engaging in a discussion on individual responsibility as opposed to collective responsibility. In internal criminal law, as in international criminal law, the principle was individual responsibility. It was true that the time had come to face the problem of organized crime, and not only in the case of crimes against peace. But the question that arose was that of the apportionment of responsibility in the perpetration of such a crime. In any case, responsibility remained individual; it depended on the role played by the person concerned in the perpetration of the crime, even if it was aggravated by the existence of an organization within which the perpetrators acted. On that point, one member observed that, if the Commission opted for the principle of individual responsibility embodied in the second alternative text, paragraph 2 would be superfluous because the draft code already contained a provision on individual responsibility.

63. One member stressed that the principle of individual responsibility should be treated to the fullest possible extent as the basic principle in the case of war crimes. The notion of conspiracy, if the Commission decided to include it in the draft code, should apply only to crimes against peace and genocide, as provided in article III of the Convention on the Prevention and Punishment of the Crime of Genocide.

64. Several members saw no real contradiction between the principle of individual responsibility and that of collective responsibility. One member thought that the two alternative texts proposed for paragraph 2 were more in the nature of complementary provisions: the first defined the crime of conspiracy, while the second determined the degree of culpability and hence the penalties incurred by the various participants in the conspiracy. In his view, if the text of article 16 were recast along those lines, it would probably attract general approval. Each participant in a conspiracy was responsible not only for the acts he personally committed, but also for all the acts committed collectively by all the parties to the conspiracy, even if he himself had not been present at the time of their commission. The degree of culpability and the penalty imposed should, however, be related to the participation of each individual in the execution of the common plan.

65. In the opinion of another member, a person should be held individually responsible for committing a crime under the code if he carried out an act which violated any of the provisions of the code. There would be collective responsibility, apart from individual responsibility, when an individual conspired with others to commit an illegal act contrary to the code and when the perpetration of that act could be attributed both to a legal entity and to each of the individuals having participated in the decision-making process or in the execution of the decision to commit the act. The nature of the crime was of great importance for determining the type of criminal responsibility involved.

Certain crimes such as aggression, genocide and apartheid could not be perpetrated by an individual; they required a group of participants or a collective participation. The tendency to broaden the field of application of collective responsibility for crimes against the peace and security of mankind was justified in this member's opinion. He proposed that conspiracy should be defined as the offence of two or more persons who decided to execute jointly a common plan aimed at committing any crime under the code, and that the definition should specify that each of the offenders was guilty of conspiracy to commit that crime. In his view, such a definition would bring out more clearly the dual responsibility—individual and collective—involved in conspiracy, as conceived by the Special Rapporteur.

66. Referring to certain questions raised in the course of the discussion, the Special Rapporteur pointed out that conspiracy differed from complicity in that, in the case of conspiracy, no distinction was made between direct perpetrators and indirect perpetrators, perpetrators and co-perpetrators, or perpetrators and accomplices: all the participants were associated in the framework of a common plan and had jointly decided to commit the crime. Although the Nürnberg Tribunal had decided not to apply the notion of conspiracy to all crimes against the peace and security of mankind, the 1954 draft code had extended that notion to all the offences it covered—a tendency which became more marked in the conventions on genocide, apartheid, narcotic drugs and slavery adopted subsequently. It could therefore be affirmed that the notion of conspiracy had been finally recognized in international law and thus had its place in the code, together with that of complicity, which had also been taken into account in those conventions.

67. Taking into account certain observations made during the discussion, the Special Rapporteur submitted to the Commission a revised version of draft article 16.<sup>38</sup>

(d) *Attempt*

68. In his eighth report and in his introduction of draft article 17,<sup>39</sup> the Special Rapporteur observed that the concept of attempt was not included in the Charters of the International Military Tribunals or in the Nürnberg

<sup>38</sup> The revised text of draft article 16 submitted by the Special Rapporteur at the 2157th meeting read:

*“Article 16. Conspiracy*

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

“2. Conspiracy means any agreement between the participants to commit jointly a crime against the peace and security of mankind.”

<sup>39</sup> Draft article 17 submitted by the Special Rapporteur in his eighth report read:

*“Article 17. Attempt*

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

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

Principles drawn up by the Commission. On the other hand, the concept of attempt was included in article 2, paragraph (13) (iv), of the 1954 draft code, although it was not defined there.

69. In the Special Rapporteur's view, the theory of attempt could be of only limited application in the case of crimes against the peace and security of mankind. It was difficult to see what form an attempt to commit an act of aggression could take and how to distinguish between commencement of execution of an act of aggression and the act itself. The idea of an attempt at a threat of aggression was even more bewildering.

70. The Special Rapporteur considered, however, that the concept of attempt in that area should not be abandoned altogether. Most crimes against humanity, such as genocide and apartheid, consisted of a series of specific criminal acts, and in such cases attempt was entirely conceivable.

71. Several members of the Commission supported the Special Rapporteur's inclusion of attempt among crimes against the peace and security of mankind. While it was difficult to conceive of attempt in the case of crimes against peace, that did not apply to crimes against humanity. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide included attempt among punishable acts (art. III (d)). As to the crime of apartheid, an attempt might conceivably be made to murder or to inflict grievous bodily or mental harm on members of a racial group for the purpose of establishing and maintaining domination by one racial group over another and of systematically oppressing it.

72. These members nevertheless considered that draft article 17 should be accompanied by a clear definition of the concept of attempt. Several members supported the definition provided by the Special Rapporteur in paragraph 65 of his eighth report (A/CN.4/430 and Add.1), which had not been included in article 17. According to that definition, attempt meant “any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention”.

73. In particular, some members pointed out that the concept of attempt comprised the following elements: (a) the intent to commit the crime in question; (b) an overt act towards its commission; (c) failure to commit the crime; (d) the apparent possibility of committing it. In that context, it was noted that mere preparatory acts not followed by execution should not be treated as crimes.

74. Other members of the Commission expressed reservations about the inclusion of draft article 17. In addition to the problems raised by the definition of attempt, and the doubts to which the applicability of that notion to crimes against peace gave rise, the article was unnecessary: for if a criminal undertaking was halted before it was carried out there was certainly no need to call upon an international criminal court. In the view of these members, attempt should be punishable only if it was expressly covered by the provisions defining a particular crime or category of crimes. In some cases it would be necessary to specify, in regard to one or other of the crimes, that attempt was subject to a less severe criminal sanction than the completed crime.

75. Lastly, some members thought that it would be difficult to review all the crimes covered by the draft code in order to determine whether the concept of attempt could be applied to them. But it would also be unwise to specify as a general rule that attempt would be punishable in respect of all crimes against the peace and security of mankind. In the view of these members, if the Commission merely included the traditional definition of attempt in the general part of the draft code, it would be for the courts to determine in each specific case whether the concept of attempt was applicable.

76. The Special Rapporteur pointed out that the concept of attempt could be treated in several ways. Most criminal codes sought an element of intent and an element of gravity to distinguish between punishable attempt and non-punishable attempt, and left it to the courts to apply that general principle to specific cases. In view of the various comments made during the discussion, the Special Rapporteur submitted to the Commission a revised version of draft article 17.<sup>40</sup>

## 2. INTERNATIONAL ILLICIT TRAFFIC IN NARCOTIC DRUGS

77. In his eighth report and in his introduction of draft articles X and Y,<sup>41</sup> the Special Rapporteur recalled that the Commission had, at its forty-first session, invited him to submit a draft provision on international drug trafficking.<sup>42</sup> He was submitting two texts. One treated international traffic in narcotic drugs as a crime against peace and the other treated it as a crime against humanity. That twofold characterization took account of the views expressed by

<sup>40</sup> The revised text of draft article 17 submitted by the Special Rapporteur at the 2157th meeting read:

*"Article 17. Attempt*

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

"2. Attempt means any commencement of execution of a crime against the peace and security of mankind that failed or was halted only because of circumstances independent of the perpetrator's intention."

<sup>41</sup> Draft articles X and Y submitted by the Special Rapporteur in his eighth report read:

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

"The following constitute crimes against peace:

"1. Engaging in illicit traffic in narcotic drugs.

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

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

"The following constitutes a crime against humanity:

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

<sup>42</sup> See footnote 25 above.

several members of the Commission at the forty-first session<sup>43</sup> and he considered it fully justified. For the wording of the draft articles, he had taken into account, *inter alia*, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988. Draft article X dealt with large-scale trafficking by associations or private groups, or by public officials, either as principals or as accomplices. Such trafficking could affect international peace by giving rise to a series of conflicts, for example between the producer or dispatcher State, the transit State and the destination State. The threat to international peace was even greater when organized groups infiltrated Governments, so that the State itself became, in a way, the perpetrator of the internationally wrongful act. Accordingly, traffic in narcotic drugs carried out by individuals and punishable under the national law of the country where it occurred was not covered by article X.

78. With regard to draft article Y, the Special Rapporteur noted that international illicit traffic in narcotic drugs, while constituting a crime against peace, was also, and above all, a threat to humanity. As had been pointed out at the forty-first session, even where traffickers were in business for profit or were lured by the prospect of financial gain, their crimes were still detrimental to the health and well-being of mankind as a whole. Thus it was humanity that was threatened.

79. Several members of the Commission expressed their approval of the recognition as a crime, under the draft code, of a problem now generally recognized as a scourge which posed a grave threat to mankind and which, in their view, should certainly be included in the code.

80. Some members, however, thought that a single provision would suffice and that drug trafficking should be treated only as a crime against humanity. It was noted in that connection that, although the criteria for classification as a crime against peace, a crime against humanity or a war crime were obviously relative, it seemed indisputable that, in view of its many characteristics, international illicit traffic in narcotic drugs clearly fell within the category of crimes against humanity, since it was directed against all the peoples of the world and its physical result was the destruction of human life in all countries, thus acting against mankind as a whole. In the opinion of one member in particular, it would suffice to identify this crime as a crime against the peace and security of mankind.

81. Other members, however, supported the Special Rapporteur's preference for two separate articles. In their view, illicit traffic in narcotic drugs as a crime against peace had a State aspect, either on an internal or on an international plane. It was because it threatened the stability of States or jeopardized international relations that it could be characterized as a crime against peace. Those parameters should be set out in the article which defined illicit traffic in narcotic drugs as a crime against peace. In the case of a crime against humanity, on the other hand, the State element was superfluous. Internal illicit traffic, which had grave consequences for the population, could, as a result of those consequences, be assimilated in some respects to a form of genocide. It did not directly threaten international peace or the stability of a Government, but it harmed large groups of the population: the

<sup>43</sup> See footnote 26 above.

point was thus to preserve the concept of humanity as such.

82. Several members thought that, whatever the Special Rapporteur's intention in drafting provisions might have been, it was not clear that only large-scale and extremely serious international drug trafficking should be made a crime. In the opinion of these members, the definition of this crime should have been accompanied by qualitative or quantitative particulars, for otherwise not only the major drug barons, but also the small dealers would come under the code. It was therefore essential to specify clearly the kind of traffic covered.

83. In the view of one member, the provisions in question should, like the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, cover every act connected with drug trafficking, including its financial aspect.

84. One member considered that the definition contained in draft article X, paragraph 2, was unnecessary. In his view, although the language was taken from article 3 of the 1988 United Nations Convention, there was a difference between characterizing the offences covered by that article as crimes—in other words making them crimes under internal law—and raising them to the level of international crimes.

85. As for making illicit traffic in narcotic drugs a crime, some members of the Commission stressed that attention should be focused on international cooperation. Such cooperation, rather than the self-help often resorted to unilaterally by certain States, should be the watchword.

86. With regard to the prevention and punishment of illicit traffic in narcotic drugs, one member considered that it would be well to add to the list of crimes covered by the draft code a new form of crime: narco-terrorism. At its forty-sixth session, the Commission on Human Rights had adopted resolution 1990/75 entitled "Consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights", in which it expressed its deep concern at the crimes and atrocities committed in many countries by irregular armed groups and drug traffickers and its alarm at the evidence of growing links between them. There were now grounds for thinking that the terrorist movements rife a few years previously in Europe had had links with drug traffickers at one time. The same was currently true in several countries of Latin America where that new form of crime constituted a real threat to society. What was involved was thus not only a crime against humanity, but also a crime against peace, which should certainly be a crime under the code.

87. The Special Rapporteur explained that he had submitted two separate draft articles on the subject because, first, the distinction between crimes against peace and crimes against humanity had apparently already been established by the Commission in its work on the draft code, and secondly, as some members had already pointed out, there were aspects of the illicit traffic in narcotic drugs which belonged to both those categories of crime.

88. He had duly taken account of the remarks made concerning the two draft articles. In the light of those comments, the Special Rapporteur submitted to the

Commission revised versions of draft articles X and Y.<sup>44</sup>

### 3. BREACH OF A TREATY DESIGNED TO ENSURE INTERNATIONAL PEACE AND SECURITY

89. When introducing the report of the Drafting Committee concerning its work on the draft articles of the code, the Chairman of the Drafting Committee informed the Commission that the Committee had held a long discussion on draft article 17, concerning the breach of a treaty designed to ensure international peace and security, but had been unable to reach agreement. He indicated that the Committee had once again encountered the seemingly irreconcilable views which had prevented it from reaching agreement after long discussion at the Commission's forty-first session.<sup>45</sup> He further pointed out the difficulties the Drafting Committee would have in taking up the question again at future sessions of the Commission in the absence of clear guidelines on the direction it should take.<sup>46</sup>

90. The discussion in the Commission<sup>47</sup> revealed a continuing divergence of views on the advisability of including an article on the subject in the draft code. On the one hand, it was felt by some members that the importance of treaties designed to ensure international peace and security, such as arms-control and disarmament treaties, could not be ignored in the code, particularly in the light of the inclusion of relatively less important questions. In the view of these members, a serious breach of such a treaty would, by definition, endanger peace and would be of universal concern, not merely a matter for the parties to the treaty.

91. Many members, on the other hand, were opposed to dealing with the subject in the code. The reasons adduced

<sup>44</sup> The revised texts of draft articles X and Y submitted by the Special Rapporteur at the 2159th meeting read:

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

"Any mass traffic in narcotic drugs organized on a large scale in a transboundary context by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace."

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

"Any mass traffic in narcotic drugs organized on a large scale, whether in the context of a State or in a transboundary context, by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against humanity."

<sup>45</sup> See the statement by the Chairman of the Drafting Committee at that session (*Yearbook . . . 1989*, vol. I, p. 304, 2136th meeting, paras. 43-50).

<sup>46</sup> For the statement by the Chairman of the Drafting Committee at the present session on draft article 17, see the summary record of the 2196th meeting (see *Yearbook . . . 1990*, vol. I), paras. 108 *et seq.*

<sup>47</sup> The Commission discussed draft article 17 at its 2196th to 2198th meetings, on 16 and 17 July 1990.

in that respect included concern that such an article would violate the principle of universality which must underlie the concept of crimes against the peace and security of mankind. Furthermore, the view was expressed that such an article would discriminate against States which had entered into the treaties concerned as compared to States which had not done so. The effect might be to discourage the conclusion of such treaties. The draft article was also criticized on the ground that it unjustifiably focused on treaty obligations, and concern was expressed that such an article would raise fundamental questions of treaty law, for example in the area of validity and interpretation of treaties, relations between parties to treaties and the question of treaties and third States. Finally, the general point was made that an article of such a controversial nature would have an adverse impact on the acceptability of the code.

92. The Commission was therefore not able to agree on guidelines for the future work of the Drafting Committee on this question. It furthermore noted that if, at its next session, it was able to agree on such guidelines, for example on the basis of the debate in the Sixth Committee of the General Assembly, the Drafting Committee should revert to the article after the completion of its consideration of the other draft articles on the topic.

### C. Question of the establishment of an international criminal jurisdiction

93. At its current session, the Commission, within the framework of the present topic, considered extensively the question of the possible establishment of an international criminal jurisdiction.

#### 1. TERMS OF REFERENCE

94. Two main reasons led the Commission at its present session to an in-depth examination of this question, within the context of the draft Code of Crimes against the Peace and Security of Mankind.

95. On the one hand, the question concerning the draft code's implementation and, in particular, the possible creation of an international criminal jurisdiction to enforce its provisions has always been foremost in the Commission's concerns regarding the topic. The Commission pronounced itself in favour of such a trial mechanism for the first time in 1950.<sup>48</sup> When it resumed its work on the topic at its thirty-fifth session, in 1983, it included in its report to the General Assembly on that session the following paragraph:

Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals.<sup>49</sup>

96. The question concerning the implementation of the draft code, including the possible establishment of an

international criminal jurisdiction, also came up in the Commission's discussions at its thirty-eighth (1986),<sup>50</sup> thirty-ninth (1987),<sup>51</sup> fortieth (1988)<sup>52</sup> and forty-first sessions (1989),<sup>53</sup> and the Commission reiterated the above-mentioned inquiry to the General Assembly at its thirty-eighth<sup>54</sup> and thirty-ninth sessions.<sup>55</sup>

97. In particular, the Commission included in article 4 (Obligation to try or extradite) of the draft code, which it provisionally adopted on first reading at its fortieth session, in 1988, a paragraph 3 stating: "The provisions of paragraphs 1 and 2 of this article do not prejudice the establishment and the jurisdiction of an international criminal court." Furthermore, in paragraph (5) of the commentary to that article, the Commission indicated that paragraph 3

deals with the possible establishment of an international criminal court and . . . shows that the jurisdictional solution adopted in article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court.<sup>56</sup>

98. Although the Commission never received from the General Assembly a clear-cut answer to the inquiries referred to in paragraphs 95 and 96 above, it is to be noted that, in paragraph 2 of its resolutions 43/164 of 9 December 1988 and 44/32 of 4 December 1989 on the draft Code of Crimes against the Peace and Security of Mankind, the Assembly

Notes the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft Code, and encourages the Commission to explore further all possible alternatives on the question.

99. It was on the basis of the above-mentioned considerations that the Special Rapporteur included in his eighth report (A/CN.4/430 and Add.1), submitted to the Commission at the present session, a part III entitled "Statute of an international criminal court".<sup>57</sup>

100. The other main reason which led the Commission at its present session to engage in an in-depth examination of this question was a specific request addressed to it by the General Assembly in resolution 44/39 of 4 December 1989, entitled: "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes". Paragraph 1 of that resolution reads:

*The General Assembly,*

1. Requests the International Law Commission, when considering at its forty-second session the item entitled "Draft Code of Crimes against the Peace and Security of Mankind", to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to

<sup>48</sup> See *Yearbook . . . 1986*, vol. II (Part Two), p. 50, paras. 146-148.

<sup>49</sup> See *Yearbook . . . 1987*, vol. II (Part Two), pp. 9-10, paras. 29-36.

<sup>50</sup> See *Yearbook . . . 1988*, vol. II (Part Two), pp. 67-68, commentary to article 4 (Obligation to try or extradite).

<sup>51</sup> See *Yearbook . . . 1989*, vol. II (Part Two), pp. 65-66, paras. 211-216.

<sup>52</sup> *Yearbook . . . 1986*, vol. II (Part Two), p. 54, para. 185 *in fine*.

<sup>53</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 17, para. 67 (c).

<sup>54</sup> See footnote 28 above.

<sup>55</sup> See footnote 28 above.

<sup>56</sup> See footnote 28 above.

<sup>57</sup> See paragraph 29 above.

<sup>48</sup> See paragraph 105 below.

<sup>49</sup> *Yearbook . . . 1983*, vol. II (Part Two), p. 16, para. 69 (c) (i).

have committed crimes which may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote particular attention to that question in its report on that session.

101. Consequently, a substantial portion of the Commission's discussion on the Special Rapporteur's eighth report (2150th to 2159th meetings) revolved around the question of the establishment of an international criminal court or other international criminal trial mechanism. At the conclusion of that discussion, the Commission decided to establish a Working Group (see para. 7 above) with a mandate to draw up a draft response by the Commission to the request addressed to it by the General Assembly in paragraph 1 of resolution 44/39. After adoption by the Commission,<sup>58</sup> the draft response would become part of its report to the General Assembly.

102. As to the question of "illicit trafficking in narcotic drugs across national frontiers", mentioned in General Assembly resolution 44/39, it was considered by the Commission in the context of its discussion of the eighth report of the Special Rapporteur.<sup>59</sup> As indicated in paragraph 31 above, the Commission provisionally adopted an article to be included in the draft code which defines illicit traffic in narcotic drugs as a crime against humanity.

## 2. PREVIOUS UNITED NATIONS EFFORTS IN THE FIELD OF AN INTERNATIONAL CRIMINAL JURISDICTION

103. In considering this question, the Commission was aware of the fact that the Commission itself, as well as other United Nations organs, had been involved in the past in efforts tending towards the creation of some kind of international criminal jurisdiction. Those efforts, although they did not come to fruition for different reasons, could well provide the Commission with a useful background against which to gauge both the feasibility of an international criminal jurisdiction and the conditions under which it may be workable today.

104. The Commission itself was at the centre of the first attempt by the United Nations to examine in depth the possible creation of an international criminal jurisdiction. The General Assembly, by resolution 260 B (III) of 9 December 1948, invited the Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions" and requested the Commission, in carrying out that task, "to pay attention to the possibility of establishing a criminal chamber of the International Court of Justice".

105. After considering the above request at its first session, in 1949,<sup>60</sup> and its second session, in 1950, the Commission decided that "the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable" and that "the establishment of the above-mentioned international judicial organ is possible". The

Commission also decided "to state that it has paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute, the Commission does not recommend it".<sup>61</sup>

106. After considering the Commission's report on its second session, the General Assembly, by resolution 489 (V) of 12 December 1950, set up a committee composed of representatives of 17 Member States for the purpose of preparing concrete proposals relating to the establishment and the statute of an international criminal court. The Committee on International Criminal Jurisdiction (1951 Committee), which met in Geneva in August 1951, completed a draft statute for an international criminal court to be established by means of an international convention.<sup>62</sup>

107. The report of the Committee, as well as the draft statute, were transmitted to Governments for comments and observations. By resolution 687 (VII) of 5 December 1952, the General Assembly, considering that few Member States had commented on the Committee's report, decided to appoint a second committee consisting again of representatives of 17 Member States, whose mandate was the following: (a) to explore the implications and consequences of establishing an international criminal court and of the various methods by which that might be done; (b) to study the relationship between such a court and the United Nations and its organs; (c) to re-examine the draft statute.

108. This second Committee (1953 Committee on International Criminal Jurisdiction), which met in New York in July-August 1953, in addition to examining points (a) and (b) referred to above, made a number of changes in the draft statute of the 1951 Committee and, for several provisions of the draft, prepared alternative texts, one applying if the court were to be closely linked with the United Nations and the other if it were to be decided that the court would operate independently from the United Nations.<sup>63</sup>

109. On two occasions, however, the General Assembly, by resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957, deferred consideration of the 1953 Committee's report, on the ground that, since the question of an international criminal jurisdiction was closely linked both with the question of defining aggression and with the draft Code of Offences against the Peace and Security of Mankind, consideration thereof should be postponed until the Assembly examined again the other two related questions.<sup>64</sup>

<sup>61</sup> See *Yearbook . . . 1950*, vol. II, pp. 378-379, document A/1316, paras. 128-145, at paras. 140 and 145.

<sup>62</sup> For the report of the Committee on International Criminal Jurisdiction, see *Official Records of the General Assembly, Seventh Session, Supplement No. 11 (A/2136)*.

<sup>63</sup> For the report of the 1953 Committee on International Criminal Jurisdiction, *ibid.*, *Ninth Session, Supplement No. 12 (A/2645)*.

<sup>64</sup> By resolution 3314 (XXIX) of 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression. By resolution 36/106 of 10 December 1981, the Assembly invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind. No mention was made, however, in either resolution of the question concerning the establishment of an international criminal jurisdiction.

<sup>58</sup> See footnote 30 above.

<sup>59</sup> See paragraphs 77-88 above.

<sup>60</sup> See *Yearbook . . . 1949*, p. 283, paras. 32-34.

110. The other cases of United Nations involvement in the possible creation of an international criminal jurisdiction concern two specific conventions, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

111. Article I of the 1948 Genocide Convention categorizes genocide as “a crime under international law” and article VI provides that persons charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

112. On various occasions, the Subcommission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, the Commission on Human Rights itself and the Economic and Social Council have adopted resolutions mentioning the possibility of creating an international criminal court to implement article VI of the Genocide Convention, or ordering studies on the question of prevention and punishment of the crime of genocide, including the question of an international criminal jurisdiction.<sup>65</sup> However, no actual draft has so far been recommended by these organs.

113. For its part, the 1973 Apartheid Convention categorized apartheid as “a crime against humanity” (art. I). Article V states that persons charged with the crime of apartheid “may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction”. On the basis of that provision and of paragraph 20 of the Programme of activities to be undertaken during the second half of the Decade for Action to Combat Racism and Racial Discrimination,<sup>66</sup> the Commission on Human Rights, by resolution 12 (XXXVI) of 26 February 1980 (para. 7), requested the Ad Hoc Working Group of Experts on Southern Africa, in co-operation with the Special Committee against Apartheid, to undertake a study on the question of establishing the international jurisdiction contemplated in article V of the Apartheid Convention. The Working Group, which met in Geneva in August 1980 and January 1981, produced an interim report to the Commission on Human Rights which contained a draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes, as well as a draft Additional Protocol for the Penal Enforcement of the International Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>67</sup>

<sup>65</sup> See resolutions 7 (XX) of 3 October 1967, 8 (XX) of 10 October 1967 and 7 (XXIV) of 18 August 1971 of the Subcommission on Prevention of Discrimination and Protection of Minorities; resolutions 10 (XXIV) of 5 March 1968 and 9 (XXXV) of 5 March 1979 of the Commission on Human Rights; and resolutions 1420 (XLVI) of 6 June 1969 and 1983/33 of 27 May 1983 of the Economic and Social Council.

<sup>66</sup> General Assembly resolution 34/24 of 15 November 1979, annex.

<sup>67</sup> See document E/CN.4/1426 of 19 January 1981; see also the report of the Commission on Human Rights on its thirty-seventh session, *Official Records of the Economic and Social Council, 1981, Supplement No. 5 (E/1981/25-E/CN.4/1475)*, chap. XV.

114. From its thirty-seventh session in 1981 onwards, the Commission on Human Rights has adopted a number of resolutions inviting, or requesting the Secretary-General to invite, States parties to the Apartheid Convention and all Member States to submit their comments and observations on the above-mentioned drafts<sup>68</sup> as well as drawing attention to “the need to strengthen the various mechanisms for combating apartheid, *inter alia* through the establishment of an international penal tribunal as provided for in article V of the Convention”.<sup>69</sup>

115. It should also be mentioned in the context of United Nations efforts in the field of an international criminal jurisdiction that, at its 11th meeting, on 16 February 1990, the Committee on Crime Prevention and Control adopted decision 11/111<sup>70</sup> recommending that the Economic and Social Council transmit to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to be held at Havana from 27 August to 7 September 1990, a draft resolution entitled “Terrorist criminal activities” for action under item 5 (topic III) of its provisional agenda: “Effective national and international action against: (a) organized crime; (b) terrorist criminal activities”. Section P of the annex to that draft resolution read:

**P. Codification of international criminal law and creation of an international criminal court**

31. International criminal law should be codified and the work of the International Law Commission on various aspects of codification should be encouraged, in cooperation with the Committee on Crime Prevention and Control.

32. The possibility of establishing a special penal jurisdiction within the International Court of Justice, or a separate international criminal court, should be considered. Such drafts as the 1951 and 1953 draft statutes for the establishment of an international criminal court and the 1980 draft statute for the establishment of an international jurisdiction to implement the International Convention on the Suppression and Punishment of the Crime of Apartheid should be considered. Also, the United Nations should encourage States to explore seriously the possibility of establishing such an international court under the auspices of the Organization, in which grave international crimes, and particularly terrorism, could be brought to trial. This goal could be achieved by the application of the principle of universal jurisdiction to certain particularly harmful and/or hideous crimes.

**3. DISCUSSION OF THE QUESTION BY THE COMMISSION AT THE PRESENT SESSION**

116. Paragraphs 117 to 121 below contain a general discussion of the advantages and disadvantages, for the trial of crimes against the peace and security of mankind, of the possible establishment of an international criminal court as compared, in particular, to the system of universal

<sup>68</sup> See resolutions 5 (XXXVII) of 23 February 1981, 1982/8 and 1982/10 of 25 February 1982, 1983/9 and 1983/12 of 18 February 1983, and 1984/5 and 1984/7 of 28 February 1984 of the Commission on Human Rights.

<sup>69</sup> Preamble to resolutions 1987/11 of 26 February 1987, 1988/14 of 29 February 1988, 1989/8 of 23 February 1989 and 1990/12 of 23 February 1990 of the Commission on Human Rights.

<sup>70</sup> See the report of the Committee on Crime Prevention and Control on its eleventh session, *Official Records of the Economic and Social Council, 1990, Supplement No. 10 (E/1990/31-E/AC.57/1990/8 and Add.1)*, chap. I.C.

jurisdiction based on prosecution before national tribunals. Paragraphs 123 to 151 contain an overview of the possible options and main trends evidenced in the Commission with regard to some very specific and significant areas related to the creation of an international criminal court. Paragraphs 152 to 154 deal with other possible international mechanisms for the trial of crimes against the peace and security of mankind.

(a) *General considerations*

117. The Commission has noted that a number of developments in international relations and international law have contributed to making the establishment of an international criminal court more feasible than when the matter was studied earlier, although the Commission is aware that, in the view of some States, the time may not be ripe for the establishment of such a court. It has now emerged that international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international peaceful relations. There have thus been increased calls for enhanced international cooperation to combat such crime. Of course, the final position of States would depend largely on the form that such a court was to take and therefore the Commission has set out below the various forms in which the court could be conceived.

118. Proposals for the establishment of an international court must be seen against existing mechanisms for prosecuting international crimes. The system of universal jurisdiction exists for a large number of crimes, in some cases with the participation of a large number of States, and prosecution is carried out effectively in national courts. Proposals for an international court must therefore take into account the danger of disrupting satisfactory implementation of the existing systems. The latter, however, depends wholly on the administration of justice in individual national systems. A recognized advantage of an international court is the uniform application of the law with the best possible guarantees of objectivity to try these kinds of crimes.

119. A major concern with respect to the establishment of such a court is its possible curtailment of national sovereignty, although it must be taken into account that existing regimes of universal jurisdiction also have an impact on the exercise of the competences of the State. Some Governments critical of universal jurisdiction refer to the fact that it makes national tribunals responsible for judging the conduct of foreign Governments. Considered in this context, and in the long term, the acceptance of the competence of an international criminal jurisdiction constitutes, on the contrary, the exercise by States of their sovereign competences.

120. In the light of the fact that an international crime often involves more than one State and may relate to a dispute between States, the international court, in providing recourse to a third-party dispute-settlement mechanism, would contribute to the prevention and settlement of international conflicts and thus to the maintenance of international peace and security. In some cases, referring to the court a case against an individual could result in the case not being regarded as relating to an inter-State dispute.

121. Although concerns have been expressed that an international court could not be totally insulated from political currents, the Commission is convinced that the court's independence and integrity may be guaranteed by devising a structure with adequate safeguards. In any event, the court could be expected to provide better safeguards against arbitrary proceedings and for the protection of the rights of the accused than the existing system of universal jurisdiction.

122. Subsections (b) (iii) and (g) below discuss in more detail other possible means of implementation of the draft code, as well as possible systems of relations between an international court and national jurisdictions.

(b) *Jurisdiction and competence*

(i) *Subject-matter*

123. Three options appear to be possible:

(a) The court would exercise jurisdiction over the crimes defined in the code.

(b) The court would exercise jurisdiction over only some of the crimes defined in the code.

(c) The court would be established independently of the code and exercise jurisdiction over all crimes in respect of which States would confer competence on it, particularly under existing international conventions.

124. As regards the first option, an argument in favour of limiting subject-matter jurisdiction to the crimes under the code is that, in the code, the crimes can be expected to be defined in a manner which meets the standards of criminal law, particularly the rule *nullum crimen sine lege*. Furthermore, restricting subject-matter jurisdiction to the crimes under the code would not preclude a possible later extension to other crimes. Another advantage of this option is that the code would include only the most serious crimes, as agreed to by the international community.

125. On the other hand, a possible disadvantage of this option would be that the court could not be established until the Commission's work on the draft code had been completed.

126. The second option envisages the possibility that the court would, for reasons of practicability or acceptability, be granted competence over only some of the crimes defined in the code, at least at the initial stage of its creation. This limitation could be implemented either in the statute *ab initio* or through the provision of clauses allowing States to opt out of the court's jurisdiction. In this latter case, problems of reciprocity and universality could arise: if only some States agree to confer on the court competence over certain crimes, these States would resort to the international criminal court, while other States would not, and would, for example, continue to prosecute these crimes through their national jurisdictions.

127. The main advantage of the third option is that it would entirely free the establishment of the court from any possible delay in the adoption of the code.

(ii) *Competence and jurisdiction over persons*

128. The draft code being prepared by the Commission is restricted in application to individuals (art. 3). The

question of extending the scope of the code to States, although discussed, was left open for consideration at a later stage.

129. The possibility was also discussed of extending jurisdiction to legal entities other than States, at least for certain crimes, for example drug trafficking.

(iii) *Nature of jurisdiction*

130. As to the nature of the court's jurisdiction, there are three possible options:

(a) an international criminal court with exclusive jurisdiction;

(b) concurrent jurisdiction between the international criminal court and national courts;

(c) an international criminal court having only review competence.

Competence to provide legal opinions could also be envisaged as a complement to any one of these options.

131. In the case of exclusive jurisdiction by the court, individual States would refrain from exercising jurisdiction over crimes falling under the competence specified for the court.

132. Under the option of concurrent jurisdiction between the international criminal court and national courts, a State would choose whether to institute an action before a national court or before the international court. This possibility would detract from the advantages of uniformity of application. Under this option, means would also have to be devised to overcome difficulties which might arise if one party wished to initiate an action before a national court and another party wanted it brought before the international court.

133. Under the third option, the court would have competence only to re-examine decisions of national courts on international crimes, where that became necessary.

134. As regards the possibility of endowing the court with the competence to issue legal opinions on criminal matters, these could be, *inter alia*, binding opinions requested by national courts or advisory opinions requested by an organ of the United Nations. The court could be entrusted with the task of harmonizing the interpretation of international criminal law, leaving to national tribunals the function of deciding on the merits.

(iv) *Submission of cases*

135. On the question of who could submit a case to the court, different options were considered: (a) all States; (b) all States parties to the court's statute; (c) any State which has an interest in the proceedings, because (i) the crime was alleged to have been committed on its territory or directed against it; (ii) the victim was its national; (iii) the alleged perpetrator was its national; or (iv) the accused was found on its territory; (d) intergovernmental organizations of a universal or regional character; (e) non-governmental organizations; (f) individuals.

136. Two possible restrictions on the right of submission were discussed. The first was the possibility of requiring the consent of all States which had an interest in the case

(as provided under option (c) above). The second was to require the authorization of either the General Assembly or the Security Council of the United Nations.

137. The choice among these options relates to the question of how limited the right to submit cases should be. As an example, the most limited access would result from a requirement that cases could be brought only by States parties to the court's statute which had an interest in the case and subject to the consent of all other directly concerned States and authorization by either the General Assembly or the Security Council. The most liberal access would be provided by granting the right of submission to any State, organization or individual.

(c) *Structure of the court*

(i) *Institutional structure*

138. The question whether there should be established a permanent court or an ad hoc court was addressed. The latter would raise questions of uniformity in the implementation of the code.

139. The court could be established: (a) by a separate convention; (b) within the framework of the convention adopting the code; or (c) by an amendment to the Charter of the United Nations, for example, if the court was to be an organ of the United Nations. The possibility of the court being established by a General Assembly resolution was also discussed.

140. Whatever the method of establishment, the relationship between the court and the United Nations would have to be clearly determined, both for reasons of general policy and with respect to institutional aspects as dealt with elsewhere (e.g. appointment of judges, submission of cases and financing). The role of the Security Council in determining the existence of aggression under the code (article 12 as provisionally adopted by the Commission at its fortieth session<sup>71</sup>) should be noted.

(ii) *Composition of the court*

141. It was presumed that the court should be of moderate size and that the judges should represent the main legal systems of the world. The desirability of allowing for the formation of chambers was discussed. One idea was to try all cases in chambers and allow for review by the plenary court. The system of chambers in the International Court of Justice, allowing for some role for claimants in the selection of judges, was also considered.

(iii) *Election of judges*

142. Three options for the election of judges were considered: (a) in the same manner as for the ICJ;<sup>72</sup> (b) by a qualified majority in the General Assembly; (c) by the parties to the statute of the court.

<sup>71</sup> *Yearbook* . . . 1988, vol. II (Part Two), pp. 71-72.

<sup>72</sup> The procedure for the election of members of the International Court of Justice is set out in Articles 4 to 16 of the Court's Statute. They

(iv) *Organs responsible for criminal prosecution*

143. Different possibilities regarding a prosecuting attorney were envisaged. The role of such an attorney would vary depending on the various options for the court's jurisdiction listed in paragraph 130 above. The possibilities discussed were appointment of a prosecuting attorney and establishment of an independent body associated with the court.

(v) *Pre-trial examination*

144. Various possible methods of pre-trial examination were discussed: one method would entrust it to the court, and others to the prosecutor or to a judge.

(d) *Legal force of judgments*

145. With regard to the legal force of judgments in cases where there was concurrent jurisdiction and the international court had made a decision, it was envisaged that a national court could not re-examine the case. This conclusion was consistent with paragraph 1 of article 7 (*Non bis in idem*) of the draft code, provisionally adopted by the Commission at its fortieth session.<sup>73</sup>

146. As to the legal force of judgments in cases where a national court had taken a decision, re-examination by the international court could be envisaged, for example: (a) if a State concerned had grounds for believing that the decision was not based on a proper appraisal of the law or the facts; (b) if the acts had been tried as ordinary crimes although they were characterized as crimes falling under the jurisdiction of the court (see, for example, paragraph 3 of article 7 of the draft code); (c) in the case of an appeal by the convicted individual.

147. Of course, if the court were established only to consider appeals against judgments handed down by national courts, its decisions would take precedence over the judgments of national courts.

(e) *Other questions*(i) *Penalties*

148. The question of penalties was addressed in the context of the rule *nulla poena sine lege*. The options are to have either a general description of penalties or a specific penalty for each crime.

149. In the discussion of penalties, it was stated that a penalty should be proportionate to the gravity of the crime

committed. The possibility of excluding the death penalty was also suggested.

(ii) *Implementation of judgments*

150. A general discussion was held on the different aspects of implementation. There are basically two options. One would require an international detention facility. The other would provide for implementation under national systems, in which case the advantages and disadvantages of according priority to the State which had submitted the case to the court would need to be considered.

(iii) *Financing of the court*

151. Two options for financing the court were considered, namely financing by the parties to its statute or by the United Nations. The latter option, which has the advantage of guaranteeing greater efficiency and continuity in the financing of the court, presupposes that the majority of the Members of the United Nations become, at the same time, parties to the statute of the court.

(f) *Other possible international trial mechanisms*

152. The understanding was reached that, instead of establishing separate courts for different categories of crimes, as is provided for in relevant conventions, it would be preferable to have a single organ for international criminal justice.

153. The option of entrusting the International Court of Justice with jurisdiction in criminal actions against individuals was discussed. It was pointed out that such jurisdiction would require amendments to the Court's Statute. It would be necessary to obtain the views of the ICJ on this option.

154. A proposal was made to complement national courts with judges from other legal systems in cases of international crimes. This proposal was not made as an alternative to an international court but, rather, as a transitional step possibly to overcome certain difficulties in the application of the system of universal national jurisdiction.

(g) *Conclusions*

155. The Commission's consideration of the question reflected broad agreement, in principle, on the desirability of establishing a permanent international criminal court to be brought into relationship with the United Nations system, although different views were expressed as to the structure and scope of jurisdiction of such a court. There are at least three possible models, varying mainly with respect to the competence and jurisdiction of the court:

(i) *An international criminal court with exclusive jurisdiction*

This would necessitate that States cede their criminal jurisdiction as regards crimes coming under the jurisdiction of the court.

(Footnote 72 continued)

provide, *inter alia*, that members shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration (Art. 4 (1)); that the General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court (Art. 8); and that no distinction will be made in the Security Council vote between permanent and non-permanent members of the Council (Art. 10 (2)). Those candidates who obtain an absolute majority in the General Assembly and in the Security Council shall be considered as elected (Art. 10(1)).

<sup>73</sup> *Yearbook* . . . 1988, vol. II (Part Two), pp. 68-69.

It may raise problems in relation to existing treaty obligations establishing universal jurisdiction under national tribunals.

Recourse to a review procedure within the court's system has to be provided for.<sup>74</sup>

This model necessarily leads to the establishment of a system of pre-trial examination and a public prosecutor. It also requires rules for the handing over of the accused to the court, as well as an agreement on the establishment of an international detention facility and rules on implementing the judgment.

It also raises the question of reciprocity (States parties to the statute of the court; States not parties) and the question that the jurisdiction of the court may depend on the consent of the States concerned (territorial State, State whose national is accused, State where the accused is found).

(ii) *Concurrent jurisdiction between the international criminal court and national courts*

States parties would not have to cede their national criminal jurisdiction but could decide on a case-by-case basis whether to submit a case to the international criminal court or exercise national jurisdiction. For instance, according to this model, some States might choose to exercise national jurisdiction in cases where their own nationals are involved, where the crime was directed against them or where the crime was committed in their territory.

Such a system could lead to conflicts of jurisdiction between the States concerned.

All the other aspects of model (i) will apply to model (ii) (prosecution, appeal, handing over of the accused, implementation of judgments, reciprocity).

(iii) *An international criminal court having only review competence*

States parties would not have to cede their national criminal jurisdiction.

They would have to accept that judgments of their courts on crimes coming under the code could be brought for review to the international criminal court.

In addition to those who could bring a case before the court under the other two models, namely other States concerned (territorial State, State whose national has been tried, States against which the crime was directed) or all States parties to the court's statute, this model could allow for the possibility of the convicted individual bringing a case.

This model would not interfere with existing international obligations on universal jurisdiction. It would not require the consent of other States.

It would not require a further procedure for appeal.

It would establish a permanent international criminal court, the competence of which could be extended when

States had gained some experience with the court and if they agreed to do so.

156. It is possible to choose from among the various elements discussed in subsections (b) to (e) above for incorporation in each of the envisaged models. Each of the three models could also provide for the competence of the court to give legal opinions, if so requested, either binding or advisory, or both (see paras. 130 and 134 above).

157. Establishing an international criminal court would in the end be a progressive step in developing international law and strengthening the rule of law, and be successful, only if widely supported by the international community.

#### D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind

##### 1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

158. The texts of draft articles 1 to 8, 10 to 16, 18 and X provisionally adopted so far by the Commission are reproduced below.

###### CHAPTER I

###### INTRODUCTION

###### PART I. DEFINITION AND CHARACTERIZATION

###### *Article 1. Definition*

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

###### *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.**

###### 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.**

###### *Article 4. Obligation to try or extradite*

**1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.**

**2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.**

**3. The provisions of paragraphs 1 and 2 of this article do not preclude the establishment and the jurisdiction of an international criminal court.\***

<sup>74</sup> Reference was made to article 14, para. 5, of the International Covenant on Civil and Political Rights.

\* This paragraph will be deleted if an international criminal court is established.

*Article 5. Non-applicability of statutory limitations*

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

*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.

*Article 7. Non bis in idem*

[1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]

2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the act which was the subject of a trial and judgment as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

- (a) if the act which was the subject of the previous judgment took place in the territory of that State;
- (b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.

*Article 8. Non-retroactivity*

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

*Article 10. Responsibility of the superior*

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

*Article 11. Official position and criminal responsibility*

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

## CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE  
AND SECURITY OF MANKIND

## PART I. CRIMES AGAINST PEACE

*Article 12. Aggression*

1. Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable to be tried and punished for a crime against peace.

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

#### *Article 13. Threat of aggression*

Threat of aggression consisting of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

#### *Article 14. Intervention*

1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

2. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

#### *Article 15. Colonial domination and other forms of alien domination*

Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.

#### *Article 16. International terrorism*

1. The undertaking, organizing, assisting, financing, encouraging or tolerating by the agents or representatives of a State of acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

2. The participation by individuals other than agents or representatives of a State in the commission of any of the acts referred to in paragraph 1.\*

...<sup>75</sup>

#### *Article 18. Recruitment, use, financing and training of mercenaries*

1. The recruitment, use, financing or training of mercenaries by agents or representatives of a State for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law.

\* Paragraph 2 will be reviewed in the light of the provisions on complicity and on crimes against humanity which will be examined by the Commission at a later stage.

<sup>75</sup> With regard to article 17, see paras. 89-92 above.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) is not a member of the armed forces of a party to the conflict; and

(e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any person who, in any other situation:

(a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) is neither a national nor a resident of the State against which such an act is directed;

(d) has not been sent by a State on official duty; and

(e) is not a member of the armed forces of the State on whose territory the act is undertaken.

#### PART ... CRIMES AGAINST HUMANITY

#### *Article X. Illicit traffic in narcotic drugs<sup>76</sup>*

1. The undertaking, organizing, facilitating, financing or encouraging, by the agents or representatives of a State, or by other individuals, of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context.

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs shall include the acquisition, holding, conversion or transfer of property by a person who knows that such property is derived from the crime described in the present article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

2. TEXTS OF DRAFT ARTICLES 16, 18 AND X, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SECOND SESSION<sup>77</sup>

<sup>76</sup> See footnote 85 below. Article X corresponds to draft article Y submitted by the Special Rapporteur (see footnote 44 above). Draft article X submitted by the Special Rapporteur dealt with illicit traffic in narcotic drugs as a crime against peace.

<sup>77</sup> Contrary to paragraph 1 of article 12 (Aggression), articles 16 and 18 are at present confined to defining the acts constituting the crimes identified in the articles. The question of the attribution of those crimes to individuals will be dealt with later in a general provision.

## CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST  
THE PEACE AND SECURITY OF MANKIND

## PART I. CRIMES AGAINST PEACE

...

**Article 16. International terrorism**

**1. The undertaking, organizing, assisting, financing, encouraging or tolerating by the agents or representatives of a State of acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.**

**2. The participation by individuals other than agents or representatives of a State in the commission of any of the acts referred to in paragraph 1.\***

*Commentary*

(1) Terrorism, as a crime against peace, was dealt with in the 1954 draft code (art. 2, para. (6)) in the following terms: "The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State."

(2) The object of the title of article 16, "International terrorism", is to distinguish the terrorism in question from internal terrorism. International terrorism is terrorism organized and carried out by a State against another State, whereas internal terrorism is organized and carried out in the territory of a State by nationals of that State. Internal terrorism comes under internal law, since it does not endanger international relations.

(3) *Paragraph 1* defines the constituent elements of international terrorism, as follows:

(a) The intervention of agents or representatives of a State.

(b) Such intervention must consist of specific acts: organizing, assisting, financing or encouraging the terrorist activities; or tolerating terrorist activities in the territory of the State.

The word "tolerating" implies conscious acceptance of terrorist activity.

(c) Lastly, the acts in question must be of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public. The expression "public figures" means not only political leaders, that is to say members of a Government, members of political assemblies or trade union leaders, but also other eminent persons who play an important part in the economic or social life of a country.

(4) *Paragraph 2* concerns the participation of individuals in acts of terrorism by agents or representatives of the State. It does not cover acts of terrorism committed by individuals which have no link with international acts of terrorism as defined in paragraph 1.

Notwithstanding the proportions which the phenomenon has assumed nowadays, particularly in the framework of certain entities (terrorist organizations or groups, which are usually motivated by the desire for gain), and the danger which it represents for States, it has not seemed possible to consider terrorism by individuals as belonging to the category of crimes against peace, to the extent that such activities are not attributable to a State.

Paragraph 2 deals with terrorist activities in which individuals acting with the support of the State are involved. But the question arises whether, in such situations, the individuals concerned should not be considered as accomplices. Consequently, paragraph 2 will have to be re-examined in the light of the future provisions on complicity. Furthermore, the Commission intends to revert to international terrorism by individuals when it examines provisions relating to crimes against humanity.

**Article 18. Recruitment, use, financing and training of mercenaries**

**1. The recruitment, use, financing or training of mercenaries by agents or representatives of a State for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law.**

**2. A mercenary is any person who:**

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) is not a member of the armed forces of a party to the conflict; and

(e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

**3. A mercenary is also any person who, in any other situation:**

(a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) is neither a national nor a resident of the State against which such an act is directed;

\* Paragraph 2 will be reviewed in the light of the provisions on complicity and on crimes against humanity which will be examined by the Commission at a later stage.

- (d) has not been sent by a State on official duty; and**  
**(e) is not a member of the armed forces of the State on whose territory the act is undertaken.**

#### *Commentary*

(1) The 1954 draft code did not deal with mercenarism. It should be noted, however, that it contained a provision (art. 2, para. (4)) covering:

The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(2) On the other hand, three other international instruments adopted during the last 20 years contain important provisions on mercenarism. These are the 1974 Definition of Aggression;<sup>78</sup> Additional Protocol I of 1977<sup>79</sup> to the 1949 Geneva Conventions; and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.<sup>80</sup> Under article 3 (g) of the Definition of Aggression (which served as the basis for paragraph 4 (g) of article 12 (Aggression) of the draft code,<sup>81</sup> provisionally adopted by the Commission at its fortieth session), the sending by or on behalf of a State of mercenaries who carry out acts of armed force against another State (or its substantial involvement therein) qualifies as an act of aggression under certain conditions. Article 47 of Additional Protocol I deals with the status of mercenaries, specifying (para. 1) that a mercenary shall not have the right to be a combatant or a prisoner of war. The 1989 Convention established as offences the recruitment, use, financing and training of mercenaries (art. 2) and the direct participation by a mercenary in hostilities or in a concerted act of violence (art. 3).

(3) *Paragraph 1* of article 18 sets the scope and limits of the crime dealt with in the article. It makes clear, first, that the crime is not constituted by the activities of the mercenaries themselves but rather by the acts of recruiting, using, financing or training of mercenaries. Secondly, the only persons to whom the crime can be attributed are agents or representatives of a State. Thirdly, to fall under the definition, the acts must have one of two objectives: the mercenaries must be recruited, used, financed or trained either (a) for activities directed against another State, or (b) for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law.<sup>82</sup> With respect to the phrase "right of peoples to self-

determination as recognized under international law", reference may be made to the terms of paragraph 7 of article 12 (Aggression), as well as to the use of the phrase "right of peoples to self-determination as enshrined in the Charter of the United Nations" in article 14 (Intervention) and article 15 (Colonial domination and other forms of alien domination) of the draft code, both provisionally adopted by the Commission at its forty-first session.<sup>83</sup>

(4) *Paragraph 2* defines the mercenary himself, following the definition in paragraph 1 of article 1 of the 1989 Convention.<sup>84</sup> The definition refers to a person recruited to fight in an armed conflict.

(5) *Paragraph 3*, derived from paragraph 2 of article 1 of the 1989 Convention, defines an additional category of mercenaries, i.e. those recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State, or undermining the territorial integrity of a State. The expression "in any other situation" contrasts this category with that referred to in paragraph 2 of article 18.

(6) In recent years, the activities of this kind of mercenary have greatly increased in the third world.

#### PART ... CRIMES AGAINST HUMANITY

#### *Article X. Illicit traffic in narcotic drugs*<sup>85</sup>

**1. The undertaking, organizing, facilitating, financing or encouraging, by the agents or representatives of a State, or by other individuals, of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context.**

**2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs shall include the acquisition, holding, conversion or transfer of property by a person who knows that such property is derived from the crime defined in the present article in order to conceal or disguise the illicit origin of the property.**

**3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.**

#### *Commentary*

(1) In adopting article X, the Commission has provisionally confined itself to illicit drug trafficking as a crime against humanity, even though the Special

<sup>78</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>79</sup> Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

<sup>80</sup> General Assembly resolution 44/34 of 4 December 1989, annex.

<sup>81</sup> See footnote 71 above.

<sup>82</sup> Under article 5 of the 1989 Convention, the obligation of States not to recruit, use, finance or train mercenaries expressly encompasses an obligation not to recruit, use, finance or train mercenaries "for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law".

<sup>83</sup> See the commentaries to articles 14 and 15 (*Yearbook ... 1989*, vol. II (Part Two), pp. 69-70).

<sup>84</sup> See also the definition of a mercenary in paragraph 2 of article 47 of Additional Protocol I.

<sup>85</sup> As explained in the commentary, the Commission provisionally decided that article X should appear in the part of chapter II of the draft code devoted to crimes against humanity.

Rapporteur had also submitted a draft article on illicit drug trafficking as a crime against peace. In characterizing traffic in narcotic drugs as a crime against humanity, the Commission wished to stress that the phenomenon is a danger for all mankind and to emphasize the fact that it is a threat not only to the public order of the country where it occurs, but also to the international community. The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>86</sup> did not make the crime an international one, but it did give international and regional organizations competence for the prevention of illicit traffic and the pursuit of offenders (art. 10, paras. 1 and 2). Article X goes one step further by making the crime an international one, subject to certain qualifications. It provides that illicit traffic in narcotic drugs is no longer only a crime under internal law, but also a crime against humanity. Although the title of the article refers only to narcotic drugs, paragraph 3 also deals with psychotropic substances, as defined in the 1988 Convention.

(2) *Paragraph 1* defines the crime, but some of the elements of the definition must be read in the light of paragraphs 2 and 3.

(3) With regard to the persons who may commit the crime, paragraph 1 refers to the agents or representatives of a State, as well as to private individuals. Since article X characterizes illicit traffic in narcotic drugs as a crime against humanity, it makes no difference whether the perpetrators are acting in the exercise of, or in connection with, functions assigned to them by a State or as private individuals. While it is true that traffic in narcotic drugs is often engaged in by private individuals, the possibility cannot be ruled out that agents of a State may facilitate or take part in such traffic. The term "individuals" includes persons acting for or on behalf of organizations, associations and other bodies, such as cartels, through or within which traffickers operate. It also covers persons acting in the framework of financial institutions, such as banks, investment companies, etc., which are used to move money or other assets deriving from illicit traffic in narcotic drugs.

(4) *Paragraph 1* refers to the undertaking, organizing, facilitating, financing or encouraging of illicit traffic in narcotic drugs only "on a large scale". This idea involves a mass element. The article relates not to isolated or

individual activities of small dealers, but, rather, to large-scale, organized operations.

(5) The words "within the confines of a State or in a transboundary context" indicate that the traffic does not have to be carried on in an inter-State context in order to constitute a crime against humanity. Internal traffic engaged in on a large scale may constitute a crime against humanity. It is even conceivable that it may be specially organized within a State for the purpose of impairing the physical integrity of members of an ethnic, racial or other group and, in that case, its nature as a crime against humanity would be even more pronounced.

(6) *Paragraph 2* explains the meaning of the words "facilitating" and "encouraging" in paragraph 1. Its wording is based on article 3, paragraph 1 (b) (i), of the 1988 Convention and it covers, *inter alia*, what is commonly known as money laundering, as well as establishments involved in money-laundering operations. The term "property" means all types of corporeal or incorporeal, movable or immovable and tangible or intangible assets, as well as legal instruments and documents proving ownership of such assets and the rights to which they give rise.

(7) The words "who knows that such property is derived from the crime defined in the present article in order to conceal or disguise the illicit origin of the property" exclude from the scope of article X persons who, acting in good faith, may have taken part in one of the operations referred to in paragraph 2, but who have no knowledge either of the illicit origin of the property or of the aim of concealing or disguising that origin.

(8) *Paragraph 3* explains the meaning of the words "illicit traffic in narcotic drugs". The list of operations it contains is taken from article 3, paragraph 1 (a) (i), of the 1988 Convention. These operations relate both to illicit traffic in narcotic drugs and to illicit traffic in psychotropic substances.

(9) The words "contrary to internal or international law" emphasize the illicit nature of traffic in narcotic drugs. The reference to international law takes account of the existence of numerous international conventions concerning narcotic drugs. The reference to internal law excludes from the scope of article X operations such as the production or import of narcotic drugs—for example for the preparation of medicaments or for research purposes—which are lawful under the internal law of many countries.

<sup>86</sup> E/CONF.82/15 and Corr.2.

## Chapter III

### JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

#### A. Introduction

159. The topic "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by decision of the Commission at its thirtieth session, in 1978, on the recommendation of the Working Group which it had established to commence work on the topic<sup>87</sup> and in response to General Assembly resolution 32/151 of 19 December 1977 (para. 7).

160. At its thirty-first session, in 1979, the Commission had before it the preliminary report<sup>88</sup> of the Special Rapporteur, Mr. Sompong Sucharitkul. The Commission decided at the same session that a questionnaire should be circulated to States Members of the United Nations to obtain further information and the views of Governments. The materials received in response to the questionnaire were submitted to the Commission at its thirty-third session, in 1981.<sup>89</sup>

161. From its thirty-second session (1980) to its thirty-eighth session (1986), the Commission received seven further reports of the Special Rapporteur,<sup>90</sup> which contained draft articles arranged in five parts, as follows: part I (Introduction); part II (General principles); part III (Exceptions to State immunity); part IV (State immunity in respect of property from attachment and execution); and part V (Miscellaneous provisions).

162. At its thirty-eighth session, in 1986, the Commission provisionally adopted on first reading a complete

set of 28 draft articles on the topic,<sup>91</sup> which were transmitted, in accordance with articles 16 and 21 of the Commission's statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.

163. At its thirty-ninth session, in 1987, the Commission appointed Mr. Motoo Ogiso Special Rapporteur for the topic. At its fortieth session, in 1988, the Commission had before it the written comments and observations on the draft articles received from Member States and Switzerland,<sup>92</sup> as well as the Special Rapporteur's preliminary report on the topic.<sup>93</sup>

164. At its forty-first session, in 1989, the Commission had before it the Special Rapporteur's second report on the topic,<sup>94</sup> which it considered together with the preliminary report for the purpose of conducting the second reading of the draft articles. After discussing the two reports, the Commission decided to refer articles 1 to 11 *bis* to the Drafting Committee for their second reading, together with the proposals made by the Special Rapporteur and those formulated by some members in plenary during the discussion. The Commission was unable to conclude its discussion of the remaining articles 12 to 28 and decided to consider them further at the forty-second session.

#### B. Consideration of the topic at the present session

165. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/431). In the report, the Special Rapporteur again reviewed the entire set of draft articles provisionally adopted on first reading and suggested certain reformulations, taking into account the views expressed by members of the Commission at the forty-first session<sup>95</sup> and by Governments in their written comments and observations and in the Sixth Committee at the forty-fourth session of the General Assembly.<sup>96</sup>

<sup>87</sup> See *Yearbook* . . . 1978, vol. II (Part Two), pp. 152-153, paras. 179-190.

<sup>88</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323.

<sup>89</sup> Those materials, together with certain further materials prepared by the Secretariat, were later published in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10).

<sup>90</sup> These seven further reports of the Special Rapporteur are reproduced as follows:

Second report: *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add. 1;

Third report: *Yearbook* . . . 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add. 1;

Fourth report: *Yearbook* . . . 1982, vol. II (Part One), p. 199, document A/CN.4/357;

Fifth report: *Yearbook* . . . 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add. 1;

Sixth report: *Yearbook* . . . 1984, vol. II (Part One), p. 5, document A/CN.4/376 and Add. 1 and 2;

Seventh report: *Yearbook* . . . 1985, vol. II (Part One), p. 21, document A/CN.4/388;

Eighth report: *Yearbook* . . . 1986, vol. II (Part One), p. 21, document A/CN.4/396;

<sup>91</sup> See *Yearbook* . . . 1986, vol. II (Part Two), pp. 8 *et seq.*

<sup>92</sup> *Yearbook* . . . 1988, vol. II (Part One), p. 45, document A/CN.4/410 and Add.1-5.

<sup>93</sup> *Ibid.*, p. 96, document A/CN.4/415.

<sup>94</sup> *Yearbook* . . . 1989, vol. II (Part One), p. 59, document A/CN.4/422 and Add.1.

<sup>95</sup> See *Yearbook* . . . 1989, vol. II (Part Two), pp. 97 *et seq.*, paras. 403-610.

<sup>96</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fourth session of the General Assembly" (A/CN.4/L.443), sect. E.

166. The Commission considered the Special Rapporteur's third report at its 2158th to 2162nd meetings, from 16 to 23 May 1990. After hearing the introduction by the Special Rapporteur, the Commission resumed its consideration of articles 12 to 28, including the title of part III of the draft. At its 2162nd meeting, the Commission decided to refer articles 12 to 28 to the Drafting Committee, together with the proposals made by the Special Rapporteur and by members of the Commission.

167. The Drafting Committee dealt at the present session with 16 of the 28 articles adopted on first reading, but, due to lack of time, was not able to consider the remaining articles. The articles adopted by the Drafting Committee on second reading were: article 1 (Scope of the present articles); article 2 (Use of terms);<sup>97</sup> article 3 (Privileges and immunities not affected by the present articles); article 4 (Non-retroactivity of the present articles); article 5 (State immunity); article 6 (Modalities for giving effect to State immunity); article 7 (Express consent to the exercise of jurisdiction); article 8 (Effect of participation in a proceeding before a court); article 9 (Counter-claims); article 10 (Commercial transactions);<sup>98</sup> article 12 (Contracts of employment); article 13 (Personal injuries and damage to property); article 14 (Ownership, possession and use of property); article 15 (Intellectual and industrial property); and article 16 (Fiscal matters). In view of the fact that the second reading could not be concluded at the present session and a number of provisions were still pending, the Commission agreed that a detailed discussion of the articles adopted so far by the Drafting Committee on second reading would not serve any useful purpose. It accordingly decided to defer the final adoption of the above articles until after the completion of the remaining articles and to confine itself at the present session to taking note of the oral report of the Chairman of the Drafting Committee.<sup>99</sup> In accordance with its statute, the Commission expects to submit the entire set of draft articles and commentaries, as finally adopted by it, to the General Assembly at its forty-sixth session.

168. The following paragraphs reflect the comments and proposals made by members of the Commission at the present session on the title of part III of the draft and articles 12 to 28, as well as those made by the Special Rapporteur. With regard to the comments and proposals of the Special Rapporteur on articles 1 to 11 *bis*,<sup>100</sup> only a few members expressed opinions on them in the plenary Commission, mainly because other members had already expressed their views at the previous session. One member was of the opinion that the scope of the draft articles should be expanded to cover not only immunity of a State from the jurisdiction of a court of another State, and measures of constraint, as proposed by the Special Rapporteur, but also immunity from the jurisdiction of

legislative bodies or institutions of another State, and he suggested that articles 1 (Scope of the present articles) and 6 (State immunity) be amended to that effect. With regard to the new text of article 2 (Use of terms) proposed by the Special Rapporteur in his third report, combining articles 2 and 3 as adopted on first reading, one member supported the use of the expression "commercial transaction", rather than "commercial contract", in paragraph 1 (c). The same member, on the other hand, expressed doubts about the Special Rapporteur's proposal in paragraph 2 of the new text, which was to use the nature of a transaction as the primary test for determining whether or not the transaction was commercial, but also to allow a court of the forum State to take a governmental purpose into account. It was held that the proposed reformulation still begged the fundamental question of the relevance of an asserted governmental purpose of a transaction which was by its nature commercial, and that any reference to the purpose of a transaction would merely confuse the issue. Two other members commented on this proposal by the Special Rapporteur, one in support of the reformulation, and the other opposing it as it considerably reduced the importance to be attached to the purpose of a transaction.

169. With regard to article 6 (State immunity), the Special Rapporteur's proposal to delete the bracketed phrase "and the relevant rules of general international law" was supported by two members. It was said that the deletion of that phrase would eliminate the possibility of unilateral interpretations of international law by domestic courts; it was also pointed out that there would always be room for the application of new rules of international law with or without that reference in the draft articles. Some other members, however, considered it preferable that no decision on the wording of article 6 and on the title of part II of the draft be taken until after the completion of the second reading of the remaining articles, particularly parts III and IV of the draft.

170. Concerning article 11 (Commercial contracts), one member stated that he would have preferred a reformulation of the article which did not include any reference to the applicable rules of private international law. The text proposed by the Special Rapporteur in his third report was, in this member's view, somewhat eclectic and left room for a good deal of uncertainty. In that connection, he recalled that the business community had in the past deplored the frequent inclusion of similar vaguely worded references in international agreements. In his view, it would be preferable if paragraph 1 of article 11 referred to international agreements concerning choice of jurisdiction or to clauses designating the governing law, and he asked the Special Rapporteur and the Drafting Committee to consider that suggestion. As to draft article 11 *bis* (Segregated State property),<sup>101</sup> the same member was concerned that the reformulated text proposed by the Special Rapporteur did not cover the situation in which, even if a State enterprise was engaged in a commercial transaction as defined in the article, differences arose regarding the contract as a result of *acta jure imperii*. Neither article 11 nor article 11 *bis* would seem to cover that possibility. Two members, however, supported draft article 11 *bis* as reformulated by the Special Rapporteur:

<sup>97</sup> The Drafting Committee deferred the option of paragraph 1 (b) (iii) *bis* of article 2 pending the adoption of article 11 (originally submitted by the Special Rapporteur in his preliminary report as draft article 11 *bis* (Segregated State property) (*Yearbook* . . . 1988, vol. II (Part One), p. 109, document A/CN.4/415, para. 122)).

<sup>98</sup> The Drafting Committee combined articles 2 and 3 as provisionally adopted on first reading in a new article 2 and renumbered articles 4 to 11 as articles 3 to 10.

<sup>99</sup> See the summary record of the 2191st meeting (see *Yearbook* . . . 1990, vol. I), paras. 24-89.

<sup>100</sup> For the texts, see the Special Rapporteur's third report (*Yearbook* . . . 1990, vol. II (Part One), pp. 6 *et seq.*, document A/CN.4/431).

<sup>101</sup> See footnote 97 *in fine* above. The expression "segregated State property" refers to a distinct category of property recognized in certain legal systems.

one member stated that he was particularly happy with the new text, which put the question of the immunity or lack of immunity of the State and State enterprises in its proper perspective; another member emphasized the importance of the question of segregated State property for all States, since every State in the world had economic relations with States such as the USSR and China, where segregated State property played, to varying degrees, a considerable role, and he said that the proposed provisions on this question would facilitate the establishment of close economic relations in the interest of all States. In that connection, the attention of the Commission was drawn to the process of reconstruction in progress in the Soviet Union and, in particular, the adoption of a new law on property and economic reforms involving the introduction of a market economy.

171. Commenting on the draft articles as a whole, one member noted the opposing views of members of the Commission as regards the general principles of State immunity and expressed doubts that those views could be reconciled either in the Drafting Committee, or in the Sixth Committee of the General Assembly, or at a diplomatic conference, since they reflected differences of substance.

#### 1. PART III OF THE DRAFT:

##### [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

172. In his third report, the Special Rapporteur proposed, with a view to reaching agreement on the title of part III, a neutral formulation such as "Activities of States to which immunity does not apply" or, as suggested by a member of the Commission at the previous session, "Cases in which State immunity may not be invoked before a court of another State". If there was no support for any such formulation, he said, the matter should be decided on at the conclusion of the consideration of the draft articles.

173. During the Commission's discussion, some members expressed support for a neutral formulation along the lines suggested by the Special Rapporteur. One member proposed the alternative formulation: "Activities of States in respect of which States agree not to invoke immunity".

174. In the light of the above, and considering that no member of the Commission had opposed the adoption of a neutral formulation, the Special Rapporteur suggested that the Drafting Committee be entrusted with finding a generally acceptable title for part III.

##### ARTICLE 12 (Contracts of employment)<sup>102</sup>

175. The Special Rapporteur recalled that divergent views had been expressed on article 12. Some members of the Commission, as well as some representatives in the

<sup>102</sup> Article 12, as provisionally adopted by the Commission on first reading, reads as follows:

##### "Article 12. Contracts of employment

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

Sixth Committee of the General Assembly and one Government in its written comments, had suggested the deletion of the article. In their view, the labour-law disputes envisaged in the present text were normally settled by mutual agreement or by insurance coverage. It was further suggested that the scarcity of judicial practice or evidence of State practice did not justify the inclusion of the article. Others, however, considered article 12 important, pointing out that local courts were the only convenient forum to provide effective remedies to certain categories of employees of a foreign State.

176. The Special Rapporteur noted that there was in fact no uniformity in national legislation in this field.<sup>103</sup> Article 12 as adopted on first reading, which appeared to be based on the United Kingdom *State Immunity Act 1978*<sup>104</sup> and the 1972 European Convention on State Immunity,<sup>105</sup> laid down the rule of non-immunity of a foreign State in proceedings relating to a contract of employment between the State and an individual for work performed in the territory of the forum State, with certain exceptions to that rule. The question to be examined, according to the Special Rapporteur, was whether those exceptions were so extensive as practically to negate the non-immunity principle, which he assumed to be generally accepted. In his preliminary report, the Special Rapporteur had made two proposals which would have the effect of narrowing the scope of the exceptions to the rule of non-immunity, namely to delete the social-security requirement in paragraph 1<sup>106</sup> and to delete subparagraphs (a) and (b) of paragraph 2.<sup>107</sup>

177. The deletion of the social-security requirement had been proposed by the Special Rapporteur in response to the view expressed that not all States had a social security system for their workforce. As regards the deletion of

contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

"2. Paragraph 1 does not apply if:

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

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

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

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

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

<sup>103</sup> The United Kingdom *State Immunity Act 1978* contained, in section 4, detailed provisions on the subject, which were followed closely in Singapore's *State Immunity Act, 1979* and in Pakistan's *State Immunity Ordinance, 1981*. The United States *Foreign Sovereign Immunities Act of 1976* and Canada's *State Immunity Act, 1982*, on the other hand, contained no such specific provisions. The 1972 European Convention on State Immunity contained detailed provisions in article 5. (References to these instruments are given in the note to the Special Rapporteur's third report (A/CN.4/431).)

<sup>104</sup> See A/CN.4/431, footnote 20.

<sup>105</sup> *Ibid.*, footnote 19.

<sup>106</sup> *Yearbook . . . 1988*, vol. II (Part One), p. 110, document A/CN.4/415, para. 131.

<sup>107</sup> *Ibid.*, para. 132.

subparagraph (a) of paragraph 2, the Special Rapporteur had suggested it since, according to some members of the Commission and Governments, the category of persons covered by that provision was too broad, for it would make the rule of non-immunity established under paragraph 1 inapplicable in respect of all employees who had been recruited to perform services associated with the exercise of governmental authority (fairly liberal interpretation might be given to the words "associated with"). The Special Rapporteur was, however, of the view that subparagraph (a) was mainly intended to exclude administrative and technical staff of a diplomatic mission from the application of paragraph 1, which effect might not be achieved under article 4. Accordingly, he withdrew his proposal to delete subparagraph (a) and proposed an alternative text which would limit the exception by requiring the employee to be a member of the administrative or technical staff of a diplomatic or consular mission. The proposed text read:

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

As to the deletion of subparagraph (b), the Special Rapporteur agreed with the view previously expressed by some members of the Commission and Governments that, if immunity could be invoked in proceedings relating to recruitment, renewal of employment or reinstatement, little would remain to be protected by the local court.<sup>108</sup> The reference to "recruitment" raised a particularly difficult problem; in the case where there was a requirement under local labour law for non-discrimination in respect of recruitment, the State of the forum might have an overriding interest in determining the violation of that requirement in the local court. In that connection, a suggestion was made both in the Commission and in the Sixth Committee to the effect that the word "recruitment" be replaced by "appointment". The Special Rapporteur stated that, in any event, he wished to keep the matter open pending further discussion in the Commission.

178. During the Commission's discussion, all members who spoke on article 12, with one exception, appeared to support the retention of the provision in some form so that an employee of a foreign State, since he would have no other effective recourse, might be allowed to bring an action against that State in a court of another State where his service was performed. One other member, while supporting the retention of the article, pointed out that it raised many issues. He recalled that, in the past, States had consistently granted immunity from claims brought by employees of a diplomatic mission engaged in the work of the mission, the main reason being that working for a foreign State involved participation in the public functions of that State and that hearing the complainant was likely to involve investigation of governmental functions. Most cases adjudicated in the past had fallen outside the category of governmental activity and involved employees working in semi-governmental institutions, such as cultural agencies and the like; in such cases, jurisdictional immunity clearly could not be claimed. On the other hand, where employees were recruited to work for a governmental institution or for the Government itself, their activities were considered to be governmental functions

and the prerogatives of Governments were, by and large, respected. With those considerations in mind, this member preferred the text adopted on first reading to the text proposed by the Special Rapporteur.

179. One member drew attention to the fact that, while it was true, as the Special Rapporteur had pointed out, that legislation of the United States of America contained no specific provision on contracts of employment, there was no doubt that such contracts were covered by the general commercial-activity exception in section 1605 (a) (2) of the *Foreign Sovereign Immunities Act of 1976*. The legislative history of the Act made that point clear. Contracts of employment were not mentioned simply because the entire approach was different from that taken in the present draft.

180. There was general support for deleting the social-security requirement in paragraph 1 of article 12. One member, however, considered that the reference should be retained, as difficulties often arose in that connection. In his view, the words "which may be in force" made it clear that States which did not have a social security system would not on that account be required to introduce one. As regards subparagraph (a) of paragraph 2, the opinions of members were divided: some members supported the Special Rapporteur's alternative text, which was more limited in scope, whereas other members preferred either the deletion of the subparagraph or the general language of the text adopted on first reading.

181. Views were also divided on subparagraph (b) of paragraph 2. Some members, supporting the view expressed by the Special Rapporteur, suggested the deletion of the word "recruitment" or the deletion of the entire subparagraph. One member considered that subparagraph (b) might not be necessary in the light of article 26, on State immunity from measures of coercion, since the latter article would ensure that a State could not be forced by a court of the State of the forum to employ, or to retain in its employment, or to re-employ, a particular individual. Some other members, however, insisted on the retention of subparagraph (b), including the word "recruitment", which, it was maintained, was consistent with the established rules of international law. Recruitment, according to one member, could not be challenged in court, for a State's freedom to decide whether or not to hire or to renew employment should not be questioned. In his view, only a problem of failure to respect the rights granted to the employee by the contract of employment could be referred to the courts.

182. The Special Rapporteur suggested that one solution might be to specify that, when a proceeding related to the recruitment, renewal of employment or reinstatement of an individual, it should be allowed only in so far as it was aimed at ensuring pecuniary compensation, but without allowing the court to issue an injunction against the foreign State.

183. With regard to subparagraph (c) of paragraph 2, one member suggested the deletion of the words "nor a habitual resident". In his view, a national of a State residing abroad should still be treated like any other national of the State, with all the legal consequences deriving from that status.

184. Taking into account the above discussion, as well as the discussion at the previous session on article 12, the

<sup>108</sup> Ibid.; see also *Yearbook* . . . 1989, vol. II (Part Two), p. 110, para. 513.

Special Rapporteur proposed retaining the article, with the deletion of the social-security requirement in paragraph 1. As to subparagraphs (a) and (b) of paragraph 2, the Special Rapporteur suggested that further consideration be given to them by the Drafting Committee.

ARTICLE 13 (Personal injuries and damage to property)<sup>109</sup>

185. The Special Rapporteur noted that article 13 was generally conceived as a provision relating to non-commercial tort and liability of a State to pay monetary compensation for the damage caused by an act or omission attributable to that State. He observed that, as in the case of article 12, the views of members of the Commission on article 13 had been divided so far: some had proposed the deletion of the entire article, since in their view it was based on the legislation of a few States and such cases could be settled through diplomatic channels; others had expressed concern that, if the act or omission which caused the injury or damage was attributable to a State, a question of State responsibility would arise and the matter could be resolved only on the basis of international law and not by national law. It had also been pointed out that the article would create inconsistency between jurisdictional immunities enjoyed by a State under the present articles and those enjoyed by diplomatic agents representing the State under the relevant international agreements in force, and that the provision made no distinction between sovereign acts and private-law acts. Still other members had held the view that disputes of the kind in question were not uncommon and that diplomatic protection was not a viable alternative as a practical matter.

186. Considering such differences of opinion, the Special Rapporteur had earlier made three suggestions: first, the addition of a new paragraph 2, reading: "Paragraph 1 does not affect any rules concerning State responsibility under international law"; secondly, the deletion of the phrase "and if the author of the act or omission was present in that territory at the time of the act or omission"; and, thirdly, the narrowing of the scope of the article mainly to cover pecuniary compensation arising from traffic accidents involving State-owned or State-operated means of transport and occurring within the territory of the forum State. With regard to the first suggestion, there had, at the previous session, been neither opposition nor clear support; as for the second, some members had expressed reservations with regard to the proposed deletion; on the third suggestion the views of members had also been divided, and it had been remarked that the general practice was to settle such matters through insurance, although it

<sup>109</sup> Article 13, as provisionally adopted by the Commission on first reading, reads as follows:

*"Article 13. Personal injuries and damage to property"*

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

had also been pointed out that insurance did not always cover the full risk involved. In the light of that discussion at the previous session, the Special Rapporteur now wished to revert to the text of article 13 adopted on first reading and to ascertain whether the concept of non-commercial tort itself was acceptable to the Commission.

187. During the Commission's discussion at the present session, most of the members who spoke on article 13 were in favour of retaining it. It was said that, without this exception to State immunity, an injured individual would as a practical matter be without remedy, for in nearly all cases of personal injury and damage to property diplomatic protection would probably be unavailable. As a matter of international human-rights law, individuals must have some effective recourse. One member, however, favoured the deletion of the article, stating that exceptions to State immunity should be kept to a minimum. In his view, the exception was not necessary, because cases of domestic-law violations were normally settled by insurance or through diplomatic channels.

188. Some other members, while not entirely opposed to the inclusion of a provision on this matter, expressed concern that the text of article 13 adopted on first reading might be prejudicial to the question of State responsibility. Difficulties arose, according to one member, from the fact that, in the first place, the article provided for the possibility that a court might attribute to a foreign State an act or omission of a physical or legal person, distinct from that State, who was present in the territory of the forum State at the time of the act or omission, and declare that State to be responsible. In his view, the regulation of legal relations in connection with compensation for damage was outside the scope of article 13. Secondly, it was said, an unlawful act or omission of a State was to be determined through international procedures in accordance with the rules of international law, and could not be determined by national courts. Another member was similarly concerned that article 13 at first sight might imply that the question arose of the international responsibility of a State, whereas in fact the scope of application of the article was limited to the determination of responsibility by reference not so much to the rules of international law as to the rules of municipal law applied by the court of the forum State, pursuant to the *lex loci delicti commissi*. In that connection, one member indicated that he could accept the article only on condition that the proposed new paragraph 2 (see para. 186 above) was added.

189. Concern was also expressed that, under the terms of article 13, the State would have narrower immunity than that conferred on its own diplomatic agents under article 31 of the 1961 Vienna Convention on Diplomatic Relations. The view of one member was that the text of article 13 was in complete contradiction with article 31 of the Vienna Convention. Another view, however, was that there was no such contradiction. Although the Vienna Convention provided for various immunities for diplomatic and consular premises and personnel, it contained nothing to make a foreign State itself immune from the courts of the State of the forum with respect, for example, to actions arising out of commercial contracts between the State and a private person or out of torts. A further view was that the problem concerning article 13 was that it contained a number of related notions without clearly distinguishing between them. The article spoke only of the State, not of

diplomats, and of an act or omission “attributable to the State”, a distinction that must be made clear.

190. Different views were also expressed as to the scope of article 13: some members supported the idea that the application of the article should be limited to pecuniary compensation arising from traffic accidents, while one member opposed it. Concerning the so-called “presence requirement”, there was general support for the retention of the phrase “and if the author of the act or omission was present in that territory at the time of the act or omission”. One member suggested that, if the article were retained, the phrase “act or omission which is alleged to be attributable to the State” should be redrafted in more precise terms and the subjects and objects of the regulation defined more clearly in the light of the comments made by Governments and members of the Commission.

191. The Special Rapporteur suggested that these points should be taken into account in the Drafting Committee.

#### ARTICLE 14 (Ownership, possession and use of property)<sup>110</sup>

192. In the light of the views expressed on article 14 at the Commission’s previous session and the comments of Governments, the Special Rapporteur proposed the deletion of subparagraphs (c), (d) and (e) of paragraph 1, which represented mainly the practice of common-law countries.

193. Most members who spoke on the article supported the Special Rapporteur’s proposal. It was generally said that the provisions in question did not reflect universal

practice and therefore were not appropriate for a general convention. It was also suggested that they might open the door to foreign jurisdiction even in the absence of any link between the property and the forum State. One member, however, cautioned against accepting the proposal to delete subparagraphs (c), (d) and (e) without thinking through the effects of such a deletion. In his view, the cases in question, in respect of which there should certainly be no immunity, did not seem to be covered by other more general provisions; the Commission should therefore either retain the subparagraphs or add some general provisions. Another member, while agreeing to the Special Rapporteur’s suggestion to delete terminology which was not universally accepted, hoped that the underlying concept, which was universally valid, would not be lost in consequence.

194. Two members were also concerned that subparagraph (b) of paragraph 1 might allow jurisdiction of a foreign court even if there was no link between the property and the forum State, and they suggested that wording be included, as in paragraph 1 (a), to provide that the property was situated in the forum State. Another member felt that paragraph 1 (b) should be deleted.

195. With regard to paragraph 2, some members suggested the deletion of the entire provision, which appeared to be a duplication or otherwise a contradiction of paragraph 2 of article 7 (Modalities for giving effect to State immunity).

196. The Special Rapporteur suggested that these points should be taken into account in the Drafting Committee.

#### ARTICLE 15 (Patents, trade marks and intellectual or industrial property)<sup>111</sup>

197. The Special Rapporteur noted that one Government, in its written comments on article 15, had requested the addition of a reference to plant breeders’ rights. To meet that request, he proposed that subparagraph (a) be amended to read: “. . . or any other form of intellectual or industrial property, including a plant breeder’s right . . .”. The addition of the phrase “and a right in computer-generated works” in the same subparagraph was also suggested by the Special Rapporteur, taking into account the recent technical developments in that field. The latter phrase was to be understood as including, *inter alia*, computer programs and semiconductor chip layouts.

<sup>111</sup> Article 15, as provisionally adopted by the Commission on first reading, reads as follows:

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

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

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

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

<sup>110</sup> Article 14, as provisionally adopted by the Commission on first reading, reads as follows:

#### “Article 14. Ownership, possession and use of property

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

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

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

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

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

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

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

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

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

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

198. Those additional references to a plant breeder's right and a right in computer-generated works met with the approval of several members, although one of them suggested that the nature and scope of those rights should be made clear in the commentary. Some other members were, however, not convinced that such special references were justified. They felt that, since no listing could be exhaustive, it would be better to find general wording which would also cover those rights, or to make such specific references in the commentary. Two members associated themselves with the view that article 15 was applied only to the commercial use of patents or trade names in the forum State and not in connection with the determination of the ownership of such rights. Even with that qualification, however, the article was considered strictly unnecessary by one of them, since the problems it set out to resolve were of a highly technical nature and should be left to specialized international conventions, such as those concluded under the auspices of WIPO. The suggestion was also made that subparagraph (b) should be deleted, since the words "alleged infringement" were so broad as to pave the way for abuse.

#### ARTICLE 16 (Fiscal matters)<sup>112</sup>

199. The Special Rapporteur noted that no question of substance had been raised concerning article 16, except for one proposal to reformulate the article along the lines of article 29 (c) of the 1972 European Convention on State Immunity, so as to read: "The present articles do not apply to proceedings concerning customs duties, taxes or penalties."

200. There was wide support in the Commission for the retention of article 16, although two members suggested its deletion. One member was in favour of a simplified formulation based on the wording of article 29 (c) of the 1972 European Convention.

201. The Special Rapporteur proposed that the Drafting Committee be entrusted with reviewing the wording of the article, taking into account the above suggestions.

#### ARTICLE 17 (Participation in companies or other collective bodies)<sup>113</sup>

202. The Special Rapporteur noted that no substantive objections had been raised with regard to article 17. He recalled that one Government had proposed in its written comments that the requirement that the collective body have its principal place of business in the forum State should be given preference over the other criteria. Another Government had proposed that the words "participation"

<sup>112</sup> Article 16, as provisionally adopted by the Commission on first reading, reads as follows:

*"Article 16. Fiscal matters*

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

<sup>113</sup> Article 17, as provisionally adopted by the Commission on first reading, reads as follows:

and "participants" be replaced by "membership" and "members", respectively. The Special Rapporteur suggested retaining the article without substantive changes.

203. No substantive comments were made on article 17 during the Commission's discussion.

#### ARTICLE 18 (State-owned or State-operated ships engaged in commercial service)<sup>114</sup>

204. The Special Rapporteur pointed out that he had given detailed explanations concerning article 18 in his

*"Article 17. Participation in companies  
or other collective bodies*

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

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

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

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

<sup>114</sup> Article 18, as provisionally adopted by the Commission on first reading, reads as follows:

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

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

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

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

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

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

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

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

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

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

second report<sup>115</sup> and was now recommending only the deletion of the bracketed term “non-governmental” in paragraphs 1 and 4, since in his view it rendered the meaning ambiguous and might represent a departure from the practice followed in a number of treaties relating to the law of the sea. Those treaties were cited in his third report.<sup>116</sup> As to the suggestion made by some Governments to introduce into the draft the concept of segregated State property in relation to State-owned or State-operated ships engaged in commercial service, the Special Rapporteur was inclined to the opinion, shared by some other members, that the Commission should be careful to avoid unnecessary duplication, in particular with draft article 11 *bis*. If the ship concerned belonged to a State enterprise, it would be subject, under that article, to the same rules and liability regime as were applicable to natural or juridical persons. With regard to State-owned or State-operated aircraft engaged in commercial service, the Special Rapporteur had suggested in his second report<sup>117</sup> that that question could be covered more suitably in the commentary than in an additional provision of article 18.

205. During the Commission’s discussion, a number of members supported the recommendation of the Special Rapporteur to delete the term “non-governmental” in paragraphs 1 and 4 of article 18, one with the proviso that the meaning of the words “for commercial purposes” was made clear in the commentary and that it was explained that, if a ship was engaged in a government mission, the immunity of the owner or operator State would revive. Some other members were, however, opposed to the deletion. It was pointed out by one member that “government non-commercial service” seemed to be the traditional formula and a precedent was to be found for it, *inter alia*, in the 1958 Convention on the High Seas. Logically, it was said, the expression “commercial non-governmental” was the counterpart of “government non-commercial” in paragraphs 2, 5 and 7, and there was no reason why the two expressions should not be used simultaneously. In the view of this member, the use of the two qualifying terms was justified, because they referred, respectively, to the nature of the service and to the object pursued by the State in the case in point, it being understood that the criterion of object was paramount in respect of immunity. Some drafting changes were proposed in that connection. Another member stated that the deletion of the term “non-governmental” from paragraphs 1 and 4 would constitute a serious derogation from the principle of the jurisdictional immunity of States and frustrate the efforts of many developing countries to develop national shipping lines as a matter of national policy and not merely for commercial purposes. One other member, while not insisting on the

retention of the term “non-governmental”, suggested that it be made clear that, in cases where the public interest was involved in a particular commercial activity carried on by a State ship, the State concerned could invoke the immunity of the ship.

206. Taking those views into account, and also the fact that many other members had favoured the deletion of the term “non-governmental” at the previous session, the Special Rapporteur suggested that the question be referred to the Drafting Committee.

207. As regards the suggestion of some Governments to introduce the concept of segregated State property in relation to State-owned or State-operated ships engaged in commercial service, one member of the Commission referred to the reforms which he believed would be carried out in that field in the Soviet Union in the spirit of the new laws on property and enterprises. Another member was concerned that article 18 as presently formulated failed to take fully into account the system adopted by some States in which State-owned ships were operated for commercial purposes by independent legal entities. According to this member’s interpretation, such a system did not fall within the scope of draft article 11 *bis*. He maintained that an examination of the relevant conventions cited in the Special Rapporteur’s third report revealed that they generally mentioned both the owner and operator State when dealing with ships used in non-commercial government service, but only the operator when they covered ships used strictly for commercial service. He therefore suggested that, since article 18 referred only to commercial activities, only State-operated ships should be covered. The Special Rapporteur stated that, personally, he was not convinced that such an interpretation was consistent, for example, with the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, as pointed out also by one member, but the matter could be considered by the Drafting Committee.

#### ARTICLE 19 (Effect of an arbitration agreement)<sup>118</sup>

208. With regard to article 19, the Special Rapporteur considered that there were essentially three issues on which the views of members were sought. First, views were still divided as to the choice between the bracketed expressions “commercial contract” and “civil or commercial matter” in the introductory clause. The Special Rapporteur stated that there would be little reason to limit the

<sup>118</sup> Article 19, as provisionally adopted by the Commission on first reading, reads as follows:

#### “Article 19. Effect of an arbitration agreement

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

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

“(b) the arbitration procedure;

“(c) the setting aside of the award,

“unless the arbitration agreement otherwise provides.”

(Footnote 114 continued)

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

<sup>115</sup> See *Yearbook . . . 1989*, vol. II (Part One), pp. 66-68, document A/CN.4/422 and Add. 1, paras. 24-31.

<sup>116</sup> A/CN.4/431, footnotes 22 to 25.

<sup>117</sup> *Yearbook . . . 1989*, vol. II (Part One), p. 68, document A/CN.4/422 and Add.1, para. 31.

supervisory jurisdiction of a court of the forum State to a “commercial contract” or a “commercial transaction”, since the scope of an arbitration depended primarily on the terms of the arbitration agreement and, in fact, there had been a number of arbitration cases arising out of civil or commercial matters. The words “unless the arbitration agreement otherwise provides”, at the end of the article, indicated that, if the parties to the agreement wished to limit the scope of arbitration to differences arising out of a commercial contract, they could do so by inserting a provision to that effect in the arbitration agreement.

209. The second point had to do with the wording of subparagraph (c), to which one Government had proposed adding a reference to the “recognition and enforcement” of the arbitral award. However, since the question of measures of constraint, which included “enforcement”, was dealt with in part IV of the draft articles, the Special Rapporteur had proposed simply the addition to article 19 of a new subparagraph (d) reading: “the recognition of the award”, on the understanding that “recognition” was interpreted as the act which entailed “turning the award into a judgment or a title equivalent to a judgment by providing it with an *exequatur* or some similar judicial certificate”, but not as a waiver of immunity from execution.<sup>119</sup> If, on the other hand, recognition was interpreted as a first step towards execution, his proposal might have to be reconsidered.

210. The third point was that, while the Commission had considered on first reading two alternatives for the last part of the introductory clause, namely “a court of another State which is otherwise competent . . .” and “a court of another State on the territory or according to the law of which the arbitration has taken or will take place . . .”, and had chosen the former, the Special Rapporteur was of the opinion that the latter formula, which was that used in article 12 of the 1972 European Convention on State Immunity, might have some merits as far as arbitration procedure was concerned. He therefore recommended that members discuss the point further.

211. On the first question—the choice between the expressions “commercial contract” and “civil or commercial matter”—the views of members seemed to be divided, as at the previous session. One member proposed a third formulation along the lines of “commercial or accessory [assimilated] matters” to cover, for instance, disputes that might arise in connection with the salvage of commercial ships. As to the second question—the possible addition of a new subparagraph (d) on the recognition of the arbitral award—a few members spoke in favour, while several others opposed the addition on the grounds that recognition of the award could be deemed to constitute a first step towards execution, which required the express consent of the State concerned. The view was also expressed that the recognition procedure, which appeared to be specific to certain legal systems, did not fall directly within the purview of part III of the draft, but would rather concern the part relating to enforcement; it was thus suggested that the proposed addition be considered in the context of part IV of the draft articles. One member expressed concern about the tendency to confuse an agreement on arbitration with a waiver of immunity. A

suggestion was made, therefore, to include a provision in article 19 to the effect that submission to arbitration should not be construed as submission to the jurisdiction of the forum State. Similarly, it was suggested that a State party to an arbitration agreement must retain its right to invoke immunity before the courts of a State that was not involved in or designated by the agreement, unless the agreement contained an explicit provision to the contrary.

212. With regard to the third question—the possible replacement of the phrase “a court of another State which is otherwise competent”, in the introductory clause, by “a court of another State on the territory or according to the law of which the arbitration has taken or will take place”—one member preferred the former wording, whereas two other members supported the latter.

213. In the light of the above comments, the Special Rapporteur recommended that the choice between the expressions “commercial contract” and “civil or commercial matter” be referred to the Drafting Committee. As to the addition of a new subparagraph (d) on the recognition of the arbitral award, he was of the view that, if recognition of the award was indeed interpreted under many domestic civil-law procedures as the first step towards its execution, it would be best not to include the new subparagraph. Noting the highly technical nature of the legal question, he suggested that the matter be examined further by the Drafting Committee.

#### ARTICLE 20 (Cases of nationalization)<sup>120</sup>

214. The Special Rapporteur recalled that article 20 had emerged from the first reading as a general reservation clause. According to Governments, measures of nationalization, as sovereign acts, were not subject to the jurisdiction of the courts of another State; others, however, had commented that the meaning and proper scope of the article were unclear; it had also been suggested that the article be placed in part I of the draft. The view of the Special Rapporteur was that the question of the territorial effects of nationalization was not one on which the Commission was expected to express an opinion. Considering that and also the fact that many members of the Commission were in favour of deleting the article, the Special Rapporteur recommended its deletion.

215. All members who expressed their views on article 20 at the present session agreed that it should be deleted. It was suggested that the question of nationalization was far too complex to be dealt with in an article. It was also stated that measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and could not be considered as representing an exception to the principle of State immunity.

<sup>120</sup> Article 20, as provisionally adopted by the Commission on first reading, reads as follows:

*“Article 20. Cases of nationalization*

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

<sup>119</sup> *Ibid.*, pp. 70-71, paras. 38-40.

2. PART IV OF THE DRAFT: STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

216. One member of the Commission suggested that the title of part IV of the draft might be amended to read: "Jurisdictional immunities of States in respect of their property", which would be clearer and much closer to the title of the topic than the reference to "measures of constraint" in the present title. The latter, in his opinion, did not clearly indicate whether or not it covered execution, which went well beyond measures of constraint.

ARTICLE 21 (State immunity from measures of constraint)

ARTICLE 22 (Consent to measures of constraint) *and*

ARTICLE 23 (Specific categories of property)<sup>121</sup>

217. The Special Rapporteur referred to his comments on articles 21 to 23 in his third report (A/CN.4/431), in which he had pointed out that, owing to the independent development of the subjects of immunity from measures of constraint and immunity from jurisdiction, there was still a division of opinion regarding immunity from measures of constraint, even among the industrialized countries which were inclined towards restricted immunity from jurisdiction. According to one view, the power to proceed to measures of constraint was a consequence of the power to exercise jurisdiction; but the opposing view held that international law prohibited forced execution on the property of a foreign State situated in a forum State, even where a court of the forum State had jurisdiction to adjudicate over the dispute. The former view had been upheld by the courts of Switzerland, the Netherlands and

<sup>121</sup> Articles 21, 22 and 23, as provisionally adopted by the Commission on first reading, read as follows:

*"Article 21. State immunity from measures of constraint"*

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

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

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

*"Article 22. Consent to measures of constraint"*

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

"(a) by international agreement;

"(b) in a written contract; or

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

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

the Federal Republic of Germany, while a number of socialist Governments were inclined to the latter view. However, the recent tendency among industrialized countries was to restrict State immunity in respect of property from measures of constraint. Examples of that trend could be cited in recent legislation in the United Kingdom, South Africa, Singapore, Pakistan and Australia. Under that system, provision was made for the enforcement of a judgment or an arbitral award in respect of State property which was for the time being in use, or intended to be used, for commercial purposes. Recent legislation in the United States of America, while setting forth the general rule of immunity from execution, provided for a number of exceptions to the effect that property used for a commercial activity in the United States was subject to execution. Although the basic rule of the 1972 European Convention on State Immunity was the general prohibition of enforcement measures subject to the possibility of express waiver, the Convention did provide for the direct obligation of contracting States to abide by a judgment rendered against them. In case of non-compliance, the plaintiff could institute proceedings before a court of the State against which the judgment had been rendered, and there was the further possibility of bringing an action before the European Tribunal. Still another possibility was the procedure of optional declaration, according to which judgments in cases arising from industrial or commercial activities could be enforced against the property of a debtor State that was used exclusively for such activities. The Special Rapporteur was inclined to the view, however, that the procedure established in the European Convention was based on a special confidence between the European countries and was too complex to serve as a guide for the Commission.

218. With this background in mind, the Special Rapporteur suggested that the Commission proceed with the further consideration of part IV of the draft on the basis of

*"Article 23. Specific categories of property"*

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

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

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

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

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

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

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

two alternatives. The first alternative was the texts adopted on first reading, with certain modifications, and the second was a reformulation of those texts, but without the idea of total prohibition of execution. The second alternative<sup>122</sup> was based on the view of the Special Rapporteur that, in the light of the written comments of Governments received so far and of observations made in the Sixth Committee of the General Assembly and in the Commission, carefully limited execution rather than its total prohibition would have a better chance of obtaining general approval.

219. With regard to the first alternative, the bracketed phrase in the introductory clause of article 21 and in paragraph 1 of article 22, "or property in which it has a legally protected interest", would be deleted. The phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in article 21 (a), would also be deleted. Thirdly, the Special Rapporteur suggested deleting the bracketed term "non-governmental" in article 21 (a) and in paragraph 1 of article 23. In addition, it would be useful to add the words "and used for monetary purposes" at the end of paragraph 1 (c) of article 23.

220. The second alternative for articles 21 to 23<sup>123</sup> took into account the suggestion that articles 21 and 22 as adopted on first reading should be combined. Paragraph 1 of the new article 21 stated the principle of non-execution against the property of a foreign State in the territory of a forum State, a statement that was followed by a number of exceptions set out in subparagraphs (a) to (c), which were largely the same as those contained in the adopted texts of article 21 and article 22, paragraph 1. However, the Special Rapporteur suggested three major changes to the

<sup>122</sup> See footnote 123 below.

<sup>123</sup> The texts proposed by the Special Rapporteur in his third report (A/CN.4/431) as the second alternative for articles 21 to 23 read as follows:

*"Article 21. State immunity from measures of constraint"*

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

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

"(i) by arbitration agreement;

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

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

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

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

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

*"Article 22. Specific categories of property"*

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

texts of those exceptions as adopted on first reading. First, a reference to arbitration agreements had been introduced in paragraph 1 (a) (i) of the new article 21. Secondly, the exception in paragraph 1 (a) (iii) had been reworded in line with the similar change in paragraph 1 (c) of the new article 8. Thirdly, the words "the property is in the territory of the forum State and" had been added at the beginning of paragraph 1 (c). Article 22 basically reproduced the text of article 23 as adopted on first reading. Article 23 in the second alternative was a new provision. Draft article 11 *bis* already provided that a State enterprise was subject to the same rules and liabilities as were applicable to a natural or juridical person. Accordingly, a State enterprise was also subject to the same rules and liabilities as a natural or juridical person in respect of measures of constraint. Logically, therefore, a State could not invoke immunity from measures of constraint before a court of the forum State in respect of such State property as it had entrusted to a State enterprise.

221. The two alternative sets of articles 21 to 23 proposed by the Special Rapporteur drew comments from many members of the Commission. Some members reiterated their position that the articles should clearly set forth the principle of immunity from measures of constraint, followed by limited exceptions to the rule. It was said that measures of constraint would strain relations between States; the recent tendency in some developed countries to restrict State immunity from execution was a dangerous departure from the rules of sovereign immunity of States and should be curbed rather than encouraged by the Commission. In that connection, one member referred to the reformulation of article 21 which he had proposed at the previous session,<sup>124</sup> although he would study further the Special Rapporteur's proposals for the article.

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

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

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

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

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

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

*"Article 23"*

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

<sup>124</sup> See *Yearbook . . . 1989*, vol. II (Part Two), p. 117, para. 578.

222. Notwithstanding those reservations, the Commission's discussion of the two alternative sets of articles indicated general support for the approach adopted by the Special Rapporteur in the second alternative, including the idea of combining articles 21 and 22.

223. The views of members on the substance of the new article 21 were, however, divided, in particular on two points. The first related to the proposed deletion of the bracketed phrase "or property in which it has a legally protected interest", which appeared in the introductory clause of article 21 and in paragraph 1 of article 22 as adopted on first reading. Some members supported the proposal, which had the effect of focusing on "property of a foreign State" as the sole object deserving protection. It was said that it would be absurd to grant to third parties complete protection from measures of constraint simply because a foreign State had an interest in the property concerned, although, as a safeguard, a provision could perhaps be added to the effect that any rights enjoyed by a foreign State in relation to property owned by a third party could not be affected by measures of constraint against that third party. To some other members, the deletion of the phrase in question was not acceptable as it would broaden the scope of the exceptions to State immunity from foreign enforcement jurisdiction. It was also held that the concept of "interest" was distinct from that of "property", as the Commission itself had recognized in its final draft articles on succession of States in respect of State property, archives and debts, adopted in 1981. In the commentary to article 8 of that draft, the Commission had stressed that the expression "property, rights and interests" referred to "rights and interests of a legal nature".<sup>125</sup> The deletion of the concept of "interest", it was said, would therefore leave a gap that would be difficult to fill.

224. The second point on which the views of members were divided concerned the possible deletion of the bracketed phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in paragraph 1 (c) of the new article 21. Most speakers argued that the phrase was of crucial importance and should be retained. Otherwise, it was said, measures of constraint might be taken against any property of a foreign State if it was used for commercial purposes: in particular, the phrase would avoid confusion between State property, on the one hand, and property of other agencies and of public enterprises, on the other. Some members, however, favoured the deletion, for it was often hard, if not impossible, in practice to establish a link between the claim and the property against which execution was sought, especially where financial claims were concerned.

225. In that connection, one member referred to legislation in the United States of America which followed a two-track approach on the question of linkage, treating the property of State agencies and instrumentalities differently from other State property. He suggested that the Commission might wish to consider introducing some of the distinctions contained in United States or other legislation with respect to State property. In any event, he was not sure what was meant by the phrase "has a connection . . . with the agency or instrumentality against which the proceeding was directed" in the adopted text of article 21 (a).

226. The Special Rapporteur's proposal to delete the bracketed term "non-governmental" in paragraph 1 (c) of the new article 21 was specifically commented on by two members, one in favour of and the other opposed to the deletion.

227. With regard to the new article 22 proposed by the Special Rapporteur, many members supported the addition of the words "and used for monetary purposes" in paragraph 1 (c), although one member opposed the addition because of the way those words could be interpreted by local courts. Another member endorsed the view that there was an organic link between the new article 22 and draft article 11 *bis* which should be duly taken into account. The same member, however, stressed the importance of the concept behind subparagraph (c), namely that property of the central bank of the foreign State which was in the territory of the forum State was unconditionally exempted from measures of constraint whatever the purpose for which it was used; central banks were instruments of the sovereign power and all activities conducted by them enjoyed immunity from measures of constraint; moreover, central banks should, because of their legal status, be considered as State bodies and automatically enjoy immunity on that basis. This member further suggested that the Drafting Committee should consider how the wording of paragraph 2 could be improved to ensure protection of the specific categories of property in question against all measures of constraint, in other words to allow no derogations from the principle of immunity in respect of that property.

228. The new article 23 proposed by the Special Rapporteur was considered justified by one member as a corollary to draft article 11 *bis*. Another member, however, did not agree with the concept of "segregated State property" and did not think that anything would be lost by deleting it from the article. Yet another member proposed the following alternative formulation:

"A State cannot invoke immunity from measures of constraint, including measures of attachment, arrest and execution, in respect of the property of a State enterprise."

The majority of members were, however, of the view that the new article 23 was probably unnecessary, but that the Commission should await the final results of its work concerning the definition of the term "State" in the new article 2 and the ultimate fate of draft article 11 *bis*. It was held that a State enterprise established for commercial purposes, not being a State as defined in the new article 2, was not entitled to perform acts pursuant to the governmental authority of the State: hence it fell outside the scope of the topic of jurisdictional immunities of States and the new article 23 should therefore be deleted.

### 3. PART V OF THE DRAFT: MISCELLANEOUS PROVISIONS

#### ARTICLE 24 (Service of process)<sup>126</sup>

229. In the light of the written comments of Governments, the Special Rapporteur proposed that paragraph 1

<sup>125</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 26, para. (10) of the commentary.

<sup>126</sup> Article 24, as provisionally adopted by the Commission on first reading, reads as follows:

of article 24 be amended to provide that service of process must be effected either in accordance with an international convention or by transmission through diplomatic channels. In the case of the existence of a convention binding on both the forum State and the other State concerned, the service of process under the convention should have priority. The amended subparagraphs (a) and (b) of paragraph 1 would then read:

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

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

230. With regard to paragraph 3, the Special Rapporteur recalled that several members of the Commission had expressed the view at the previous session that the words “if necessary” should be deleted. Because of the practical problems that would be encountered by the authority serving process, if those words were to be deleted the Special Rapporteur suggested the addition of the phrase “or at least by a translation into one of the official languages of the United Nations” so that, in a case where translation into a language that was not widely used might give rise to difficulties for the authority serving process, a translation into one of the official languages of the United Nations would be acceptable.

231. Most of the members who spoke on article 24 expressed support for the proposed changes. One member, however, felt that the revised text did not adequately take cognizance of the fact that every State had its own rules regarding service of process: States would not be willing to modify their domestic rules of civil procedure if a national ratification of, or accession to, an international convention so required. Accordingly, he proposed the inclusion of a new paragraph 1 (a), reading: “(a) in

accordance with the rules of civil procedure of the State of the forum”. Without such a clause, he would find it difficult to accept paragraph 4 of the article, which, in its present formulation, denied the State concerned the right to seek annulment of the proceeding on the ground that it had not been duly impleaded. Some members commented on paragraph 3, concerning the translation of documents. One member did not favour the changes suggested by the Special Rapporteur, which, in his view, did not adequately safeguard the interests of the State concerned. Another member suggested that, if the parties explicitly agreed on the proper law of the contract, the specific language of the legal order concerned should be deemed sufficient. While welcoming the suggestion concerning translation into one of the official languages of the United Nations, this member stressed the need for a reasonable link between the official language used and the proceeding. In that context, two alternative formulations for paragraph 3 were proposed by other members. The first proposal read: “The documents should be made available in a language acceptable to the State concerned” (a text which, it was suggested, should also be introduced in paragraph 2 of article 25). The second proposal read: “These documents shall be accompanied by a translation into the official language, or one of the official languages, of the State concerned, or at least by a translation into one of the official languages of the United Nations in use in that State.”

#### ARTICLE 25 (Default judgment)<sup>127</sup>

232. The Special Rapporteur, referring to the suggestion made by one Government in its written comments that it be made clear that a default judgment should not be rendered merely by virtue of due service of process (a suggestion supported by a member of the Commission at the previous session), proposed the addition at the end of paragraph 1 of article 25 of the words “and if the court has jurisdiction in accordance with the present articles”. The Special Rapporteur also noted the suggestion made by some members of the Commission to delete the words “if necessary” from paragraph 2, as proposed in the case of paragraph 3 of article 24. His view was that the same solution should be adopted for article 25 as for article 24.

233. The proposed addition of the words “and if the court has jurisdiction in accordance with the present articles” at the end of paragraph 1 commanded general support in the Commission. One member drew attention to

<sup>127</sup> Article 25, as provisionally adopted by the Commission on first reading, reads as follows:

#### “Article 25. Default judgment

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

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

#### “Article 24. Service of process

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

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

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

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

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

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

“(ii) by any other means.

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

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

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

the fact that, in a number of cases, default judgment had been rendered against foreign States simply because they had failed to enter an appearance before the court in order to invoke immunity. The rule of sovereign immunity had not shielded them from such a judgment because, under the procedural laws of the countries concerned, a defendant had to appear in court and expressly plead lack of jurisdiction. With a view to affording States better protection, this member suggested adding a separate paragraph to the effect that it was incumbent upon the judge to inquire *ex officio* into the issue of immunity under the present articles. That suggestion was supported by several other members, one of whom further suggested that, in view of its general nature, the proposed new paragraph should be inserted in article 7. In that connection, the Special Rapporteur recalled that, at the previous session, another member had suggested that it be stated, either in article 25 or in the commentary thereto, that the court of the forum must *ex officio* determine that the present articles had been complied with prior to rendering judgment. The view of the Special Rapporteur was that the Drafting Committee should consider those suggestions in conjunction with article 7.

234. As regards the provisions of article 25 in general, one member stated that he could endorse the article, subject to the adoption of the new paragraph 1 (a) which he had proposed for inclusion in article 24 (see para. 231 above).

#### ARTICLE 26 (Immunity from measures of coercion)<sup>128</sup>

235. The Special Rapporteur had no proposal to make with regard to article 26. He recalled that two Governments in their written comments had expressed doubts as to the appropriateness of the provision. One other Government, while endorsing the objective of the article, had suggested that it be reformulated in order to prevent the very possibility that such an order might be issued. The Special Rapporteur stated that he would prefer to retain the original formulation, pending the expression of views by members.

236. Some members of the Commission considered that the objective of article 26 required clarification. One member referred to two possible interpretations of the article, one being that it prohibited domestic courts from issuing any order or injunction against a foreign State carrying the threat of a monetary penalty, and the other that it would prohibit only the imposition of a monetary penalty on a foreign State. Another member commented that the article in its present form would allow only the latter interpretation. Yet another member proposed the following new text in order to accommodate the suggestion by one Government referred to by the Special Rapporteur:

<sup>128</sup> Article 26, as provisionally adopted by the Commission on first reading, reads as follows:

*"Article 26. Immunity from measures of coercion"*

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

"Where a State enjoys immunity in a proceeding before a court of another State, the court cannot issue any order against the State requiring it to perform or to refrain from performing a specific act."

In the Special Rapporteur's view, the foregoing comments could be taken into account by the Drafting Committee, which might also consider the possibility of recommending the deletion of the article.

#### ARTICLE 27 (Procedural immunities)<sup>129</sup>

237. The Special Rapporteur recalled that, in his preliminary report,<sup>130</sup> he had proposed the insertion of the words "which is a defendant in a proceeding before a court of another State" after the word "State" at the beginning of paragraph 2 of article 27, a proposal that had received support both in the Commission at its previous session and in the Sixth Committee of the General Assembly.

238. Members' views differed at the present session regarding the proposed addition. A number of members were in favour of the addition, one on the understanding that it was the plaintiff State which decided to bring a case before the courts and which could thus be said to submit, unlike the defendant State, to the same rules as those applying to any other plaintiff. Some other members were opposed to the addition, holding the view that the non-requirement of security should not be limited to defendant States alone. The Special Rapporteur said that the matter involved legal technicalities and should be referred to the Drafting Committee.

#### ARTICLE 28 (Non-discrimination)<sup>131</sup>

239. The Special Rapporteur noted that the views of members were divided as to whether or not article 28 should be retained. His suggestion was to retain the article in its present form for the time being, since the matter

<sup>129</sup> Article 27, as provisionally adopted by the Commission on first reading, reads as follows:

*"Article 27. Procedural immunities"*

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

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

<sup>130</sup> *Yearbook . . . 1988*, vol. II (Part One), p. 121, document A/CN.4/415, para. 266.

<sup>131</sup> Article 28, as provisionally adopted by the Commission on first reading, reads as follows:

*"Article 28. Non-discrimination"*

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

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

would require careful consideration after general agreement had been reached on the preceding articles.

240. With the exception of two members, all members who spoke on article 28 proposed its deletion. One member stated that the provision would encourage a restrictive application of the present articles, contrary to the very purpose of codification; moreover, it might be superfluous, since the opening clause of many articles, "Unless otherwise agreed between the States concerned", already permitted limitations or extensions of immunity by way of agreement or reciprocity. Noting that article 28 was modelled on article 47 of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the 1963 Vienna Convention on Consular Relations, another member remarked that, while there might be a justification for such a provision to appear in those Conventions, he doubted whether it needed to be included in the present draft, since neither the object of immunity nor the basis of immunity was the same.

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

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

241. As indicated above, the Special Rapporteur suggested that the article be retained in its present form for the time being.

#### 4. SETTLEMENT OF DISPUTES

242. On the question of the settlement of disputes,<sup>132</sup> one member of the Commission expressed the view that it should be the subject of an optional protocol and should, in any event, be dealt with at a diplomatic conference.

##### C. Points on which comments are invited

243. In view of the advanced stage of its work on the present topic, the Commission did not find it necessary to indicate specific issues on which expressions of views by Governments would be of particular interest (para. 4 (c) of General Assembly resolution 44/35).

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<sup>132</sup> In his eighth report, the previous Special Rapporteur submitted proposals for a part VI of the draft and an annex, on the settlement of disputes, which were not considered by the Commission due to lack of time. For the texts of draft articles 29 to 33 of part VI and the annex, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 120-121, para. 611.

## Chapter IV

### THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

#### A. Introduction<sup>133</sup>

244. The Commission included the topic “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.

245. The work begun by the three previous Special Rapporteurs was continued by Mr. Stephen C. McCaffrey, who was appointed Special Rapporteur for the topic by the Commission at its thirty-seventh session, in 1985.

246. At the thirty-seventh session, the Special Rapporteur submitted a preliminary report<sup>134</sup> reviewing the Commission’s work on the topic to date and setting out his preliminary views as to the general lines along which the Commission’s work on the topic could proceed. There was general agreement with the Special Rapporteur’s proposal that he follow generally the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic.

247. From its thirty-eighth session (1986) to its forty-first session (1989), the Commission received four further reports from the Special Rapporteur.<sup>135</sup>

248. At its thirty-ninth session, in 1987, the Commission approved the recommendation of the Drafting Committee with regard to article 1 and the question of the use of the term “system”<sup>136</sup> and provisionally adopted articles 2 to 7.<sup>137</sup> At its fortieth session, in 1988, the Commission provisionally adopted articles 8 to 21.<sup>138</sup>

<sup>133</sup> For a fuller historical review of the Commission’s work on the topic, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 68 *et seq.*, paras. 268-278; and *Yearbook . . . 1989*, vol. II (Part Two), pp. 122 *et seq.*, paras. 621-635.

<sup>134</sup> *Yearbook . . . 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

<sup>135</sup> These four further reports of the Special Rapporteur are reproduced as follows:

Second report: *Yearbook . . . 1986*, vol. II (Part One), p. 87, document A/CN.4/399 and Add.1 and 2;

Third report: *Yearbook . . . 1987*, vol. II (Part One), p. 15, document A/CN.4/406 and Add.1 and 2;

Fourth report: *Yearbook . . . 1988*, vol. II (Part One), p. 205, document A/CN.4/412 and Add.1 and 2;

Fifth report: *Yearbook . . . 1989*, vol. II (Part One), p. 91, document A/CN.4/421 and Add.1 and 2.

<sup>136</sup> See footnote 156 below.

<sup>137</sup> For the texts of these articles and the commentaries thereto, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 25 *et seq.* See also section C.1 below.

<sup>138</sup> For the texts of these articles and the commentaries thereto, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 35 *et seq.* See also section C.1 below.

249. In his fifth report,<sup>139</sup> submitted at the forty-first session, in 1989, the Special Rapporteur reaffirmed the schedule for submission of remaining material which he had proposed in his fourth report<sup>140</sup> and which was intended to place the Commission in a position to complete the first reading of the whole set of draft articles by the end of its current term of office in 1991.

250. At the forty-first session, the Commission considered draft articles 22 and 23<sup>141</sup> contained in chapter I of the fifth report and referred them to the Drafting Committee.<sup>142</sup>

#### B. Consideration of the topic at the present session

251. At the present session, the Commission had before it chapters II and III of the fifth report (A/CN.4/421 and Add.1 and 2) and the sixth report (A/CN.4/427 and Add.1) of the Special Rapporteur on the topic.

252. In chapters II and III of the fifth report, the Special Rapporteur submitted two draft articles, which he had introduced at the previous session: article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses) and article 25 (Regulation of international watercourses), which would constitute parts VII and VIII of the draft, respectively.<sup>143</sup>

253. Chapters I to III of the sixth report dealt with management of international watercourses, security of hydraulic installations and implementation of the articles. They contained three draft articles for parts IX and X of the draft, namely article 26 (Joint institutional management), article 27 (Protection of water resources and installations) and article 28 (Status of international watercourses and water installations in time of armed conflict), as well as an annex I entitled “Implementation of the articles”. Annex I consisted of the following eight articles: articles 1 (Definition), 2 (Non-discrimination),

<sup>139</sup> See footnote 135 above.

<sup>140</sup> Document A/CN.4/412 and Add.1 and 2 (see footnote 135 above), paras. 8-9.

<sup>141</sup> For the texts, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 124-125, paras. 637 and 641.

<sup>142</sup> In order to avoid confusion, it should be mentioned that, after the submission of draft articles 22 to 28 by the Special Rapporteur in his fifth and sixth reports (see paras. 252-253 below), the Commission adopted, on the basis of previously submitted texts, six articles for inclusion after article 21, and accordingly numbered 22 to 27 (see para. 254 below). As a result, two different sets of articles are designated in the present report by the same numbers.

<sup>143</sup> For the texts of draft articles 24 and 25, see *Yearbook . . . 1989*, vol. II (Part Two), p. 128, para. 677. For a summary of the Special Rapporteur’s introduction of the articles, *ibid.*, paras. 678-682.

3 (Recourse under domestic law), 4 (Equal right of access), 5 (Provision of information), 6 (Jurisdictional immunity), 7 (Conference of the Parties) and 8 (Amendment of the articles). The final part of the sixth report, namely chapter IV on the settlement of disputes, was introduced by the Special Rapporteur at the present session<sup>144</sup> but was not discussed due to lack of time.

254. The Commission considered chapters II and III of the fifth report and chapters I to III of the sixth report at its 2162nd to 2167th meetings, from 23 May to 1 June 1990. At its 2167th meeting, on the recommendation of the Special Rapporteur, the Commission referred draft articles 24 to 28, as well as draft article 3, paragraph 1, and draft article 4 of annex I, to the Drafting Committee. At its 2187th and 2188th meetings, on 5 and 6 July 1990, the Commission, after having considered the report of the Drafting Committee, provisionally adopted article 22 (Protection and preservation of ecosystems), article 23 (Prevention, reduction and control of pollution), article 24 (Introduction of alien or new species) and article 25 (Protection and preservation of the marine environment), comprising part IV of the draft (Protection and preservation), and article 26 (Prevention and mitigation of harmful conditions) and article 27 (Emergency situations), comprising part V (Harmful conditions and emergency situations). The texts of these articles, and the commentaries thereto, are reproduced in section C.2 of the present chapter.

#### 1. GENERAL COMMENTS

255. Some members of the Commission commented on the merits of the framework-agreement approach and on the meaning of the expression "framework agreement".

256. Members who spoke on the first point generally agreed with the framework character of the draft, which was in accordance with the decision taken by the Commission long ago.

257. On the meaning of the expression "framework agreement", there was no disagreement with the view that a framework agreement was an instrument of a general nature which set forth principles and other general rules. The remark was, however, made that a framework agreement could reflect rules of customary international law and went in any event beyond mere recommendations.

258. In his summing-up, the Special Rapporteur assured the Commission that, in submitting draft articles, it had always been his intention to remain within the framework-agreement approach.

#### 2. COMMENTS ON SPECIFIC DRAFT ARTICLES

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)<sup>145</sup>

<sup>144</sup> See the summary record of the 2188th meeting (see *Yearbook* . . . 1990, vol. I), paras. 76-80.

<sup>145</sup> Draft article 24 submitted by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2) read:

259. Both draft article 24 and draft article 25 had been introduced by the Special Rapporteur at the previous session.<sup>146</sup>

260. There was general agreement that article 24 was well balanced and reflected the fact that any priority that was once assigned to navigation was no longer justified in view of the many other uses of international watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources.

261. Some members doubted whether there had ever existed a universal preferential regime deriving from the treaties cited in the Special Rapporteur's fifth report.

262. General support was expressed for the underlying principle of article 24 that, in the absence of agreement to the contrary, no one use should have priority over other uses. It was, however, stressed on the one hand that the importance of navigation for some watercourse States should not be underestimated and, on the other hand, that, since the enormous growth in importance of alternative means of communication had relegated navigation on inland watercourses to a very secondary role, except in rare instances, and in view of the scarcity of water, domestic and agricultural utilization would have to be given priority over other uses. In connection with the latter consideration, the remark was made that article 24 reflected the present position, but failed to look sufficiently to the problems of the future. It was also said that greater weight should be given to certain factors, such as the health of the population and maintaining suitable water quality for domestic and agricultural uses, as well as the adverse effect of certain uses on the environment.

263. With regard to the wording of *paragraph 1*, several members asked why the Special Rapporteur had referred simply to a "use", whereas article VI of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966,<sup>147</sup> referred to a "use or category of uses".

264. *Paragraph 2* was generally supported as allowing for an equitable and reasonable resolution of any conflict between uses by weighing uses against one another in accordance with articles 6 and 7. Some members, however, favoured the inclusion of a reference to the obligation not to cause appreciable harm set forth in article 8.

265. One member, while agreeing with the principle enunciated in *paragraph 1* of article 24, felt that the

#### "PART VII

#### "RELATIONSHIP TO NAVIGATIONAL USES AND ABSENCE OF PRIORITY AMONG USES

*"Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses*

"1. In the absence of agreement to the contrary, neither navigation nor any other use enjoys an inherent priority over other uses.

"2. In the event that uses of an international watercourse [system] conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof in accordance with articles 6 and 7 of these articles."

<sup>146</sup> See footnote 143 above.

<sup>147</sup> ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*

provision in paragraph 2 went beyond the scope of the draft and, indeed, beyond the Commission's competence. In his view, there was no point in the article as a whole other than an obvious one, namely that States themselves determined their uses of watercourses, taking into account the interests of optimum utilization and relevant factors, not least their own geographical situation with respect to the watercourse in question.

266. In summing up, the Special Rapporteur explained that he had attempted in article 24 to strike a fair balance between the various considerations at issue and that it appeared from the debate that he had succeeded in doing so. He added that the constructive drafting observations made during the debate would be duly taken into consideration.

#### ARTICLE 25 (Regulation of international watercourses)<sup>148</sup>

267. Draft article 25 received broad support on the ground that regulation was essential or even vital for the manifold uses made of watercourses today. It was suggested that the term "regulation" should be defined, either in article 1, on the use of terms, or in article 25 itself.

268. Two members, however, believed article 25 was unnecessary, since a general obligation of cooperation to "attain optimum utilization and adequate protection of an international watercourse" was already laid down in article 9. The question was further asked why the application of the concept of equitable cost-sharing should be limited to the field of regulation.

269. With regard to *paragraph 1*, the approach reflected therein, whereby regulation was not an obligation for watercourse States, was viewed as correct because a watercourse State had a right to regulate the part of an international watercourse within its territory. Thus, it was observed, paragraph 1 was a concrete application of article 9, and cooperation under article 25 should therefore be based on general principles of international law such as sovereign equality and territorial integrity.

270. Another view was that the obligation to cooperate should be cast in less mandatory terms, because watercourse States might have different priorities with regard to the regulation of a watercourse. It was also pointed out that cooperation could be effected either directly or through regional or international organizations

<sup>148</sup> Draft article 25 submitted by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2) read:

#### "PART VIII

#### "REGULATION OF INTERNATIONAL WATERCOURSES

##### "Article 25. Regulation of international watercourses

"1. Watercourse States shall cooperate in identifying needs and opportunities for regulation of international watercourses.

"2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly."

as well. It was further pointed out that, in an instrument intended for worldwide use, it was important that modalities for cooperation should be flexible so as to allow the discharge of the duty to cooperate in cases when political realities did not favour direct cooperation.

271. As for *paragraph 2*, the residual rule contained therein was viewed as superfluous, since it was inconceivable that a watercourse agreement on regulation works would neglect to provide for a sharing of the burdens. Besides, the general rule of participation on an equitable basis had already been set out in article 6. On the other hand, support was expressed for the underlying idea of paragraph 2, which, it was remarked, should also include some of the more important provisions of the articles on "Regulation of the flow of water of international watercourses" adopted by the International Law Association at Belgrade in 1980,<sup>149</sup> particularly the substance of articles 4 and 6 thereof, inasmuch as such provisions might be helpful in resolving conflicts arising from the regulation of international watercourses. Emphasis was also placed on article 3 of those articles, from which the Commission could draw inspiration to establish a link between paragraphs 1 and 2 of draft article 25.

272. Some remarks were made on the drafting of paragraph 2, including the observation that the present wording could be construed to mean that, even in the absence of an agreement, watercourse States would be expected to pay towards a project simply because they happened to derive benefits from it. It was also suggested that the phrase "In the absence of agreement to the contrary" was unsatisfactory, since even when there was an agreement its objective was the equitable sharing of the burdens and benefits.

273. One member proposed that the Commission should confine itself to preventing the unfavourable consequences of unilateral regulation. For that purpose it would be useful first to specify that each watercourse State could regulate an international watercourse, provided that such regulation had no negative or harmful effects for any other watercourse State. Secondly, he proposed that the States concerned be urged to cooperate in exploring possibilities for regulation that would be profitable to all. Finally, in his view, it would be useful to enunciate the principle of equitable distribution of the burdens that might arise from joint regulation.

274. In summing up, the Special Rapporteur agreed with the suggestion that the term "regulation" should be defined and recalled in that connection the possible definition set out in his fifth report (A/CN.4/421 and Add.1 and 2), in paragraph (3) of his comments on article 25. He took note of the doubts expressed by some members as to the wording of paragraph 2 of the article. Referring specifically to the question whether watercourse States could be required to participate in regulation works, he said that the phrase "watercourse States shall participate on an equitable basis", which was drawn from article 6, was intended to convey the idea that participation would be proportional to the benefits received.

<sup>149</sup> ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), pp. 362 *et seq.*

ARTICLE 26 (Joint institutional management)<sup>150</sup>

275. In his oral introduction of draft article 26, the Special Rapporteur stated that, while a provision on joint institutional management might be viewed as going beyond the realm of a framework agreement, the need of the world's expanding population for fresh water resources made such an attitude obsolete. He remarked that, since most of the world's major watercourses were international, greater efficiency in water use would depend on increased cooperation among watercourse States in the planning, management and protection of international watercourses. In his view, therefore, article 26 had a place in the draft, for joint management of international watercourses was an increasingly important form of international cooperation. He recalled that, as noted in his sixth report (A/CN.4/427 and Add.1, para. 7), the trend emerging from the extensive work done by international organizations on watercourse management was that, while there was no obligation under general international law to form joint management institutions, management through such institutions was not only an increasingly common phenomenon, but also almost indispensable to optimum utilization and protection of international watercourse systems. The international agreements and studies reviewed in chapter I of his report recognized the need for such institutions, not only to resolve issues of utilization, but also to undertake affirmative development and protection.

<sup>150</sup> Draft article 26 submitted by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1) read:

## "PART IX

## "MANAGEMENT OF INTERNATIONAL WATERCOURSES

"Article 26. *Joint institutional management*

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

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

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

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

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

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

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

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

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

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

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

276. Most members of the Commission viewed article 26 as a key provision of the draft. It was stressed in that connection that, given the interdependence of the community of States sharing an international watercourse, the need for rational management and optimum utilization of such a watercourse was self-evident. Such rational management and optimum utilization could be realized only through cooperation among the States concerned—for example, through consultations, regular exchange of data, joint projects, bilateral arrangements and, where deemed appropriate, the establishment of permanent institutional machinery. Some members, however, wondered whether the article was absolutely necessary. The view was expressed in that connection that the obligation contained therein was simply a concrete application of the general obligation to cooperate set forth in article 9. Furthermore, the question was asked whether that obligation did not involve duplication of the terms of paragraph 3 of article 4 ([Watercourse] [System] agreements), since the establishment of a joint organization would require an agreement to that effect.

277. On the question whether there was a rule of international law involving a duty to consult with a view to establishing a joint body or organization, the view was expressed that, while the answer might be in the negative as far as general international law was concerned, there were specific fields of regulation where the establishment of institutional mechanisms was dictated by the logic of the subject-matter being regulated and by the interdependence of the States concerned, and that such seemed to be the situation in the case under consideration.

278. As regards organizational arrangements, the remark was made that, while there was a need for such arrangements, as the Special Rapporteur had suggested, the shortest way towards that goal lay in adopting recommendations which each State could use in the light of its specific situation, and that it would be premature to raise mechanisms established by virtue of bilateral agreements to the status of binding international rules. A further view was that, given their framework nature, the draft articles should not provide for the establishment of a permanent organization and that it should be left to the parties to future watercourse agreements to define the functions of the body to be set up under those agreements. Such functions would therefore have to be described in article 26 in very general terms or else the list of functions would have to be drawn up as a purely illustrative rather than exhaustive one.

279. The opinion was also expressed that references to the permanence of the proposed joint organization and to the strengthening of existing organizations, as envisaged by the previous Special Rapporteur, should be reinstated; the terms employed in article 26 were described as somewhat vague and the suggestion was made that a more firmly worded text along the lines proposed by the previous Special Rapporteur might be preferable.

280. While one member felt that article 26 should define the possible functions of the organization and not the concept of management, another suggested that, if the Commission decided to retain the article, it would be better, instead of trying to illustrate the possible functions of joint organizations, to provide a definition of "management", following, for example, the model of section 2.1 of the *Canada Water Act, 1969-1970*—which

would have the additional advantage of introducing the concept of regulation of international watercourses dealt with in draft article 25.

281. Specific comments on *paragraph 1* of article 26 included the observations that the wording should be more categorical and that, while one could agree with the Special Rapporteur's formulation establishing the duty of a watercourse State to enter into consultations at the request of any other watercourse State, that duty should go further where the economic and social needs of the region were making substantial or conflicting demands on the watercourse and should encompass an obligation to negotiate, which implied the duty to arrive at some result.

282. As for the phrase "at the request of any of them", the view was expressed that it was not very satisfactory and that wording should be found that better reflected the goals sought. Some members of the Commission were furthermore of the opinion that the obligation of watercourse States to enter into consultations should not be triggered simply by a request by one of them and that an objective element should be added, such as "when it is deemed practical and advisable".

283. Another observation was that, while the present formulation was sufficiently broad to cover very diversified international practice and while it seemed implicit in the terms of article 26 that the proposed organization for the management of an international watercourse should comprise all of the States concerned, a new paragraph could be envisaged to stipulate that the organization should necessarily comprise all States of the international watercourse system.

284. With regard to the list of functions in *paragraphs 2 and 3*, the view was expressed that, notwithstanding its non-exhaustive character, it might be useful to include the functions that were of particular importance in third-world countries, and in African countries in particular, for example action to combat water-borne diseases.

285. With regard to the place of article 26, one member remarked that transferring articles 27 and 28 to a more suitable place in the draft would have the welcome effect of establishing a direct connection between article 26 and the subsequent articles on implementation in annex I. He added that article 26 might, moreover, be combined with the articles of annex I into a fully-fledged part on implementation.

286. In summing up, the Special Rapporteur observed that most members viewed article 26 as an important component of the draft. With reference to the provision regarding consultations, he noted that for some members it was going too far to provide that "Watercourse States shall enter into consultations, at the request of any of them . . .", while, for others, an obligation to negotiate was more appropriate. He stated that his objective had been to formulate paragraph 1 in such a way as to strike a fair balance between a simple recommendation to enter into consultations and an obligation to enter into "negotiations", as had been proposed by the former Special Rapporteur, Mr. Schwebel, in his third report.<sup>151</sup>

<sup>151</sup> *Yearbook . . . 1982*, vol. II (Part One) (and corrigendum), p. 181, document A/CN.4/348, para. 471.

287. In reply to those members who had questioned the value of article 26, having regard to the number of watercourse commissions that already existed, the Special Rapporteur pointed out, first, that many of those commissions were very specialized and did not necessarily deal with management of the watercourse concerned as a whole and, secondly, that specialists involved in the day-to-day management of international watercourses who had had occasion to express their views at regional meetings held under United Nations auspices, such as the one recently held at Addis Ababa, had called for the establishment of such bodies.

288. With reference to the proposal that the obligation to consult should be made subject to certain conditions, the Special Rapporteur said that, while he would duly consider it, he feared that introducing such conditions could provide a means of escaping even the obligation to enter into consultations—which was already not very stringent—rendering it practically illusory.

289. The Special Rapporteur welcomed the quality of the drafting amendments proposed. In particular, he said that the suggestion to harmonize articles 26 and 21 could perhaps be accomplished by adding a cross-reference to article 21 in article 26.

290. With regard to the different views expressed by members on the term "management" in paragraph 2 of article 26, the Special Rapporteur stated that he was not opposed to the view that the parties should be free to define management in the particular context. He also agreed with the comment that a list of management functions could only be indicative; he would have no objection to such a list appearing in an annex, as some members had proposed, or to the addition to the list of action to combat water-borne diseases, as requested. Finally, he had no objection to replacing the word "organization" by "commission".

#### ARTICLE 27 (Protection of water resources and installations) *and*

#### ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict)<sup>152</sup>

291. In his oral introduction of draft articles 27 and 28, the Special Rapporteur pointed out that, in his sixth report (A/CN.4/427 and Add.1, para. 20), he had listed seven elements that might be included in draft articles on the

<sup>152</sup> Draft articles 27 and 28 submitted by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1) read:

#### "PART X

#### "PROTECTION OF WATER RESOURCES AND INSTALLATIONS

##### "Article 27. *Protection of water resources and installations*

"1. Watercourse States shall employ their best efforts to maintain and protect international watercourses and related installations, facilities and other works.

"2. Watercourse States shall enter into consultations with a view to concluding agreements or arrangements concerning:

subtopic of security of hydraulic installations. While two of his predecessors as Special Rapporteur had expressed some hesitation about how far the Commission should go in that area, they had concluded that a modest article was required on the question of security in time of armed conflict. He had himself reached a similar conclusion and was therefore submitting draft article 28. Draft article 27 was concerned with safety—a widespread problem—from a more general standpoint. For example, whenever a large volume of water was collected behind an unsuitable structure, the downstream State had an obvious interest in the safety standards applied in the construction and maintenance of the structure.

292. The general thrust of *article 27* was generally supported in the Commission on the ground that there was a clear need for protection of water installations. Some members, however, expressed uncertainty as to the scope of the article. Concern was voiced in particular that the inclusion of a reference to “water resources” might considerably broaden the scope of the provision. In that context it was suggested that, if the Commission wished to deal with contamination of water supplies, it should do so in a separate article, to avoid confusion. Also on the question of scope, the remark was made that *article 27*, although it appeared in the chapter of the sixth report entitled “Security of hydraulic installations”, seemed to go further by providing that international watercourses themselves should be maintained and protected. The opinion was expressed in that connection that the provision should be confined to hydraulic works and related installations, inasmuch as the protection of international watercourses was a much broader concept which was in a sense the object of the entire draft.

293. Furthermore, some members queried the usefulness of *article 27*. Thus the opinion was expressed that the provision dealt with subjects that differed too much and were dealt with in other parts of the draft. In that connection, the remark was made that the article simply repeated what was already stated in *articles 6, 8 and 10* and that the issue was therefore more a matter of the application of those articles than of drafting a new article.

294. More specifically, one member observed that, if, as had been proposed, the reference to the protection of watercourses were to be deleted, only three elements would be left in the article: the obligation for States to “employ their best efforts” to protect installations (*para. 1*);

“(a) general conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;

“(b) the establishment of adequate safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts.

“3. Watercourse States shall exchange data and information concerning the protection of water resources and installations and, in particular, concerning the conditions, specifications, standards and measures mentioned in *paragraph 2* of this article.”

“*Article 28. Status of international watercourses and water installations in time of armed conflict*

“International watercourses and related installations, facilities and other works shall be used exclusively for peaceful purposes consonant with the principles enshrined in the Charter of the United Nations and shall be inviolable in time of international as well as internal armed conflicts.”

the obligation to enter into consultations concerning the establishment and operation of installations and the adoption of measures to protect them (*para. 2*); and the obligation to “exchange data and information concerning the protection of installations” (*para. 3*). He pointed out that, since the obligation set forth in *paragraph 1* was already included in *articles 6 and 8*, the one stated in *paragraph 2* in *paragraph 3* of *article 4*, and the one provided for in *paragraph 3* in *paragraph 1* of *article 10*, the need for a provision on installations was doubtful.

295. The question was raised whether *article 27* covered new (planned) or existing installations, or both. In that connection, it was said that new installations represented a typical example of “planned measures with possible adverse effects”, as envisaged in part III of the draft, and that the residual rule on the safety of existing installations, the exchange of information relating thereto and, possibly, the establishment of safety standards would be most appropriately placed between *article 10*, on regular exchange of data and information, and part III on planned measures.

296. Specific comments on the various parts of *article 27* included the remark that the words “shall employ their best efforts”, in *paragraph 1*, should be interpreted as establishing an international standard.

297. As regards *paragraph 2*, support was expressed for an unconditional obligation of watercourse States to enter into consultations, in view of the disastrous consequences that would ensue from the failure of a major installation or from the contamination of water supplies. Members who addressed the issue considered that the article should not only provide for an obligation to prohibit poisoning of water resources, but also eliminate outdated nineteenth-century concepts according to which it was permissible to cut the enemy’s water supply, to dry up springs or to divert rivers from their courses. Another remark was that *paragraph 2* did not provide an indication of the conditions and circumstances in which consultations and agreements would be required, and therefore lent itself to an interpretation whereby installations in one country which did not affect the international watercourse in another country could be made subject to a system of security on which that other country would have the right to give its opinion.

298. Regarding *paragraph 3*, some members suggested that it might be preferable to group together all provisions relating to information.

299. In summing up the discussion on *article 27*, the Special Rapporteur noted that some members believed the question of protection was already amply covered by other articles and that other members, while stressing the importance of the subject, had asked whether the article should not focus on the protection of installations without mentioning protection of watercourses.

300. With reference to suggestions that *paragraph 2* went too far, since its provisions would apply even if there was no effect on another State, and that *article 27* should be placed between *article 10* and part III of the draft, the Special Rapporteur recognized that they were justified. He added that the idea of stating that the provisions of *paragraph 3* were without prejudice to the exception set forth in *article 20* (Data and information vital to national defence or security) should be taken into account.

301. *Article 28* elicited mixed reactions in the Commission. Some members regarded such a provision as beyond the scope of the draft articles. Others expressed reluctance to venture into the field of armed conflict for fear of the possibility of affecting, in some unforeseen way, the existing rules of international law governing that field. But a majority of members appeared to be in favour of attempting to address the subject, in view of its vital importance.

302. Questions were raised as to the meaning of the term "inviolable" in that context. Some members suggested that consistency with existing law could be achieved by making reference to the rules of international law governing armed conflict, which would include both customary and conventional law. The proposal was made by some members that express reference be made in a paragraph 2 to the poisoning of international watercourses, which was characterized as both a war crime and a crime against humanity. Finally, it was suggested that the article be divided into two parts, one concerning peaceful uses of international watercourses and the other dealing with their status in time of armed conflict.

303. In his summing-up, the Special Rapporteur said that article 28 had been diversely received, some members considering it superfluous and others, on the contrary, viewing it as very important. He noted, however, that a majority of members seemed to be in favour of at least trying to address the subject. Some members had queried the meaning of the word "inviolable", which was indeed somewhat problematical and should perhaps be replaced by a more felicitous term. He considered as well taken the point made by several members that a reference to the rules of international law governing armed conflict could be included. He had no objection either to the suggestion that the poisoning of watercourses be expressly mentioned as a war crime and a crime against humanity, or to the suggestion that the article be divided into two parts, one on peaceful uses and the other on armed conflicts.

### 3. ANNEX I. IMPLEMENTATION OF THE ARTICLES<sup>153</sup>

304. In orally introducing chapter III of his sixth report (A/CN.4/427 and Add.1), on implementation of the articles,

<sup>153</sup> Draft articles 1 to 8 of annex I submitted by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1) read:

#### "ANNEX I

#### "IMPLEMENTATION OF THE ARTICLES

##### "Article 1. Definition

"For the purposes of this annex, 'watercourse State of origin' means a watercourse State within which activities are carried on or planned that affect or may affect an international watercourse [system] and that give rise or may give rise to appreciable harm in another watercourse State."

##### "Article 2. Non-discrimination

"In considering the permissibility of proposed, planned or existing activities, the adverse effects that such activities entail or may entail

the Special Rapporteur expressed the hope that the Commission had not been inconvenienced by the fact that that question had not been mentioned in the outline of the topic

in another State shall be equated with adverse effects in the watercourse State where the activities are or may be situated."

##### "Article 3. Recourse under domestic law

"1. Watercourse States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction.

"2. With the objective of assuring prompt and adequate compensation or other relief in respect of the appreciable harm referred to in paragraph 1, watercourse States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds."

##### "Article 4. Equal right of access

"1. A watercourse State of origin shall ensure that any person in another State who has suffered appreciable harm or is exposed to a significant risk thereof receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm, and in comparable circumstances, to persons of equivalent condition or status.

"2. The treatment referred to in paragraph 1 of this article includes the right to take part in, or have resort to, all administrative and judicial procedures in the watercourse State of origin which may be utilized to prevent domestic harm or pollution, or to obtain compensation for any harm that has been suffered or rehabilitation of any environmental degradation."

##### "Article 5. Provision of information

"1. A watercourse State of origin shall take appropriate measures to provide persons in other States who are exposed to a significant risk of appreciable harm with sufficient information to enable them to exercise in a timely manner the rights referred to in paragraph 2 of this article. To the extent possible under the circumstances, such information shall be equivalent to that provided in the watercourse State of origin in comparable domestic cases.

"2. Watercourse States shall designate one or more authorities which shall receive and disseminate the information referred to in paragraph 1 in sufficient time to allow meaningful participation in existing procedures in the watercourse State of origin."

##### "Article 6. Jurisdictional immunity

"1. A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States only in so far as it enjoys such immunity in respect of proceedings brought by its own nationals and habitual residents.

"2. Watercourse States shall ensure, by the adoption of appropriate measures, that their agencies and instrumentalities act in a manner consistent with these articles."

##### "Article 7. Conference of the Parties

"1. Not later than two years after the entry into force of the present articles, the Parties to the articles shall convene a meeting of the Conference of the Parties. Thereafter, the Parties shall hold regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time upon the written request of at least one third of the Parties.

presented in his fourth report.<sup>154</sup> It was his view that actual and potential watercourse problems should, in so far as possible, be resolved through civil-law procedures, which would usually bring relief to those suffering harm more expeditiously than diplomatic procedures and could prevent problems from escalating and becoming unnecessarily politicized. He recalled that, in their statement in the Sixth Committee of the General Assembly at its forty-fourth session on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Nordic countries had stressed the importance of civil-liability regimes in ensuring compensation to victims and had adduced arguments which also applied to the case of international watercourses, since both topics dealt to some extent with

transboundary harm. The Special Rapporteur agreed that there was a need for State and civil-liability regimes to complement each other and for States to be encouraged to use existing civil-liability regimes. He indicated that such was the spirit in which he was submitting the eight draft articles on implementation contained in annex I.

305. A number of members commended the Special Rapporteur for his efforts to devise articles intended to make redress for injury available to individuals and expressed the view that the articles of annex I should be incorporated in the body of the draft, or at least—if that would avoid a possible bearing on the prospect of acceptance of the draft by States—in an optional part thereof. Others, however, observed that the annex contained obligations which were more appropriate for a small group of integrated States and that some of those obligations might require changes in national legislation and go beyond the limits of a framework agreement.

306. A number of members subscribed to the general approach underlying annex I, since its main point was to avoid a multiplication of inter-State disputes through the settlement of minor problems by domestic courts and through the action of individuals.

307. A number of members who spoke on annex I found it somewhat lacking in consistency. They suggested that some of its articles be transferred elsewhere, that others be further refined and that still others be omitted altogether. On the other hand, the view was expressed that the Special Rapporteur's sixth report contained all the necessary elements of a part of the draft dealing with implementation and that, although those elements would have to be reorganized, most of the groundwork had already been done.

308. Some members felt that the title of annex I did not correspond to its content, which did not concern implementation—an area already dealt with in many articles of the draft—so much as the active role to be played by individuals.

309. Specific comments on the draft articles of annex I included the remark that, of the obligations enunciated in articles 2 to 5, only the one stipulated in article 3, paragraph 1, embodied a principle that could be expressed in a provision of part II of the draft (General principles) and that no other provision of the annex appeared necessary. Most members who spoke on article 6 considered that it should be deleted, in particular because the question of jurisdictional immunity was being dealt with by the Commission in another draft. Article 7 was viewed as unhelpful, since each watercourse was a universe in itself and only States belonging to that watercourse would participate directly in the application in their territory of the rules embodied in the present articles. Article 8 was also questioned on the ground that it was doubtful whether such a provision would be an improvement on the general procedure concerning amendments laid down in the 1969 Vienna Convention on the Law of Treaties.

310. The observation was made that annex I as a whole raised a problem with far-reaching implications, namely that of civil liability, since the draft had not so far dealt with actions which might be brought by individuals before the administrative or judicial organs of the State of origin. It was also noted that, from the point of view of reparation

"2. At the meetings provided for in paragraph 1, the Parties shall review the implementation of the present articles. In addition, they may:

"(a) consider and adopt amendments to the present articles in accordance with article 8 of this annex;

"(b) receive and consider any reports presented by any Party or by any panel, commission or other body established pursuant to annex II to the present articles; and

"(c) where appropriate, make recommendations for improving the effectiveness of the present articles.

"3. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 1 of this article.

"4. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

"5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present articles, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

"6. Any of the following categories of bodies or agencies which is technically qualified with regard to the non-navigational uses of international watercourses, including the protection, conservation and management thereof, and which has informed the Parties of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

"(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

"(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

"Once admitted, observers representing these agencies and bodies shall have the right to participate but not to vote."

*"Article 8. Amendment of the articles*

"1. An extraordinary meeting of the Conference of the Parties shall be held on the written request of at least one third of the Parties to consider and adopt amendments to the present articles. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For the purposes of this article, 'Parties present and voting' means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

"2. The text of any proposed amendment shall be communicated by the Party or Parties proposing it to all Parties at least 90 days before the meeting.

"3. An amendment shall enter into force for the Parties that have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the [Depositary Government] [Secretary-General of the United Nations]. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment."

<sup>154</sup> Document A/CN.4/412 and Add.1 and 2 (see footnote 135 above), para. 7.

machinery, the draft articles said nothing about the relationship between reparation claims brought by individuals and those which might be brought by States, and that that question required further in-depth study.

311. In his summing-up, the Special Rapporteur noted that several speakers had criticized the title of annex I. He remarked that, although differing views had been expressed on draft articles 1 to 5, there had on the whole been substantial support for the ideas of non-discrimination and equal right of access as expressed in article 3, paragraph 1, and article 4, respectively. At the same time, he noted that article 2 had been quite heavily criticized and that it seemed to be the general opinion that draft articles 6 to 8 went beyond the scope of a framework agreement. In the light of the above and even though some members had been in favour of referring articles 1 to 5 to the Drafting Committee *en bloc*, he had come to the conclusion that the annex was not yet ripe for such action. He therefore recommended that only article 3, paragraph 1, and article 4 should be referred to the Drafting Committee, without prejudice to whether they would ultimately be incorporated in the body of the draft or be included in an annex or optional protocol, as some members had suggested. While agreeing that article 3, paragraph 2, could be considered to go beyond the scope of the topic and might therefore be omitted, he reserved the possibility of submitting proposals on that provision and on other articles of the annex at the next session, subject to the demands of brevity which would have to be borne in mind if the Commission was to complete its consideration of the draft articles in 1991.

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

#### 1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

312. The texts of draft articles 2 to 27 provisionally adopted so far by the Commission are reproduced below.

#### PART I

#### INTRODUCTION

##### *Article 1. [Use of terms]*<sup>155 156</sup>

<sup>155</sup> At its thirty-second session, in 1980, the Commission accepted a provisional working hypothesis as to what was meant by the expression "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."

##### *Article 2. 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.

##### *Article 3. 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.

##### *Article 4. [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.

##### *Article 5. 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.

#### PART II

#### GENERAL PRINCIPLES

##### *Article 6. 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

(*Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.)

<sup>156</sup> The Commission agreed at its thirty-ninth session, in 1987, 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 session, in 1980 (*ibid.*). Thus the word "system" appears in square brackets throughout the draft articles.

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 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 cooperate in the protection and development thereof, as provided in article . . .

*Article 7. 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 cooperation.

*Article 8. Obligation not to cause appreciable harm<sup>157</sup>*

Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.

*Article 9. General obligation to cooperate<sup>158</sup>*

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimum utilization and adequate protection of an international watercourse [system].

*Article 10. Regular exchange of data and information<sup>159</sup>*

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

<sup>157</sup> Text based on draft article 9 as submitted by the previous Special Rapporteur in 1984.

<sup>158</sup> Text based on draft article 10 as submitted by the Special Rapporteur in 1987.

<sup>159</sup> Text based on draft article 15 [16] as submitted by the Special Rapporteur in 1988.

PART III

PLANNED MEASURES

*Article 11. Information concerning planned measures*

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

*Article 12. Notification concerning planned measures with possible adverse effects<sup>160</sup>*

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

*Article 13. Period for reply to notification<sup>161</sup>*

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

*Article 14. Obligations of the notifying State during the period for reply<sup>162</sup>*

During the period referred to in article 13, the notifying State shall cooperate 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 implement, or permit the implementation of, the planned measures without the consent of the notified States.

*Article 15. Reply to notification<sup>163</sup>*

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding.

*Article 16. Absence of reply to notification<sup>164</sup>*

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

<sup>160</sup> Text based on draft article 11 as submitted by the Special Rapporteur in 1987.

<sup>161</sup> Text based on draft article 12 as submitted by the Special Rapporteur in 1987.

<sup>162</sup> Text based on draft article 12 as submitted by the Special Rapporteur in 1987.

<sup>163</sup> Text based on draft article 13 as submitted by the Special Rapporteur in 1987.

<sup>164</sup> Text based on draft article 14 as submitted by the Special Rapporteur in 1987.

*Article 17. Consultations and negotiations concerning planned measures*<sup>165</sup>

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

*Article 18. Procedures in the absence of notification*<sup>166</sup>

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

*Article 19. Urgent implementation of planned measures*<sup>167</sup>

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 4 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

*Article 20. Data and information vital to national defence or security*<sup>168</sup>

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with

<sup>165</sup> Text based on draft article 13 as submitted by the Special Rapporteur in 1987.

<sup>166</sup> Text based on draft article 14 as submitted by the Special Rapporteur in 1987.

<sup>167</sup> Text based on draft article 15 as submitted by the Special Rapporteur in 1987.

<sup>168</sup> Text based on draft article 15 [16] as submitted by the Special Rapporteur in 1988.

the other watercourse States with a view to providing as much information as possible under the circumstances.

*Article 21. Indirect procedures*

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

PART IV

PROTECTION AND PRESERVATION

*Article 22. Protection and preservation of ecosystems*

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourse[s] [systems].

*Article 23. Prevention, reduction and control of pollution*

1. For the purposes of the present articles, "pollution of an international watercourse [system]" means any detrimental alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct.\*

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the international watercourse [system]. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances the introduction of which into the waters of an international watercourse [system] is to be prohibited, limited, investigated or monitored.

*Article 24. Introduction of alien or new species*

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system] which may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States.

*Article 25. Protection and preservation of the marine environment*

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse [system] that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

*Article 26. Prevention and mitigation of harmful conditions*

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

\* This paragraph dealing with the definition of pollution may be transferred to article 1 on the use of terms.

*Article 27. Emergency situations*

1. For the purposes of the present article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, as for example in the case of industrial accidents.\*

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies in cooperation, where appropriate, with other potentially affected States and competent international organizations.

2. TEXTS OF DRAFT ARTICLES 22 TO 27, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-SECOND SESSION

## PART IV

## PROTECTION AND PRESERVATION

*Article 22. Protection and preservation of ecosystems*

**Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourse[s] [systems].**

*Commentary*

(1) Article 22 introduces part IV of the draft articles by laying down a general obligation to protect and preserve the ecosystems of international "watercourse[s] [systems]".<sup>169</sup> The article is based on paragraph 1 of draft article 17 [18] submitted by the Special Rapporteur in his fourth report.<sup>170</sup> In view of the general nature of the obligation contained in article 22, the Commission was of the view that it should precede the other, more specific articles of part IV.

(2) Like article 192 of the 1982 United Nations Convention on the Law of the Sea,<sup>171</sup> article 22 contains obligations of both protection and preservation. These obligations relate to the "ecosystems of international watercourse[s] [systems]", an expression used by the

\* This paragraph dealing with the definition of an emergency may be transferred to article 1 on the use of terms.

<sup>169</sup> As in the case of other articles on the present topic adopted by the Commission, the square brackets indicate that the Commission has deferred the question of the use of the term "system" (see footnote 156 above).

<sup>170</sup> *Yearbook . . . 1988*, vol. II (Part One), p. 243, document A/CN.4/412 and Add.1 and 2.

<sup>171</sup> Article 192, entitled "General obligation", provides: "States have the obligation to protect and preserve the marine environment."

Commission because it is more precise than the concept of the "environment" of a watercourse. The latter term could be interpreted quite broadly to apply to areas "surrounding" the watercourse [system] that have a minimal bearing on the protection and preservation of the watercourse [system] itself. Furthermore, the "environment" of a watercourse might be construed as referring only to areas outside the watercourse, which is of course not the Commission's intention. For these reasons, the Commission preferred to use the term "ecosystem", which is believed to have a more precise scientific and legal meaning.<sup>172</sup> Generally, this term refers to an ecological unit consisting of living and non-living components which are interdependent and function as a community.<sup>173</sup> In ecosystems, "everything depends on everything else and nothing is really wasted."<sup>174</sup> Thus "an external impact affecting one component of an ecosystem causes reactions among other components and may disturb the equilibrium of the entire ecosystem".<sup>175</sup> Since "ecosystems support life on earth",<sup>176</sup> such an "external impact", or interference, may impair or destroy the ability of an ecosystem to function as a life-support system. It goes without saying that serious interferences can be, and often are, brought about by human conduct. Human interferences may irreversibly disturb the equilibrium of freshwater ecosystems in particular, rendering them incapable of supporting human and other forms of life. As observed in the Medium-Term Plan of the United Nations for the period 1992-1997:

Interactions between freshwater ecosystems on the one hand and human activities on the other are becoming more complex and incompatible as socio-economic development proceeds. Water basin development activities can have negative impacts too, leading to unsustainable development, particularly where these water resources are shared by two or more States. . . .<sup>177</sup>

The obligation to protect and preserve the ecosystems of international watercourse[s] [systems] addresses this problem, which is already acute in some parts of the world and which will become so in others as increasing human populations place ever greater demands on finite water resources.<sup>178</sup>

<sup>172</sup> Reference may be made generally in this connection to the ongoing work of the Economic Commission for Europe in this field. See "Ecosystems approach to water management" (ENVWA/WP.3/R.7/Rev.1) and the case-studies on the Oulujoki River (Finland), Lake Mjosa (Norway), the Lower River Rhine (Netherlands) and the Ivankovskoye Reservoir (Soviet Union) (ENVWA/WP.3/R.11 and Add.1 and 2).

<sup>173</sup> "An ecosystem is commonly defined as a spatial unit of Nature in which living organisms and the non-living environment interact adaptively." (ENVWA/WP.3/R.7/Rev.1, para. 9.) The Experts Group on Environmental Law of the World Commission on Environment and Development, in its comments on article 3 of its legal principles and recommendations on environmental protection and sustainable development, defines "ecosystems" as "systems of plants, animals and micro-organisms together with the non-living components of their environment" (*Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London, Graham & Trotman, 1987), p. 45).

<sup>174</sup> ENVWA/WP.3/R.7/Rev.1, para. 9.

<sup>175</sup> *Ibid.*, para. 11.

<sup>176</sup> *Ibid.*, para. 9.

<sup>177</sup> *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 6 (A/45/6/Rev.1)*, Major Programme IV (International economic cooperation for development), Programme 16 (Environment), para. 16.24.

<sup>178</sup> See, for example, "Water: the finite resource", *IUCN Bulletin*, vol. 21, No. 1 (March 1990), p. 14.

(3) The obligation to “protect” the ecosystems of international watercourse[s] [systems] is a specific application of the requirement contained in article 6, paragraph 1, that watercourse States are to use and develop an international watercourse [system] in a manner that is consistent with adequate protection thereof. In essence, it requires that watercourse States shield the ecosystems of international watercourse[s] [systems] from harm or damage. It thus includes the duty to protect those ecosystems from a significant threat of harm.<sup>179</sup> The obligation to “preserve” the ecosystems of international watercourse[s] [systems], while similar to that of protection, applies in particular to freshwater ecosystems that are in a pristine or unspoiled condition. It requires that those ecosystems be protected in such a way as to maintain them as much as possible in their natural state. Together, protection and preservation of aquatic ecosystems help to ensure their continued viability as life-support systems, thus providing an essential basis for sustainable development.<sup>180</sup>

(4) In requiring that watercourse States act “individually or jointly”, article 22 recognizes that in some cases it will be necessary and appropriate that watercourse States cooperate, on an equitable basis, to protect and preserve the ecosystems of international watercourse[s] [systems]. The obligation to take such action “jointly” is a specific application of certain general obligations contained in part II of the draft articles. Thus article 6, paragraph 2, requires that watercourse States “participate in the . . . protection of an international watercourse [system] in an equitable and reasonable manner”, and provides that “such participation includes . . . the duty to cooperate in the protection and development” of international watercourse[s] [systems]. In addition, article 9 provides that watercourse States shall cooperate “in order to attain . . . adequate protection of an international watercourse [system]”. The requirement of article 22 that watercourse States act “individually or jointly” is therefore to be understood as meaning that joint, cooperative action is to be taken where appropriate, and that such action is to be taken on an equitable basis. For example, joint action would usually be appropriate in the case of contiguous watercourses or those being managed and developed as a unit. What constitutes action on an equitable basis will, of course, vary with the circumstances.<sup>181</sup> Among the factors to be taken into account in this connection are the extent to which the

watercourse States concerned have contributed to the problem and the extent to which they will benefit from its solution. Of course, the duty to participate equitably in the protection and preservation of the ecosystems of an international watercourse [system] is not to be regarded as implying an obligation to repair or tolerate harm that has resulted from another watercourse State’s breach of its obligations under the present articles.<sup>182</sup> But the general obligation of equitable participation demands that the contributions of watercourse States to joint protection and preservation efforts be at least proportional to the measure in which they have contributed to the threat or the harm to the ecosystems in question. Finally, it will be recalled that article 194, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea also requires that measures be taken “individually or jointly”, in that case with regard to pollution of the marine environment. This provision reflects a recognition that joint protective action may be necessary with regard to ecosystems and natural resources that come within the jurisdiction of more than one State.

(5) There is ample precedent for the obligation contained in article 22 in the practice of States and the work of international organizations. Illustrations of these authorities are provided in the following paragraphs.<sup>183</sup>

(6) Provisions concerning the protection of the ecosystems of international watercourses may be found in a number of agreements. For example, in the 1975 Statute of the Uruguay River,<sup>184</sup> Argentina and Uruguay agreed to coordinate, through a commission established under the agreement, “appropriate measures to prevent the alteration of the ecological balance and to control impurities and other harmful elements in the river and its catchment area” (art. 36). The parties further undertook to “agree on measures to regulate fishing activities in the river with a view to the conservation and preservation of living resources” (art. 37), and to “protect and preserve the aquatic environment” (art. 41). Similarly, in the 1978 Convention relating to the status of the River Gambia,<sup>185</sup> Gambia, Guinea and Senegal agreed that “No project which is likely to bring about serious modifications of the characteristics of the river’s regime . . . the sanitary state of the waters, the biological characteristics of its fauna and its flora . . . will be implemented without the prior approval of the contracting States” (art. 4). The nine States parties to the 1963 Act regarding navigation and economic cooperation between the States of the Niger Basin<sup>186</sup>

<sup>179</sup> The obligation to protect the ecosystems of international watercourses is thus a general application of the principle of precautionary action, discussed below (see footnote 200 below).

<sup>180</sup> The following observation contained in the Medium-Term Plan for the period 1992-1997 is relevant in this connection: “The maintenance of biological diversity, which encompasses all species of plants, animals and micro-organisms and the ecosystems of which they are part, is a major element in achieving sustainable development.” (Loc. cit. (footnote 177 above), para. 16.7.)

<sup>181</sup> See, generally, the commentaries to articles 6 and 7 (*Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*). For example, paragraph (1) of the commentary to article 7, referring to the rule of equitable and reasonable utilization laid down in article 6, states:

“ . . . 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 a specific case will therefore depend on a weighing of all relevant factors and circumstances. . . . ”

(Ibid., p. 36.)

<sup>182</sup> Thus, for example, State A would be under no obligation to repair appreciable harm which it had suffered solely as a result of the conduct of State B.

<sup>183</sup> For more extensive surveys of relevant authorities, see the Special Rapporteur’s fourth report, document A/CN.4/412 and Add.1 and 2 (see footnote 135 above), paras. 29-86; and the third report of the former Special Rapporteur, Mr. Schwebel, *Yearbook . . . 1982*, vol. II (Part One) (and corrigendum), pp. 122 *et seq.*, document A/CN.4/348, paras. 243-336.

<sup>184</sup> Uruguay, Ministry for External Relations, *Actos Internacionales Uruguay-Argentina, 1830-1980* (Montevideo, 1981), p. 593.

<sup>185</sup> United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 39.

<sup>186</sup> United Nations, *Treaty Series*, vol. 587, p. 9; reproduced in Natural Resources/Water Series No. 13 . . . (see footnote 185 above), p. 6. The States parties were Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad.

undertook "to establish close cooperation with regard to the study and the execution of any project likely to have an appreciable effect on certain features of the regime of the River, its tributaries and sub-tributaries . . . the sanitary conditions of their waters, and the biological characteristics of their fauna and flora" (art. 4). The 1978 Agreement between the United States of America and Canada on Great Lakes water quality<sup>187</sup> provides that "The purpose of the Parties is to restore and maintain the chemical, physical and biological integrity of the waters of the Great Lakes Basin Ecosystem" (art. II).

(7) A number of early agreements had as their object the protection of fish and fisheries.<sup>188</sup> For example, the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters<sup>189</sup> provides that "Factories, plants or establishments of any kind situated near the Doubs shall be prohibited from discharging into the water any waste or substances that may be harmful to fish" (art. 17). Other agreements in effect protect the ecosystems of international watercourse[s] [systems] by protecting the waters thereof against pollution. The 1958 Treaty between the Soviet Union and Afghanistan concerning the regime of the Soviet-Afghan State frontier,<sup>190</sup> for example, provides that "The competent authorities of both Contracting Parties shall take the necessary measures to protect the frontier waters from pollution by acids and waste products and from fouling by any other means" (art. 13). The 1956 Convention between the Federal Republic of Germany, France and Luxembourg concerning the canalization of the Moselle<sup>191</sup> provides that the parties "shall take the necessary measures to protect the waters of the Moselle and its tributaries against pollution" (art. 55).

(8) The need to protect and preserve the ecosystems of international watercourse[s] [systems] is also recognized in the work of international organizations, conferences and meetings. The Act of Asunción on the use of international rivers, adopted by the Ministers of Foreign Affairs of the River Plate Basin States at their Fourth Meeting, in

1971,<sup>192</sup> refers to the "grave health problems arising from ecological relationships in the geographic area of the River Plate Basin, which have an unfavourable impact on the social and economic development of the region", and notes that "this health syndrome is related to the quality and quantity of the water resources".<sup>193</sup> The Act also mentions "the need to control water pollution and preserve as far as possible the natural qualities of the water as an integral part of a policy in the conservation and utilization of the water resources of the Basin".<sup>194</sup> The Mar del Plata Action Plan, adopted by the United Nations Water Conference in 1977,<sup>195</sup> contains a recommendation No. 35 entitled "Environment and health", which provides: "It is necessary to evaluate the consequences which the various uses of water have on the environment, to support measures aimed at controlling water-related diseases, and to protect ecosystems."<sup>196</sup>

(9) In addition to the instruments concerning the protection and preservation of the ecosystems of international watercourses, a number of agreements, resolutions, declarations and other instruments recognize the importance of protecting and preserving the environment in general, or ecosystems other than those of watercourses in particular. These instruments are of present interest because they may either include, or be analogous to, an obligation to protect and preserve the ecosystems of international watercourse[s] [systems]. A number of these authorities may be mentioned for the purpose of illustration. Agreements concerning the environment in general include the 1968 African Convention on the Conservation of Nature and Natural Resources<sup>197</sup> and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources.<sup>198</sup> Reference has already been made to the analogous obligation "to protect and preserve the marine environment" contained in article 192 of the 1982 United Nations Convention on the Law of the Sea, which is

<sup>187</sup> *United States Treaties and Other International Agreements, 1978-79*, vol. 30, part 2, p. 1383.

<sup>188</sup> See, for example, sect. 1, para. 6, of Part Two of the 1868 Final Act of delimitation of the international frontier of the Pyrenees between France and Spain (United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (Sales No. 63.V.4) (hereinafter referred to as "*Legislative Texts . . .*"), p. 674, No. 186, at p. 676; summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 182-183, document A/5409, paras. 979-984, at para. 980 (c)). See also (a) the 1887 Convention between Switzerland, the Grand Duchy of Baden and Alsace-Lorraine establishing uniform rules on fishing on the Rhine and its tributaries, including Lake Constance (United Nations, *Legislative Texts . . .*, p. 397, No. 113; summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 113-114, document A/5409, paras. 458-463), art. 10; (b) the 1906 Convention between Switzerland and Italy establishing uniform rules on fishing in frontier waters (*Legislative Texts . . .*, p. 839, No. 230; summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 136-137, document A/5409, paras. 633-642), art. 12, para. 5; (c) the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters (*Legislative Texts . . .*, p. 701, No. 196), arts. 6, 11 and 17.

<sup>189</sup> See footnote 188 (c) above.

<sup>190</sup> United Nations, *Treaty Series*, vol. 321, p. 77.

<sup>191</sup> United Nations, *Legislative Texts . . .* (see footnote 188 above), p. 424, No. 123; summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 115-116, document A/5409, paras. 474-480.

<sup>192</sup> Text reproduced in OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington (D.C.), 1971), pp. 183-186; extracts in *Yearbook . . . 1974*, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

<sup>193</sup> Resolution No. 15 annexed to the Act of Asunción.

<sup>194</sup> Resolution No. 23 annexed to the Act of Asunción.

<sup>195</sup> *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), part one, chap. I.

<sup>196</sup> *Ibid.*, p. 25.

<sup>197</sup> United Nations, *Treaty Series*, vol. 1001, p. 3. See especially article II (Fundamental principle), in which the parties "undertake to adopt the measures necessary to ensure conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles"; and article V (Water), in which the parties agree to "establish policies for conservation, utilization and development of underground and surface water".

<sup>198</sup> Agreement adopted by Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand (*International Environmental Law—Multilateral Agreements* (Berlin, Erich Schmidt Verlag), vol. 985:51). See especially article 1 (Fundamental principle), in which the parties undertake to adopt "the measures necessary to maintain essential ecological processes and life-support systems"; and article 8 (Water), in which the parties recognize "the role of water in the functioning of natural ecosystems" and agree to endeavour to ensure sufficient water supply "for, *inter alia*, the maintenance of natural life supporting systems and aquatic fauna and flora". See also (a) the 1940 Washington Convention on nature protection and wildlife preservation in the

(Continued on next page)

complemented by a number of more specific agreements concerning the protection of the marine environment.<sup>199</sup> In addition, the principle of precautionary action reflected in article 22 has found expression in a number of international agreements and other instruments.<sup>200</sup> Also of general relevance, as evidence of recognition by States of the necessity of protecting essential ecological processes, are the numerous declarations and resolutions concerning the preservation of the environment. These include the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>201</sup> General Assembly resolution 37/7 of 28 October 1982 on the World Charter for Nature, the 1989 Amazon Declaration,<sup>202</sup> the 1989 draft American Declaration on the Environment,<sup>203</sup> the 1988 ECE Declaration on Conservation of Flora, Fauna and their Habitats,<sup>204</sup> the

1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region<sup>205</sup> and the Declaration of The Hague of 11 March 1989.<sup>206</sup> The importance of maintaining the "ecological balance" in utilizing natural resources,<sup>207</sup> and of following the "ecosystems approach" to the protection of water quality,<sup>208</sup> has also been recognized in instruments adopted within the framework of the Conference on Security and Cooperation in Europe. Finally, the work of the World Commission on Environment and Development<sup>209</sup> and its Experts Group on Environmental Law<sup>210</sup> also emphasizes that maintaining ecosystems and related ecological processes is essential to the achievement of sustainable development.<sup>211</sup>

### Article 23. Prevention, reduction and control of pollution

**1. For the purposes of the present articles, "pollution of an international watercourse [system]" means any detrimental alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct.\***

(Footnote 198 continued.)

Western hemisphere (United Nations, *Treaty Series*, vol. 161, p. 193); (b) the 1972 Paris Convention for the protection of the world cultural and natural heritage (*ibid.*, vol. 1037, p. 151); (c) the 1979 Bern Convention on the conservation of European wildlife and natural habitats (Council of Europe, *European Treaty Series*, No. 104 (September 1979)); (d) the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (*International Legal Materials* (Washington, D.C.), vol. XXVI (1987), p. 38).

<sup>199</sup> See, for example, (a) the 1981 Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (document UNEP/IG.22/7 (31 March 1981); *International Legal Materials* (Washington, D.C.), vol. XX (1981), p. 746); (b) the 1974 Convention on the Prevention of Marine Pollution from Land-based Sources (UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 430); (c) the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area (*ibid.*, p. 405); (d) the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (United Nations, *Treaty Series*, vol. 1102, p. 27) and its 1980 Protocol (*International Legal Materials*, vol. XIX (1980), p. 869); (e) the 1978 Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution (United Nations, *Treaty Series*, vol. 1140, p. 133).

<sup>200</sup> The principle of precautionary action has been applied especially in instruments concerning the ozone layer and land-based marine pollution. With regard to the ozone layer, see the 1985 Vienna Convention for the Protection of the Ozone Layer (UNEP, Nairobi, 1985) and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP, Nairobi, 1987). Concerning land-based and other forms of marine pollution, see, for example, (a) decision 15/27 of 25 May 1989 of the UNEP Governing Council, entitled "Precautionary approach to marine pollution, including waste-dumping at sea" (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 25 (A/44/25)*, annex I); (b) the Ministerial Declarations of the Second and Third International Conferences on the Protection of the North Sea (London, 24-25 November 1987 and The Hague, 7-8 March 1990) (see footnote 232 below). The Ministerial Declarations specify that the principle of precautionary action entails the taking of action to avoid potentially damaging impacts of dangerous substances (i.e. those that are persistent, toxic or bioaccumulative) even before a causal link between emissions and effects has been established by absolutely clear scientific evidence.

<sup>201</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I. See especially Principles 2 to 5 and 12 of the Declaration.

<sup>202</sup> See A/44/275-E/1989/79, annex.

<sup>203</sup> See OAS, document CJI/RES.II-10/89.

<sup>204</sup> See E/ECE/1172-ECE/ENVWA/6. In the Declaration, the ECE member Governments agree, *inter alia*, to pursue the aim of conserving living natural resources "in the interests of present and future generations by maintaining essential ecological processes and life-support systems, preserving genetic diversity and ensuring sustainable utilization of species and ecosystems" (para. 1).

\* This paragraph dealing with the definition of pollution may be transferred to article 1 on the use of terms.

<sup>205</sup> See A/CONF.151/PC/10, annex I. The Declaration recognizes, *inter alia*, that "The challenge of sustainable development of humanity depends on providing sustainability of the biosphere and its ecosystems ..." (para. 6).

<sup>206</sup> See A/44/340-E/1989/120, annex.

<sup>207</sup> See section 5 (Environment) of the chapter on "Cooperation in the field of economics, of science and technology and of the environment" of the Helsinki Final Act adopted on 1 August 1975 (*Final Act of the Conference on Security and Cooperation in Europe* (Helsinki, 1975) (Lausanne, Imprimeries Réunies, [n.d.]), at p. 102).

<sup>208</sup> See the *Report on Conclusions and Recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Cooperation in Europe* (Sofia, 1989) (CSCE/SEM.36/Rev.1, 3 November 1989), p. 12.

<sup>209</sup> See the report of the World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987).

<sup>210</sup> See especially article 3 (Ecosystems, related ecological processes, biological diversity, and sustainability) of the legal principles and recommendations on environmental protection and sustainable development adopted by the Experts Group (see footnote 173 *in fine* above).

<sup>211</sup> See, to the same effect, the Environmental Perspective to the Year 2000 and Beyond, study adopted by the UNEP Governing Council at its fourteenth session (decision 14/13 of 19 June 1987) (*Official Records of the General Assembly, Forty-second Session, Supplement No. 25 (A/42/25)*, annex II), for example paras. 2 and 3 (d). The study was subsequently adopted by the General Assembly in resolution 42/186 of 11 December 1987 "as a broad framework to guide national action and international cooperation on policies and programmes aimed at achieving environmentally sound development".

Also to the same effect are certain provisions of the Constitution of Namibia, which entered into force on 21 March 1990 (see S/20967/Add.2, annex I), including article 91 (concerning functions of the Ombudsman), subpara. (c), and article 95 (Promotion of the welfare of the people), subpara. (l). According to the latter, for example:

"The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

...

"(l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; ..."

**2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the international watercourse [system]. Watercourse States shall take steps to harmonize their policies in this connection.**

**3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances the introduction of which into the waters of an international watercourse [system] is to be prohibited, limited, investigated or monitored.**

#### Commentary

(1) Article 23 establishes the fundamental obligation to prevent, reduce and control pollution of international watercourse[s] [systems]. The article is based on draft article 16 [17] submitted by the Special Rapporteur in his fourth report.<sup>212</sup> It consists of three paragraphs, the first of which defines the term “pollution”, while the second lays down the obligation just referred to and the third establishes a procedure for drawing up agreed lists of dangerous substances that should be subjected to special controls.

(2) *Paragraph 1* contains a general definition of the term “pollution”, as that term is used in the present articles. While it contains the basic elements found in other definitions of the term,<sup>213</sup> paragraph 1 is more general in several respects. First, it does not mention any particular type of pollution or polluting agent (e.g. substances or energy), unlike some other definitions. Secondly, the definition simply refers to “any detrimental alteration” and thus does not prejudge the question of the threshold at which pollution becomes impermissible. That threshold is addressed in paragraph 2. The definition is thus a purely factual one. It encompasses all pollution, whether or not it results in “appreciable harm” to other watercourse States within the meaning of article 8 and, more specifically, of paragraph 2 of article 23. Thirdly, in order to preserve the factual character of the definition, paragraph 1 does not refer to any specific “detrimental” effects, such as harm to

human health, property or living resources. Examples of such effects that rise to the level of “appreciable harm” are provided in paragraph 2. The definition requires only that there be a detrimental alteration in the “composition or quality” of the water. The term “composition” refers to all substances contained in the water, including solutes, as well as suspended particulate matter and other insoluble substances. The term “quality” is commonly used in relation to pollution, especially in such expressions as “air quality” and “water quality”. While it is difficult, and perhaps undesirable, to define the term precisely, it refers generally to the essential nature and degree of purity of water. Fourthly, the definition does not refer to the means by which pollution is caused, such as by the “introduction” of substances, energy, etc. into a watercourse. It requires only that the “detrimental alteration” result from “human conduct”. The latter expression is understood to include both acts and omissions, and was thus considered preferable to a term such as “activities”. Finally, the definition does not include “biological” alterations. While there is no doubt that the introduction into a watercourse of alien or new species of flora and fauna may have harmful effects on the quality of the water, the introduction of such living organisms is not generally regarded as “pollution” *per se*. Biological alterations are therefore the subject of a separate article, namely article 24.

(3) *Paragraph 2* sets forth the general obligation of watercourse States to “prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to their environment”. The paragraph is a specific application of the general obligation contained in article 8 not to cause appreciable harm to other watercourse States. The various elements of paragraph 2 are dealt with in the following paragraphs of the commentary.

(4) In applying the general obligation under article 8 to the case of pollution, the Commission took into account the practical consideration that some international watercourse[s] [systems] are already polluted to varying degrees, while others are not. In the light of that state of affairs, it employed the formula “prevent, reduce and control” in relation to pollution of international watercourse[s] [systems]. That expression is utilized in the 1982 United Nations Convention on the Law of the Sea (art. 194, para. 1) in connection with marine pollution, with respect to which the situation is similar. The obligation to “prevent” relates to new pollution of international watercourse[s] [systems], while the obligations to “reduce” and “control” relate to existing pollution. Thus watercourse States must take whatever steps are necessary to prevent new pollution from existing or planned activities, such as factories, sewage-disposal systems, or irrigation projects, to the extent that such pollution “may cause appreciable harm to other watercourse States or to their environment”. As with the obligation to “protect” ecosystems under article 22, the obligation to “prevent . . . pollution . . . that may cause appreciable harm” includes the duty to prevent the threat of such harm.<sup>214</sup> This obligation is signified by the words “may cause”. Furthermore, as in the case of article 22, the principle of precautionary action is applicable, especially

<sup>212</sup> *Yearbook . . . 1988*, vol. II (Part One), p. 237, document A/CN.4/412 and Add.1 and 2.

<sup>213</sup> See, for example, (a) the International Law Association's 1966 Helsinki Rules (see footnote 147 above), art. IX; (b) the resolution on “The pollution of rivers and lakes and international law” adopted by the Institute of International Law at its Athens session, in 1979, (*Annuaire de l'Institut de droit international*, 1979, vol. 58-II, pp. 196 *et seq.*), art. I, para. 1; (c) the “Principles concerning transfrontier pollution” annexed to recommendation C(74)224 adopted by the OECD Council on 14 November 1974 (OECD, *OECD and the Environment* (Paris, 1986), pp. 142 *et seq.*), title A, third paragraph; (d) the Rules of International Law Applicable to Transfrontier Pollution adopted by the International Law Association at Montreal in 1982 (ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 1-3), art. 2, para. 1; (e) the 1982 United Nations Convention on the Law of the Sea, art. 1, para. 4; (f) the 1979 Convention on Long-range Transboundary Air Pollution (E/ECE/1010), art. 1; (g) the Council of Europe's 1969 draft European convention on the protection of fresh water against pollution (see *Yearbook . . . 1974*, vol. II (Part Two), pp. 343 *et seq.*, document A/CN.4/274, para. 374), art. 1, subpara. (c); (h) the Council of Europe's 1974 draft European convention for the protection of international watercourses against pollution (*ibid.*, pp. 346 *et seq.*, para. 377), art. 1, subpara. (d).

<sup>214</sup> See paragraph (3) of the commentary to article 22.

in respect of dangerous substances such as those that are toxic, persistent or bioaccumulative.<sup>215</sup> The requirement that watercourse States “reduce and control” existing pollution reflects the practice of States, in particular those in whose territories polluted watercourses are situated. That practice indicates a general willingness to tolerate even appreciable pollution harm, provided—and this is an important proviso—that the watercourse State of origin is making its best efforts to reduce the pollution to a mutually acceptable level.<sup>216</sup> A requirement that existing pollution causing such harm be abated immediately could, in some cases, result in undue hardship, especially where the detriment to the watercourse State of origin would be grossly disproportionate to the benefit that would accrue to the watercourse State experiencing the harm.<sup>217</sup> On the other hand, failure by the watercourse State of origin to exercise due diligence in reducing the pollution to acceptable levels would entitle the affected State to claim that the State of origin had breached its obligation to do so.

(5) Like article 22, paragraph 2 of article 23 requires that the measures in question be taken “individually or jointly”. The remarks made in paragraph (4) of the commentary to article 22 apply, *mutatis mutandis*, with regard to paragraph 2 of article 23. Thus the requirement that watercourse States act “individually or jointly” to prevent, reduce and control water pollution is to be understood as meaning that joint, cooperative action is to be taken where appropriate, and that such action is to be taken on an equitable basis. As explained in the commentary to article 22, the obligation to take joint action derives from certain general obligations contained in part II of the draft articles. In the case of paragraph 2 of article 23, the obligation of watercourse States under article 6, paragraph 2, to “participate in the . . . protection of an international watercourse [system] in an equitable and reasonable manner”, as well as that under article 9 to “cooperate . . . in order to attain . . . adequate protection of an international watercourse [system]”, may, in some situations, call for joint participation in the application of pollution-control measures.<sup>218</sup> Those obligations under articles 6 and 9 are also relevant to the duty to harmonize policies, addressed in paragraph (7) below.

(6) The obligations of prevention, reduction and control all apply to pollution “that may cause appreciable harm to other watercourse States or to their environment”. Pollution below that threshold would not fall within the scope of paragraph 2 but, depending on the circumstances, might be covered either by article 22 or by article 25.

<sup>215</sup> See the commentary to article 22, especially footnotes 179 and 200 and accompanying text.

<sup>216</sup> See para. (11) of the Special Rapporteur’s comments on draft article 16 [17] in his fourth report (*Yearbook . . . 1988*, vol. II (Part One), pp. 240-241, document A/CN.4/412 and Add.1 and 2). This assessment of the practice of States is also reflected in the most recent comprehensive study of the subject: see J. G. Lammers, *Pollution of International Watercourses* (The Hague, Martinus Nijhoff, 1984), p. 349.

<sup>217</sup> This position is in accordance with that taken in the Helsinki Rules. See especially the commentary (para. (d)) to article XI of those Rules (ILA, *op. cit.* (footnote 147 above), pp. 503-504).

<sup>218</sup> Such participation and cooperation may take a number of forms, including the provision of technical assistance, joint financing, the exchange of specific data and information, and similar forms of joint participation and cooperation. To the same effect, see the commentary (para. (b)) to article X of the Helsinki Rules (*ibid.*, p. 499).

Several examples of appreciable harm that pollution may cause to a watercourse State or to its environment are provided at the end of the first sentence of paragraph 2. The list is preceded by the word “including”, which indicates that it does not purport to be exhaustive but is provided for purposes of illustration only. Pollution of an international watercourse [system] may cause harm not only to “human health or safety” or to “the use of the waters for any beneficial purpose”,<sup>219</sup> but also to “the living resources of the international watercourse [system]”, flora and fauna dependent on the watercourse, and the amenities connected with it.<sup>220</sup> The reference to the “environment” of other watercourse States is intended to encompass, in particular, matters of the latter kind.<sup>221</sup> It is thus broader than the concept of the “ecosystem” of an international watercourse [system], which is the subject of article 22.

(7) The second sentence of paragraph 2 requires watercourse States to “take steps to harmonize their policies” concerning the prevention, reduction and control of water pollution. This obligation, which is grounded on treaty practice<sup>222</sup> and which has a counterpart in the 1982 United Nations Convention on the Law of the Sea (art. 194, para. 1), addresses the problems that often arise when States adopt divergent policies, or apply different standards, concerning the pollution of international watercourse[s] [systems]. For example, if the standards applied by watercourse State A are quite stringent, while those of watercourse State B are less so, the less stringent standards of State B, if they prove inadequate, may frustrate State A’s efforts to prevent, reduce and control pollution of the portion of the watercourse in its territory, or at least decrease the value of those efforts. Such problems manifest themselves most dramatically in the

<sup>219</sup> The Commission recognizes that it may be regarded as somewhat awkward to speak of “harm . . . to the use of the waters”, but preferred not to use another expression (for example, “interference with the use of the waters”), at least at the present stage of its work, since other expressions could raise doubts as to whether a uniform standard was being applied in the case of each illustration. The present wording leaves no doubt that the same standard—that of appreciable harm—is applied in all illustrations.

<sup>220</sup> Such amenities may include, for example, the use of a watercourse for recreational purposes or for tourism.

<sup>221</sup> Appreciable pollution harm to the “environment” of a watercourse State could also consist in harm to human health in the form of diseases, or their vectors, carried by water. While harm to “human health” is expressly mentioned in paragraph 2, other forms of appreciable harm that are not directly connected with the use of water may also result from pollution of an international watercourse [system].

<sup>222</sup> International agreements concerning water pollution normally have as one of their explicit or implicit objects the harmonization of the relevant policies and standards of the watercourse States concerned. This is true whether the agreement concerns the protection of fisheries (see, for example, the 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters (see footnote 188 (c) above), art. 17) or the prevention of adverse effects on certain uses (see, for example, the 1960 Indus Waters Treaty between India and Pakistan (United Nations, *Treaty Series*, vol. 419, p. 125), art. IV, para. 10), or actually sets water-quality standards and objectives (see, for example, the 1978 Agreement between the United States of America and Canada on Great Lakes water quality (see footnote 187 above), art. II). Thus harmonization may be achieved by agreement on specific policies and standards or by requiring that pollution not exceed levels necessary for the protection of a particular resource, use or amenity. See, generally, the discussion of international agreements concerning water pollution in the Special Rapporteur’s fourth report, document A/CN.4/412 and Add.1 and 2 (see footnote 135 above), paras. 39-47.

case of contiguous watercourses, and lakes or aquifers that straddle boundaries, as well as in situations in which the policies and standards of an upstream State are less stringent than those of its downstream neighbour. But they may also arise in other situations. For example, the less stringent standards of a downstream State may result in harm to fish that migrate to a State lying upstream. Harmonization of the policies of the various watercourse States concerning water pollution will help to mitigate or avoid these problems. The duty to harmonize policies is a specific application of certain of the general obligations contained in articles 6 and 9, mentioned in paragraph (5) above, particularly the obligation of watercourse States under article 9 to "cooperate . . . in order to attain . . . adequate protection of an international watercourse [system]". In the present case, that means that watercourse States are to work together in good faith to achieve and maintain harmonization of their policies concerning water pollution. Harmonization of policies is thus a process in two different senses. First, initial achievement of harmonization will often involve several steps or stages; it is this aspect of the process that is addressed in paragraph 2, as indicated by the words "take steps". Secondly, even after policies have been successfully harmonized, continuing cooperative efforts will ordinarily be required to maintain their harmonization as conditions change. The entire process will necessarily depend on consensus among watercourse States. In any event, the idea of harmonization does not imply that policies must be identical, only that conflicts among them should be avoided or removed.

(8) *Paragraph 3* requires watercourse States to enter into consultations, if one or more of them should so request, with a view to drawing up lists of substances which, by virtue of their dangerous nature, should be subjected to special regulation. Such substances are principally those that are toxic, persistent or bioaccumulative. The practice of establishing lists of substances whose discharge into international watercourse[s] [systems] is either prohibited or subject to special regulation has been followed in a number of international agreements and other instruments.<sup>223</sup> States have made the discharge of these substances subject to special regimes because of their particularly dangerous and long-lasting nature. Indeed, the objective of some of the recent agreements dealing with

<sup>223</sup> See, for example, the 1976 Agreement for the Protection of the Rhine against Chemical Pollution (United Nations, *Treaty Series*, vol. 1124, p. 375); and the 1978 Agreement between the United States of America and Canada on Great Lakes water quality (see footnote 187 above).

See also the Council of Europe's 1974 draft European convention for the protection of international watercourses against pollution (see footnote 213 (h) above); the 1979 Athens resolution on "The pollution of rivers and lakes and international law" adopted by the Institute of International Law (see footnote 213 (b) above), art. III, para. 2; and the Rules on Water Pollution in an International Drainage Basin adopted by the International Law Association at Montreal in 1982 (ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 13 and 535 *et seq.*), art. 2.

The same approach has also been used in the field of marine pollution. See especially the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (United Nations, *Treaty Series*, vol. 1046, p. 120). This Convention separates harmful wastes into three categories: those whose discharge is prohibited altogether; those whose discharge is subject to a prior special permit; and those whose discharge is subject only to a prior general permit.

these substances is to eliminate them entirely from the watercourses in question.<sup>224</sup>

(9) A detailed survey of representative illustrations of international agreements, the work of international organizations, decisions of international courts and tribunals, and other instances of State practice supporting article 23 is contained in the fourth report of the Special Rapporteur.<sup>225</sup> A recent study lists 88 international agreements "containing substantive provisions concerning pollution of international watercourses".<sup>226</sup> The work of international non-governmental organizations concerned with international law and groups of experts in this field has been particularly rich.<sup>227</sup> These authorities evidence a long-standing concern of States with the problem of pollution of international watercourses. States have stepped up their efforts to deal with the problem as water pollution has become more serious, and as they have become increasingly aware of the close and interdependent relationship between nature and humankind. These considerations are reflected in article 23, which contains a set of general obligations that are necessary for the protection of watercourse States against pollution.

#### *Article 24. Introduction of alien or new species*

**Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system] which may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States.**

#### *Commentary*

(1) The introduction of alien or new species of flora or fauna into a watercourse can upset its ecological balance and result in serious problems, including the clogging of intakes and machinery, the spoiling of recreation, the acceleration of eutrophication, the disruption of food webs, the elimination of other, often valuable species, and the transmission of disease. Once introduced, alien and new species can be highly difficult to eradicate. Article 24 addresses this problem by requiring watercourse States to

<sup>224</sup> Examples of such agreements are provided in the preceding footnote.

<sup>225</sup> Document A/CN.4/412 and Add.1 and 2 (see footnote 135 above), paras. 38-87.

<sup>226</sup> Lammers, *op. cit.* (footnote 216 above), pp. 124 *et seq.* See also the survey by J. J. A. Salmon, in the context of the study of the subject by the Institute of International Law, of obligations relating to the protection of the aquatic environment (*Yearbook of the Institute of International Law, 1979*, vol. 58-1, pp. 195 *et seq.*; see also pp. 268 *et seq.*).

<sup>227</sup> This is especially true of the Institute of International Law and the International Law Association. For the Institute of International Law, see especially the 1979 Athens resolution on "The pollution of rivers and lakes and international law" (see footnote 213 (b) above). For the International Law Association, see the Helsinki Rules (see footnote 147 above), arts. IX-XI; the 1982 Montreal Rules on Water Pollution in an International Drainage Basin (see footnote 223 above); and the Rules on International Groundwaters adopted at Seoul in 1986 (ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987), pp. 251 *et seq.*), art. 3. See also the legal principles and recommendations on environmental protection and sustainable development adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (see footnote 173 *in fine* above).

take all measures necessary to prevent such introduction. A separate article is necessary to cover this subject because, as already noted, the definition of "pollution" contained in paragraph 1 of article 23 does not include biological alterations.<sup>228</sup> A similar provision, relating to the protection of the marine environment, is contained in article 196, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea.

(2) The term "species" includes both flora and fauna, i.e. plants, animals and other living organisms.<sup>229</sup> The term "alien" refers to species that are non-native, while the term "new" encompasses species that have been genetically altered or produced through biological engineering. As is clear from its terms, article 24 concerns the introduction of such species only into the watercourse itself and does not concern fish farming or other activities conducted outside the watercourse.<sup>230</sup>

(3) Article 24 requires watercourse States to "take all measures necessary" to prevent the introduction of alien or new species. This expression, which is also used in article 196 of the 1982 United Nations Convention on the Law of the Sea, indicates that watercourse States are to undertake studies, in so far as they are able, and take the precautions required to prevent alien or new species from being introduced into a watercourse by public authorities or private persons. The obligation is one of due diligence, and will not be regarded as having been breached if a watercourse State has done all that can reasonably be expected to prevent the introduction of such species.

(4) The "introduction" that watercourse States are to take all measures necessary to prevent is that which "may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States". While any introduction of an alien or new species into an international watercourse [system] should be treated with great caution, the Commission was of the view that the relevant legal obligation under the present articles should be kept in harmony with the general rule contained in article 8. Since detrimental effects of alien or new species will, almost invariably, manifest themselves first upon the ecosystem of a watercourse, that link between the "introduction" of the species and appreciable harm was included in article 24. As in the case of paragraph 2 of article 23, the use of the word "may" indicates that precautionary action is necessary to guard against the very serious problems that alien or new species may cause. While the term "environment" was included for purposes of emphasis in paragraph 2 of article 23, it perhaps goes without saying that the "appreciable harm to other watercourse States" contemplated in article 24 includes harm to the environment of those States. Finally, as is true of other aspects of the protection of international watercourse[s] [systems], joint as well as individual action may be called for in preventing the introduction of alien or new species.

<sup>228</sup> See paragraph (2) *in fine* of the commentary to article 23.

<sup>229</sup> Thus the term would include parasites and disease vectors.

<sup>230</sup> Appropriate precautionary measures may be required, however, to prevent any alien or new species involved in such activities from making their way into the watercourse.

### Article 25. *Protection and preservation of the marine environment*

**Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse [system] that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.**

#### *Commentary*

(1) Article 25 addresses the increasingly serious problem of pollution that is transported into the marine environment by international watercourse[s] [systems]. While the impact of such pollution upon the marine environment, including estuaries, has been recognized only relatively recently, it is now dealt with, directly or indirectly, in a number of agreements. In particular, the obligation not to cause pollution damage to the marine environment from land-based sources is recognized both in the 1982 United Nations Convention on the Law of the Sea<sup>231</sup> and in conventions concerning various regional seas.<sup>232</sup>

(2) The obligation set forth in article 25 is not, however, to protect the marine environment *per se*, but to take the measures "with respect to an international watercourse [system]" that are necessary to protect that environment. The obligation of watercourse States under article 25 is separate from, and additional to, the obligations set forth in articles 22 to 24. Thus a watercourse State could conceivably damage an estuary through pollution of an international watercourse [system] without breaching its obligation not to cause appreciable harm to other watercourse States. Article 25 would require the watercourse State in question to take the measures necessary to protect and preserve the estuary.

(3) The expression "take all measures . . . necessary" has the same meaning, *mutatis mutandis*, as in article 24.<sup>233</sup> In the present case, watercourse States are to take all the necessary measures of which they are capable, financially and technologically. The expression "individually or jointly" has the same meaning, *mutatis mutandis*, as in article 22<sup>234</sup> and article 23, paragraph 2.<sup>235</sup> Thus, where appropriate, watercourse States are to take joint, cooperative action to protect the marine environment from pollution carried there by an international watercourse [system]. Such action is to be taken on an equitable basis, which means that the obligation of watercourse States to

<sup>231</sup> See article 194, para. 3 (a), and article 207 of the Convention.

<sup>232</sup> See, for example, the agreements cited in footnote 199 above. See also the Ministerial Declarations of the various International Conferences on the Protection of the North Sea: First International Conference (Bremen, 31 October-1 November 1984) (see B. Rüster and B. Simma, eds., *International Protection of the Environment, Treaties and Related Documents*, second series (Dobbs Ferry, N.Y., Oceana Publications), booklet II.B (May 1991), II/B/01-11-84); Second International Conference (London, 24-25 November 1987) (*ibid.*, II/B/25-11-87); Third International Conference (The Hague, 7-8 March 1990) (see *Yearbook of International Environmental Law*, vol. 1 (1990), p. 658).

<sup>233</sup> See paragraph (3) of the commentary to article 24.

<sup>234</sup> See paragraph (4) of the commentary to article 22.

<sup>235</sup> See paragraph (5) of the commentary to article 23.

participate in the measures in question is a function of their responsibility for the damage to the marine environment or the threat thereof. The terms "protect" and "preserve" have the same meaning, *mutatis mutandis*, as in article 22.<sup>236</sup> In the present case, the obligation to "protect" includes the duty to take the measures necessary with respect to an international watercourse [system] to protect the marine environment against harm from both pollution and alien or new species. Without prejudice to its meaning in the 1982 United Nations Convention on the Law of the Sea and other international agreements, the expression "marine environment" is understood to include, *inter alia*, the water, flora and fauna of the sea, as well as the seabed and ocean floor.<sup>237</sup>

(4) Article 25 concludes with the phrase "taking into account generally accepted international rules and standards", which is also used in the 1982 United Nations Convention on the Law of the Sea.<sup>238</sup> The phrase refers both to rules of general international law and to those derived from international agreements, as well as to standards adopted by States and international organizations pursuant to those agreements.<sup>239</sup> Watercourse States are to take those rules and standards into account in planning and implementing the measures to be taken under article 25, with a view to ensuring that such measures are consistent with any applicable rules and standards governing protection and preservation of the marine environment.

## PART V

### HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

#### *Article 26. Prevention and mitigation of harmful conditions*

**Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.**

#### *Commentary*

(1) Article 26 deals with a wide variety of "conditions" related to international watercourse[s] [systems] that may be harmful to watercourse States. While it may be debated whether the harm results from the condition itself or from the effects thereof, there is no doubt that such problems as floods, ice floes, drought and water-borne diseases, to mention only a few, are of serious consequence for watercourse States. Article 26 is concerned with the prevention and mitigation of such conditions, while article

27 deals with the obligations of watercourse States in responding to actual emergency situations. Of course, some of the "conditions" to be prevented and mitigated under article 26, for example floods and ice floes, may in fact materialize in an "emergency" of the kind dealt with in article 27. But the measures called for in preventing and mitigating these conditions are of an anticipatory nature and are thus quite different from those involved in responding to emergencies.

(2) Like articles 22, 23 and 25, article 26 requires that the measures in question be taken "individually or jointly". As in the case of those articles, this expression is an application of the general obligation of equitable participation set forth in article 6. The requirement that watercourse States take "all appropriate measures" means that they are to take measures that are tailored to the situation involved, and that are reasonable in view of the circumstances of the watercourse State in question. The obligation is thus that watercourse States exercise their best efforts to prevent and mitigate the conditions in question. It takes into account the capabilities of watercourse States, in so far as their means of knowing of the conditions and their ability to take the necessary measures are concerned.

(3) The conditions dealt with in article 26 may result from natural causes, human conduct, or a combination of the two.<sup>240</sup> The expression "natural causes or human conduct" comprehends each of these three possibilities. While States cannot prevent phenomena resulting entirely from natural causes, they can do much to prevent and mitigate harmful conditions that are consequent upon such phenomena. For example, floods may be prevented, or their severity mitigated, through the construction of reservoirs, afforestation, or improved range-management practices. Such measures must be predicated upon as much data and information as possible concerning the hydrological and meteorological situation in the area in question.

(4) The list of conditions provided at the end of article 26 is non-exhaustive, but includes most of the major problems that the article is intended to address. Other conditions covered by the article include drainage problems and flow obstructions. Drought and desertification may not, at first glance, seem to fit in with the other problems mentioned, since, unlike the others, they are the result of the lack of water rather than the harmful effects of it. But the effects of a drought, for example, may be seriously exacerbated by improper water-management practices.<sup>241</sup> States situated in regions subject to drought and desertification have demonstrated their determination to cooperate with a view to controlling and mitigating these problems.<sup>242</sup> In view of the severity of these problems, and the fact that

<sup>240</sup> For example, floods and siltation may result from deforestation coupled with heavy rains. Or a flood may be caused by earthquake damage to a dam.

<sup>241</sup> See, for example, *Report of the United Nations Water Conference* ... (see footnote 195 above), part three, chap. V, at p. 112.

<sup>242</sup> See, for example, (a) the 1980 Convention creating the Niger Basin Authority (United Nations, Natural Resources/Water Series No. 13 ... (see footnote 185 above), p. 56), art. 4, para. 2 (c) (iv), which provides that the Authority shall undertake activities relating to "prevention and control of drought and desertification"; (b) the 1973 Convention establishing the Permanent Inter-State Committee on Drought Control in the Sahel (see A/9178, annex II), art. 4, subparas. (i) and (iv).

<sup>236</sup> See paragraph (3) of the commentary to article 22.

<sup>237</sup> The expression "marine environment" is not defined in the 1982 United Nations Convention on the Law of the Sea. "Pollution of the marine environment" is, however, defined in article 1, para. 1 (4).

<sup>238</sup> See, for example, article 211, para. 2, of the Convention.

<sup>239</sup> See, in particular, the agreements referred to in footnotes 231 and 232 above.

cooperative action among watercourse States can do much to prevent or mitigate them, they are expressly mentioned in article 26.

(5) The kinds of measures that may be taken under article 26 are many and varied. They range from the regular and timely exchange of data and information that would be of assistance in preventing and mitigating the conditions in question to taking all reasonable steps to ensure that activities in the territory of a watercourse State are so conducted as not to cause conditions that may be harmful to other watercourse States. They may also include the holding of consultations concerning the planning and implementation of joint measures, whether or not involving the construction of works, and the preparation of studies of the efficacy of measures that have been taken.

(6) Article 26 is based on the provisions of numerous treaties,<sup>243</sup> decisions of international courts and tribunals, other evidence of State practice, and the work of international organizations.<sup>244</sup> Representative examples of these authorities are surveyed and analysed in the fifth report of the Special Rapporteur.<sup>245</sup>

### *Article 27. Emergency situations*

**1. For the purposes of the present article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, as for example in the case of industrial accidents.\***

**2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.**

**3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.**

**4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies in cooperation, where appropriate, with**

\* This paragraph dealing with the definition of an emergency may be transferred to article 1 on the use of terms.

<sup>243</sup> See, for example, the systematized collection of treaty provisions concerning floods in part II of the report presented to the International Law Association in 1972 by the Committee on International Water Resources Law, relating to flood control (ILA, *Report of the Fifty-fifth Conference, New York, 1972* (London, 1974), pp. 43 *et seq.*). A number of these agreements require consultation, notification, the exchange of data and information, the operation of warning systems, the preparation of surveys and studies, the planning and execution of flood-control measures, and the operation and maintenance of works.

<sup>244</sup> See especially the articles on flood control adopted in 1972 by the International Law Association, which appear, together with comments thereon, in part II of the report of the Committee on International Water Resources Law (*ibid.*).

<sup>245</sup> Document A/CN.4/421 and Add.1 and 2 (see footnote 135 above), paras. 2-117.

**other potentially affected States and competent international organizations.**

### *Commentary*

(1) Article 27 deals with the obligations of watercourse States in responding to actual emergency situations that are related to international watercourse[s] [systems]. It is to be contrasted with article 26, which concerns the prevention and mitigation of conditions that may be harmful to watercourse States.<sup>246</sup> Article 27 consists of four paragraphs, which may be reduced to three if the definition contained in paragraph 1 is transferred to article 1.

(2) *Paragraph 1* defines the term "emergency". The definition contains a number of important elements and includes several examples that are provided for purposes of illustration. As defined, an "emergency" must cause, or imminently threaten, "serious harm" to watercourse States "or other States". The seriousness of the harm involved, together with the suddenness of the emergency's occurrence, justifies the measures required by the article. The expression "other States" refers to non-watercourse States that might be affected by an emergency. These would usually be coastal States that could be harmed, for example, by a chemical spill transported by an international watercourse into the sea. The situation constituting an emergency must arise "suddenly". This does not necessarily mean, however, that the situation need be wholly unexpected. For example, weather patterns may provide an advance indication that a flood is likely. Because that situation would pose "an imminent threat of causing . . . serious harm to watercourse States", a watercourse State in whose territory the flood is likely to originate would be obligated under paragraph 2 to notify other potentially affected States of the emergency. Finally, the situation may result either "from natural causes . . . or from human conduct". While there may well be no liability on the part of a watercourse State for the harmful effects in another watercourse State of an emergency originating in the former and resulting entirely from natural causes, the obligations under paragraphs 2 and 3 would none the less apply to such an emergency.<sup>247</sup>

(3) *Paragraph 2* requires a watercourse State within whose territory an emergency originates to notify, "without delay and by the most expeditious means available", other potentially affected States and competent international organizations. Similar obligations are contained, for example, in the 1986 Convention on Early Notification of a Nuclear Accident<sup>248</sup> (art. 2), the 1982 United Nations Convention on the Law of the Sea (art. 198), and a number of agreements concerning international watercourses.<sup>249</sup> The words "without delay" mean

<sup>246</sup> See paragraph (1) of the commentary to article 26.

<sup>247</sup> Thus the breach of one of those obligations would engage the responsibility of the State in question.

<sup>248</sup> IAEA, Legal Series No. 14 (Vienna, 1987), p. 1.

<sup>249</sup> See, for example, the 1976 Agreement for the Protection of the Rhine against Chemical Pollution (see footnote 223 above), art. 11; the 1978 Agreement between the United States of America and Canada on Great Lakes water quality (see footnote 187 above); and the 1977 Agreement between France and Switzerland concerning intervention by the agencies responsible for combating accidental pollution of Lake Geneva (Switzerland, *Recueil des lois fédérales*, 1977, p. 2204).

immediately upon learning of the emergency, and the phrase “by the most expeditious means available” means that the most rapid means of communication that is accessible is to be used. The States to be notified are not confined to watercourse States, since, as explained above, non-watercourse States may be affected by an emergency. Paragraph 2 also calls for the notification of “competent international organizations”. Such an organization would have to be competent to participate in responding to the emergency by virtue of its constituent instrument. Most frequently, such an organization would be one established by the watercourse States to deal, *inter alia*, with emergencies.<sup>250</sup>

(4) *Paragraph 3* requires that a watercourse State within whose territory an emergency originates “immediately take all practicable measures . . . to prevent, mitigate and eliminate harmful effects of the emergency”. The most effective action to counteract most emergencies resulting from human conduct is that taken where the industrial accident, vessel grounding or other incident occurs. But paragraph 3 requires only that all “practicable” measures be taken, meaning those that are feasible, workable and reasonable. Furthermore, only such measures as are “necessitated by the circumstances” need be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States. Like paragraph 2, paragraph 3 foresees the possibility that there will be a competent international organization, such as a joint commission, with which the watercourse State may cooperate in taking the requisite measures. Finally, cooperation with potentially affected States (again including non-watercourse States) is also provided for. Such cooperation may be especially appropriate in the case of contiguous watercourses or where a potentially affected State is in a position to render assistance on the territory of the watercourse State where the emergency originated.

(5) *Paragraph 4* contains an obligation that is different in character from those contained in the two preceding paragraphs in that it calls for anticipatory rather than responsive action. The need for the development of contingency plans for responding to possible emergencies

<sup>250</sup> See, for example, article 11 of the 1976 Agreement for the Protection of the Rhine against Chemical Pollution (see footnote 223 above).

is now well recognized. For example, article 199 of the 1982 United Nations Convention on the Law of the Sea provides that “States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment”.

(6) The obligation set forth in paragraph 4 is qualified by the words “when necessary”, in recognition of the fact that the circumstances of some watercourse States and international watercourse[s] [systems] may not justify the effort and expense that are involved in the development of contingency plans. Whether such plans were necessary would depend, for example, on whether the characteristics of the natural environment of the watercourse, and the uses made of the watercourse and adjacent land areas, indicated that it was possible for emergencies to arise. It is probable that, with respect to most international watercourse[s] [systems] in the world today, the development of contingency plans would be advisable, if not strictly necessary, since they help to avoid unnecessary damage to property, health, the ecosystem of the watercourse, amenities and the marine environment.

(7) While watercourse States bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in cooperation with “other potentially affected States and competent international organizations”. For example, the establishment of effective warning systems may necessitate the involvement of other, non-watercourse States, as well as international organizations with competence in that particular field. In addition, the coordination of response efforts might be most effectively handled by a competent international organization set up by the States concerned. In such cases, paragraph 4 requires that watercourse States cooperate with the other States and any international organization or organizations concerned.

#### D. Points on which comments are invited

313. The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the draft articles of annex I (Implementation of the articles) submitted by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1).

## Chapter V

### STATE RESPONSIBILITY

#### A. Introduction

314. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft as follows: part 1 would concern the origin of international responsibility; part 2 would concern the content, forms and degrees of international responsibility; and a possible part 3, which the Commission might decide to include, could concern the question of the settlement of disputes and the "implementation" (*mise en œuvre*) of international responsibility.<sup>251</sup>

315. At its thirty-second session, in 1980, the Commission provisionally adopted on first reading *part 1* of the draft articles, on the "Origin of international responsibility".<sup>252</sup>

316. At the same session, the Commission also began its consideration of *part 2* of the draft articles, on the "Content, forms and degrees of international responsibility".

317. From its thirty-second session to its thirty-eighth session (1986), the Commission considered seven reports submitted by the Special Rapporteur, Mr. Willem Riphagen, relating to part 2 of the draft and *part 3* of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes).<sup>253</sup> The seventh report contained a section (which was neither introduced nor discussed at the thirty-eighth session) on the preparation of the second reading of part 1 of the draft articles and dealing with the written comments of Governments on the articles of part 1.

318. By the end of its thirty-eighth session, in 1986, the Commission had reached the following stage in its work

<sup>251</sup> *Yearbook* . . . 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

<sup>252</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>253</sup> The seven reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook* . . . 1980, vol. II (Part One), p. 107, document A/CN.4/330;

Second report: *Yearbook* . . . 1981, vol. II (Part One), p. 79, document A/CN.4/344;

Third report: *Yearbook* . . . 1982, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2;

Fourth report: *Yearbook* . . . 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;

Fifth report: *Yearbook* . . . 1984, vol. II (Part One), p. 1, document A/CN.4/380;

Sixth report: *Yearbook* . . . 1985, vol. II (Part One), p. 3, document A/CN.4/389;

Seventh report: *Yearbook* . . . 1986, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

on parts 2 and 3 of the draft articles. It had: (a) provisionally adopted articles 1 to 5 of part 2 on first reading;<sup>254</sup> (b) referred draft articles 6 to 16 of part 2<sup>255</sup> to the Drafting Committee; (c) referred draft articles 1 to 5 and the annex of part 3<sup>256</sup> to the Drafting Committee.<sup>257</sup>

319. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz Special Rapporteur for the topic "State responsibility". At its fortieth session, in 1988, the Commission had before it the Special Rapporteur's preliminary report on the topic,<sup>258</sup> as well as the comments and observations received from one Government on the articles of part 1 of the draft.<sup>259</sup> At its forty-first session, in 1989, the Commission received the Special Rapporteur's second report.<sup>260</sup> The Commission considered the preliminary report at its forty-first session and referred to the Drafting Committee the new articles 6 and 7 of chapter II (Legal consequences deriving from an international delict) of part 2 of the draft contained therein.<sup>261</sup>

#### B. Consideration of the topic at the present session

320. At the present session, the Commission considered the second report of the Special Rapporteur (A/CN.4/425 and Add.1), submitted in 1989,<sup>262</sup> at its 2168th to 2175th and 2185th meetings, from 5 to 15 June and on 3 July 1990.

321. At the conclusion of its debate, the Commission decided at its 2185th meeting to refer to the Drafting Committee the new articles 8, 9 and 10 of part 2 of the draft<sup>263</sup> submitted by the Special Rapporteur in his second report.

<sup>254</sup> For the texts, see section C of the present chapter.

<sup>255</sup> For the texts, see *Yearbook* . . . 1985, vol. II (Part Two), pp. 20-21, footnote 66.

<sup>256</sup> For the texts, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 35-36, footnote 86.

<sup>257</sup> For a complete historical review of the Commission's work on the topic up to 1986, see *Yearbook* . . . 1985, vol. II (Part Two), pp. 19 *et seq.*, paras. 102-163; and *Yearbook* . . . 1986, vol. II (Part Two) pp. 35 *et seq.*, paras. 40-65.

<sup>258</sup> *Yearbook* . . . 1988, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

<sup>259</sup> *Ibid.*, p. 1, document A/CN.4/414.

<sup>260</sup> *Yearbook* . . . 1989, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1.

<sup>261</sup> For the texts of draft article 6 (Cessation of an internationally wrongful act of a continuing character) and draft article 7 (Restitution in kind) submitted by the Special Rapporteur in his preliminary report, see *Yearbook* . . . 1989, vol. II (Part Two), pp. 72-73, paras. 229-230.

<sup>262</sup> See footnote 260 above.

<sup>263</sup> See footnotes 271, 289 and 291 below.

## 1. GENERAL APPROACH

322. The Special Rapporteur stated that his second report dealt with the substantive consequences arising from an internationally wrongful act (delict) other than cessation and *naturalis restitutio*, which had been dealt with in his preliminary report. He had examined three further consequences: reparation by equivalent, satisfaction and guarantees of non-repetition. The report also dealt with the impact of fault, in a broad sense, on the forms and degrees of reparation.

323. Before entering into the more detailed discussion of remedies, it was important, the Special Rapporteur stated, to examine some issues of a general nature which affected his approach to draft articles 8, 9 and 10. One important issue in conceptualizing remedies was the kind of injury or damage for which each one of the possible remedies was provided.

324. The Special Rapporteur stated that compensation was generally described as covering the "material" injury suffered by the offended State. Satisfaction was generally indicated as covering instead the "moral" injury sustained by the offended State in its honour, dignity and prestige, as well as its "subjective right". The adjectives "material" and "moral" failed, however, to give an exact picture of the areas of injury covered respectively by compensation and satisfaction. On the one hand, pecuniary compensation, allegedly covering only material damage, was intended also to compensate for moral damage suffered by the nationals of the offended State. Satisfaction, for its part, covered not the moral damage sustained by the State's nationals, but only the moral damage caused to the honour, dignity, prestige and "subjective right" of the State (as an international person), such damage being qualified as moral damage to the injured State. Moral damage to nationals and moral damage to the State were thus to be distinguished.

325. With regard to moral damage to nationals, the Special Rapporteur noted that, notwithstanding the lack of uniformity among national legal systems, international law provided that such damage was to be compensated for as an integral part of the principal damage suffered by the injured State. One of the leading cases on the issue was the "*Lusitania*" case (1923), in which the umpire had concluded that both civil law and common law recognized injury caused by invasion of private rights.<sup>264</sup> The umpire had further concluded that international law provided compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social position or injury to one's credit and reputation. For the umpire, those injuries were real, and the mere fact that they were difficult to measure by money standards did not make them any less real and was not sufficient reason why the injured person should not be compensated. Such damages, the umpire had added, were not a penalty. The Special Rapporteur stated that the "*Lusitania*" case was not an exception and that other international tribunals had also granted compensation for moral injury.<sup>265</sup> This moral injury to individuals (which may extend to the

State's agents as private persons) should, however, be distinguished from moral damage to the State.

326. Some authors had characterized moral damage to the State as the infringement of the State's "subjective right";<sup>266</sup> others had referred to it as political injury.<sup>267</sup> It seemed to the Special Rapporteur that the term "political" was probably intended to stress the "public" nature acquired by moral damage when it affected more immediately the State in its sovereign quality and international personality. In the Special Rapporteur's view, moral damage to the State consisted in (a) the infringement of the State's right *per se*, and (b) injury to the State's dignity, honour or prestige. He referred to the former as a "legal" or "juridical" injury, such injury deriving from any infringement of the offended State's "subjective right", regardless of the existence of any other kind of damage. Both (a) and (b) should be understood as moral damage to the injured State.

327. The Special Rapporteur also explained that, despite the distinction between them, and despite the fact that their reparation was achieved in principle (and frequently also in practice) by the distinct remedies of pecuniary compensation and satisfaction, material and moral damage to the injured State, as defined, were not infrequently confused in the award of remedies. In particular, moral damage to the State might be "absorbed", so to speak, by pecuniary compensation, so that at first sight the specific remedy for the moral damage would seem to be hardly perceptible. However, a more careful examination of international jurisprudence and diplomatic practice revealed that moral damage to the injured State had been given special reparation which could be classified as satisfaction.

328. As regards the distinction between "material" damage and "non-material" or "moral" damage, most members of the Commission agreed with the Special Rapporteur's general premise that damage suffered by a State or by individuals as a result of an internationally wrongful act could broadly be divided into those two categories. It was agreed that a State, in addition to financial losses, might also suffer damage in respect of its honour and dignity and that a remedy should be provided for the latter damage. Views differed, however, as to the content of material injury and moral injury, i.e. what types of injury should be considered as "material" or "moral" damage and hence covered by the draft articles. Views also differed as regards the forms of remedy that were most appropriate for the various types of damage. For example, while some members were not certain that "moral" damage to agents of a State was independent of "moral" damage to the State itself, as the Special Rapporteur had suggested, some others agreed with the Special Rapporteur on that issue. The views expressed on the various forms of

the *Grimm* case (1983) (see A/CN.4/425 and Add.1, para. 12 *in fine*) (*International Law Reports* (Cambridge), vol. 71 (1986), pp. 650 *et seq.*, at p. 653).

<sup>264</sup> See, for example, D. Anzilotti, *Cours de droit international*, vol. I (French trans. by G. Gidel of 3rd Italian ed.) (Paris, 1929), pp. 493-494.

<sup>267</sup> See the sixth report by F. V. García Amador on State responsibility, *Yearbook . . . 1961*, vol. II, pp. 8 and 24, document A/CN.4/134 and Add.1, paras. 31 and 92; and F. Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", *Revue générale de droit international public*, vol. 78 (1974), p. 936.

<sup>264</sup> United Nations, *Reports of International Arbitral Awards* (hereinafter referred to as UNRIAA), vol. VII, pp. 32 *et seq.*, at p. 35.

<sup>265</sup> The Special Rapporteur cited as examples the *Chevreau* case (1931) (UNRIAA, vol. II, pp. 1113 *et seq.*), the *Gage* case (1903) (*ibid.*, vol. IX, pp. 226 *et seq.*), the *Di Caro* case (1903) (*ibid.*, vol. X, pp. 597-598), the *Heirs of Jean Maninat* case (1905) (*ibid.*, pp. 55 *et seq.*) and

damage in relation to the forms of remedy are analysed below in the sections dealing with articles 8, 9 and 10 (see paras. 344 *et seq.*).

329. With regard to the use of the expression "moral damage", a few members preferred the expression "non-material damage", which, in their view, more appropriately corresponded to the type of responsibility a State would incur, namely non-material and (according to some writers) political responsibility. The expression "non-material damage", in their view, also avoided unnecessary theoretical discussions about whether a State as a collective entity was capable of having "moral" attitudes—attitudes which, in most legal systems, were attributed to human beings only.

330. The Special Rapporteur stated that, in the area of primary rules, such as maritime delimitation, trade and economic relations, the uses of watercourses, etc., conflicts of interest between groups of States (coastal and land-locked, poor and rich, upstream and downstream, etc.) were clear and rather well defined. In his view, that was not as much the case with secondary rules. Any State might any day be either an author State or an injured State. Therefore all States would, on balance, draw equal advantages and disadvantages from any rules adopted.

331. A few members did not agree with the Special Rapporteur's analysis that all States were on an equal footing in matters of remedy. While it was true that on legal grounds States were equal, factually States were not equal. There were States which were capital-exporting and those which were capital-importing; there were former administering States and former colonies; there were militarily powerful States and weaker States, etc. State practice upon which the Special Rapporteur had relied had grown also in the light of such factual inequalities between States. Thus, formulating abstract rules on reparation on the assumption that States had equal interests might lead to undesirable consequences.

332. The Special Rapporteur stressed in his reply that he had not intended to deny the existence of differences between States due to historical, economic and other factors. He had only meant that the conflicts of interest due to such differences did not affect the choice of secondary rules as much—and as directly—as they surely affected choices with regard to primary rules; and equity, which in his view played an implied role in the application of any rule, could surely be invoked in favour of a poor injured or responsible State more than in favour of a rich one. It was also his belief that it was mainly in the area of primary rules that the vital needs and concerns of the developing countries should be taken into fuller account than had been done so far by the developed world. Another matter was, of course, the problem of taking account of inequality of might when dealing with countermeasures. With regard to the latter, it would be indispensable to avoid formulating any rules which might favour the strong and the rich.

333. A number of further comments of a general nature were made in the Commission, relating to the overall approach of the Special Rapporteur to remedies and the methodology he had followed in his second report.

334. In the view of some members, the Special Rapporteur had made, perhaps unnecessarily, a rigid distinction between various remedies. According to these members, satisfaction and pecuniary compensation were just two forms of reparation by equivalent, both intended to wipe

out the consequences of a wrongful act when restitution in kind was impossible or inadequate. Compensation corresponded to the pecuniary form of reparation by equivalent and satisfaction to the other forms of non-pecuniary reparation.

335. While not questioning the ultimate functional unity of reparation in a broad sense, all the various forms of which contained a compensatory as well as a retributive element, the Special Rapporteur believed that satisfaction occupied a particular place and performed a distinct function within the general framework of reparation. This was proved, in his view, by a very rich and varied practice of States, including the award of 30 April 1990 by the arbitral tribunal in the "*Rainbow Warrior*" case.<sup>268</sup>

336. In the view of some other members, the Special Rapporteur had approached remedies primarily from the point of view of injury to aliens in cases of torts. Most of the judicial and arbitral decisions, upon which he seemed to have relied dealt with alleged damage to property, bodily harm or loss of life affecting aliens. The second report did not contain much material on different situations, for example cases of violation of a general rule of international law pertaining to the environment, international trade or treaty obligations. It was, in the view of these members, unclear, under the approach adopted, what consequences would emerge in cases of violation, for example, of a disarmament treaty. Would the so-called injured State, in addition to the right to suspend or terminate the treaty, have a right to pecuniary compensation? The problem with too much reliance on tort cases was that those cases involved real interferences with property, rights or interests of the injured party. However, in most treaty violations, one confronted interferences with the "expectations" of the so-called injured State. These members were not certain how the Special Rapporteur's approach, namely that the injured party should be put in as good a position as it would have been in if the wrongful act had not occurred, would apply to cases other than torts. It was noted that, in State practice under the General Agreement on Tariffs and Trade, which protected economic rights and thereby created economic expectations, violations of the treaty did not seem to lead to pecuniary compensation. Also, in the case of damage caused in armed conflicts, State practice did not support the presumption that the State which began the armed conflict should pay all the costs for reconstruction. In the view of these members, these matters were not sufficiently explored by the Special Rapporteur, and that limited his approach to remedies.

337. Commenting on these remarks, the Special Rapporteur stressed that, while he still maintained that many of the rules on reparation were developed through practice concerning injury to nationals and their property, he had not relied solely on that practice. With regard to both pecuniary compensation and satisfaction, he had also taken into account practice in other areas. As regards in particular the "expectations" mentioned by one member, he was not sure that that was a matter necessarily to be covered by the general rules presently under discussion. As for the consequences of a violation of a disarmament treaty, they

<sup>268</sup> *International Law Reports* (Cambridge), vol. 82 (1990), pp. 500 *et seq.*

were among the matters he would cover in his third report, which would deal with countermeasures and the conditions under which they could be resorted to. Concerning, finally, the hypothesis of post-war settlements, he thought that equity and reasonableness would not fail to have a bearing in avoiding the total disruption of a defeated State's economy. One should not go so far in leniency, however, as practically to condone an act of aggression. Again that was a matter to be dealt with in connection with the crimes referred to in article 19 of part I of the draft.

338. As regards the material cited by the Special Rapporteur, two points were raised, one regarding the citation of old arbitral awards and the other regarding reliance on diplomatic practice. In respect of the first point, some members felt that the second report covered too many old cases and instead should have relied on newer material. Many of the decisions in older cases, particularly those of the late nineteenth or early twentieth centuries, had been given during colonial practice and they no longer represented contemporary international law. The *Boxer* uprising<sup>269</sup> was mentioned as a case which should not be invoked as a precedent. On that issue, some other members believed that it was important rigorously to examine past State practice. States' behaviour in the past and the consequences derived from it were essential in formulating rules governing the future. That did not mean, in their view, that all past State practice was indiscriminately relevant, but it provided a clearer picture and guided those who were in a position to make a decision. Even the worst cases, such as the *Boxer* case, could be used as a warning signal so as not to repeat the same mistake. In the final analysis, it was stated, what was important was whether a particular rule, regardless of its origin, was part of contemporary international law and whether it was generally accepted by States.

339. With regard to the second point, namely too much reliance on diplomatic practice, a few members felt that in diplomatic practice many political factors usually played an important role and that those factors could not be easily pinpointed. Hence legal principles might not have always been relied upon to resolve disputes of this nature at the diplomatic level. That, in their view, somewhat reduced the value of such practice as sole evidence of international law.

340. With regard to the practice analysed being old, the Special Rapporteur stated that not all the cases cited were referred to as precedents. A number of them had been cited precisely in order to condemn, in the most unambiguous terms, practices of colonialist and imperialist States (notably Western States) incompatible with sovereign equality, and to justify paragraph 4 of draft article 10.<sup>270</sup>

341. As for reliance on diplomatic practice, the Special Rapporteur stated that it was precisely through diplomatic practice that general ("customary" or "unwritten") international law developed. The analysis of diplomatic practice was particularly essential in view of the relative scarcity of international jurisprudence, a scarcity due to the tendency not to resort to arbitration as frequently as desirable.

342. It was also pointed out in the Commission that any approach to remedies should include the possibility of enhancing the peaceful settlement of disputes between States. There had been many cases in which States had resolved questions of remedies peacefully among themselves and, without accepting responsibility, had provided compensation. Those types of settlement, rather typical of those following the Second World War, were made through lump-sum agreements, *ex gratia* payments and other types of political settlement. It might be useful to include an article in the draft expressly stipulating that the forms of reparation provided for in the articles should apply without prejudice to any other form of settlement based on an agreement between the parties.

343. With regard to these points, the Special Rapporteur explained that the subject-matter of his second report did not include any provision directly or indirectly concerning peaceful-settlement procedures. Reference to such procedures would be made in his third report, on reprisals; and settlement procedures would be further developed in part 3 of the draft. As regards lump-sum agreements and *ex gratia* settlements, there was nothing in the draft articles submitted which could represent an obstacle thereto.

## 2. DRAFT ARTICLES 8, 9 AND 10 OF PART 2

### ARTICLE 8 (Reparation by equivalent)<sup>271</sup>

344. The Special Rapporteur stated that the concept of reparation by equivalent was governed by the well-known principle that the result of reparation in a broad sense should be the wiping out, to use the dictum of the *Chorzów Factory* case (Merits), of all the legal and material consequences of the unlawful act in such a manner as to re-establish, in favour of the injured party, the situation that

<sup>271</sup> Draft article 8 submitted by the Special Rapporteur in his second report read:

#### "Article 8. Reparation by equivalent

"1 (ALTERNATIVE A). The injured State is entitled to claim from the State which has committed an internationally wrongful act pecuniary compensation for any damage not covered by restitution in kind, in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed.

"1 (ALTERNATIVE B). If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind in accordance with the provisions of article 7, the injured State has the right to claim from the State which has committed the wrongful act pecuniary compensation in the measure necessary to make good any damage not covered by restitution in kind.

"2. Pecuniary compensation under the present article shall cover any economically assessable damage to the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals.

"3. Compensation under the present article includes any profits the loss of which derives from the internationally wrongful act.

"4. For the purposes of the present article, damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.

"5. Whenever the damage in question is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly."

<sup>269</sup> See C. Eagleton, *The Responsibility of States in International Law* (New York, 1928), pp. 185-186.

<sup>270</sup> See footnote 291 below.

would exist if the wrongful act had not been committed.<sup>272</sup> In view of the incompleteness that frequently characterized restitution in kind, it was obviously through pecuniary compensation that that principle could eventually be effectively applied. Reparation by equivalent was qualified by three features that distinguished it from other forms of reparation. The first was that it could be used to compensate for damage which could be evaluated in economic terms, including moral damage to nationals. The second was that, although some measure of retribution was present in any form of reparation, reparation by equivalent performed by nature an essentially and predominantly compensatory function. The third was that the objective of reparation by equivalent was to compensate for all the economically assessable damage caused by the internationally wrongful act, but only for such damage. Indications to that effect were to be found in the relevant literature and in case-law, for example the "*Lusitania*" case<sup>273</sup> and the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war (1930)*.<sup>274</sup> The Special Rapporteur mentioned a number of issues related to pecuniary compensation that should be examined. They included: the compensatory function of reparation by equivalent and the question of "punitive damages"; whether such reparation should also be granted for "moral" damage; indemnification of "indirect" as well as "direct" damage; the effect of multiplicity of causes on this form of reparation; the effect of the injured State's conduct on reparation; and the question of *lucrum cessans* as distinguished from *damnum emergens*.

345. The Special Rapporteur was aware that the standards of indemnification in international law did not present the high degree of uniformity that would be desirable. But that did not mean, in his view, that no general principles could be determined in international law that were of sufficient clarity for application or codification. He further believed, on the other hand, that, considering the nature of the topic, it would be impossible and indeed undesirable to identify or develop rigid and detailed rules susceptible of mechanical application to every conceivable breach. Many of the principles regarding pecuniary compensation, even though they were originally modelled on municipal-law principles, had now become rules of international law. Those rules did more than provide just general guidance, as some authors suggested: they provided sufficient grounds for their codification. Besides, it was within the function of the Commission to fill the "gaps", where more detailed rules were necessary and conceivable, by progressively developing the law. In the field of international responsibility more than in any other, the Commission was not entrusted with the task of codification alone. Whenever the study of doctrine and practice indicated a lack of clarity, uncertainty or a gap in existing law, the Commission should not necessarily declare a *non liquet*. An effort should be made to examine the issue *de lege ferenda* and find out whether the uncertainty might be removed or the gap filled by developing the law. Taking into account State practice and the purpose of reparation by equivalent, the Special Rapporteur

proposed two alternatives for paragraph 1 of article 8 which defined the general scope of pecuniary compensation.

346. It was generally agreed in the Commission that the dictum of the PCIJ in the *Chorzów Factory* case,<sup>275</sup> namely that reparation was to wipe out all the consequences of the wrongful act and that damages should be awarded for loss sustained which would not be covered by restitution in kind, should be the point of departure in formulating the articles on remedies. That common ground indicated that there was a certain interdependence between the various forms of remedies. The difficulty some members found with draft article 8 was that its relationship with draft article 7, on restitution in kind,<sup>276</sup> which was now before the Drafting Committee, was not brought out clearly. It was recalled that article 7 did not define the content of restitution, and yet article 8, as proposed, relied on such a definition, which was not there. As a result, the scope of article 8 became unclear. The two alternatives for paragraph 1 did not clarify the situation. Alternative A simply spoke of "any damage not covered by restitution in kind", without giving any explanation about the meaning of that phrase. Alternative B appeared to give a definition of restitution in kind that was based on the establishment of a theoretical or hypothetical situation which would have existed if the breach had not occurred. Such a broad definition of restitution in kind necessarily covered the whole range of reparation and always comprised a certain amount of pecuniary compensation. The ambiguity in article 8 would therefore create confusion. Even the title of the article was misleading, since the award of damages—the subject of article 8—was based on the assumption that damage could not be restored by the return of the object that had been damaged or its equivalent. Indeed, if an equivalent of the damaged object could be offered, that would constitute restitution. What article 8 covered was basically pecuniary compensation and it should therefore be entitled as such.

347. The Special Rapporteur explained that alternatives A and B of paragraph 1 were intended, as a number of speakers had noted, only as a choice for the Drafting Committee. As regards the relationship between article 8, paragraph 1, and article 7, he believed that, since the combined effect of the two provisions would be the re-establishment of the situation that would exist if the unlawful act had not been committed—and since *naturalis restitutio* could hardly be expected to achieve that result by itself—it was really not necessary in the text to take an explicit stand between the broad and the narrow definitions of *restitutio*. However, while he had thought it to be indispensable to go beyond the formulation of draft article 6 as submitted by the previous Special Rapporteur,<sup>277</sup> he would be reluctant to suggest that the Commission now go too far in the opposite direction. As regards the title of article 8, he agreed that "Pecuniary compensation" would be preferable. That title would also meet the point made by one member that reparation by equivalent might in certain cases, according to Islamic private law, represent a form of *naturalis restitutio* rather than compensation—i.e. in the case of "restitution" of an object of the same kind as the "lost" original.

<sup>272</sup> Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17*, p. 47.

<sup>273</sup> See UNRIAA, vol. VII, p. 39.

<sup>274</sup> *Ibid.*, vol. II, pp. 1035 *et seq.*, at pp. 1076-1077.

<sup>275</sup> See footnote 272 above.

<sup>276</sup> See footnote 261 above.

<sup>277</sup> See footnote 255 above.

348. With regard to how much the article on pecuniary compensation should be influenced by progressive development of international law, two general views were expressed. One view supported the idea of developing the law through the exercise of progressive development, particularly in view of the fact that much of the law in the area was influenced by municipal law and should therefore be thoroughly examined and that States had an interest in modifying and developing the law further. However, noting the comment by the Special Rapporteur to the effect that the actual payment of pecuniary compensation depended on assessment of the facts of a particular case, it was unclear to these members what matters were appropriate for development. The other view urged caution in developing rules on the payment of compensation beyond what was already established by the *Chorzów Factory* case. The problem which the supporters of this view saw was that, in such development, the Commission would most likely look into municipal law of torts, a concept basically elaborated in the Western industrial States and not properly developed in all developing States. Such development might therefore run counter to the interests of developing countries, which formed the majority of States. These members were also not in favour of detailed rules on pecuniary compensation, and in particular on the amount of such compensation. They preferred a flexible approach.

349. The Special Rapporteur reiterated his belief in the need to take into full consideration the position of developing States also in codifying the law of State responsibility, as in any other relevant area of international law. He had already explained in what sense he believed that a difference did exist in that respect between different kinds of rules (for example, primary rules and secondary rules, rules on reparation and rules on countermeasures). He also explained in what sense equity and reasonableness could be used by arbitrators in order to adapt the general rules to the circumstances of each case.

350. With regard to *paragraph 1* of article 8, some members felt that it did not seem to have fully taken into account the definition of the "injured State" in article 5 of part 2 as provisionally adopted. According to that article, there might be many injured States, but not all of them could have the right to financial compensation. A practical difficulty would, they felt, arise, for example where a person had suffered damage as a result of a violation of a human rights treaty. Every other State party would be deemed to have been injured, but to what State could the economically assessable damage be imputed? If it were maintained that damage caused to a national of a State was always damage to the State itself, the right to claim compensation would be denied because it was normally the home State which violated the rights of its own national.

351. Similarly, in the event of damage to the environment, there might be cases where there would be several injured States entitled to claim cessation and restitution. Very often, however, only one or two States might actually have suffered harm not covered by restitution and could claim pecuniary compensation. The situation of those injured States did not seem to be quite clear under *paragraph 1* of article 8.

352. Concerning the relationship of *paragraph 1* with the definition of the injured State, the Special Rapporteur stated that the *paragraph* should be read in conjunction

with *paragraph 1* of draft article 10.<sup>278</sup> According to the draft articles, whenever no material damage could be identified to the detriment of one or more of the injured States, *paragraph 1* of article 10 should apply. That provision covered both the case where no material damage had been sustained—or the case of human rights violations by another State to the detriment of its own nationals—and the case where the wrongful act affected a number of injured States in different ways. The latter might be the case of violations of rules on the environment. That was precisely the reason why, given the broad concept he had adopted for moral damage to the State (covering also the legal injury involved in the infringement of any "subjective right"), the reference to moral and legal injury in *paragraph 1* of article 10 was, in his view, indispensable.

353. *Paragraph 1*, in the view of a few members, did not seem to take into account the time factor, namely the time when damage should be assessed; for example, whether the assessment of damage at the time an agreement for pecuniary compensation had been reached by the parties was final. If that was the case, the question arose how that understanding could be reconciled with the proposition that damages should be awarded to restore the situation that would exist if the wrongful act had not been committed, since in the time period between the agreement and the actual implementation of the agreement the damage might be aggravated. It was also suggested that a provision on limitation should be formulated to indicate a time-limit within which a claim for pecuniary compensation could be made. Otherwise claims might be made indefinitely.

354. The Special Rapporteur pointed out that, much as he appreciated the importance of the issue of the time element raised by a few members, the matter should not be covered by article 8. Any such issues, as well as those concerning limitation, should be left to the general rules eventually to be codified in part 3 of the draft.

355. With regard to the two alternative texts proposed for *paragraph 1*, some members preferred alternative A. For them, alternative A, despite its ambiguity, provided a more viable approach to pecuniary compensation and was more efficiently drafted. Some other members preferred alternative B, because it dealt with what pecuniary compensation was about, namely "making good" any damage not covered by restitution in kind. A few members saw no substantial difference between the two alternatives, while one member could not support either text and preferred one which made it clear that, within the claim for reparation, pecuniary compensation could be claimed to the extent that reparation could not be made or had not been made by restitution.

356. Many members found the structure of *paragraph 1* in both alternatives inappropriate and preferred that the *paragraph* be formulated with explicit reference to the obligation of the wrongdoing State to pay pecuniary compensation. Some members also made drafting suggestions.

357. With respect to the alternative formulations of *paragraph 1*, the Special Rapporteur confirmed the view of members who had found them equivalent in substance. In reply to the members who had made drafting suggestions, he stated that he was open to drafting improvements. That

<sup>278</sup> See footnote 291 below.

included the question whether the draft articles would be better formulated in terms of rights of the aggrieved State or of obligations of the offending State.

358. Paragraph 2, the Special Rapporteur stated, specified the type of damage for which reparation by equivalent should be made. In his view, when one began with the premise that all the damage and only the damage caused by a wrongful act must be compensated for, there would be no reason to make a distinction between direct and indirect damage. In doctrine, he said, an attempt was made to make such a distinction. Jurisprudence seemed to suggest that the concept of indirect injury was generally used to justify not awarding damages. However, no clear indications were given about the relationship between an event and damage that would justify its identification as indirect. As for a demarcation line beyond which injury was indemnifiable, the Special Rapporteur referred to administrative decision No. II of the United States-German Mixed Claims Commission of 1 November 1923, in which the tribunal had stated that it did not matter whether the loss was indirect or direct so long as there was a clear and unbroken connection between the wrongful act and the loss complained of.<sup>279</sup> Accordingly, in the Special Rapporteur's view, pecuniary compensation must cover both so-called direct damage to the State, such as that caused to its territory, its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft and spacecraft, and so-called indirect damage to the State, such as that caused through the persons, natural or legal, of its nationals or agents. Within the latter context, the Special Rapporteur drew a distinction between patrimonial damage and personal damage. Personal damage included physical and moral damage to persons and involved such injuries as unjustified detention or any other restriction on freedom, torture or other physical injury to the person, and death. In international case-law and State practice, injuries of that kind were treated, in so far as they were capable of economic assessment, according to the rules and principles that applied to pecuniary compensation for material damage to the State. As for patrimonial damage, it had always been the area in which pecuniary compensation had found its most natural scope, and it was in connection with such damage that the principles, rules and standards for the application of the remedy of pecuniary compensation had principally been developed by judicial decisions and diplomatic practice. It was mainly in relation to patrimonial injury that judicial decisions and doctrine had had recourse to distinctions and categories typical of private law—whether civil or common—and had adapted them to the peculiar features of international responsibility.

359. Two issues in particular, in paragraph 2, generated discussion in the Commission. They were the expressions “economically assessable damage” and “moral damage”. With respect to “economically assessable damage”, some members felt that the expression was not entirely clear and did not serve as guidance to arbitrators who had to make such determinations because it simply stated the obvious, namely that, in order to be compensated for in pecuniary terms, damage had to be capable of being assessed in economic terms. For some other members, the expression “economically assessable damage” was not so ambiguous.

In many instances, in assessing damage, international tribunals had, they believed, been guided by municipal legal systems. Under those systems, damage was assessed, in the case of property, on the basis of the market value at the time of the damage or loss, or, if that was not possible, on the basis of the intrinsic value; in the case of personal injury, damage was assessed on the basis of the age and family and financial position of the injured person or the person killed. Presumably, that was the sense in which the expression “economically assessable damage” was used. On the other hand, it was true that international tribunals used such indices merely as signposts to facilitate assessment of the loss and that much depended on the individual facts of the case. Jurisprudence in the matter varied from State to State. That did not, however, vitiate the principle, the statement of which was an acknowledgement of current practice.

360. For yet other members, the expression “economically assessable damage” was much too subjective. It depended on the philosophical approach and led to controversial interpretations. The expression was neither explained in the second report nor made clear in article 8 itself. No indication was given whether it excluded moral damage to the State itself or included the costs of preventive measures or economic losses actually sustained as a direct result of such measures. Obviously, the expression did not refer to quantifiable economic losses alone. But was it sufficient for a loss to be economically quantifiable in order for it to be regarded as economically assessable damage? Or did the loss have to have been actually sustained? Such questions took on particular importance in environmental law and most likely there had not yet been any arbitral decisions on them. The question as to what could or should be understood by the expression “economically assessable damage” gave rise to many complex issues, many of them of a contemporary nature, which paragraph 2 failed to elucidate.

361. A few members also felt that, in the final analysis, what mattered was that compensation should be adequate. That was, in their view, particularly relevant in cases of nationalization. It meant that the financial status of the offending State in such cases should also be taken into account. That approach was consistent with the concept of “excessive onerousness” which had been introduced in draft article 7, on restitution in kind, but not in draft article 8, on reparation by equivalent. These members saw no reason why that concept should be absent from article 8.

362. Considering the different views expressed—some members finding the expression “economically assessable damage” unsatisfactory and others finding it acceptable—the Special Rapporteur was ready to give the question of terminology some further thought. He submitted, however, that it would not be easy to find a better expression to indicate the criterion to be followed in determining the amount of pecuniary compensation. Any other criterion was bound to appear either too general or too specific. The criterion proposed left the necessary latitude to arbitrators and to the parties. In his view, equity was an implicit element of any rule or decision; and the same applied to reasonableness. An express reference to earlier elements might distort the general principle expressed in the *Chorzów Factory* case,<sup>280</sup> which had met, it seemed, very wide acceptance in the Commission. Equity and reason could not

<sup>279</sup> UNRIAA, vol. VII, pp. 23 *et seq.*, at p. 29.

<sup>280</sup> See footnote 272 above.

naturally lead any arbitrator to take due account of the circumstances of the case, including the respective economic and political situations of the parties. As regards, finally, the suggestion that one extend to pecuniary compensation the "excessive onerousness" limitation proposed for restitution in kind, the Special Rapporteur explained that that limitation was envisaged in draft article 7 only in a relative sense. It was used notably in connection with the relationship between *naturalis restitutio* and pecuniary compensation, and allowed the offending State to revert to pecuniary compensation from *naturalis restitutio* in case the latter proved to represent an excessive burden.

363. The second issue concerning paragraph 2 on which many comments were made was that of pecuniary compensation for "moral damage". Some members were not convinced by the Special Rapporteur's analysis. They felt that there was no uniformity in compensation awarded by arbitral tribunals for unlawful arrest or imprisonment and for grief and indignity and that it was over-optimistic to believe, as did the Special Rapporteur in his second report, that relatively uniform solutions could be assumed to exist. It was also felt by some members that the Special Rapporteur had perhaps relied too much on fragmented municipal decisions and had generalized them. The absence of such uniform rules, these members felt, did not of course prevent the Commission from establishing such standards if it deemed it possible, necessary or wise to do so. They did not feel, however, that it was appropriate to do so and preferred the deletion of the reference to "moral damage" in paragraph 2.

364. Some other members did not dispute the possibility of awarding compensation for "moral damage". They thought that, on theoretical grounds, "moral damage" did not belong in paragraph 2 on pecuniary compensation, since it could not be economically assessed. They agreed that the tendency of judges and arbitrators was more often to try to assess non-patrimonial damage in terms of its economic or material aspects or consequences, which could serve as a basis for calculating compensation, as in the *Corfu Channel (Merits)*<sup>281</sup> and "*Lusitania*" cases. They agreed that, in instances of death or physical injury, as in cases of detention, etc., it was relatively easy to assess, in pecuniary terms, the damage to be compensated for. But they found it practically impossible to do so in cases of mental suffering, such as humiliation, shame or degradation. They did not intend to imply that, in such cases, the injured person should not claim satisfaction; but treating such satisfaction as reparation by equivalent was not true to the principle that reparation by equivalent was of an exclusively compensatory nature. For that reason, they felt that the reference in paragraph 2 to "moral damage sustained by the injured State's nationals" should be transferred to draft article 10, on satisfaction, which referred to the possibility of "nominal or punitive damages". It was also pointed out that, even though not all municipal law granted pecuniary compensation for moral damage to individuals, international arbitrators often took account of such mental suffering in their calculation of compensation.

365. On the question of moral damage to private parties, the Special Rapporteur felt that the Commission should not neglect that important element of State responsibility, an element closely connected with respect for human rights. As regards the difficulty—but surely not an impossibility—

of assessing moral damage in monetary terms, he did not believe it should represent an obstacle to the inclusion of moral damage to human beings in draft article 8. As explained in the second report, that would not be an appropriate object for satisfaction, a remedy which was appropriate only for moral/legal injury to the State.

366. With respect to *paragraph 3*, the Special Rapporteur explained that, in the context of patrimonial damage, namely damage to property, authors generally seemed to agree that compensation should be paid not only for the value of the damaged property itself (*damnum emergens*), but also for the loss of profit that could have been derived from that property (*lucrum cessans*). In State practice, however, while compensation for the former loss had not posed any difficulty, problems had at times arisen concerning the latter and required special attention. He mentioned two problems regarding *lucrum cessans*: one related to the distinction between direct and indirect injury—namely in connection with what lost profits compensation should be paid—and the other to the extent to which lost profits should be compensated for, particularly in respect of damage to property rights on a going concern of an industrial or commercial nature. As regards the former problem, the Special Rapporteur mentioned that in at least two cases<sup>282</sup> the tribunals had denied compensation for lost profits on the grounds that they were uncertain, not immediate, or indirect. In the literature, however, a clear distinction had been made between indirect damage and profit; and profit had been found to be a legitimate component of pecuniary compensation. For lost profits to be compensable, the doctrine seemed to support the view that it was not necessary for the judge to determine with certainty that the damage (*lucrum cessans*) arose out of the wrongful act. It was sufficient if it could be presumed that, in the ordinary and normal course of events, the identified loss would not have occurred if the unlawful act had not occurred. The Special Rapporteur cited a number of cases which supported that conclusion.<sup>283</sup> As for the calculation of *lucrum cessans*, he mentioned two methods: the *in abstracto* and *in concreto* systems. The more commonly used *in abstracto* method consisted in calculating interest on the amounts due by way of compensation for the principal damage. Under that method, either a larger amount of pecuniary compensation which included profits was granted in a lump sum, or profits were calculated on the basis of the profits earned by the same physical or juridical person in the period preceding the unlawful act, or earned during the same period by similar business concerns. The *in concreto* method was used, depending on the circumstances of the case, to calculate profits which the injured enterprise or property would have made in the period in question. That method involved complicated formulas for computation.

<sup>282</sup> The "*Canada*" case (1870) (J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II, pp. 1733 *et seq.*, at p. 1746); and the *Lacaze* case (1864) (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, vol. II, pp. 290 *et seq.*, at p. 298).

<sup>283</sup> The "*Cape Horn Pigeon*" case (1902) (UNRIAA, vol. IX, pp. 63 *et seq.*, at pp. 65-66); the *Delagoa Bay Railway* case (1900) (G. F. de Martens, *Nouveau Recueil général de Traités*, 2nd series, vol. XXX, pp. 329 *et seq.*, at p. 407); the "*William Lee*" case (1867) (Moore, *op. cit.* (footnote 282 above), vol. IV, pp. 3405-3407); and the *Chorzów Factory* case (Merits) (1928) (*P.C.I.J., Series A, No. 17*, pp. 47-48).

<sup>281</sup> Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

367. With regard to the calculation of profit involving reparation due for the unlawful taking of foreign property of a going concern of a commercial or industrial nature, the Special Rapporteur felt that State practice should not be ignored. He explained that a review of State practice seemed to indicate that the trend with regard to unlawful taking had been to calculate profits which would approximate to the complete wiping out of the damage caused by the wrongful act. In *AMINOIL v. Kuwait* (1982), where expropriation was considered lawful in connection with lost profits, the tribunal found that the Discounted Cash Flow method, which was unsuitable for the calculation of lost profits in a lawful take-over, might be adequate in a case of unlawful expropriation.<sup>284</sup> That approach reflected the understanding that the application of such a method would, in a case of wrongful taking, ensure compensation more likely to restore the situation that would have existed if the wrongful act had not been committed. The Special Rapporteur deemed it indispensable to stress, however, that all that applied to the unlawful taking of foreign property. It did not prejudice the solution in cases of lawful nationalization.

368. With respect to paragraph 3, many members of the Commission, while admiring the analysis of abundant materials by the Special Rapporteur in his second report, did not feel that that analysis was fully reflected in the proposed text. Some members agreed with the Special Rapporteur that an answer to what constituted compensable lost profits was found in two presumptions: that of the existence of profits, and that of a causal link with the wrongful act. But they found the reference, in paragraph 3, to "any" profits the loss of which derived from the internationally wrongful act much too broad. Such a reference, they felt, encompassed all possible profits without any qualification, whereas care should be taken to cover only the lost profits which could be clearly defined and were more than a mere possibility or hope, or speculative profits. In connection with damage caused by pollution, it had often been held that the loss of profits had to be a direct result of the pollution or at least that the loss should have been foreseeable. These members wondered why the Special Rapporteur had not introduced into the text of article 8 any of the qualifications discussed in paragraphs 65 to 76 of his report (A/CN.4/425 and Add.1). One member cautioned against taking a narrow approach to lost profits in terms of limiting it to the property of private individuals. In his view, some contemporary practice unrelated to the property of private individuals was of particular relevance. He referred to the judgment of the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.<sup>285</sup>

369. As regards the reference to pollution in general and the international transport of oil in particular, the Special Rapporteur stated that paragraph 3 of article 8 covered only unlawful acts; and it only set forth a general rule, surely subject to derogation by special conventions such as those concerning oil transport. Concerning in particular the injured parties, he had not intended to exclude damage

to the State itself: on the contrary, damage to the State—actually the most important aspect of the matter—absorbed any damage (patrimonial or personal, including moral damage) to private parties.

370. With regard to the assessment of lost profits, it was felt by some members that most of the methods discussed in the Special Rapporteur's second report had been taken from nationalization cases and did not result in any clear-cut measurement. Perhaps less weight, they thought, should be given to the methods used in nationalization cases and more attention paid to treaty regulations, for example on international transport of oil and on pollution. In any case, not all lost profits had to be compensated for—only such profits, as indicated in paragraph 65 of the second report, as were "normal and foreseeable" and "in all probability [would] have been obtained" if the wrongful act had not been committed. A suggestion was made that it would be sufficient to state in paragraph 3 of article 8 that compensation for lost profits should be reasonable and equitable.

371. On the question of a causal link between a wrongful act and injury, dealt with in *paragraph 4*, the Special Rapporteur proposed the criterion of a clear and unbroken causal link between the two. Those two criteria, and not the "directness" of the damage, he felt, should determine whether damage was indemnifiable. He referred to the literature in support of that view. He also explained that references had been made to the "normality" and "predictability" criteria, meaning that an injury was properly linked to a wrongful act when the normal and natural course of events would indicate that the injury was a logical consequence of the act or when the author of the wrongful act could have foreseen the damage he would cause. The Special Rapporteur referred to the award in the *Portuguese Colonies* case (Naulilaa incident) (1928), where Germany was held responsible for the injuries caused to Portugal by the revolt of the indigenous population in Portuguese colonies. It was alleged that the revolt had been triggered by the German invasion and Germany was held responsible for all the damage it could have anticipated. On the contrary, damages were not awarded for injuries that could not have been foreseen.<sup>286</sup> The Special Rapporteur noted that, in State practice, references were also made to "proximity"—as, for example, in the claim by Canada following the disintegration of the *Cosmos 954* Soviet nuclear satellite in 1978<sup>287</sup>—a criterion not without ambiguity. Against that background, the Special Rapporteur believed that the causal link criterion should operate as follows: (a) damages must be fully paid in respect of injuries that were caused immediately and exclusively by the wrongful act; (b) damages must be fully paid in respect of injuries for which the wrongful act was the exclusive cause, even though they might be linked to that act not by an immediate relationship but by a series of events each exclusively linked with each other by a cause-and-effect relationship.

372. Some members of the Commission agreed with the Special Rapporteur's analysis in his second report but did not find that it was adequately reflected in the formulation

<sup>284</sup> *International Legal Materials* (Washington, D.C.), vol. XXI (1982), pp. 976 *et seq.*, at pp. 1031 *et seq.*

<sup>285</sup> *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), (*Merits*). Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, at p. 149, para. 292 (13) and (14).

<sup>286</sup> UNRIAA, vol. II, pp. 1011 *et seq.*, at p. 1031.

<sup>287</sup> See *International Legal Materials* (Washington, D.C.), vol. XVIII (1979), p. 907, para. 23 of the claim.

of paragraph 4 of article 8. In particular, they expressed doubts about the concept of an "uninterrupted causal link", however long, which could result in virtually unlimited liability for the State and seemed much broader than the concept developed by the Special Rapporteur. In that context, it was suggested that, in cases of international delicts, the general interest was to limit the scope of consequences that would be covered by damages. In order to avoid a causal link growing to infinity, decisions of arbitral tribunals and scholars usually spoke of "proximate cause", "adequate causality", or "ordinary course of events", or stated that "the cause must not be too remote or speculative" or that there must be "a sufficiently direct causal relationship". The term "foreseeability" was also used to describe a causal relationship which was considered to be normal. That was the meaning of *proxima causa*, a well-established expression which was more precise and acceptable than the reference to an "uninterrupted causal link". The question was whether, from the course of events, a court had clear and convincing evidence—language used in the *Trail Smelter* case.<sup>288</sup> It therefore seemed to be against practice to rely without any limitation on an uninterrupted chain of events, however long. Most legal systems, and many arbitral decisions, relied on "proximate causation".

373. Some other members also expressed reservations about the "uninterrupted causal link" formula, but on other grounds. They felt that a distinction must be made between a causal link in the natural sciences and a causal link in the social sciences. In the former, one could perhaps, with certainty, rely entirely on the "uninterrupted causal link" formula because of the way in which natural elements operated and reacted. In social sciences, however, one always had to deal with human beings and the psychology which motivated their behaviour. Thus the uninterrupted causal link referred to in paragraph 4 should be qualified by other criteria, such as "proximity", "foreseeability", etc. Besides, it was mentioned that the issue of causality could not be a simple question of fact: there had to be some policy-based control over the responsibility of the offended State. One member, on the other hand, preferred paragraph 4 to be worded flexibly and the content of the rule left to be developed in practice.

374. The Special Rapporteur stated that, while believing, together with some members of the Commission, that the expression used in paragraph 4 was an adequate general indication for arbitrators to settle the various cases on their specific merits, he was ready to explore other possibilities. He felt, however, that the best solution might be an adequate explanation of the expression in the commentary.

375. With regard to the question of causal link and concomitant causes, the subject of *paragraph 5*, the Special Rapporteur stated that there might be circumstances in which injury was not caused exclusively by an unlawful act, but also by acts of third parties or the conduct of the injured State itself. In such cases, the wrongdoing State should not be held responsible for full damages: partial damages in proportion to the amount of injury attributable to the wrongful act should be awarded. That approach, the Special Rapporteur said, was supported by State practice.

376. Many members of the Commission generally accepted the thrust of paragraph 5. Their views differed, however, as to whether the paragraph should remain part of article 8 or be drafted as a separate article. Those who supported a separate article on concomitant causes did so on the basis of the importance and general applicability of the paragraph, namely that it was applicable to other forms of remedy as well. They felt that the paragraph raised the problem of the allocation of liability and, indeed, of diminished responsibility or exoneration from responsibility. Some other members felt that the expression "contributory negligence" should be avoided, since it had a special meaning in the common-law system. In that system, contributory negligence was used as a defence by the offending party in order to avoid the payment of any compensation. The intention of paragraph 5, however, was to apportion the damage in respect of different causes, and perhaps a different term could be used to reflect that idea.

377. The Special Rapporteur specified that paragraph 5 did not refer to contributory negligence as a cause of exclusion of wrongfulness. It referred to such conduct of the injured State as might have contributed to causing damage. He was ready, in any case, to consider different language and was equally open to the possibility of turning the paragraph into a separate article, as suggested by some members.

#### ARTICLE 9 (Interest)<sup>289</sup>

378. The very basic premise for including interest in compensation, the Special Rapporteur explained, was found in the concept of full compensation and of wiping out all the consequences of the wrongful act. He explained that, while there was general support in the literature and in State practice for awarding interest on the principal damages, there was no consistency as to the date from which interest should be calculated or on the interest rate. Regarding the date from which interest should be calculated (*dies a quo*), three positions had emerged. First, a method frequently resorted to was to calculate interest from the date on which the damage had occurred. A second method, less frequently used, was to calculate interest from the date on which the *quantum* decision was rendered. A third method, also commonly used, was to calculate interest from the date on which the claim for damages had been filed at the national or international level. The third method was based on the argument that only the submission of a claim to the offending State could reasonably create the presumption of that State's knowledge of its international obligation. In practice, the choice

<sup>289</sup> Draft article 9 submitted by the Special Rapporteur in his second report read:

#### "Article 9. Interest

"1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

"(a) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

"(b) shall run until the day of effective payment.

"2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result."

<sup>288</sup> UNRIIA, vol. III, pp. 1905 *et seq.*

of date was suggested by international tribunals, taking into account the circumstances specific to each case. Those circumstances included, for example, the fact that the claimant himself asked for interest only from the date on which the claim was made; the fact that the injured party waited a long time before putting forward a claim for damages; and the fact that interest had already been included in the principal sum and was recommended in a lump sum. The Special Rapporteur said that he felt that the proper date from which interest should be calculated was the date of the occurrence of the injury, since that would be closest to the concept of full compensation in accordance with the *Chorzów* principle.<sup>290</sup>

379. As regards the interest rate, the Special Rapporteur stated that there was no uniform practice and the issue had not been much commented on in the literature. In some cases, the rate applied in the offending State had been used, and in others the rate applied in the offended State. The Special Rapporteur said that he had not yet taken a position on the issue and would welcome the views of members. As for compound interest, the Special Rapporteur noted that, in the absence of uniform State practice, he was inclined to think that such interest should be awarded only when it was proved to be indispensable to ensuring full compensation in accordance with the *Chorzów* principle.

380. The Commission generally agreed that interest was part of compensation and that it was necessary to indicate somewhere in the draft articles the obligation to pay interest in order to ensure complete reparation for damage caused by an internationally wrongful act. Views differed, however, as to detailed rules applicable in respect of the date from which interest should accrue, the interest rate and compound interest.

381. For some members, any provision regarding interest should explicitly lay down the obligation to pay interest. However, draft article 9 as submitted by the Special Rapporteur did not stipulate that obligation and moved on to secondary issues of interest rates, etc. As regards the date from which interest should be calculated, some members preferred the date on which the damage had occurred, since it would bring compensation much closer to wiping out all the consequences of the wrongful act. Some other members preferred the date on which the claim was submitted, since it was on that date that the wrongdoing State was notified of the wrongful act and of its obligation. A few members expressed a preference for the date on which the award or judgment was given. Many members seemed to agree that interest should run until the date of payment. One member preferred, however, that interest should stop on the date of the award.

382. As regards interest rates, again various views were expressed. Some members felt that, in setting interest rates, the level of economic development of the States concerned should be taken into account. Commercial rates were preferable between States on an equal level of economic development and differential interest rates between States at different economic levels. Suggestions were also made to the effect that one should take into account the interest rates used in the countries concerned and the rates applied for public loans or loans offered by the World Bank.

383. In general, however, it was agreed that determining interest rates depended much on the factual situation of a particular case and should be left to the discretion of the court or arbitral tribunal. It was therefore preferable not to go into detail on the matter and not to formulate strict rules on interest rates.

384. It was also pointed out that, in practice, the allocation of interest was usually regarded as intended to compensate for the additional damage suffered by the victim as a result of the period of time which elapsed between the occurrence of the damage and the final payment of compensation. In such cases, interest was allocated on the compensation as a whole, without making any distinction between *damnum emergens* and *lucrum cessans*. However, the Special Rapporteur had seemed to put greater emphasis on the case of a claim regarding a sum of money or capital and on the fact that, in such cases, interest was awarded to compensate for the lost earnings resulting from the non-availability of that capital. A few members found no reasonable explanation for denying interest for loss of property.

385. As regards compound interest, dealt with in paragraph 2 of article 9, most members felt that, due to the absence of clear State practice, the matter should not be dealt with in the draft articles. For some members, compound interest might lead to arbitrary calculations and unfairness. It was generally agreed that paragraph 2 should be deleted.

386. Many members preferred the deletion of article 9 as a whole, since they believed that the question of interest should be dealt with in a general formula. Such a general formulation could be included in paragraph 3 of article 8 or elsewhere in that article.

387. The Special Rapporteur specified that he had not intended to confine interest to sums of money. He agreed, however, with the suggestion to delete article 9 and to include the general obligation to pay interest in article 8, perhaps in paragraph 3.

#### ARTICLE 10 (Satisfaction and guarantees of non-repetition)<sup>291</sup>

388. The Special Rapporteur stated that a review of State practice and the literature indicated that satisfaction had frequently been granted as an autonomous remedy, even though sometimes it was given in conjunction with other

<sup>291</sup> Draft article 10 submitted by the Special Rapporteur in his second report read:

##### "Article 10. Satisfaction and guarantees of non-repetition

"1. In the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation, the State which has committed the wrongful act is under an obligation to provide the injured State with adequate satisfaction in the form of apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof.

"2. The choice of the form or forms of satisfaction shall be made taking into account the importance of the obligation breached and the existence and degree of wilful intent or negligence of the State which has committed the wrongful act.

<sup>290</sup> See footnote 272 above.

forms of remedy and occasionally was so absorbed into pecuniary compensation that the award of satisfaction was difficult to perceive. In the literature, many authors viewed satisfaction as a specific remedy for injury to the State's dignity, honour or prestige. Some authors expressed the view that satisfaction was a remedy for juridical injury to a State regardless of the presence of any material damage. The distinction between satisfaction and other forms of remedy was not only in terms of the injury it covered, but also in terms of the forms it took. The Special Rapporteur noted that expressions of regret, punishment of the responsible person, safeguards against repetition, saluting the flag, payment of some symbolic sum, a judicial declaration, etc. were often mentioned in the literature. He stated that the views expressed in the literature seemed to be supported by State practice. While there were few judicial decisions explicitly granting forms of satisfaction, presumably because tribunals were inclined to feel that they lacked competence with regard to such forms of reparation, there was an impressive corpus of diplomatic practice where satisfaction had been granted. A notable case in which satisfaction seemed to have been denied was the "*Lusitania*" case, in which the umpire had concluded that superimposing a penalty in addition to full compensation and naming it "damages" (with the qualifying word "exemplary", "vindictive" or "punitive") would be a hopeless confusion of terms. In the view of the umpire, such matters should have been settled at the diplomatic level.<sup>292</sup> The Special Rapporteur interpreted that decision as having been based on lack of competence. There were, however, other judicial decisions, the Special Rapporteur noted, which supported granting satisfaction, including the "*Carthage*" (1913),<sup>293</sup> "*Manouba*" (1913),<sup>294</sup> "*Corfu Channel (Merits)*",<sup>295</sup> "*I'm Alone*" (1933, 1935)<sup>296</sup> and "*Rainbow Warrior*" (1986)<sup>297</sup> cases.

389. The Special Rapporteur stated that the relevant practice should be divided into three periods: (a) prior to the First World War; (b) between the two World Wars; (c) from the end of the Second World War to the present day. The practice of the first period revealed a high percentage of cases where the form or forms of satisfaction claimed and the very manner and terms in which the demands were formulated (usually against weaker States) were offensive to the honour, dignity and prestige of the allegedly law-breaking State. Therefore, even when any such arrogant demands had been met, the cases in question could not be considered to represent valid precedents, except in a negative sense. The practice of periods (b) and (c), on the contrary, showed (despite some exceptions) that satisfaction performed an important role among the remedies resorted to by States. That was particularly evident in cases where the injured party had suffered insults, ill-treatment or

attacks against the head of State or Government, its diplomatic or consular representatives or its nationals. Being less easily susceptible of economic assessment, those types of "prejudice" were the most typical examples of what the Special Rapporteur called moral and legal injury. That did not exclude, however, that legal injury in particular was present among the effects of any internationally wrongful act.

390. With regard to the nature of satisfaction, i.e. whether it was compensatory or punitive, the Special Rapporteur explained that a review of the literature and State practice, in particular diplomatic practice, indicated the existence of various forms of satisfaction as a remedy apart from compensatory forms of remedy and partly marked by its retributive or punitive nature. Such a distinction in the nature of various forms of reparation, the Special Rapporteur maintained, was not of course absolute. In his view, the function of pecuniary compensation, for example, was not entirely limited to compensating for the material loss. It also had, at least, the function of dissuading against or preventing the commission of wrongful acts in the future. Nevertheless, satisfaction was distinguished from other remedies by its predominantly retributive rather than compensatory role. The Special Rapporteur stated that he did not find the retributive or punitive character of satisfaction incompatible with the sovereign equality of States. That belief was based on the consideration that none of the forms of satisfaction usually resorted to involved a direct action of the injured State *vis-à-vis* the offending State. They were either self-inflicted sanctions or sanctions administered by an international body. In either case, they would fall quite short of such sanctioning measures as reprisals and retortion, where a penalty was directly inflicted by the injured State itself.

391. As to the choice of the form of satisfaction, the Special Rapporteur stated that a study of practice showed that the gravity of the wrongful act or the importance of the obligation breached and the degree of fault or wilful intent of the wrongdoing State were taken into account.

392. The fact, however, that the form of reparation in question had in the past been seriously abused by States which were in the more powerful position made it necessary to limit resort to satisfaction by the requirement that the forms of satisfaction should not include humiliating demands or a violation of the sovereign equality of the wrongdoing State.

393. The Special Rapporteur felt that the literature seemed to support the view that safeguards against repetition were a form of satisfaction, even though it did not introduce much clarity about the forms such guarantees could take. The purpose of guarantees of non-repetition, the Special Rapporteur explained, was that sometimes the injured State believed that restoration of the situation to what it was before the occurrence of the wrongful act was insufficient, because of the strong possibility of repetition of the wrongful act. With regard to that remedy, the Special Rapporteur explained that a number of issues should be considered, including: (a) the source of the offending State's obligation to provide such guarantees; (b) whether a request by the offended State was necessary; (c) whether the offended State or the offending State should choose the form of guarantees; (d) whether the offending State might refuse to provide such safeguards. With respect to the form of guarantee, the Special

<sup>3</sup> A declaration of the wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction.

<sup>4</sup> In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act or a violation of that State's sovereign equality or domestic jurisdiction."

<sup>292</sup> UNRIAA, vol. VII, pp. 39 and 43.

<sup>293</sup> *Ibid.*, vol. XI, pp. 449 *et seq.*, at pp. 460-461.

<sup>294</sup> *Ibid.*, pp. 463 *et seq.*, at p. 475.

<sup>295</sup> *I.C.J. Reports 1949*, p. 36.

<sup>296</sup> UNRIAA, vol. III pp. 1609 *et seq.*, at p. 1618.

<sup>297</sup> *Ibid.*, vol. XIX, pp. 197 *et seq.*

Rapporteur noted that there seemed to be no uniform practice. In most cases, the injured State had demanded safeguards for non-repetition. In some cases, the request was limited, for example, to the better protection of citizens and their property. In other cases, the request for guarantees went so far as to include the adoption or abrogation by the offending State of specific legislative provisions. That form of guarantee, the Special Rapporteur explained, was rather common in cases of violation of human rights in which ad hoc international bodies requested States responsible for such violations to modify their legislation in order to prevent repetition of the violations. The analysis of doctrine and State practice led to the conclusion, with which the Special Rapporteur concurred, that guarantees of non-repetition of a wrongful act were one of the forms of satisfaction.

394. It was generally agreed in the Commission that satisfaction was an appropriate form of remedy apart from restitution in kind and pecuniary compensation. It was, however, emphasized that satisfaction must be viewed as a form of remedy which was given in conjunction with other forms of remedy.

395. As regards the purpose of satisfaction, some members found the Special Rapporteur's approach too narrow to the extent that he had conceptualized satisfaction only in terms of providing a remedy for the injured State. In their view, satisfaction had a much broader function of restating the rule of international law that had been violated. Considering the fact that breaches of international obligations could constitute precedent for future violations, reaffirmation of those norms, through the remedy of satisfaction, played an important role in contemporary international law. Satisfaction, it was felt, served to protect weaker States. For example, in a case of pollution in which the author State was rich and believed it could afford to pay compensation, it would go ahead and inflict pollution on a weaker State and, in effect, expropriate an easement allowing it to pollute against payment. Satisfaction could help to deter that type of conduct by requiring the stronger State to make appropriate amends.

396. With regard to the nature of satisfaction, many members disagreed with the "punitive" nature as defined by the Special Rapporteur. In their view, the concept of punitive damages was inconsistent with the sovereign equality of States. Punitive damages also automatically called for third-party adjudication, since no State would unilaterally agree to punish itself. In addition, the concept of punishment belonged to the topic of the draft Code of Crimes against the Peace and Security of Mankind, and even there punishment meant the punishment of individuals.

397. Some members, however, did not disagree with the proposition that satisfaction had a more punitive character in comparison with other forms of remedy, but felt that the word "punitive", in paragraph 1 of draft article 10, was inappropriate. In their view, at some level all forms of remedy had some kind of retributive function. They felt that, when deciding on the consequences of international crimes under article 19 of part 1 of the draft, they would have to deal with sanctions which surely had a punitive nature. However, they agreed that the matter could be re-examined when dealing with countermeasures and the consequences of crimes under article 19 of part 1.

398. With regard to the question of the nature of satisfaction, the Special Rapporteur stated that on further reflection he believed the term "afflictive" to be inappropriate. Indeed,

in a number of languages it was used with regard to forms of punishment applicable only to individuals. He confirmed his belief, however, in the retributive—and in that sense punitive—function of satisfaction. On the other hand, he did not think that the real question was whether the adjective would be used. What mattered was the retributive function of satisfaction. That remedy placed itself halfway between the purely compensatory forms of reparation such as pecuniary compensation and *naturalis restitutio*, on the one hand, and the predominantly retributive remedies represented by reprisals and sanctions in general, on the other. After all, the Commission was required to deal with similar concepts not only in its work on the draft Code of Crimes against the Peace and Security of Mankind—such crimes to be attributable to, among others, heads of State or Government—but also in developing and codifying the consequences of the international crimes of States as defined in article 19 of part 1 of the draft.

399. Concerning the type of damage for which satisfaction should be granted, some members found the scope of the expression "moral or legal injury", in paragraph 1 of draft article 10, too broad in the light of the definition the Special Rapporteur had given. The concept of "legal injury", defined by the Special Rapporteur as the infringement of the State's rights *per se* and independent of the infringement of the State's dignity, honour and prestige, existed in any wrongful act. Therefore, by definition, there was always a legal injury when a rule of international law was breached and it would result from that theory that satisfaction would have to be granted for every single breach. That approach did not seem practical. Considering the increasing number of inter-State cooperation agreements and consequently the increasing possibility for technical and bureaucratic violations, it seemed unreasonable to ask each time for satisfaction. In most cases, it was enough for the aggrieved State to remind the other State of its obligation. The article on satisfaction should display some degree of moderation with respect to petty violations of that kind. Satisfaction, in the view of these members, should be limited to the infringement of the State's dignity, honour and prestige, which gave an approximate idea of those attributes of a State which could suffer "moral damage". These members felt that the reference to "legal injury" should therefore be deleted.

400. Some members also felt that the reference in paragraph 1 to "nominal or punitive damages" should be deleted, not only because it gave a punitive character to satisfaction, but also because it was theoretically inconsistent with the very assumption on the basis of which article 10 was formulated, namely damage not economically assessable. If such damage were assessable, it should be covered by draft article 8 on reparation by equivalent. It was also suggested that the reference to "apologies" as a form of satisfaction be amended to "expressions of regret", which appeared more feasible. Some members, however, referred to the ruling of 6 July 1986 by the Secretary-General of the United Nations in the "Rainbow Warrior" case between France and New Zealand,<sup>298</sup> where apologies were recommended and were given by France in addition to other forms of satisfaction.

<sup>298</sup> Ibid.

401. According to the Special Rapporteur, the question of "moral or legal injury" was a matter to be considered with the utmost care, particularly in view of the importance of the rules of international law concerning human rights and the environment. As he had noted in reply to the preoccupations expressed by some members according to whom draft article 8, paragraph 1, did not seem to cover the position of States not directly or not materially injured by a violation of such rules, it was precisely in the language of paragraph 1 of article 10 that such injured States could find the basis to claim remedy. If, in the case of certain violations, a legal injury did not appear to be covered by any form of satisfaction, that was because in some such cases satisfaction was absorbed, so to speak, into pecuniary compensation.

402. Many members agreed that guarantees of non-repetition of the wrongful act were a form of satisfaction. There were a number of ways in which such guarantees could be given. For example, under articles 26 to 34 of the Constitution of the International Labour Organisation relating to complaints filed by one member State against another, the commission of inquiry investigating the matter could recommend the adoption of certain measures to remedy certain irregular situations. Some members of the Commission were not convinced that guarantees of non-repetition of the wrongful act should be limited to moral damage to a State. In their view, when a wrongful act caused monetary damage and there was a fear that the act might be repeated, a request for guarantees of non-repetition was quite reasonable and proper. For a few members, satisfaction and guarantees of non-repetition of the wrongful act constituted two different consequences of failure to comply with an international obligation. The former addressed the past, while the latter looked to the future. For that reason they should each be the subject of a separate article and the various forms of guarantees of non-repetition should be explored in more detail.

403. The Special Rapporteur stated that he found in the above considerations an additional reason to retain legal injury—in addition to moral damage or injury—as a justification for the demand for and granting of satisfaction. He was also ready to consider a separate article for guarantees of non-repetition.

404. With regard to the forms of satisfaction, some members felt that, instead of enumerating those forms, it was preferable to refer in general terms to various measures that might be necessary. Many members, however, agreed with the Special Rapporteur that the importance of the obligation violated and the degree of negligence of the wrongdoing State should be taken into account in choosing the form or forms of satisfaction. It was generally agreed that a declaration of the wrongfulness of the act by a competent international tribunal would, in some circumstances, be appropriate satisfaction. There were many precedents to that effect. It was noted that, in the award of 30 April 1990 in the "*Rainbow Warrior*" case, the arbitral tribunal had specifically stated in paragraph 8 of its decision that the condemnation of one party for breaches of its treaty obligations to the other, made public by the decision of the tribunal, constituted in the circumstances appropriate satisfaction for the legal and moral damage caused.<sup>299</sup>

405. As regards paragraph 4 of article 10, some members felt that it should be deleted, since it was generally understood that forms of satisfaction should not be humiliating to States and inconsistent with their sovereign equality. Others, however, felt that, precisely because some States had in the past abused that form of remedy and imposed humiliating demands on weaker States, paragraph 4 should be retained as a safeguard.

406. Some drafting suggestions were also made. In particular, it was noted that paragraph 4 provided that a "claim" for satisfaction must not include humiliating demands. That wording was unusual, since article 10 did not deal with "claims" by aggrieved States but with the law applicable in a particular situation and with the rights and obligations of the parties. That part of the text should therefore be reworded.

407. It was noted by some members that the indication of the forms of satisfaction should not be exhaustive. The Special Rapporteur agreed that the text should be amended accordingly.

### 3. THE IMPACT OF FAULT ON THE FORMS AND DEGREES OF REPARATION

408. The Special Rapporteur stated that fault had not played an important role in the conceptualization of part 1 of the draft articles. In his view, part 2 of the draft, on the determination of specific consequences of an internationally wrongful act, could not ignore the importance of fault in such determinations. The importance of fault was particularly emphasized by the fact that part 2 had to deal with the consequences of international crimes as well as of international delicts. Fault, in the view of the Special Rapporteur, referred to wilful intent or negligence on the part of the offending State. In that context, he raised two issues: first, whether fault should play a role in the determination of the consequences of a wrongful act; and, secondly, how fault could be attributed to a State. As regards the first issue, the Special Rapporteur felt that a decision on the role of fault in determining the forms and degree of severity of consequences was a policy decision and eventually a legal one. In his view, it seemed both logical and rational, as recognized by a number of authorities, that the presence of fault and the degree of wilful intent or negligence should play some role in establishing the degree of responsibility and hence consequences. As regards the second issue, namely how fault could be attributed to a State, the Special Rapporteur said that that was a question of fact and, in his view, that was in substance the implication of the relevant articles of part 1 of the draft. As such, the determination of the existence or absence of fault should be left to appropriate decision-makers such as international arbitral tribunals and courts. He admitted that the determination of whether or not there had been wilful intent or negligence on the part of a wrongdoing State was a complex question. An act of a State as an international person was mostly, if not always, composed of a plurality of acts and attitudes emanating from different levels of the hierarchy of the State's organization. He explained that, just as the conduct of one or more low-ranking officials might or might not *per se* be considered, in fact, conduct of the State as an international person, the so-called psychological attitudes of such

<sup>299</sup> Loc. cit. (footnote 268 above), p. 579.

officials might or might not in fact constitute fault on the part of the State; the determination of the presence and degree of such an element involved an equally global consideration of the internal organization of a modern State. In his view, the fact that one could not rely on legal rules for such a determination might explain in part the doubts that had been expressed about the impact and role of fault in international law.

409. With regard to the impact of fault on pecuniary compensation, the Special Rapporteur explained that a study of jurisprudence seemed to indicate that fault had not played any role in the determination of the *quantum* of damages, damages being in most cases calculated solely on the basis of the nature and extent of the injury caused. In a few cases, however, fault did seem to have been taken into account. In addition, he stated that it was quite conceivable that fault might have been taken more frequently into account by arbitrators implicitly. That should be given due consideration in deciding whether to agree with the prevailing doctrinal view that the presence and degree of fault—the “intentional element”—should in no way affect the computation of compensation. Although that approach was compatible with the narrow definition of pecuniary compensation, he none the less cautioned that such an interpretation might not always be correct, for the following reasons: (a) the various forms of reparation did not, in practice, operate in isolation; (b) the compensatory and retributive functions were in a sense always present in any one of the forms of reparation; (c) the retributive or punitive function, which seemed to be most typical of satisfaction, might also in some cases affect the computation of damages by means of the award of a higher amount of pecuniary compensation.

410. As regards the role of fault in satisfaction, the Special Rapporteur said it was clear that fault had played an important role with respect to the forms and degrees of satisfaction. State practice, and particularly diplomatic practice, was marked by that trend. He noted that, in most of the post-Second World War diplomatic practice, some degree of fault had presumably been admitted by the offending State, in consideration either of the fact that the injury had been inflicted on foreign nationals or agents by public officials, or of the fact that the objects of injury were persons or premises with regard to which the injured State was entitled to special protection. The question remained, however, to what extent the fault of a low-ranking State agent was in fact the fault of the offending State. The Special Rapporteur stated that, subject to further research and reflection, he was inclined to believe that a State could not be considered to be exempt from fault when it did not provide the members of its organization—particularly members of the police and armed forces—with adequate instructions concerning the positive and negative duties incumbent upon them with regard to the treatment of foreign nationals and agents.

411. Some members of the Commission who spoke on the question of fault agreed with the general view of the Special Rapporteur that fault should play some role in the determination of the form of remedy. They noted that, since the Special Rapporteur himself had expressed only tentative views on the matter, the issue should perhaps be re-examined more thoroughly in the future. They nevertheless expressed some preliminary views. For example, some members pointed out that the somewhat mystical

view of the State and the efforts to elude the question of fault resulting from that approach would, sooner or later, have to yield to the need to consider the place of fault in State responsibility. They believed that, while fault would be of particular importance when the Commission went on to consider responsibility for crimes such as genocide or aggression, the issue was also relevant in connection with delicts. For a few members, fault was only one of the many factors which should affect the form and degree of remedies. Other factors included the importance of the obligation breached, and these members were not convinced that only fault should be singled out.

412. A few members felt that the question of attribution of fault to a State was a very complex one and required careful examination. They believed fault by State agents should not be imputed indiscriminately to the State. Nor were they entirely certain that fault was irrelevant to the form and degree of reparation by equivalent. Such an approach, it was felt, might break the logical and theoretical balance of the draft articles as a whole. A few members did not feel that it was prudent for the Commission, at the present stage of development of the topic, to open up the relevance of fault as an element of an internationally wrongful act for the purposes of part 1 of the draft. As for part 2 of the draft, a few members questioned the advisability of dealing with the problem of fault, at least until the Commission examined the consequences of international crimes.

### C. Draft articles on State responsibility

#### *Part 2. Content, forms and degrees of international responsibility*

TEXTS OF THE DRAFT ARTICLES PROVISIONALLY  
ADOPTED SO FAR BY THE COMMISSION<sup>300</sup>

413. The texts of articles 1 to 5 of part 2 of the draft provisionally adopted so far by the Commission are reproduced below.

#### *Article 1*<sup>301</sup>

**The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.**

#### *Article 2*<sup>302</sup>

**Without prejudice to the provisions of articles 4 and [12], the provisions of this part govern the legal consequences of any**

<sup>300</sup> As a result of the provisional adoption of article 5 at its thirty-seventh session, the Commission decided to modify articles 2, 3 and 5 provisionally adopted at the thirty-fifth session (see *Yearbook* . . . 1985, vol. II (Part Two), p. 20, para. 106) as follows: in articles 2 and 3, the reference to “articles [4] and 5” was replaced by a reference to “articles 4 and [12]”; and article “5” was renumbered article “4”.

<sup>301</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook* . . . 1983, vol. II (Part Two), p. 42.

<sup>302</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, *ibid.*, pp. 42-43.

internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

*Article 3*<sup>303</sup>

Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

*Article 4*<sup>304</sup>

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

*Article 5*<sup>305</sup>

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part 1 of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

<sup>303</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, *ibid.*, p. 43.

<sup>304</sup> Provisionally adopted by the Commission at its thirty-fifth session (then article 5); for the commentary, *ibid.*

<sup>305</sup> Provisionally adopted by the Commission at its thirty-seventh session; for the commentary, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 25 *et seq.*

## Chapter VI

### RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

#### A. Introduction

414. The topic entitled "Relations between 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.<sup>306</sup>

415. 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.<sup>307</sup>

416. 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, and experts and other persons engaged in their activities not being representatives of States.<sup>308</sup>

417. At the Commission's twenty-ninth and thirtieth sessions, in 1977 and 1978, the previous Special Rapporteur, the late Abdullah El-Erian, submitted his preliminary and second reports on the topic,<sup>309</sup> which were duly considered by the Commission.<sup>310</sup>

418. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz González Special Rapporteur for the topic.<sup>311</sup>

419. Owing to the priority that the Commission had assigned, on the recommendation of the General Assembly, to the conclusion of its studies on a number of topics in its programme of work with respect to which the process of preparing draft articles was already advanced, the Commission did not take up the topic at its thirty-second session, in 1980, or at its subsequent two sessions. It resumed its work on the topic only at its thirty-fifth session, in 1983.

<sup>306</sup> *Yearbook . . . 1971*, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sects. C and D.

<sup>307</sup> United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

<sup>308</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 164, para. 173.

<sup>309</sup> *Yearbook . . . 1977*, vol. II (Part One), p. 139, document A/CN.4/304; and *Yearbook . . . 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

<sup>310</sup> For a summary of the Commission's discussion of the two reports, the conclusions reached and the action taken by the Secretariat, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 50-51, paras. 199-203.

<sup>311</sup> *Yearbook . . . 1979*, vol. II (Part Two), p. 189, para. 196.

420. From its thirty-fifth session (1983) to its forty-first session (1989), the Commission received four reports from the Special Rapporteur.<sup>312</sup> During that period, the Commission adopted a number of preliminary decisions concerning the topic and approved an outline of the subject-matter to be covered by the draft articles which the Special Rapporteur intended to prepare on the topic.<sup>313</sup>

421. At its forty-first session, in 1989, the Commission was unable to discuss the topic due to lack of time and therefore did not consider the Special Rapporteur's fourth report (A/CN.4/424). The Commission nevertheless deemed it advisable for the Special Rapporteur to introduce the report in order to facilitate work on the topic at its next session, and the Special Rapporteur did so.<sup>314</sup>

#### B. Consideration of the topic at the present session

422. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/424), submitted in 1989,<sup>315</sup> as well as his fifth report (A/CN.4/432), which, due to lack of time, could not be introduced by the Special Rapporteur or considered by the Commission.

423. The Commission considered the fourth report at its 2176th to 2180th meetings, from 19 to 26 June 1990. After discussing draft articles 1 to 11 contained in the report, the Commission decided, at its 2180th meeting, to refer them to the Drafting Committee. The comments made by members of the Commission on those articles are summarized in paragraphs 424 to 463 below.

424. There was broad support in the Commission for the path charted for the topic by the Special Rapporteur in his fourth report. Some members pointed out that the Commission could now give the topic more attention, since it

<sup>312</sup> These four reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook . . . 1983*, vol. II (Part One), p. 227, document A/CN.4/370;

Second report: *Yearbook . . . 1985*, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1;

Third report: *Yearbook . . . 1986*, vol. II (Part One), p. 163, document A/CN.4/401;

Fourth report: *Yearbook . . . 1989*, vol. II (Part One), p. 153, document A/CN.4/424.

<sup>313</sup> For a more complete historical review of the Commission's work on the topic from its thirty-fifth to its forty-first sessions, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 131 *et seq.*, paras. 692-707. For the text of the outline, *ibid.*, p. 132, footnote 323.

<sup>314</sup> For a summary of the Special Rapporteur's introduction of his fourth report, *ibid.*, pp. 133 *et seq.*, paras. 708-726.

<sup>315</sup> See footnote 312 above.

had completed or almost completed its consideration of other topics. Some members also emphasized the usefulness of the topic, which would put some order in the diversity and disparity of the law governing international organizations.

425. Some members, while not questioning the need to pursue the work on the topic and fulfil the mandate which the General Assembly had given the Commission, thought that it might be necessary, before continuing, to define the ultimate aim of the draft articles which would be adopted and their relationship with the many existing instruments, namely the constituent instruments of the various organizations covered by the draft, conventions on privileges and immunities, and headquarters agreements.

426. One member said that he had doubts whether any useful results could be achieved and whether such results would be acceptable to the States for which the draft articles would be intended. He did not see any urgent need to undertake the codification of a subject-matter which was, in his opinion, already adequately regulated by various instruments in force, such as conventions on privileges and immunities and headquarters agreements. He thought that the Commission should continue to defer its consideration of the topic.

427. The Special Rapporteur, referring to views expressed by several members, recalled that the Commission's duty was to comply with the mandate assigned to it by the General Assembly and reaffirmed in annual Assembly resolutions on the report of the Commission. The meaning and orientation of the topic, as well as its content, had been defined by the Commission at its thirtieth session, in 1987, when it had approved the outline of the subject-matter which it had requested the Special Rapporteur to submit to it (see para. 420 above). The Special Rapporteur noted that many other topics on the Commission's agenda also encompassed aspects regulated by existing instruments. Referring to the Commission's role in the codification of international law, he stated that it would be useful to systematize and organize rules on the topic. Indeed, a close look at the international situation showed that there were many gaps to be filled and problems to be solved. For example, he noted, many problems had arisen in recent years between some organizations and host countries in connection with the rights and obligations of officials, experts and persons having official business with the organizations. The Special Rapporteur therefore emphasized the importance of considering the draft articles fully and referring them, following such consideration, to the Drafting Committee.

428. Other comments made in the Commission related to specific aspects of the draft articles submitted by the Special Rapporteur.

429. With regard to *draft article 1*,<sup>316</sup> one member said that the title in English should be "Use of terms". Several members also indicated that the definition of an "inter-

national organization" in paragraph 1 (a) should make it clear that the "universal" character of the organization derived from the fact that membership was open to all States, not from the actual number of member States of the organization. One member suggested that the words "of a universal character" be placed in square brackets in view of the possibility that the scope of the draft articles might subsequently be extended to regional organizations.

430. The Special Rapporteur agreed that the words "of a universal character", in paragraph 1 (a), had been used to mean "with a potential for universality"; perhaps that wording should be adopted in order to cover organizations such as those set up by producers and consumers of certain commodities. He would have no objection if all or part of paragraph 1 (a) were placed in square brackets until a final decision had been taken on whether regional organizations should come within the scope of the articles.

431. With regard to paragraph 1 (b), some members suggested that the word "relevant", qualifying the words "rules of the organization", should be deleted in order to ensure greater uniformity with the wording used in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. One member said that the words "its established practice" should be deleted because practice was constantly changing and was subject to interpretation and could therefore not be stated in the form of a rule. Other members, however, said that those words were entirely acceptable and were included in the 1986 Vienna Convention (art. 2, para. 1 (j)).

432. Referring to paragraph 1 (c), some members said that the words "of a worldwide character" were too vague. In that connection, one member suggested the word "global". Some members also said that the word "responsibilities" should be replaced by "functions". One member commented that the specific reference to the International Atomic Energy Agency was unnecessary and another member that the word "similar" was ambiguous.

433. As to paragraph 1 (e) and the concept of a "host State", one member suggested that reference should also be made to States where officials of international organizations were on official mission. In that connection, one member asked whether the word "office", in paragraph 1 (e) (i), also included temporary offices of a subsidiary body of the organization, such as the field-operations

"(a) 'international organization' means an intergovernmental organization of a universal character;

"(b) 'relevant rules of the organization' means, in particular, the constituent instruments of the organization, its decisions and resolutions adopted in accordance therewith and its established practice;

"(c) 'organization of a universal character' means the United Nations, the specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are of a worldwide character;

"(d) 'organization' means the international organization in question;

"(e) 'host State' means the State in whose territory:

"(i) the organization has its seat or an office; or

"(ii) a meeting of one of its organs or a conference convened by it is held.

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

<sup>316</sup> Draft article 1 submitted by the Special Rapporteur in his fourth report read:

"PART I. INTRODUCTION

"Article 1. *Terms used*

"1. For the purposes of the present articles:

offices of United Nations peace-keeping forces. The Special Rapporteur said that that term referred to any premises used by an organization to perform its functions, as indicated in Articles 104 and 105 of the Charter of the United Nations and in the relevant provisions of the headquarters agreements or constituent instruments of various international organizations. He said that a parallel could be drawn with the definition of the term "premises" contained in article 1 (i) of the 1961 Vienna Convention on Diplomatic Relations.

434. One member suggested that paragraph 2 should be deleted because it was unnecessary.

435. Referring to article 1 as a whole, some members said that, as the Commission made headway in its consideration of the topic, account should be taken of the possibility of incorporating other definitions.

436. With regard to *draft article 2*,<sup>317</sup> several members said that they agreed with the Special Rapporteur's approach of limiting the scope of the articles, in principle, to international organizations of a universal character, without prejudice to the possibility that, at a later stage, the scope might be extended to other organizations, such as regional organizations.

437. Different views were expressed with regard to the last phrase of paragraph 1. While some members thought that the words "when the latter have accepted them" should be deleted, others said that they should be retained in order to make the draft articles more acceptable.

438. Some members expressed doubts about the need for paragraph 2. Other members were in favour of the deletion of paragraph 3. It was also suggested that paragraph 3 should be replaced by optional protocols that would make it possible to extend the scope of the articles to other organizations not referred to in paragraph 1.

439. With regard to *draft article 3*,<sup>318</sup> some members

<sup>317</sup> Draft article 2 submitted by the Special Rapporteur in his fourth report read:

*"Article 2. Scope of the present articles"*

"1. The present articles apply to international organizations of a universal character in their relations with States when the latter have accepted them.

"2. The fact that the present articles do not apply to other international organizations is without prejudice to the application of any of the rules set forth in the articles which would be applicable under international law independently of the present articles [Convention].

"3. Nothing in the present articles [Convention] shall preclude the conclusion of agreements between States or between international organizations making the articles [Convention] applicable in whole or in part to international organizations other than those referred to in paragraph 1 of this article."

<sup>318</sup> Draft article 3 submitted by the Special Rapporteur in his fourth report read:

*"Article 3. Relationship between the present articles [Convention] and the relevant rules of international organizations"*

"The provisions of the present articles [Convention] are without prejudice to any relevant rules of the organization."

thought that it should be worded more clearly in order to remove the ambiguity introduced by the words "without prejudice to". It was noted that the text would have to be reconsidered in the light of the final results of the Commission's work on the draft articles as a whole.

440. Referring to *draft article 4*,<sup>319</sup> some members said that the relationship between the present articles and agreements in force should be more clearly defined. One member was of the opinion that, if the present articles were "without prejudice" to agreements in force on the subject-matter, the need for the former would be highly doubtful. It was also stated that the question of the relationship between the present articles and future agreements on the same subject-matter should be regulated by the applicable rules of treaty law and that it would be advisable to reconsider article 4 when all the draft articles had been completed.

441. Two comments on methodology were made with regard to *draft articles 5 and 6*.<sup>320</sup> The first was that the present wording of the articles did not distinguish clearly between the legal personality of the organization under international law and its legal personality under the internal law of its member States and of the host country. The second comment was that, although the capacity of an international organization to conclude treaties was expressly provided for, other legal consequences of the international legal personality of an organization were not. In that connection, it was suggested that one article should refer exclusively to international legal personality and the legal powers deriving from it at the international level, such as capacity to conclude treaties, capacity to file an

<sup>319</sup> Draft article 4 submitted by the Special Rapporteur in his fourth report read:

*"Article 4. Relationship between the present articles [Convention] and other international agreements"*

"The provisions of the present articles [Convention]:

"(a) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character; and

"(b) shall not preclude the conclusion of other international agreements regarding the privileges and immunities of international organizations of a universal character."

<sup>320</sup> Draft articles 5 and 6 submitted by the Special Rapporteur in his fourth report read:

"PART II. LEGAL PERSONALITY"

*"Article 5"*

"International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

"(a) contract;

"(b) acquire and dispose of movable and immovable property; and

"(c) institute legal proceedings."

*"Article 6"*

"The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization and by international law."

international claim and the active and passive right of legation. Another article would refer to legal personality under internal law and the legal powers deriving therefrom.

442. In the opinion of some members, articles 5 and 6 should also reflect more clearly the functional criterion that should govern the granting of legal personality to an international organization.

443. Some specific comments were made on the wording of articles 5 and 6.

444. With regard to article 5, one member pointed out that, as it now stood, subparagraph (c) might give the impression that organizations were being given the right to sue and be sued before the International Court of Justice, something that would be contrary to the Statute of the Court. Another member noted that, in view of developments in international society, article 5 should not give the impression of being exhaustive. He therefore suggested that the words "in particular" be added after "shall have the capacity". Another member suggested that the introductory clause should simply state that "International organizations shall enjoy legal personality".

445. Different views were expressed with regard to article 6. One member considered that the words "and by international law" strengthened the provision, which virtually reproduced the wording of article 6 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Another member considered that draft article 6 was superfluous because it repeated provisions contained in other international instruments. Yet another member was of the opinion that draft article 6 offered a reasonable solution to conflicting opinions on the capacity of international organizations to conclude treaties.

446. Referring to some of those comments, the Special Rapporteur pointed out that, in his second report, he had submitted two alternative texts relating to the legal personality of international organizations: alternative A, which had referred in the same article to the concepts of international legal personality and the capacity of an international organization to conclude treaties; and alternative B, which had referred to the two concepts in separate articles.<sup>321</sup> In his fourth report, he had submitted two separate articles, in order to comply with the wishes of the majority of the members of the Commission who had, at the time, expressed a preference for alternative B: international legal personality was dealt with in draft article 5, while draft article 6 was devoted to the capacity to conclude treaties. With regard to the internal legal capacity of an organization, he said that he had taken particular account of Article 104 of the Charter of the United Nations and similar provisions contained in other agreements, such as article XII of the Constitution of UNESCO and article 211 of the Treaty establishing EEC. He had dealt at length with that question in his second report.<sup>322</sup>

447. Referring to part III of the draft on "Property, funds and assets" of international organizations, one member suggested that the title should be amended to reflect its

content more clearly, namely jurisdictional immunities of an organization, the status of its premises and its freedom to transfer funds and other assets. He also suggested that part III should be divided into two or three chapters, with article 10 forming a chapter on its own.

448. Considerable support was expressed by some members for the underlying philosophy of *draft article 7*.<sup>323</sup> These members stressed that the current tendency to restrict the jurisdictional immunities of States should not be extended to international organizations. The concept of absolute immunity of the property, funds and assets of international organizations was embodied in the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, as well as in many constituent instruments of international organizations and headquarters agreements. In their view, that concept had to be maintained. Unlike the jurisdictional immunity granted to States, which applied only to the property, funds and assets of a particular State, immunity from jurisdiction in the case of international organizations was granted to protect the interests of all the member States, which could, in the particular case of organizations of a universal character, represent most of the international community. They added that, to apply the criterion of functional necessity to the immunity of organizations would be a mistake, since immunity was a legal means of guaranteeing the unhampered fulfilment of the purposes of the organization, whatever their nature or extent. Quite apart from the specificity of the purposes of each organization, all organizations, especially those of a universal character covered by the draft articles, had common features (problems relating to headquarters, personnel, contributions by member States, etc.) and the most common was the obligation to achieve the purposes for which they had been established. In the view of these members, it was especially in the light of those common features that absolute immunity was necessary to guarantee the independent functioning of international organizations.

449. One member who was in favour of the rule of absolute immunity nevertheless pointed out that procedures and mechanisms had to be established to enable individuals to assert their rights in the event of a dispute with an international organization. In his opinion, such cases, which were outside the jurisdiction of domestic courts, could be referred to arbitral tribunals.

450. Another member who supported the general thrust of article 7 suggested that it might be balanced by adding another paragraph stating that it was the duty of the organization to respect the laws and regulations of the host State.

<sup>323</sup> Draft article 7 submitted by the Special Rapporteur in his fourth report read:

"PART III. PROPERTY, FUNDS AND ASSETS

"Article 7

"International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion."

<sup>321</sup> *Yearbook ... 1985*, vol. II (Part One), pp. 112-113, document A/CN.4/391 and Add.1, para. 74.

<sup>322</sup> *Ibid.*, pp. 107 *et seq.*, paras. 31-73.

451. Some drafting suggestions were also made. One member suggested that the kinds of jurisdiction from which organizations were immune, civil or administrative, should be spelt out and that, in the English text, the words "every form of legal process" should be replaced by the word "jurisdiction". Some members also suggested that there should be a separate article or paragraph on the question of immunity from execution. One member suggested that the part of article 7 relating to waiver of immunity should be strengthened, so that it would clearly state that waiver of immunity from jurisdiction would not be considered as including waiver of immunity from execution, for which a separate waiver would be necessary.

452. Lastly, some members expressed reservations about article 7 as a whole. One member in particular said that he could conceive of international organizations of a universal character that might not require immunity from jurisdiction for functional reasons. According to this member, even in cases where it was necessary to grant some degree of immunity, it could not be said that international organizations should enjoy greater immunity than their member States. In his opinion, the greater degree of immunity that might be necessary for an organization of a special nature, such as the United Nations, did not have to be extended to other organizations, in view of the specificity of their functions. Another member said that he was in favour of excluding from article 7 absolute immunity of organizations from the jurisdiction of the host country and that he preferred specific immunity clauses.

453. In general, members of the Commission expressed support for *draft article 8*,<sup>324</sup> although they made some suggestions regarding the content and the wording. For example, several members pointed out that the article should encompass not only the duty to refrain from certain acts to respect the inviolability of an organization's premises, but also the active duty to protect those premises against any disturbance. The Special Rapporteur said that he had referred in his fourth report to that aspect of the matter and had no objection whatsoever to the idea being incorporated in article 8. While some members thought that the phrase "used solely for the performance of their official functions", in paragraph 1, was suitable for describing the premises as inviolable, another member took the view that the phrase could unduly restrict the inviolability of

<sup>324</sup> Draft article 8 submitted by the Special Rapporteur in his fourth report read:

"Article 8

"1. The premises of international organizations used solely for the performance of their official functions shall be inviolable. The property, funds and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or coercion, whether by executive, administrative, judicial or legislative action.

"2. International organizations shall notify the host State of the location and description of the premises and the date on which occupation begins. They shall also notify the host State of the vacation of premises and the date of such vacation.

"3. The dates of the notification provided for in paragraph 2 of this article, except where otherwise agreed by the parties concerned, shall determine when the enjoyment of the inviolability of the premises, as provided for in paragraph 1 of this article, begins and ends."

international organizations. He also thought that article 8 should make it clear that no agent of the host State could enter the premises of an international organization without the organization's consent. Another member thought that the word "premises" called for greater precision in order to make its scope perfectly clear.

454. One member expressed doubts that there was the same degree of functional necessity calling for inviolability in the case of the premises of an organization as in the case of the premises of a State's embassy or mission.

455. Some members expressly supported the inviolability of the premises of an organization and the immunity of its property, funds and assets from expropriation, as stated in paragraph 1. Other members questioned whether such immunity was in keeping with international law at the present time. In that connection, the Special Rapporteur pointed out that it was generally agreed that the property of international organizations could not be expropriated by the host country on the grounds of public interest. That would, among other things, place the host State in an inadmissible position of superiority in relation to the organization's member States. In many legal systems, the regime governing the immovable property of international organizations was modelled on the regime applicable to property in the public domain, which was regarded as inalienable under internal law.

456. With regard to *draft article 9*,<sup>325</sup> several members generally supported the content and the underlying principle. They pointed out that the provision was justified by the functional approach to privileges and immunities and that it was a safeguard against possible abuses.

457. As to the wording, it was suggested that the article should refer not only to the headquarters *stricto sensu*, but also to the premises of the organization in general. It was also pointed out that it might be advisable to omit the reference to persons "wanted on account of *flagrans crimen*", since such a concept did not exist in every legal system.

458. Other members, however, thought that article 9 was unnecessary and counter-productive. It was unnecessary because the fact that it was not possible for an organization to grant refuge to the persons referred to stemmed from the functional nature of privileges and immunities as embodied in other articles. And it was counter-productive because it could be invoked to prevent an international organization from granting refuge in justifiable cases, for example in the case of persons wanted strictly for political reasons, where refuge or asylum made it possible to protect a fundamental human right, such as the right to life or physical integrity.

<sup>325</sup> Draft article 9 submitted by the Special Rapporteur in his fourth report read:

"Article 9

"Without prejudice to the provisions of the present articles [Convention], international organizations shall not allow their headquarters to serve as a refuge for persons trying to evade arrest under the legal provisions of the host country, or sought by the authorities of that country with a view to the execution of a judicial decision, or wanted on account of *flagrans crimen*, or against whom a court order or deportation order has been issued by the authorities of the host country."

459. With regard to *draft article 10*,<sup>326</sup> some members expressed reservations about the breadth of the privileges and immunities provided for therein. They pointed out that the privilege of holding and freely transferring funds and currency should be subject, on the one hand, to the functional needs of the organization in question, and on the other, to the provisions of the headquarters agreement. One member expressed surprise that the article should fail to deal with questions relating to customs duties and taxes.

460. Referring to the introductory clause, one member pointed out that it did not properly clarify which controls, inspections, etc. were involved—whether those of the host State or those of member States. With particular reference to subparagraph (b), one member noted that it did not specify whether an international organization could transfer funds in local currency when it was established in a host State whose currency was not convertible. In connection with subparagraph (c), one member wondered about the meaning of the phrase “shall . . . pay due regard to any representations” and about the kind of obligations involved. Other members thought that subparagraph (c) should refer not only to representations made by member States of the organization, but also to those made by a host State that was not a member of the organization, as well as

<sup>326</sup> Draft article 10 submitted by the Special Rapporteur in his fourth report read:

“Article 10

“Without being restricted by controls, inspections, regulations or moratoria of any kind:

“(a) International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency;

“(b) International organizations may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency;

“(c) International organizations shall, in exercising their rights under subparagraphs (a) and (b) of this article, pay due regard to any representations made by the Government of any member State party to the present articles [Convention] in so far as it is considered that effect can be given to such representations without detriment to their own interests.”

to those made by any non-member State which entered into relations with the organization as a result of a transfer of funds or currency.

461. Other members, referring to the reservations of some members about various aspects of article 10, pointed out that it reproduced similar provisions of the 1946 Convention on the Privileges and Immunities of the United Nations (art. II, sects. 5 and 6) and therefore seemed acceptable.

462. As for *draft article 11*,<sup>327</sup> several members viewed it as unnecessary, since its content was covered by article 4. One member also pointed out that article 11 might introduce an element of uncertainty in the interpretation of article 10 and make it difficult to determine which “functional requirements” had to be taken into account for the purpose of limiting the provisions of article 10, subparagraphs (a) and (b). He said that the fiscal independence which international organizations ought to enjoy did not make it advisable to include article 11 in the draft.

463. On the other hand, another member found it useful to include article 11 provided the wording was amended, particularly the phrase “the scope of the rights accorded may be limited, in the light of the functional requirements of the organization”, for, in his opinion, it could give the impression that the common regime established in article 10 failed to take account of the functional-requirements criterion.

464. As already indicated (para. 423 above), the Commission decided at the end of its discussion to refer draft articles 1 to 11 to the Drafting Committee.

<sup>327</sup> Draft article 11 submitted by the Special Rapporteur in his fourth report read:

“Article 11

“Notwithstanding the provisions of article 10, subparagraphs (a) and (b), the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned.”

## Chapter VII

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

#### A. Introduction

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

466. From its thirty-second session (1980) to its thirty-sixth session (1984), the Commission considered the five reports submitted by the Special Rapporteur.<sup>328</sup> The reports sought to develop a conceptual basis for the topic and included a schematic outline and five draft articles. The schematic outline was contained in the Special Rapporteur's third report, submitted to the Commission at its thirty-fourth session, in 1982.<sup>329</sup> The five draft articles were contained in the Special Rapporteur's fifth report, submitted to the Commission at its thirty-sixth session, in 1984,<sup>330</sup> and were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

467. At its thirty-sixth session, in 1984, the Commission also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain, among other matters, whether obligations which States owed to each other and discharged as members of international organizations could, to that extent, fulfil or replace some of the procedures referred to in the schematic outline;<sup>331</sup> and the "Survey of State practice relevant to international liability for injurious consequences arising out of acts not

prohibited by international law", prepared by the Secretariat.<sup>332</sup>

468. At its thirty-seventh session, in 1985, the Commission appointed Mr. Julio Barboza Special Rapporteur for the topic. From its thirty-seventh session to its forty-first session (1989), the Commission received five reports from the Special Rapporteur.<sup>333</sup> At its fortieth session, in 1988, the Commission referred to the Drafting Committee draft articles 1 to 10 of chapter I (General provisions) and chapter II (Principles) of the draft, as submitted by the Special Rapporteur in his fourth report.<sup>334</sup>

#### B. Consideration of the topic at the present session

469. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/428 and Add.1). The Commission considered the topic at its 2179th, 2181st to 2186th and 2190th meetings, on 22 June, from 27 June to 4 July and on 10 July 1990.

470. In his sixth report, the Special Rapporteur examined further the question whether obligations in respect of activities involving risk and those in respect of activities with harmful effects should be treated together or separately; offered another approach to clarification of the concept of activities involving risk; introduced a set of revised procedural rules in respect of activities with harmful transboundary consequences (articles 11 to 20 of chapter III); and proposed all the substantive rules on the question of liability (articles 21 to 33

<sup>328</sup> The five reports of the previous Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook . . . 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook . . . 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add. 1 and 2;

Third report: *Yearbook . . . 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook . . . 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook . . . 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

<sup>329</sup> The text of the schematic outline is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline by the previous Special Rapporteur are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

<sup>330</sup> The texts of draft articles 1 to 5 submitted by the previous Special Rapporteur are reproduced in *Yearbook . . . 1984*, vol. II (Part Two), p. 77, para. 237.

<sup>331</sup> The replies to the questionnaire are reproduced in *Yearbook . . . 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

<sup>332</sup> *Yearbook . . . 1985*, vol. II (Part One)/Add.1, p. 1, document A/CN.4/384.

<sup>333</sup> These five reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook . . . 1985*, vol. II (Part One), p. 97, document A/CN.4/394 ;

Second report: *Yearbook . . . 1986*, vol. II (Part One), p. 145, document A/CN.4/402;

Third report: *Yearbook . . . 1987*, vol. II (Part One), p. 47, document A/CN.4/405;

Fourth report: *Yearbook . . . 1988*, vol. II (Part One), p. 251, document A/CN.4/413.

Fifth report: *Yearbook . . . 1989*, vol. II (Part One), p. 131, document A/CN.4/423.

<sup>334</sup> For the texts of draft articles 1 to 10 referred to the Drafting Committee at the fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), p. 9, para. 22. For the revised draft articles 1 to 9 submitted by the Special Rapporteur in his fifth report, which were referred to the Drafting Committee by the Commission at its forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 84-85, para. 311.

of chapters IV and V). He thus proposed a complete outline of a set of 33 draft articles on the topic, as follows:<sup>335</sup>

#### CHAPTER I. GENERAL PROVISIONS

- Article 1. *Scope of the present articles*
- Article 2. *Use of terms*
- Article 3. *Assignment of obligations*
- Article 4. *Relationship between the present articles and other international agreements*
- Article 5. *Absence of effect upon other rules of international law*

#### CHAPTER II. PRINCIPLES

- Article 6. *Freedom of action and the limits thereto*
- Article 7. *Cooperation*
- Article 8. *Prevention*
- Article 9. *Reparation*
- Article 10. *Non-discrimination*

#### CHAPTER III. PREVENTION

- Article 11. *Assessment, notification and information*
- Article 12. *Participation by the international organization*
- Article 13. *Initiative by the presumed affected State*
- Article 14. *Consultations*
- Article 15. *Protection of national security or industrial secrets*
- Article 16. *Unilateral preventive measures*
- Article 17. *Balance of interests*
- Article 18. *Failure to comply with the foregoing obligations*
- Article 19. *Absence of reply to the notification under article 11*
- Article 20. *Prohibition of the activity*

#### CHAPTER IV. LIABILITY

- Article 21. *Obligation to negotiate*
- Article 22. *Plurality of affected States*
- Article 23. *Reduction of compensation payable by the State of origin*
- Article 24. *Harm to the environment and resulting harm to persons or property*
- Article 25. *Plurality of States of origin*
- Article 26. *Exceptions*
- Article 27. *Limitation*

#### CHAPTER V. CIVIL LIABILITY

- Article 28. *Domestic channel*
- Article 29. *Jurisdiction of national courts*
- Article 30. *Application of national law*
- Article 31. *Immunity from jurisdiction*
- Article 32. *Enforceability of the judgment*
- Article 33. *Remittances*

471. The Special Rapporteur indicated that his intention in proposing an almost complete set of draft articles was to facilitate concrete discussion of the approach to the topic and its scope, as well as of specific articles and the principles to be reflected therein. The new articles were only an outline of the topic; they were put together with the purpose of giving the Commission a panoramic view of the topic and an idea of the possible interrelationship between the different provisions, so that the manner in which the main ideas behind the texts acted within a hypothetical set of articles could be seen. Except for draft article 2, which was considerably changed due to further clarification of the concept of risk, the Special Rapporteur had kept draft articles 1 to 9 basically in the form in which

they had been referred to the Drafting Committee.<sup>336</sup> He felt that all the pertinent comments made on those articles in the Commission or in the Sixth Committee of the General Assembly should be taken up by the Drafting Committee. In his sixth report, he had also examined the possibility of extending the scope of the topic to include harm to areas beyond national jurisdictions—the so-called “global commons”.

472. The sixth report raised some complex policy and technical issues and contained 33 articles. Many members of the Commission felt that they needed more time to reflect on the issues raised in the report and were able to make only tentative remarks. The Commission therefore decided to revert to the issues raised in the sixth report at its next session.

#### I. GENERAL APPROACH AND SCOPE

##### (a) *Activities involving risk and activities with harmful effects*

473. In response to requests made in the Commission at its previous session and in the Sixth Committee of the General Assembly, the Special Rapporteur again examined the possibility of separate treatment in the topic of activities involving risk and activities causing harm. His further examination of the issue had led him again to the conclusion that the two kinds of activities had more features in common than distinguishing features. The similarities were sufficient to allow examination of their consequences in a similar manner under a single regime. He pointed out that a number of recent legislative efforts relating to the same type of problems had also opted for dealing with these activities together.<sup>337</sup> The separate treatment of the two kinds of activities was not, however, without precedent.<sup>338</sup> The differences between the two approaches were in fact in the area of prevention. The Special Rapporteur noted that the obligation of prevention could be interpreted in two ways: one was to take measures prior to the occurrence of any accident in order to prevent an accident from happening, and the other was either to take measures after the occurrence of any accident to reduce the scope and the degree of harm, or to take measures to mitigate, contain or minimize the transboundary harm in respect of activities with harmful effects. The first meaning of “prevention” applied to activities involving risk, the second mainly to activities with harmful effects. While the Special Rapporteur was prepared to follow the wishes of the Commission, he was meanwhile inclined to follow the first approach, with

<sup>336</sup> See footnote 334 *in fine* above.

<sup>337</sup> For example, the Council of Europe's draft rules on compensation for damage caused to the environment (Council of Europe, document CDCJ (89) 60 (Strasbourg, 8 September 1989)), which dealt with dangerous activities, also covered activities causing harm as a result of continuous pollution, without apparently differentiating between the legal treatment accorded to them.

<sup>338</sup> The legal principles and recommendations on environmental protection and sustainable development drawn up by the Experts Group on Environmental Law of the World Commission on Environment and Development (*Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London, Graham & Trotman, 1987)) distinguished between activities creating a risk of substantial transboundary harm and those which actually caused substantial transboundary harm.

<sup>335</sup> In his sixth report, the Special Rapporteur also suggested possible alternative texts for some of the first nine articles, for the benefit of the Drafting Committee.

modification, and to propose the establishment of a regime for both types of activities in which there was a need for notification, information and consultation between the States concerned. However, the so-called "hard" obligations arose only when harm had occurred and could be imputed to an activity by a causal link. It was reasonable to expect States to inform, consult and negotiate with one another in respect of such activities affecting them. As regards liability, he was still inclined to recommend the obligation to negotiate compensation for harm caused rather than automatic strict liability.

474. Most members of the Commission agreed with the Special Rapporteur that it would be preferable to consider activities involving risk and activities causing harm together, since they had a lot in common in terms of legal consequences. That was particularly so if one adopted a broader concept of prevention to include not only measures to prevent an accident, but also measures designed to reduce or prevent harm. A few members, while not disagreeing with that approach, were not certain how obligations of prevention, particularly those intended to prevent the occurrence of an accident, could be formulated in a set of articles which made no distinction between the two types of activities. The obligations of prevention were quite distinct. They also preferred not to refer to measures taken to mitigate or reduce harm after the occurrence of an accident as "preventive" measures. It was also suggested that the draft could be divided into two parts, the first part dealing with prevention and the second consisting of one or more model clauses on reparation.

475. A few members felt that the Special Rapporteur, in an attempt to treat activities involving risk and those involving harm together, had tended to narrow the scope of the topic so as almost to subordinate activities involving harm to those involving risk. Thus activities causing harm appeared to have a different meaning, i.e. activities in which harm was seen as an inevitable or virtually inevitable consequence from the beginning and which could be undertaken and continued on the basis that measures would be taken to reduce the harm and compensation would be paid for such harm as did occur. That meaning emerged particularly from the definition of "activities with harmful effects" in draft article 2 (f). If the definition of activities with harmful effects failed to include activities which caused harm even though the risk of harm was not anticipated, the scope of the topic would be considerably narrowed, and that had already been rejected by most members of the Commission at previous sessions. Another narrowing element, according to this view, was the list of dangerous substances in article 2.<sup>339</sup>

476. A few members maintained the view that the topic should build upon the concept of risk and not that of harm. It was the concept of risk which imposed certain obligations of prevention on States, and transboundary harm normally would not occur unless there was a risk in an activity. That approach, in their view, was a more commonly accepted practice. They felt that it would be unrealistic to expect States to accept responsibility for any transboundary harm resulting from any activities, whether or not they posed a risk of causing such harm.

477. A few members felt that, despite the Special Rapporteur's suggestions, it might be more appropriate to treat activities involving risk and activities causing harm in separate chapters of the draft.

(b) *Further clarification of scope*

478. During the previous debate in the Commission and in the Sixth Committee of the General Assembly, comments were made by a few members and representatives of Governments about further clarification of the scope of the topic by having a list of the activities covered. The Special Rapporteur explained that he had not reached a different conclusion, after further examination of the matter, and that he still believed that a list of activities was inappropriate for a global convention of the kind anticipated for the topic. He was, however, well aware of the concern which had been expressed regarding the need for further clarity in the scope of the topic, specifically about the type of activities with respect to which the draft articles would apply. To that end, he had explored the possibility of listing not activities, but substances which were inherently dangerous, so that certain activities relating to them would most likely carry the risk of causing transboundary harm. That model had been followed in the draft rules on compensation for damage caused to the environment prepared for the Council of Europe,<sup>340</sup> which were rules on civil liability for dangerous activities. Dangerous activities in that draft were defined in relation to the concept of dangerous substances, a list of which was annexed to the rules, and what was done with such substances: handling, storage, production, discharge and similar operations. That draft also covered activities using technologies which produced hazardous radiation, the introduction into the environment of dangerous genetically altered organisms or dangerous micro-organisms, etc. The draft rules defined dangerous substances as those which created a significant risk of harm to persons or property, or to the environment, such as flammable and corrosive materials, explosives, oxidants, irritants, carcinogens and toxic, ecotoxic and radiogenic substances, as indicated in an annex. The Special Rapporteur felt that that model was perhaps better for a global convention than a list of activities, since it offered greater flexibility and yet allowed for considerable precision in the scope of the topic. He was therefore inclined to propose that model to the Commission. Of course, such a list would have to be drawn up in consultation with a group of experts and would not be exhaustive, because it would always remain to be seen if the risk of transboundary harm presented by a particular activity was real. Such a list would also require some changes in draft articles 1 to 9 now before the Drafting Committee.

479. With regard to the list of dangerous substances, three general views emerged from the debate in the Commission: some members welcomed the list of substances in the form proposed; other members approved of it only if it was to be exhaustive; and yet other members did not agree with formulating any list.

480. According to the first view, the list of dangerous substances helped to clarify the scope of the draft articles further, since it gave examples of types of substances, and

<sup>339</sup> The Commission's discussion on the list of dangerous substances is reflected in paragraphs 478-483 below.

<sup>340</sup> See footnote 337 above.

eventually the activities related to them. Such a list, without departing from the general approach of the topic, provided additional clarity to the concept of risk. With the list, the notion of risk was associated with the types of activities for which preventive measures were to be taken. The list should not, as the Special Rapporteur had stated, be exhaustive but only illustrative and should be updated whenever necessary.

481. According to the second view, the whole purpose of having a list, whether of activities or of substances, was to state clearly the scope of the topic so that States knew exactly in respect of what activities or substances they must comply with the obligations set forth in the articles. A non-exhaustive list, or an illustrative list, would defeat that purpose. Such a list was of value only if it was exhaustive. A few of the members who expressed this view were those who had originally preferred a list of activities covered by the topic.

482. According to the third view, establishing a list, whether or not it was exhaustive, would tend to narrow the scope of the topic and to shift the emphasis in the topic from liability on the basis of causing harm to liability on the basis of conducting activities involving risk. According to these members, risk should play no role in compensation, otherwise it would be incompatible with the principle that the innocent victim should not be left alone to bear the loss. The concept of risk was relevant only to obligations of prevention and for that there was no need to have a list: a general definition of risk would suffice.

483. In summarizing the debate, the Special Rapporteur noted that his intention in proposing a list of dangerous substances was only to give more precise meaning to the concept of "significant risk" in relation to activities involving risk. The list of dangerous substances did not apply to activities with harmful effects. He did not believe such a list would have any impact on the scope of the topic. Nor did he feel that an exhaustive list would automatically determine whether an activity was one involving a significant risk of transboundary harm. An assessment of the risk was always necessary, and many factors had to be taken into account. A dangerous substance might cause a risk of harm in the territory of the State of origin, but not transboundary harm, when it was located too far from the borders of the neighbouring State; or a dangerous substance might be used in such a small quantity that it would not pose a risk of any transboundary harm. Therefore, regardless of whether the list was purported to be exhaustive, there must always be an assessment of the risk taking into account the circumstances in which a substance was being used.

## 2. COMMENTS ON SPECIFIC ARTICLES OF THE OUTLINE PROPOSED BY THE SPECIAL RAPPORTEUR

### (a) CHAPTER I. GENERAL PROVISIONS

ARTICLE 1 (Scope of the present articles) and  
ARTICLE 2 (Use of terms)<sup>341</sup>

<sup>341</sup> Draft articles 1 and 2 submitted by the Special Rapporteur in his sixth report read:

484. The Special Rapporteur pointed out that the inclusion of a list of dangerous substances would require changes in draft article 2. Subparagraph (a) defined activities involving risk. Subparagraphs (b) to (d) introduced the notion of dangerous substances. Those subparagraphs would eventually have to be drafted in consultation with experts. Some other changes had been introduced in article 2 in the light of comments made in the Commission and in the Sixth Committee of the General Assembly the previous

#### "CHAPTER I. GENERAL PROVISIONS

##### "Article 1. Scope of the present articles

"The present articles shall apply with respect to activities carried on in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create a risk of causing, transboundary harm throughout the process."

##### "Article 2. Use of terms

"For the purposes of the present articles:

"(a) 'Activities involving risk' means activities referred to in article 1, including those carried on directly by the State, which:

"(i) involve the handling, storage, production, carriage, discharge or other similar operation of one or more dangerous substances;

"(ii) use technologies that produce hazardous radiation; or

"(iii) introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

"(b) 'Dangerous substances' means substances which present a[n] appreciable [significant] risk of harm to persons, property [, the use or enjoyment of areas] or the environment, for example flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in annex . . . A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of subparagraph (a);

"(c) 'Dangerous genetically altered organisms' means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombination, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in annex . . . ;

"(d) 'Dangerous micro-organisms' means micro-organisms which create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms which produce toxins;

"(e) '[Appreciable] [Significant] risk' means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm;

"(f) 'Activities with harmful effects' means activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

"(g) 'Transboundary harm' means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use or enjoyment of areas] or the environment. In the present articles, the expression always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;

"(h) '[Appreciable] [Significant] harm' means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

(Continued on next page)

year. Subparagraph (g) on “transboundary harm” had been revised to include the concept of preventive measures taken after an accident had occurred, in the case of activities involving risk, or, in the case of activities with harmful effects, to minimize the harm. Such measures, in the Special Rapporteur’s view, if taken by the affected State in order to protect itself and its citizens, should be treated as part of the harm to that State. Another significant change in the definition of transboundary harm in subparagraph (g) was the inclusion of harm to the environment apart from harm to persons and property. In the Special Rapporteur’s view, reparation for harm to the environment must be made by restoring the conditions which existed prior to the occurrence of the harm, and the cost of such operations must be borne by the State of origin if they were carried out by the affected State or by a third party at its request. If it was not possible to return to the *status quo ante*, the monetary value of the impairment suffered should somehow be estimated and the affected State be compensated with an equivalent sum, or with such other compensation by the State of origin as was negotiated between the parties concerned. Subparagraph (h) attempted to give a brief definition of “[appreciable] [significant] harm”. The Special Rapporteur said that he was open to suggestions in that regard. He had also attempted to define the concept of an “incident” in subparagraph (k). He had preferred the term “incident” to “accident” so as to include conditions both when matters were beyond the operator’s control and when the injurious effects arose in the normal course of an activity and were somehow linked to it. Subparagraph (m) introduced the two aspects of the concept of prevention, namely measures taken to prevent the occurrence of an incident or harm and measures intended to minimize harm.

485. There were few comments in the Commission on draft article 1. Some were made in reference to the general scope of the topic (see paras. 478-483 above). A few comments were also made to the effect that, in terms of structure, article 1 did not seem to incorporate the very many changes which had been made in article 2 in the definition of activities involving risk and activities causing harm. Article 2, on the other hand, was extensively discussed. Some members felt that the new text of article 2 was too long and too complex for definitions of terms. It included 14 definitions, some of which were not self-contained and in turn had to rely on further definitions. Perhaps the definitions of some of the terms could be separated and introduced as independent articles. Some

(Footnote 341 continued)

“(i) ‘State of origin’ means the State which exercises jurisdiction or control over an activity referred to in article 1;

“(j) ‘Affected State’ means the State under whose jurisdiction or control the transboundary harm arises;

“(k) ‘Incident’ means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

“(l) ‘Restorative measures’ means appropriate and reasonable measures to restore or replace the natural resources which have been damaged or destroyed;

“(m) ‘Preventive measures’ means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it has occurred;

“(n) ‘States concerned’ means the State or States of origin and the affected State or States.”

other members did not see much difficulty with a long list of terms being defined in article 2 at the present early stage of the work on the topic, since, as that work progressed, the list could be shortened if some terms proved unnecessary. The Special Rapporteur, in summing up the discussion, noted that the topic dealt with a new field and obviously many terms used in the draft articles were not widely known and must therefore be defined. Conventions on related subjects all had long lists of terms defined.

486. Some members commented that the definition of the expression “activities involving risk” in subparagraph (a) relied on four separate concepts: “dangerous substances”, “technologies that produce hazardous radiation”, “dangerous genetically altered organisms” and “dangerous micro-organisms”. Any activity which was not related to one of those four elements, even if, objectively speaking, it might be the cause of transboundary harm—for instance, the construction or operation of a dam—would apparently be excluded from the definition and would therefore not be considered an activity involving risk. The definition should therefore be reconsidered.

487. It was also pointed out that the definition of “activities with harmful effects” in subparagraph (f) was perhaps narrowly construed and that it was uncertain whether it also included the effects of activities which caused harm although the risk of harm was not anticipated. It was further stated that the relationship between the latter type of activities and article 2 should be clarified, since the article made no reference to such activities. With regard to the expression “transboundary harm” in subparagraph (g), many members welcomed the fact that that concept now included harm to the environment, as well as the cost of preventive measures taken to contain or minimize transboundary harm. As regards the choice between the qualifiers “appreciable” and “significant” to set the threshold for harm, many members preferred the term “significant”. As for the term “incident”, some members expressed a preference for the term “accident” in regard to activities involving risk, which they felt was more commonly used. Concerning the definition of “restorative measures” in subparagraph (l), a comment was made that the cost of such measures should also be included in the definition of “transboundary harm”. It was felt that, in the concept of “preventive measures”, a clearer distinction should be made between measures taken to prevent an accident and those taken to minimize harm. The latter could perhaps be referred to as measures to mitigate harm. Some members also suggested that the concept of damage should perhaps not be defined in article 2, but be the subject of a separate article; many precedents already existed in that regard. Particularly in the context of the present topic, where damage was meant to include damage to the environment, persons and property, preventive measures, etc., it might be better to have a separate article devoted to such a definition.

ARTICLE 3 (Assignment of obligations)

ARTICLE 4 (Relationship between the present articles and other international agreements) *and*

ARTICLE 5 (Absence of effect upon other rules of international law)<sup>342</sup>

<sup>342</sup> Draft articles 3, 4 and 5 submitted by the Special Rapporteur in his sixth report read:

488. The Special Rapporteur did not propose changes in draft articles 3, 4 and 5. None of the articles was extensively discussed, although a few members of the Commission felt that the title of draft article 3 was unclear and that it should be made plain in the article that, if liability was to be established, the State of origin must be fully aware of the potential risk of the activity and have some control over it. One member also expressed uncertainty about the compatibility of draft article 4 with article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties.

(b) CHAPTER II. PRINCIPLES

ARTICLE 6 (Freedom of action and the limits thereto)

ARTICLE 7 (Cooperation)

ARTICLE 8 (Prevention) and

ARTICLE 9 (Reparation)<sup>343</sup>

*"Article 3. Assignment of obligations"*

"1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

"2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1."

*"Article 4. Relationship between the present articles and other international agreements"*

"Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1 in relations between such States the present articles shall apply subject to that other international agreement."

*"Article 5. Absence of effect upon other rules of international law"*

"The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act."

<sup>343</sup> Draft articles 6, 7, 8 and 9 submitted by the Special Rapporteur in his sixth report read:

"CHAPTER II. PRINCIPLES

*"Article 6. Freedom of action and the limits thereto"*

"The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States."

*"Article 7. Cooperation"*

"States shall cooperate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall cooperate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also cooperate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places [areas] under its jurisdiction or control."

489. The Special Rapporteur did not propose substantive changes in draft articles 6, 7, 8 and 9. Only draft article 8, he stated, had been revised to include the broader definition of prevention, namely those measures which also had to be taken in order to minimize the harmful effects of an activity. As for draft article 9, the Special Rapporteur suggested qualifying the obligation of the State of origin by stating that "the State of origin shall ensure that [compensation] [reparation] is made"; he also suggested replacing the words "the State of origin and the affected State or States" by "the parties concerned" in order to cover cases in which parties other than States were involved, such as in cases of civil liability. Draft articles 6 and 7 were not extensively discussed in the Commission, although a few members felt that their wording could be improved. Concerning article 7, the comment was made that, while it was useful to call on the assistance of international organizations, there might not be any such organizations competent to intervene.

490. With regard to draft article 8, while some members found it generally acceptable, a few others did not agree with the use of the broader concept of preventive measures to include measures designed to minimize harmful effects. A comment was also made to the effect that the article was not sufficiently stringent and that there should at least be a requirement for compliance with safety measures. To that end, the phrase "in so far as they are able" should be deleted.

491. As regards draft article 9, it was pointed out that the text should also include the concept of "restorative measures", at least where the affected State permitted such measures. While a few members were not satisfied that the article fully reflected the concept of civil liability, some others felt that, with the revisions suggested by the Special Rapporteur, the provision was sufficiently flexible to allow the settlement of issues of reparation between private parties also, without the direct involvement of States.

ARTICLE 10 (Non-discrimination)<sup>344</sup>

492. In order to ascertain the views of the Commission, the Special Rapporteur proposed a new article on non-discrimination in chapter II. He noted that that principle was not unknown in "channelling" claims in respect of

*"Article 8. Prevention"*

"States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of the activities in question. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1."

*"Article 9. Reparation"*

"To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm."

<sup>344</sup> Draft article 10 submitted by the Special Rapporteur in his sixth report read:

(Continued on next page)

transboundary harm in Europe. Under that principle, foreign individual claimants were given access to domestic courts and channels of the State of origin on an equal footing with domestic claimants. The principle was without prejudice to the fact that a minimum international standard might be required of a State of origin which was higher than that established by its domestic law. That minimum standard, the Special Rapporteur noted, was particularly important in view of the fact that, with the exception of some well-integrated States in a few regions, domestic-law standards varied considerably. The principle in question also implied that States must provide remedies in their domestic law for the type of harm dealt with in the present articles. Otherwise, there would be no point in having access to the domestic courts of a State of origin whose domestic law did not provide for any remedy.

493. Many members welcomed draft article 10. They felt that such a provision was essential in the operation of the civil liability regime, where injured parties would be given access to courts of the State of origin. Some members, however, wondered about the acceptability of article 10 in a global convention. They were not certain how the article would deal with the considerable diversity in domestic laws—which the Special Rapporteur himself had noted—regarding damage caused as a result of the type of activities covered by the topic. Hence they felt that further reflection was necessary.

### (c) CHAPTER III. PREVENTION

494. The Special Rapporteur had also revised the procedural rules on measures of cooperation and of prevention in order to make them simpler and more flexible. Most members of the Commission, while welcoming the more flexible procedural rules to secure preventive measures, were not certain that the articles of chapter III sufficiently took into account all types of activities covered by the topic. It appeared that the articles were basically designed to apply to planned activities. It seemed unclear how the obligations of preventing transboundary harm were to apply to activities which were not planned. That was perhaps one of the drawbacks of formulating obligations of prevention entirely in terms of procedural rules. Several members also pointed out that, in general, the obligations of States under the provisions of chapter III were not very stringent and often less exacting than their obligations under positive law.

ARTICLE 11 (Assessment, notification and information) and

ARTICLE 12 (Participation by the international organization)<sup>345</sup>

(Footnote 344 continued.)

#### *“Article 10. Non-discrimination*

“States Parties shall treat the effects of an activity arising in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of the present articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by activities referred to in article 1.”

<sup>345</sup> Draft articles 11 and 12 submitted by the Special Rapporteur in his sixth report read:

495. Draft article 11 sets forth the general duty of States to assess, notify and inform in the case of certain activities which cause, or create the risk of causing, transboundary harm. Even though that duty was relatively well established in State practice, the Special Rapporteur stated that, in his view, it had not become a firm obligation whose breach would incur sanctions. With regard to activities involving risk, the introduction of a list of dangerous substances, the Special Rapporteur felt, narrowed and made more precise the duty of States under article 11. Where there was more than one State which might be affected by the extraterritorial effects of such activities and it would be difficult to identify them, the State of origin had to call on an international organization competent in that area for assistance and supply it with the relevant information. The State of origin might evade the duties established by article 11, but naturally it would have to pay the corresponding compensation if transboundary harm occurred, and that compensation should be negotiated with the affected State in accordance with draft articles 21 and 23.<sup>346</sup> Draft article 12 was intended to provide a framework within which international organizations could function in accordance with paragraph 2 of article 11.

496. Most members considered participation by international organizations in facilitating the obligations of prevention positive and useful. The technical assistance that such organizations could provide to developing countries would be particularly significant and necessary. Some members wondered about the existence of such competent international organizations. Some doubts were also expressed about how international organizations could become involved in the resolution of the issues raised by the topic. International organizations could operate only under their own charter and mandate and many of them would not be

### “CHAPTER III. PREVENTION

#### *“Article 11. Assessment, notification and information*

“1. If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on under its jurisdiction or control, it shall review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.

“2. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in paragraph 1.”

#### *“Article 12. Participation by the international organization*

“Any international organization which intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster cooperation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make of it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State which requests such assistance in relation to the matter which prompted its intervention.”

<sup>346</sup> See footnote 353 below.

authorized to perform the functions that were anticipated for them in the draft articles. Besides, such organizations might not be able to extend their assistance to non-members. There was also the question as to who should pay the expenses incurred by international organizations in the case of their participation. Hence more thought should be given to the role of international organizations in the context of the present topic.

ARTICLE 13 (Initiative by the presumed affected State)

ARTICLE 14 (Consultations)

ARTICLE 15 (Protection of national security or industrial secrets) and

ARTICLE 16 (Unilateral preventive measures)<sup>347</sup>

497. The Special Rapporteur stated that draft article 13 was intended to give an opportunity to a State that was affected by an activity in another State to put in motion the procedure designed to create a regime for that activity. Such a potentially affected State could request the State of origin to comply with article 11. The request should be

<sup>347</sup> Draft articles 13, 14, 15 and 16 submitted by the Special Rapporteur in his sixth report read:

*"Article 13. Initiative by the presumed affected State*

"If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (g), or creating a[n appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of article 11. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State."

*"Article 14. Consultations*

"The States concerned shall consult among themselves, in good faith and in a spirit of cooperation, in an attempt to establish a regime for the activity in question which takes into account the interests of all parties. At the initiative of any of those States, consultations may be held by means of joint meetings among all the States concerned."

*"Article 15. Protection of national security or industrial secrets*

"The State of origin shall not be bound by the provisions of article 11 to provide data and information which are vital to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall cooperate in good faith with the other States concerned in providing any information which it is able to provide, depending on the circumstances."

*"Article 16. Unilateral preventive measures*

"If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal regime for that activity among the States concerned, the State of origin shall take appropriate preventive measures as indicated in article 8, in particular appropriate legislative and administrative measures, including requiring prior authorization for the conduct of the activity and encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident which has already occurred and which presents an imminent and grave risk of causing transboundary harm."

accompanied by a technical and documented explanation setting forth the reasons for the former State's belief that it was affected. Under article 13, if the activity in question happened to be one of those covered by article 1, the State of origin should bear the costs incurred by the affected State.

498. The Special Rapporteur said that consultations in good faith were essential to regimes of that nature. Draft article 14 simply obligated States which found themselves within the scope of the present articles to negotiate in good faith and in a spirit of cooperation in order to agree on a regime for the activity in question which adequately took care of their interests. Draft article 15 was designed, in addition to protecting the potentially affected States, to respect the essential interests of the State of origin in matters of national security and industrial secrets. While the State of origin was not obliged to disclose information, it was expected to negotiate in good faith with potentially affected States and to take their interests into account. The Special Rapporteur noted that similar ideas had been incorporated in recent legislative efforts of a similar nature.<sup>348</sup> Draft article 16 reiterated the obligation of the State of origin to take unilateral measures to prevent transboundary negative consequences of activities being conducted under its jurisdiction or control until agreement had been reached on such matters with the potentially affected State. Such unilateral measures included prior government authorization for conducting the activities in question, compulsory insurance or other financial guarantees to cover possible damages, and measures to mitigate the damage in case the harmful effects of the activities began to appear.

499. Articles 13 to 16 were not extensively discussed in the Commission. It was noted that article 13 was not quite clear and that article 16 was too complex. While a few members supported the retention of article 16, a few others preferred its deletion. A comment was made that article 16 was a specific application of the general obligation of due diligence and of article 8. Since it was unrealistic to expect States to formulate a regime for each activity, article 16 imposed on them the obligation of taking unilateral preventive measures. However, the measures that the State of origin must take under article 16 were not sufficiently stringent.

ARTICLE 17 (Balance of interests)<sup>349</sup>

500. In view of the interest expressed during the debates in the Commission and in the Sixth Committee of the

<sup>348</sup> See, for example, the principles concerning transfrontier pollution annexed to OECD Council recommendation C(74)224 of 14 November 1974 (*OECD and the Environment* (Paris, OECD, 1986), p. 142); and principle 6, paragraph 2, of the "Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States" adopted by UNEP in 1978 (UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978)).

<sup>349</sup> Draft article 17 submitted by the Special Rapporteur in his sixth report read:

*"Article 17. Balance of interests*

"In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1,

(Continued on next page)

General Assembly in providing some guidelines for States in negotiating a regime in respect of activities covered by the present articles, the Special Rapporteur had proposed article 17. The article was intended to give some content to the concept of a balance of interests. The factors listed should be taken into account in order to balance the interests of the parties involved in such cases. Those factors mostly reflected the ones originally indicated in section 6 of the schematic outline. The Special Rapporteur stated that, even though he saw certain advantages in having such guidelines, he was concerned that such guidelines were not truly legal norms and hence they might be inappropriate for inclusion in the draft articles. He was, however, aware that the incorporation of such guidelines in a legal instrument was not novel. Article 7 of the draft articles on the law of the non-navigational uses of international watercourses<sup>350</sup> had also listed factors relevant to "equitable and reasonable" utilization of an international watercourse. Due to the non-normative nature of the factors in question, he had drafted article 17 in permissive and not obligatory language. Besides, the relevance of the factors, he maintained, depended on the particular case.

501. Many members of the Commission felt that draft article 17 was a commendable effort to produce a list of factors to be taken into account. There was solid support in State practice for the use of the balance-of-interests approach. Such a list could be of assistance to States in negotiating a regime. There were, however, divergent views among these members about how the factors in

(Footnote 349 continued)

those States may, in their consultations or negotiations, take into account the following factors:

"(a) the degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

"(b) the existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

"(c) the possibility of carrying on the activity in other places or by other means, or the availability of alternative activities;

"(d) the importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

"(e) the economic viability of the activity in relation to possible means of prevention;

"(f) the physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

"(g) the standards of protection which the affected State applies to the same or comparable activities, and the standards applied in regional or international practice;

"(h) the benefits which the State of origin or the affected State derive from the activity;

"(i) the extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

"(j) the willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

"(k) the extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

"(l) the extent to which assistance from international organizations is available to the State of origin;

"(m) the applicability of relevant principles and norms of international law."

<sup>350</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 36.

question and the concept of a balance of interests fitted into the obligations in the preceding and subsequent articles. For example, it was wondered whether that concept was relevant only to setting up a regime to prevent transboundary harm, or also with respect to reparation and liability, in particular with respect to draft articles 9 and 21.<sup>351</sup> A few members, questioning the legal nature of the list in article 17, felt that it could be annexed to the draft articles since the factors were only guidelines and had no normative value.

ARTICLE 18 (Failure to comply with the foregoing obligations)

ARTICLE 19 (Absence of reply to the notification under article 11) and

ARTICLE 20 (Prohibition of the activity)<sup>352</sup>

502. It was the Special Rapporteur's understanding from the discussion in the Commission and in the Sixth Committee of the General Assembly the previous year that the preferred view was that non-compliance with obligations of prevention, and particularly with procedural obligations, should not constitute grounds for a cause of action by the potentially affected State. In his view, however, certain important consequences should be attached to compliance with procedural obligations so as at least to induce States to fulfil them. Otherwise, there would be no incentive for States to take preventive measures. Draft article 18 therefore attempted to strike a certain balance. Non-compliance with the relevant provisions would deprive the State of origin of the right to invoke article 23, on the reduction of compensation payable to the affected State, in case of transboundary harm caused by the activity in question.

<sup>351</sup> The Commission's discussion on the interrelationship between draft articles 17 and 21 is reflected in paragraphs 511-512 below.

<sup>352</sup> Draft articles 18, 19 and 20 submitted by the Special Rapporteur in his sixth report read:

"Article 18. *Failure to comply with the foregoing obligations*

"Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings unless that is provided for in other international agreements in effect between the parties. If, in those circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23."

"Article 19. *Absence of reply to the notification under article 11*

"In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory. This period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it."

"Article 20. *Prohibition of the activity*

"If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated for, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives."

503. Some members who addressed article 18 had difficulties with its basic structure and one member expressed reservations about the very principle embodied in the article. In their view, article 18 could not deny a right of action for the affected State that might exist outside the present articles under customary international law. They felt that the article should therefore be revised. A few of these members were also concerned that article 18 perhaps went too far and in its current form reduced considerably the obligation of prevention under article 8. There should perhaps be some more significant consequences of failure to comply with the procedural obligations. According to this view, the Commission should create a regime containing obligations that gave rise to international responsibility in the event of a breach. The obligations of consultation, notification, etc. must be at least as strict as those in the 1982 United Nations Convention on the Law of the Sea. A breach of such obligations, as had become clear in the Commission's work on the topic of State responsibility, did not always entail pecuniary compensation: nominal damages or other forms of satisfaction could perhaps apply.

504. In summing up the debate, the Special Rapporteur said he felt that there seemed to be uncertainty in the Commission as to the role which the obligations of prevention should play in the topic. If the obligations of prevention were to be more stringent, i.e. if their breach would lead to State responsibility, then the topic would be dealing with wrongful acts, not with acts not prohibited by international law. Of course, that could be remedied if, in the title of the topic, the word "acts" were replaced by "activities". In that case, if States did not comply with the obligations incumbent on them—for example, imposing certain obligations of prevention on private parties conducting, under their jurisdiction or control, activities referred to in article 1—they would be obligated to pay compensation for transboundary harm.

505. With regard to draft article 19, the Special Rapporteur stated that it provided a reasonable time within which the State that had been notified had to reply. He had recommended a period of six months. If during that time the notifying State did not receive any reply, it would be considered that the notified State agreed either that the activity would not cause transboundary effects or that the measures of prevention indicated by the notifying State were sufficient to prevent possible transboundary harm. In the event of a notified State being a developing country, technical assistance to evaluate the information received from a notifying State might be forthcoming from relevant international organizations. A few members of the Commission commented on article 19. They expressed reservations about the assumption that non-reply by the potentially affected State should amount to acquiescence. They also suggested that the "six months" period for reply should be replaced by a reference to "a reasonable time".

506. Regarding draft article 20, the Special Rapporteur explained that there might be circumstances in which a proposed activity would have transboundary harmful consequences which could not be avoided or even adequately compensated for, such as in cases of irreversible environmental harm. It was only fair and reasonable that such activities should not be authorized. Once it could be demonstrated that the activity in question had been modified and would not cause unreasonable risk of

transboundary harm, or that such harm could be adequately compensated for, permission would be granted. Article 20, the Special Rapporteur said, was intended to set a limit—to provide a threshold beyond which an activity could not be conducted.

507. The members who spoke on article 20 welcomed the general idea it put forward. Their views differed, however, as to how a threshold could be placed on such activities. For a few members, the article functioned as an injunction pending satisfactory preventive measures. For some others, the article should be couched in stronger terms, since a qualified prohibition would merely undermine the efficiency of prevention. According to these members, once it was clear that an activity would cause such serious and irreversible transboundary harm, there should be no hesitation in requiring its prohibition until necessary preventive measures were taken. That approach, in their view, was only fair. One member, however, felt that article 20 should apply only in respect of those activities which presented a high probability of causing disastrous transboundary harm. According to this view, the obligation of the State of origin should be clarified; in other words, should it refuse authorization to conduct the activity, or should it also withdraw authorization? Thus the relationship between article 20 and the civil liability regime introduced in chapter V of the draft should be further clarified. For example, it should be made clearer whether the ability to pay compensation, under article 20, was that of the State or that of the operator. Another member felt that the obligation of banning an activity of the kind in question should be reciprocal; the other State should also agree not to conduct similar activities in its territory.

#### (d) CHAPTER IV. LIABILITY

508. The purpose of chapter IV, the Special Rapporteur explained, was to elaborate in specific articles the concept of liability, which as a principle was introduced in article 9 (Reparation). Accordingly, liability would be incurred in the case of transboundary harm regardless of any preventive measures which the State of origin might have taken. The only difference was in the amount of compensation. In the Special Rapporteur's original view, the concept of reparation in the present articles did not entirely correspond to the classical one as used in the topic of State responsibility. Under the present articles, reparation did not amount to total restitution, since deductions were permissible. Such deductions would contemplate, for example, the cost of preventive measures taken specifically for the benefit of the affected State, the extent to which the affected State might also have benefited from the activity, etc. The Special Rapporteur felt that, considering that the present articles were intended to apply to a wide range of activities, one could not possibly envisage in advance all circumstances which would affect the measure of damages in every particular case. Besides, the purpose of the articles, he stated, was to provide guidelines for States in negotiating a regime in respect of activities covered by article 1, and also to provide a safety net to protect the affected State in the absence of such an agreement. The articles were designed on the basis that States would, in so far as possible, negotiate the amount of compensation. Only if the State of origin refused to negotiate the matter or refused to pay the agreed compensation would it incur responsibility for a wrongful act.

509. Many members of the Commission agreed that chapter IV formed the central core of the topic. Two basic issues in the chapter were considered to be of particular importance: first, the obligation to pay compensation for transboundary harm, and secondly, determination of the liable party, i.e. whether the State of origin or the operator should be held liable. As regards the first point, many members felt that the chapter should have begun with a clear statement on the obligation to pay compensation, rather than with a provision stressing the obligation to negotiate compensation. Negotiation was only a modality by which disputes regarding compensation could be settled. Substantive rights and obligations concerning liability and compensation should be set forth clearly. Some members also questioned the existence in present international law of an obligation to pay compensation in the absence of any breach of international law. Although accepting that such an obligation could be envisaged, they stressed that it would be a considerable innovation. As regards the second point, namely determination of the liable party, some members strongly opposed the primary liability of the State of origin. In their view, the operator should be held liable, a proposition that was compatible with contemporary State practice. It was only in the 1972 Convention on International Liability for Damage Caused by Space Objects that the State of origin was liable for transboundary damage caused by its activities. That Convention was, however, of a special nature and could not be generalized. In other conventions, operators were held strictly liable and States were held responsible only to the extent that they had not adopted proper domestic legislation for the safe operation of the activities with which the operators should have complied. A few other members disagreed with this view. They felt that the State should be held primarily liable, because it alone had control and authority in its territory to organize its domestic affairs and make certain that activities conducted there did not cause harm to other States. Other members felt that States should bear some liability for activities within their territory having extraterritorial effects. They felt that it was unfair to allow States to avoid liability by hiding behind the operators.

510. In summing up the debate, the Special Rapporteur noted that there was a division of views in the Commission as to how the question of liability should be settled between the operator and the State of origin. He agreed that international practice regarding liability and compensation undoubtedly pointed to the private party, whether operator, owner, carrier, etc., as the subject of such obligations. States sometimes bore a residual liability for the amounts not covered by the private party. He felt that, in order to formulate articles on liability, it must be decided who should bear primary liability for transboundary harm. He invited the Commission to address that issue more extensively at its next session.

ARTICLE 21 (Obligation to negotiate)

ARTICLE 22 (Plurality of affected States) and

ARTICLE 23 (Reduction of compensation payable by the State of origin)<sup>353</sup>

511. Draft article 21, the Special Rapporteur stated, reiterated the principle of negotiation in good faith in respect of resolving problems deriving from the occurrence of transboundary harm. The article thus directed the parties to negotiate compensation, bearing in mind that the harm should, in principle, be fully compensated for. The language, however, had been chosen so as to allow considerations of balancing of interests to play a role in the amount of compensation. Those considerations were stipulated in draft article 23.

512. Some members reiterated the view that article 21 should simply state the obligation to pay compensation. They felt that the qualifying expression "in principle" weakened the article and should therefore be deleted. These members also saw an inconsistency in the language of the article, which seemed to attempt to combine the balancing of interests with the principle of full compensation. The two concepts would not go together. Compensation determined on the basis of a balance of interests might never be full. Article 21 should therefore reflect a choice. An alternative would be to begin with an article indicating the principle of full compensation, to be followed by another article indicating the circumstances in which compensation must be reduced. That approach would perhaps bring the concept of a balance of interests more appropriately into liability and compensation without denying the principle of full compensation. One member found article 21, as drafted, appropriate, since it presumed that the State of origin itself had also suffered damage and was thus innocent. Another member did not agree with the principle of full compensation. In his view, such a principle was not supported by State practice. The principle of full compensation confused the present topic with that of

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"CHAPTER IV. LIABILITY

"Article 21. *Obligation to negotiate*

"If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for."

"Article 22. *Plurality of affected States*

"Where more than one State is affected, an international organization with competence in the matter may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their cooperation. If the consultations referred to in article 14 have been held and if an international organization has participated in them, the same organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a regime for the activity that caused the harm."

"Article 23. *Reduction of compensation payable by the State of origin*

"For claims made through the diplomatic channel, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [ , for example if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried on in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm]."

<sup>353</sup> Draft articles 21, 22 and 23 submitted by the Special Rapporteur in his sixth report read:

State responsibility, which also called for full compensation. What then were the differences in terms of consequences between the present topic and that of State responsibility? Another member also wondered about the real difference between the two topics, since in his view the liability envisaged in the present topic was increasingly eclipsed, in practice, by the implementation of rules normally applicable in the case of responsibility for failure to comply with an obligation. A few members felt that some thought should be given to setting a ceiling on compensation. A few other members opposed that idea and found it unfair and impractical considering the fact that the topic applied to so many different activities with different levels of consequences. Those members who preferred that liability should be placed primarily on the operator felt that article 21 should be revised to introduce that idea.

513. The purpose of draft article 22, the Special Rapporteur stated, was to facilitate the obligation of negotiation embodied in article 21 where there was more than one affected State. The Special Rapporteur felt that international organizations could play a role in that process through their good offices and by helping to resolve the problems among States concerned more amicably. Draft article 23 was intended only to give some guidelines to States in their negotiations as to how harm should be determined and compensation measured. For example, if the State of origin could demonstrate that certain preventive measures had been taken solely with the intention of preventing transboundary harm, the cost of those particular measures might be taken into account. Similarly, if the State of origin could show that the affected State had also benefited from the activity, it would be only fair that some reduction be made in the amount of compensation proportionate to the benefit. The Special Rapporteur explained that such criteria, due to their broad nature, could be taken into account only in diplomatic negotiations. Most likely, when the matter was before a domestic court, the relevant factors would be limited to what the domestic law provided (art. 24, para. 3).

514. A few comments were made in the Commission on articles 22 and 23. The general question whether any international organizations would have competence in such matters was also raised in the context of article 22. As for article 23, it was felt that it was perhaps too general.

ARTICLE 24 (Harm to the environment and resulting harm to persons or property)

ARTICLE 25 (Plurality of States of origin)

ARTICLE 26 (Exceptions) *and*

ARTICLE 27 (Limitation)<sup>354</sup>

<sup>354</sup> Draft articles 24, 25, 26 and 27 submitted by the Special Rapporteur in his sixth report read:

*"Article 24. Harm to the environment and resulting harm to persons or property*

"1. If the transboundary harm proves detrimental to the environment of the affected State, the State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore those conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.

515. The Special Rapporteur pointed out that transboundary harm might be caused to the environment of the affected State or to persons or property in that State. Draft article 24 was intended to provide some basis for remedies when the harm was to the environment of the affected State. Accordingly, the State of origin was obligated to bear the costs of any reasonable operation to restore the conditions that existed prior to the occurrence of the harm. If such restoration was impossible, the parties should reach agreement on other remedies, including monetary compensation. Obviously, if damage was caused to persons or property in the affected State apart from its environment, compensation should also be made. The factors relevant to determining the amount of compensation referred to in article 23 should be taken into account in negotiations between the parties under article 24.

516. Many members of the Commission welcomed the idea of imposing an obligation of compensation for harm to the environment. In their view, that was a step forward. But a few of these members saw no need for a separate article, since the concept of harm as defined in article 2

"2. If, as a consequence of the harm to the environment referred to in paragraph 1, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm.

"3. In the cases referred to in paragraphs 1 and 2, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply."

*"Article 25. Plurality of States of origin*

"In the cases referred to in articles 23 and 24, if there is more than one State of origin,

ALTERNATIVE A

they shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability."

ALTERNATIVE B

they shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused."

*"Article 26. Exceptions*

"1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

"(a) if the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

"(b) if the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

"2. If the State of origin or the operator, as the case may be, prove that the harm resulted wholly or partially either from an act or omission done with intent to cause harm by the person who suffered the harm or from the negligence of that person, they may be exonerated wholly or partially from their liability to such person."

*"Article 27. Limitation*

"Proceedings in respect of liability under the present articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event shall proceedings be instituted once thirty years have elapsed since the date of the accident that caused the harm. If the accident consisted of a series of occurrences, the thirty years shall start from the date of the last occurrence."

already included harm to the environment, and particularly in view of the fact that all the criteria relevant to determining and measuring damage to persons and property were applied to harm to the environment. There was therefore no point in stipulating the obligation to pay compensation for harm to the environment separately. One member disagreed with this view. He felt that, traditionally, compensation had been provided only for damage to persons or property. The notion that compensation should also be provided for damage to the environment *per se* was new and should therefore be stated separately. Another view was that, in State practice, compensation for damage to the environment was paid only for those measures that were actually taken or were to be taken in order to restore the environment. Except for the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, which provided for compensation in case it was impossible to restore the *status quo ante*, no other State practice supported such an obligation.

517. The Special Rapporteur stated that draft article 25 was intended to deal with circumstances in which there was more than one State of origin whose activities had caused transboundary harm. He suggested two ways of approaching the problem. Under one approach, States of origin would be jointly and severally liable and an entire claim might be brought against any one of them. That approach was more advantageous to the affected State and the injured party, had been adopted in the 1972 Convention on International Liability for Damage Caused by Space Objects and was more suitable for court proceedings. Under the second approach, the States of origin would be liable only in proportion to the harm they had caused. That approach therefore allowed each State of origin to put forward its procedural position and claims for reduction of compensation, and was more suitable for diplomatic negotiations. Most members who spoke on article 25 preferred the second approach, proposed in alternative B. In their view, it was unlikely that States would accept full liability for harm which had been partly caused or aggravated as a result of activities of other States. One member felt that the concept of joint and several liability was established in domestic law and was more protective of the interests of the injured party, without excluding the possibility for States of origin to apportion the damages among themselves. The concept should therefore be maintained in article 25.

518. Draft article 26 dealt with full or partial exoneration from liability. The Special Rapporteur explained that there might be circumstances in which transboundary harm occurred due to conditions beyond the control of the State of origin or the operator, or partly due to negligence on the part of the affected State or of the party who suffered harm. Acts of war, hostilities, civil war, insurrection, natural phenomena of an exceptional character, or an act or omission of a third party done with intent to cause harm were grounds for exoneration. Such acts or omissions or negligence on the part of the party who suffered harm were grounds for partial or complete exoneration. The Special Rapporteur explained that such grounds were common in conventions dealing with liability.<sup>355</sup> Draft article 27 set forth a statute of limitation. The period of time chosen was, of course, subjective. The question was to determine

a reasonable period. Some conventions had adopted a period of one year from the date of the occurrence of the damage or from the date of the identification of the State of origin.<sup>356</sup> More recent instruments elaborated on issues of liability, for example in the Council of Europe and the Economic Commission for Europe, seemed to opt for a period of three or five years from the discovery of the damage and a 30-year period from the occurrence of the incident, after which no claims could be brought against the author of the damage.<sup>357</sup>

519. On article 26, comments were made to the effect that it should also include terrorism as grounds for exoneration. Questions were also raised as to whether *force majeure* should also be included in the article. One member also stated that the wording of subparagraphs (a) and (b) of paragraph 1 had to be harmonized, because full exemption of the State concerned from liability was justified not only by the fact that the harm was directly due to the events referred to in subparagraph (a), but also and in particular by the fact that the harm was wholly caused by those events. As for article 27, the view was expressed that it was rather vague, since it did not indicate what was meant by "proceedings". In the way it was drafted, the article did not seem to apply to diplomatic negotiations and appeared to be limited to instances where the injured party was using judicial means.

#### (e) CHAPTER V. CIVIL LIABILITY

520. The Special Rapporteur recalled that, up to now, liability had been envisaged in the draft articles as primarily falling on the State of origin for the extraterritorial harmful consequences of activities conducted under its jurisdiction or control.<sup>358</sup> Without prejudice to that notion, he felt that the draft articles should provide certain rules in order to ensure a minimum degree of uniformity in the treatment by national courts of claims arising from activities referred to in article 1. As it was, there was nothing to prevent a claimant who had suffered transboundary harm from pursuing a claim before the courts of the State of origin. Besides, there might be situations where the affected State might wish not to bring any claims on behalf of its citizens against the State of origin. In such cases, private-law remedies would be the only channel for individuals to seek redress. The Special Rapporteur therefore thought that it would be useful to have some articles dealing with civil liability. Draft articles 28 to 33 were designed for that purpose.

ARTICLE 28 (Domestic channel)

ARTICLE 29 (Jurisdiction of national courts)

ARTICLE 30 (Application of national law)

<sup>355</sup> See, for example, article X of the 1972 Convention on International Liability for Damage Caused by Space Objects (United Nations, *Treaty Series*, vol. 961, p. 187).

<sup>357</sup> See rule 9 of the Council of Europe's draft rules on compensation for damage caused to the environment (see footnote 337 above); and article 18 of the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, adopted under the auspices of ECE (see United Nations publication, Sales No. E.90.II.E.39).

<sup>358</sup> For the Commission's discussion at the present session on the question whether the operator or the State of origin should bear primary liability, see paragraphs 508–510 above.

<sup>355</sup> See the conventions cited in the Special Rapporteur's sixth report (A/CN.4/428 and Add.1, paras. 56–59).

ARTICLE 31 (Immunity from jurisdiction)

ARTICLE 32 (Enforceability of the judgment) *and*

ARTICLE 33 (Remittances)<sup>359</sup>

521. The Special Rapporteur explained that draft article 28 was intended to bring into harmony the two channels

<sup>359</sup> Draft articles 28 to 33 submitted by the Special Rapporteur in his sixth report read:

“CHAPTER V. CIVIL LIABILITY

“Article 28. *Domestic channel*

“1. It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

“2. There is nothing in the present articles to prevent a State, or any individual or legal entity represented by that State that considers that it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and, in the case of article 29, paragraph 3, of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.”

“Article 29. *Jurisdiction of national courts*

“1. States Parties to the present articles shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in article 28 and shall also give affected States or individuals or legal entities access to their courts.

“2. States Parties shall make provision in their domestic legal systems for remedies which permit prompt and adequate compensation or other reparation for transboundary harm caused by activities referred to in article 1 carried on under their jurisdiction or control.

“[3. Except for the affected State, the other persons referred to in article 28 who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.]”

“Article 30. *Application of national law*

“The court shall apply its national law in all matters of substance or procedure not specifically regulated by the present articles. The present articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.”

“Article 31. *Immunity from jurisdiction*

“States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, except in respect of enforcement measures.”

“Article 32. *Enforceability of the judgment*

“1. When a final judgment made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

“(a) the judgment has been obtained fraudulently;

“(b) the respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;

“(c) the judgment is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

for pursuing a remedy, namely diplomatic negotiations and proceedings before domestic courts. Accordingly, presentation of a claim through negotiations between States did not require prior exhaustion of local remedies in the State of origin. At the same time, if a claim had already been presented before the domestic courts, the affected State was barred from presenting a claim for the same harm for which such claim had been made. Claims might be instituted against the State of origin or a liable private party in the courts of the affected State.

522. The Special Rapporteur mentioned two issues that must be resolved in respect of private-law remedies: first, access to the courts for all affected parties, including the affected State; and, secondly, the availability of remedies in applicable domestic laws. To resolve the former, States should, through their national legislation, give their courts subject-matter jurisdiction over claims in respect of transboundary harm covered by the present articles. To resolve the latter, States should ensure that reasonable pecuniary and other forms of remedy were available under their domestic law. Draft article 29 dealt with such jurisdictional issues.

523. In order to ensure a minimum uniformity in the laws applied by domestic courts, those courts should, in the Special Rapporteur's view, apply the present articles—and, of course, the domestic laws in respect of all matters, whether procedural or of substance, not dealt with in the articles. Domestic laws must be applied in such a manner as to be compatible with draft article 10, i.e. without discrimination. The Special Rapporteur stated that he had borrowed the idea for draft article 30 from articles 13 and 14 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy.<sup>360</sup> Domestic-law remedies could be used only if States of origin could not invoke immunity from jurisdiction, the subject of draft article 31.<sup>361</sup> Draft article 32 dealt with enforcement of judgments and draft article 33 removed any obstacles to the transfer of monetary compensation.

524. A number of members of the Commission welcomed chapter V of the draft, giving the option to the injured party to avail itself of domestic courts. Some of these members, however, felt that the articles should be re-examined, since they seemed to have been modelled primarily on provisions of the 1972 Convention on International Liability for Damage Caused by Space Objects, which might

“2. A judgment which is recognized to be in accordance with paragraph 1 shall be enforceable in any of the States Parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.”

“Article 33. *Remittances*

“States Parties shall take the steps necessary to ensure that any monies due to the applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover the harm in question, may be freely remitted to him in the currency of the affected State or in that of the State of his habitual residence.”

<sup>360</sup> United Nations, *Treaty Series*, vol. 956, p. 251.

<sup>361</sup> Draft article 31 did not affect immunity from enforcement measures. A similar idea was contained in article 13 (e) of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy (*ibid.*) and article XIV of the 1963 Vienna Convention on Civil Liability for Nuclear Damage (*ibid.*, vol. 1063, p. 265).

not be entirely appropriate for the present topic. Moreover, draft article 31, on immunity from jurisdiction, should be brought into harmony with the draft articles on the topic of jurisdictional immunities of States and their property. It was also pointed out that resort to domestic courts should not deny other forms of recourse available to private claimants in the case of, for example, denial of justice.

525. For those members who preferred that the topic be based primarily on civil liability, namely the liability of the operator, the articles of chapter V were not appropriate and needed reformulation to express that idea.

### 3. LIABILITY FOR HARM TO THE ENVIRONMENT IN AREAS BEYOND NATIONAL JURISDICTIONS (GLOBAL COMMONS)

526. In response to the Commission's request at its previous session, the Special Rapporteur had examined the possibility of extending the topic to include harm to areas beyond national jurisdictions of States—the so-called "global commons". The Special Rapporteur had examined a number of issues. They related to policy and to the applicability of important components of the theory of liability underlying the approach to the topic so far to harm to the global commons. It was evident, the Special Rapporteur felt, that industrial civilization had reached a point at which harm was being caused either in small quantities, but repeatedly, or in large amounts by accidents, but occasionally, to the environment in areas beyond national jurisdictions of States. The question was what was the best way of confronting the problem. A choice had to be made between two topics currently before the Commission. The problem could be dealt with either within the framework of liability in the present topic or within the framework of responsibility for wrongful acts in the topic of State responsibility.

527. As regards the applicability of some important components of the theory of liability forming the basis of the present topic, the Special Rapporteur referred to two elements: (a) the concept of harm; (b) the concept of affected States. He noted that there were two possibilities when harm occurred in areas beyond national jurisdictions: either the harm affected persons or property, or it affected the environment *per se*. The former possibility was already anticipated and hence came within the framework of the international liability topic. The latter possibility, however, namely harm to the environment *per se* in areas beyond national jurisdictions, posed considerable difficulty because that type of harm was not covered in the concept of harm appropriate for the present topic. The Special Rapporteur noted that harm to the environment *per se* as an independent ground for liability was something new and that, if such harm was to be measured on the basis of its impact on persons or property, it was difficult, at the current stage of scientific development, to measure with a sufficient degree of precision what identifiable harm to the global commons would result in identifiable harm to human beings or property. Even though an overall correlation could be made between harm to the global commons, the environment in general and the well-being and quality of life of human beings, that did not seem to be enough to establish the causal link necessary under the international liability topic as currently formulated. That would require,

perhaps, a different definition of harm and a different threshold of harm. There seemed to be only one convention to date which had come close to imposing liability for harm to the environment *per se*: the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities. The Special Rapporteur admitted that the absence of State practice was indicative of the fact that the problem was recent.

528. The Special Rapporteur noted that, if harm to the global commons was to be measured on the same basis as currently understood in the present topic, the consequences could be undesirable. The topic measured harm in relation to significant harm to human beings or property. Significant harm to the environment of the global commons might not lead to immediate significant harm to human beings: in order to affect human beings, harm to the global commons might have to reach a point of no return, given the enormous magnitude of the areas involved. It seemed to the Special Rapporteur that currently in general international law there was no liability for harm to the environment of the global commons which did not affect persons or property. He believed, however, that such a situation should not be allowed to continue, and the international law should provide some form of remedy. In recent international practice, harm to the global commons had been approached by identifying certain substances harmful to such areas and establishing a limit with respect to their discharge into those areas. Any discharge over and above the permissible level might entail liability. The Special Rapporteur referred to a further difficulty in applying the concept of liability, as now formulated, to harm to the global commons, namely the identification of the affected State. Since harm to those areas did not necessarily have consequences for States, their nationals or their property, determination of the injured State posed a special problem. The Special Rapporteur thought that the notion of a "collective interest" could be used to respond to that problem, in the terms of paragraph 2 (f) of article 5 of part 2 of the draft articles on State responsibility.<sup>362</sup>

529. The Special Rapporteur noted that a review of State practice seemed to indicate that the problem of harm to the global commons had been confronted by identifying certain harmful substances or certain areas of the global commons and making them subject to special regulations, including restricting or banning the use of those substances and banning any activity which would cause harm to the areas in question. The most recent examples were the 1985 Vienna Convention for the Protection of the Ozone Layer (and its 1987 Montreal Protocol) and the 1982 United Nations Convention on the Law of the Sea. The trend, in the Special Rapporteur's view, indicated that the problem was being dealt with in the context of State responsibility for wrongful acts. He felt that that approach had some advantages. It used the concept of legal injury,<sup>363</sup> namely injury for mere violation of an obligation, which resolved the problem of having to demonstrate harm to persons or property. He explained, however, that these were his preliminary views and he wished to hear comments in the Commission.

<sup>362</sup> *Yearbook* . . . 1985, vol. II (Part Two), p. 25.

<sup>363</sup> The concept of legal injury was introduced in article 3 of part I of the draft articles on State responsibility; for the text and commentary, see *Yearbook* . . . 1973, vol. II, pp. 179 *et seq.*, document A/9010/Rev.1.

530. Due to lack of time, only a few members of the Commission made comments, of a preliminary nature, on the question of harm to the global commons. Most of them believed that the issue could not be ignored and that some regulation should be envisaged. They therefore encouraged the Special Rapporteur to continue his work on the issue. One member referred in that connection to the 1982 United Nations Convention on the Law of the Sea and Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).<sup>364</sup> He advocated considering an approach involving international class actions, coupled with insurance schemes and voluntary funds. Another member felt that the issues raised in the context of harm to the global commons

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<sup>364</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

were complex and might disturb progress on a topic which was already complicated. For yet another member, the subject could form a separate topic.

### C. Points on which comments are invited

531. The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the following points:

(a) clarification of the concept of "significant risk" by the introduction of a list of dangerous substances (see paras. 478-483 above);

(b) whether and to what extent the draft articles should provide for liability of the State of origin for trans-boundary harm caused by activities under its jurisdiction or control covered by the present topic when they are conducted by private parties (see paras. 508-510 above).

## Chapter VIII

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

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

532. At its 2149th meeting, on 1 May 1990, the Commission noted that, in paragraph 4 of its resolution 44/35 of 4 December 1989, the General Assembly had requested the Commission:

(a) To keep under review 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;

(b) To consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute, *inter alia*, to a more effective consideration of its report in the Sixth Committee;

(c) To pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work;

533. The Commission decided that that request should be taken up under item 9 of its agenda, entitled "Programme, procedures and working methods of the Commission, and its documentation".

534. The Planning Group of the Enlarged Bureau was composed as indicated in chapter I (para. 5). Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

535. The Planning Group held four meetings, between 8 May and 10 July 1990. It had before it the section of the topical summary of the discussion held in the Sixth Committee during the forty-fourth session of the General Assembly entitled "Programme, procedures and working methods of the Commission" (A/CN.4/L.443, paras. 324-343). It also had before it a number of proposals submitted by members of the Commission.

536. The Enlarged Bureau considered the report of the Planning Group at its 4th meeting, on 12 July 1990. At its 2200th and 2202nd meetings, on 18 and 19 July 1990, the Commission adopted the following paragraphs on the basis of recommendations of the Enlarged Bureau resulting from the discussions in the Planning Group.

#### *Planning of activities*

##### *Present programme of work*

537. The Commission is of the view that the programme of work which it set itself for the remainder of the five-year term of office of its members remains valid, subject however to some adjustments.

538. Under that programme of work, the Commission intended to complete, during the term of office of its current members, the second reading of the draft articles on jurisdictional immunities of States and their property.

At its forty-first session, in 1989, the Commission expressed the intention to make every effort to complete the second reading at the current session. The Drafting Committee at the current session reviewed and provisionally adopted on second reading 16 of the draft articles provisionally adopted by the Commission on first reading. The Commission expects to submit to the General Assembly at its forty-sixth session the entire set of draft articles, thereby attaining its goal of concluding the second reading of the draft before the end of the term of office of its current members.

539. The Commission also expressed the intention to give priority to the topic "Draft Code of Crimes against the Peace and Security of Mankind" and to the topic "The law of the non-navigational uses of international watercourses", with a view to completing the first reading of the draft articles on both topics at its forty-third session.

540. With regard to the topic "Draft Code of Crimes against the Peace and Security of Mankind", the consideration in the plenary Commission of all the provisions which will comprise chapters I and II has now been concluded. It should be noted, however, that a number of the provisions submitted by the Special Rapporteur are still pending before the Drafting Committee. The Commission intends to make every effort at its next session with a view to completing the first reading of the draft articles at the earliest possible date. Also in relation to this topic, the Commission may, depending on the reaction of the General Assembly to the work carried out at the current session pursuant to Assembly resolution 44/39 of 4 December 1989, devote further attention to the request contained in that resolution.

541. As regards the topic "The law of the non-navigational uses of international watercourses", substantial progress was achieved at the current session and it may be expected that the Commission will be able to complete the first reading of the draft articles at its forty-third session.

542. In keeping with the intentions it expressed at the outset of the current five-year term of office, the Commission will also endeavour to make substantial progress on the topics "State responsibility" and "International liability for injurious consequences arising out of acts not prohibited by international law", and will continue its consideration of the second part of the topic "Relations between States and international organizations".

##### *Long-term programme of work*

543. Pursuant to paragraph 736 of the Commission's report on its forty-first session,<sup>365</sup> the Working Group

<sup>365</sup> *Yearbook* . . . 1989, vol. II (Part Two), p. 138.

established at that session to consider the Commission's long-term programme of work continued the examination of questions within its mandate. The Working Group, which was composed of Mr. Díaz González (Chairman), Mr. Al-Khasawneh, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat, submitted a progress report to the Planning Group.<sup>366</sup>

<sup>366</sup> The substantive part of the report of the Working Group read as follows:

"1. The discussions of the Working Group revolved mainly around the following points:

"(a) general criteria for the selection of new topics;

"(b) possible new specific topics for the Commission's agenda;

"(c) form and timing of the Commission's recommendations to the General Assembly on the future programme of work.

"2. As regards the general criteria suited to guide the selection of new topics, there was broad agreement that, primarily, account should be taken of the pressing needs of the international community at its present stage of development in the last decade of the twentieth century. It was indicated that the Commission, in accordance with its role as the main organ established by the General Assembly for the codification and progressive development of international law, should actively contribute to framing the requisite legal rules to accommodate those needs. Topics designed to provide practical answers to current issues of legal policy in various areas of international life should have priority over topics concerning which doctrinal and theoretical interests prevailed. It was also suggested that new topics should be fairly manageable with regard to their time requirements. Given the fact that the Commission currently had before it a number of topics whose study had begun many years ago and which were not likely to be completed during the term of office of its current members, i.e. by 1991, it would be unwise, at the present juncture, additionally to burden the agenda with topics of a similarly complex nature. Any new topic should be susceptible of being dealt with in a few years.

"3. Members of the Group focused on some specific topics for possible inclusion in the Commission's programme of work. A strong case was made for a topic concerning 'protection of the environment' or 'legal principles regulating the protection of the environment'. The usefulness and worldwide interest of that topic were stressed, as well as the need for codifying, from a global perspective, the principles regulating the environment. On the other hand, the possible relationship or partial overlapping of the proposed topic with some of the topics currently on the Commission's agenda was also pointed out.

"4. Another topical area strongly supported was 'the international law of economic relations'. Aspects of that area specifically mentioned included 'the regulation of foreign indebtedness', 'the international legal regime of investments', 'legal aspects of contracts between States and foreign corporations' and 'legal aspects of economic development'.

"5. Other themes mentioned were 'the refugee problem', 'legal aspects of the international trade in arms', 'a new generation of human rights', 'updating of rules relating to armed conflicts and protection of the civilian population', 'legal aspects of disarmament' and 'extraterritorial jurisdiction'.

"6. While not concerning a specific topic, the suggestion was also made that the Commission could indicate to the General Assembly its readiness to receive from the Assembly requests for legal opinions on some pressing legal issues of the international community. In order to respond to such requests, the Commission could use methods of work different from those employed in the consideration of the regular topics on its agenda. An example given in that connection was the handling by the Commission of the question concerning the establishment of an international criminal jurisdiction and the options paper prepared in response to the General Assembly's request (see chap. II, sect. C, above).

"7. With reference to the form and timing of the Commission's recommendations to the General Assembly, it was generally agreed that only a few topics should be selected and that the reasons for the choice should be clearly and cogently stated. A long-term programme should be established as soon as possible, although many valid reasons militated in favour of commencing the study of any new themes only after finalizing the work on some of the topics currently on the Commission's agenda.

544. The Planning Group and, at a later stage, the Commission took note of the report of the Working Group and endorsed the Group's suggestion that it hold further meetings at the Commission's forty-third session with a view to formulating appropriate recommendations on the question within its mandate.

545. The Commission agreed to allocate some time at its forty-third session to the consideration of its long-term programme of work, taking into account in particular the conclusions which it expects to receive from the Working Group, and to formulate recommendations on the question.

#### *Methods of work*

546. The Commission continued to discuss various proposals for the most efficient organization of its work. These included proposals by some members to hold special sessions of the Commission outside its regular annual sessions (for instance for specific tasks such as meetings of the Drafting Committee) and to split the annual session into two parts (to be convened alternately in New York and Geneva, for example). Other members pointed to difficulties with respect to the various proposals made. Further consideration of these questions for the next term of office of members would have to take into account the most efficient and flexible way to deal with the items on the Commission's agenda, as well as financial considerations.

#### *Role of the Drafting Committee*

547. The Commission is aware of the need to facilitate the work of the Drafting Committee.<sup>367</sup> One way of meeting

"8. Furthermore, it was agreed that any recommendation to the General Assembly on the Commission's long-term programme of work should also take into account the objectives of the Decade of International Law declared by the General Assembly in resolution 44/23 of 17 November 1989, among which figured prominently the encouragement of the progressive development of international law and its codification. The Commission, as the main organ created by the Assembly for the codification and progressive development of international law, should play an active role in the fulfilment of the Decade's objectives. However, before formulating recommendations to the General Assembly, it was considered indispensable to examine the views of Member States, appropriate international bodies and non-governmental organizations requested in paragraph 3 of the above-mentioned resolution and, in particular, the conclusions of the working group of the Sixth Committee which the Assembly had decided in paragraph 4 of that resolution to establish at its forty-fifth session with a view to preparing generally acceptable recommendations for the Decade.

"9. Therefore, the Working Group suggests that it hold further meetings at the Commission's next session with a view to formulating appropriate recommendations on the questions within its mandate, in the light of the considerations set out in paragraphs 3 to 8 above and, in particular, bearing in mind the programme to be adopted by the General Assembly for the Decade of International Law."

<sup>367</sup> At the concluding stage of the present session, the Drafting Committee had pending before it: draft articles 6 to 10 on State responsibility; draft articles 17 to 28 on jurisdictional immunities of States and their property; draft articles 9 and 13 to 17 on the draft Code of Crimes against the Peace and Security of Mankind; draft articles 1 and 24 to 28 on the law of the non-navigational uses of international watercourses, as well as article 3, paragraph 1, and article 4 of draft annex I; draft articles 1 to 9 on international liability for injurious consequences arising out of acts not prohibited by international law; and draft articles 1 to 11 on relations between States and international organizations (second part of the topic).

this concern would be to arrange for meetings of the Drafting Committee between the regular sessions of the Commission. The Commission commends this possibility to the attention of the General Assembly.

548. At the present stage, the Commission agreed that, in order to meet the goals it had set for itself as described in paragraphs 538 to 542 above, it should, as an exceptional arrangement, allow for two weeks of concentrated work in the Drafting Committee at the beginning of the forty-third session, the last of the term of office of its current members.

#### *Decade of International Law*

549. The Commission welcomes General Assembly resolution 44/23 of 17 November 1989, in which the Assembly declared the period 1990 to 1999 as the United Nations Decade of International Law. As stated in that resolution, one of the main purposes of the Decade is to encourage the progressive development and codification of international law. According to article 1 of its statute, the Commission was established for "the promotion of the progressive development of international law and its codification". The Commission considers that it would be an essential contribution to the Decade if it could finalize work on the topics currently on its agenda. The Commission further considers that a particularly appropriate contribution to the basic purposes of the Decade and to the strengthening of the rule of law in international relations would be the preparation by the Commission of a draft statute for an international criminal court, if the General Assembly so decides.

#### *Relationship between the Commission and the General Assembly*

550. The Commission notes with satisfaction the continuation within the Sixth Committee of the General Assembly of efforts to improve the ways in which the report of the Commission is considered in the Sixth Committee, with a view to providing effective guidance for the Commission in its work. The Commission is aware of the need to facilitate the consideration of its report by the Sixth Committee. It has, in particular, endeavoured to meet the expectations of the General Assembly as reflected in paragraph 4 (c) of resolution 44/35, whereby the Assembly requested it "to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work".<sup>368</sup>

551. The Commission also takes note with satisfaction of paragraph 5 of resolution 44/35, whereby the General Assembly

*Invites* the International Law Commission, when circumstances so warrant, to request a special rapporteur to attend the session of the General Assembly during the discussion of the topic for which that special rapporteur is responsible and requests the Secretary-General to make the necessary arrangements within existing resources.

<sup>368</sup> Points on which comments are invited with respect to the topics "The law of the non-navigational uses of international watercourses" and "International liability for injurious consequences arising out of acts not prohibited by international law" are indicated in paragraphs 313 and 531 above, respectively.

The Commission wishes to refer in this connection to paragraph 742 of its report on its forty-first session,<sup>369</sup> in which it drew attention to the possibility of enabling special rapporteurs to attend the debates of the Sixth Committee on the report of the Commission so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of observations made and to begin preparing their reports at an earlier stage. That paragraph also reflected the view that, in addition to the reasons already cited, the presence of special rapporteurs could facilitate useful informal contacts, exchanges of views and consultations between them and representatives of Governments.<sup>370</sup>

#### *Duration of the next session*

552. The Commission wishes to reiterate its view that the requirements of the work on the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of the session be maintained. The Commission also wishes to emphasize that it made full use of the time and services made available to it during its current session.

### **B. Cooperation with other bodies**

553. The Commission was represented at the March 1990 session of the Asian-African Legal Consultative Committee in Beijing by the outgoing Chairman of the Commission, Mr. Bernhard Graefrath, who attended 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. Frank X. Njenga. Mr. Njenga addressed the Commission at its 2160th meeting, on 18 May 1990; his statement is recorded in the summary record of that meeting.

554. The Commission was represented at the August 1989 session of the Inter-American Juridical Committee in Rio de Janeiro by the outgoing Chairman of the Commission, Mr. Bernhard Graefrath, who attended as Observer for the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Ramiro Saraiva Guerreiro. Mr. Saraiva Guerreiro addressed the Commission at its 2166th meeting, on 31 May 1990; his statement is recorded in the summary record of that meeting.

555. The Commission was represented at the November 1989 session of the European Committee on Legal Cooperation in Strasbourg by Mr. Christian Tomuschat, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Cooperation was represented at the present session of the Commission by Ms. Margaret Killerby. Ms. Killerby addressed the Commission at its

<sup>369</sup> *Yearbook . . . 1989*, vol. II (Part Two), p. 138.

<sup>370</sup> At its 2200th meeting, on 18 July 1990, the Commission requested Mr. Doudou Thiam, Special Rapporteur for the draft Code of Crimes against the Peace and Security of Mankind, to attend the forty-fifth session of the General Assembly during the discussion of his topic.

2191st meeting, on 11 July 1990; her statement is recorded in the summary record of that meeting.

### C. Date and place of the forty-third session

556. The Commission decided to hold its next session at the United Nations Office at Geneva from 29 April to 19 July 1991.

### D. Representation at the forty-fifth session of the General Assembly

557. The Commission decided that it should be represented at the forty-fifth session of the General Assembly by its Chairman, Mr. Jiuyong Shi.

### E. International Law Seminar

558. Pursuant to General Assembly resolution 44/35 of 4 December 1989, the United Nations Office at Geneva organized the twenty-sixth session of the International Law Seminar during the present session of the Commission. The Seminar is intended for postgraduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

559. A selection committee under the chairmanship of Professor Philippe Cahier (Graduate Institute of International Studies, Geneva) met on 27 March 1990 and, after having considered some 80 applications for participation in the Seminar, selected 24 candidates of different nationalities and mostly from developing countries. Seventeen of the selected candidates, as well as three UNITAR fellowship holders, were able to participate in this session of the Seminar.<sup>371</sup>

560. The session of the Seminar was held at the Palais des Nations from 5 to 22 June 1990 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. During the three weeks of the session, the participants in the Seminar attended the meetings of the Commission and lectures specifically organized for them. Several lectures were given by members of the Commission, as follows: Mr. Husain Al-Baharna: "The International Law Commission in perspective: historical and legal development of its programme of work"; Mr. Mohamed Bennouna: "The United Nations Convention on the Rights of the Child"; Mr. Ahmed Mahiou: "The work of the International Law Commission"; Mr. Stephen C. McCaffrey: "The law of the non-navigational uses of

international watercourses"; Mr. César Sepúlveda Gutiérrez: "The relationship between public international law and politics"; Mr. Doudou Thiam: "Draft Code of Crimes against the Peace and Security of Mankind"; Mr. Christian Tomuschat: "Jurisdictional immunities of States and their property".

561. In addition, talks were given by staff of the United Nations and of ICRC and GATT, as follows: Mr. Antoine Bouvier (Legal Division, ICRC): "Approach of international humanitarian law"; Mr. Vladimir Kotliar (Office of Legal Affairs): "The activities of the Codification Division"; Mr. Jakob Möller (Centre for Human Rights): "Handling of human rights complaints"; Mr. Dennis McNamara (UNHCR): "International instruments for the protection of refugees"; Mr. Frieder Roessler (Legal Affairs Division, GATT): "The activities of the Legal Affairs Division of GATT".

562. As has become a tradition for the Seminar, the participants enjoyed the hospitality of the City of Geneva and were also officially received by the Republic and Canton of Geneva. On that occasion they were addressed by Mr. E. Bollinger, Chief of Information of the Canton, who gave a talk on the constitutional and political features of Switzerland in general and of the Canton of Geneva in particular.

563. At the end of the Seminar, Mr. Jiuyong Shi, Chairman of the Commission, and Mr. Jan Martenson, Director-General of the United Nations Office at Geneva, addressed the participants. In the course of this brief ceremony, the participants were presented with certificates attesting to their participation in the twenty-sixth session of the Seminar.

564. The Seminar is funded by voluntary contributions from Member States and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Austria, Bahrain, Cyprus, Denmark, Finland, the Federal Republic of Germany, Ireland, New Zealand, the Philippines, Sweden and Switzerland had made fellowships available, in particular to participants from developing countries, through voluntary contributions to the appropriate United Nations assistance programme. With the award of those fellowships, it was possible to achieve adequate geographical distribution of participants and bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. In 1990, full fellowships (travel and subsistence allowance) were awarded to 13 participants and a partial fellowship (subsistence allowance only) was awarded to one participant. Of the 575 candidates, representing 142 nationalities, selected to participate in the Seminar since its inception in 1965, fellowships have been awarded to 294.

565. 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 noted with regret that, in 1990, not all applicants who had applied for financial assistance could be awarded fellowships and that some of them were therefore unable to participate in the Seminar although they had been selected on the basis of their good qualifications. The Commission therefore recommends that the General Assembly should again appeal to States which are

<sup>371</sup> The participants in the twenty-sixth session of the International Law Seminar were: Mr. Louis-Antoine Aledo (France); Mr. Moenir Ari Soenanda (Indonesia); Mr. Dominique Bassinga (Burkina Faso); Mr. Albert Beja (Observer) (Albania); Ms. Teresa Blake (Ireland); Mr. Joaquin Caceres Brun (Paraguay); Mr. Marcelo Canton (Uruguay); Ms. Esther Chibanda (Zimbabwe); Mr. Mohiuddin Farooque (Bangladesh); Mr. Francisco Flores Villa (Panama); Mr. Andreas de Hoogh (Netherlands); Ms. Ahilenah Jonet (Malaysia); Mr. Niklas Kebbon (Sweden); Ms. Sara Lozano Veliz (Ecuador); Mr. Said Moustakime (Comoros) (UNITAR fellowship holder); Mr. Virachai Plasai (Thailand); Mr. Haji Razmi (Afghanistan) (UNITAR fellowship holder); Mr. Abdallah Saffari (United Republic of Tanzania); Mr. José Sandoval (Ecuador) (UNITAR fellowship holder); Mr. Joaquin Taesan (Costa Rica); Mr. Smokin Wanjala (Kenya).

able to do so to make the voluntary contributions that are needed for the holding of the Seminar in 1991 with as broad a participation as possible.

566. The Commission noted with satisfaction that, in 1990, full interpretation services had been made available to the Seminar and it expresses the hope that every effort will be made to continue to provide the Seminar at future

sessions with the same level of services and facilities, despite existing financial constraints.

567. At its 2190th meeting, on 10 July 1990, the Commission decided that the twenty-seventh session of the International Law Seminar would be dedicated to the memory of Mr. Paul Reuter and entitled the "Paul Reuter Session".

## CHECK-LIST OF DOCUMENTS OF THE FORTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/426/Rev.1	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 8 above, para.9.
A/CN.4/427 [and Corr.1] and Add.1	Sixth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	Reproduced in <i>Yearbook . . . 1990</i> , vol. II (Part One).
A/CN.4/428 [and Corr.1, 2 and 4] and Add.1	Sixth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem.</i>
A/CN.4/429 and Add.1-4	Draft Code of Crimes against the Peace and Security of Mankind: observations of Member States received pursuant to General Assembly resolutions 43/164 and 44/32	<i>Idem.</i>
A/CN.4/430 and Add.1	Eighth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem.</i>
A/CN.4/431 [and Corr.1]	Third report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur	<i>Idem.</i>
A/CN.4/432	Fifth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	To be reproduced in consolidated form in <i>Yearbook . . . 1991</i> , vol. II (Part One), as document A/CN.4/438.
A/CN.4/433	Filling of a casual vacancy (article 11 of the statute): note by the Secretariat	Reproduced in <i>Yearbook . . . 1990</i> , vol. II (Part One).
A/CN.4/433/Add.1	<i>Idem</i> —Addendum to the note by the Secretariat: candidature and curriculum vitae	Mimeographed.
A/CN.4/L.443	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fourth session of the General Assembly	Mimeographed.
A/CN.4/L.444	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 10 and 12 to 16	Texts reproduced in <i>Yearbook . . . 1990</i> , vol. I, summary record of the 2191st meeting (paras. 23 <i>et seq.</i> ).
A/CN.4/L.445	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: articles 22 to 27	<i>Idem.</i> summary records of the 2187th meeting and 2188th meeting (paras. 1-74).
A/CN.4/L.446	Draft report of the International Law Commission on the work of its forty-second session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10)</i> . For the final text, see p. 7 above.
A/CN.4/L.447 and Add.1 and 2 [and Add.2/Corr.1] and Add.3	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem.</i> see p. 10 above.
A/CN.4/L.448	<i>Idem</i> : chapter III (Jurisdictional immunities of States and their property)	<i>Idem.</i> see p. 31 above.
A/CN.4/L.449 and Add.1 and 2	<i>Idem</i> : chapter IV (The law of the non-navigational uses of international watercourses)	<i>Idem.</i> see p. 46 above.
A/CN.4/L.450	<i>Idem</i> : chapter V (State responsibility)	<i>Idem.</i> see p. 68 above.
A/CN.4/L.451	<i>Idem</i> : chapter VI (Relations between States and international organizations (second part of the topic))	<i>Idem.</i> see p. 84 above.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.452	<i>Idem</i> : chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> , see p. 90 above.
A/CN.4/L.453	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i> , see p. 106 above.
A/CN.4/L.454 [and Corr.1]	Draft Code of Crimes against the Peace and Security of Mankind: report of the Working Group established by the Commission pursuant to the request from the General Assembly in paragraph 1 of its resolution 44/39	<i>Idem</i> , see chap. II, sect. C, above.
A/CN.4/L.455	Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 16, 18 and X	Texts reproduced in <i>Yearbook . . . 1990</i> , vol. I, summary records of the 2196th meeting (paras. 43 <i>et seq.</i> ), 2197th meeting and 2198th meeting (paras. 1-8 and 52-81).
A/CN.4/SR.2149-A/CN.4/SR.2204	Provisional summary records of the 2149th to 2204th meetings	Mimeographed. The final text appears in <i>Yearbook . . . 1990</i> , vol. I.



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