A/CN.4/SER.A/1991/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1991

Volume II
Part One

Documents of the forty-third session

UNITED NATIONS

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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 . . . 1990*).

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

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

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

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

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

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The reports of the special rapporteurs and other documents considered by the Commission during its forty-third session, which were originally issued in mimeographed form, are reproduced in the present volume incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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ABBREVIATIONS

ECA	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East (now ESCAP)
ECE	Economic Commission for Europe
ECLA	Economic Commission for Latin America (now ECLAC)
ECLAC	Economic Commission for Latin America and the Caribbean
ESCAP	Economic and Social Commission for Asia and the Pacific
ESCWA	Economic and Social Commission for Western Asia
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDA	International Development Association
IDB	Inter-American Development Bank
IFC	International Finance Corporation
ILA	International Law Association
ILO	International Labour Organisation
IMF	International Monetary Fund
ITU	International Telecommunication Union
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UNDP	United Nations Development Programme
UNEF	United Nations Emergency Force
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UPU	Universal Postal Union
WFP	World Food Programme
WHO	World Health Organization
WMO	World Meteorological Organization

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AJIL	American Journal of International Law
I.C.J. Reports	*ICJ, Reports of Judgments, Advisory Opinions and Orders*
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (nos. 1-24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Judgments, Orders and Advisory Opinions* (nos. 40-80: beginning in 1931)

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NOTE CONCERNING QUOTATIONS

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

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

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/440 and Add.1

Third report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

[*Original: English*]
[*19 July 1991*]

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NOTE

Multilateral conventions cited in the present report

	Source
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, p. 31.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	Ibid., vol. 993, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.

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Introduction

1. The preliminary and second reports of the Special Rapporteur on State responsibility submitted in 1988[1] and 1989[2] respectively, dealt with the substantive consequences of an internationally wrongful act, namely cessation (art. 6), restitution in kind (art. 7), reparation by equivalent (arts. 8 and 9), and satisfaction and guarantees of non-repetition (art. 10). The present report deals with what are referred to as the "instrumental" consequences of an internationally wrongful act. Whatever the merits of that distinction, which had been adopted solely for the purposes of a more orderly discussion, the present report addresses itself to the legal issues arising in connection with the measures that may be taken by the injured State or States against a wrongdoing State. Like the two previous reports, this report will deal, in principle, with the measures in question as applied or applicable in the case of delicts, namely of ordinary wrongful acts. It may be necessary to refer, of course, to issues which are more or less analogous and arise in connection with international crimes of States. However, in conformity with the outline submitted in the preliminary report,[3] discussion of these issues is to be kept for the appropriate, next stage.

2. The task facing the Commission with regard to this part of the topic differs quite considerably, however, from the one it has undertaken so far with regard to the substantive consequences of an internationally wrongful act, as it has defined them. Two main features characterize, *de lege lata* and *de lege ferenda*, the regime of instrumental consequences (countermeasures). The first is a drastic reduction, if not a total absence, of any similarities with the regime of responsibility within national legal systems which would make it relatively easy to transplant into international law, in the area of substantive consequences, what an eminent authority, more than half a century ago, called private law sources and analogies.[4] With regard to the major substantive consequences (with the only exception, to some extent, of satisfaction) the international "legislator" faces legal problems so similar to those that have basically been settled for centuries in national law, that it is possible to envisage the essence of the legal relationship between the injured and the wrongdoing State in terms not dissimilar from those of homologous institutions of national systems. Thanks to such obvious analogies, the Commission had little difficulty making basic choices with a high degree of confidence that they were ultimately sound, however numerous the issues which lend themselves to alternative solutions. In contrast, when it comes to the regime of the instrumental consequences, a comparative study of "corresponding" problems of national law—namely of the rules governing the ways and means to ensure the cessation of wrongful conduct and the making good of the physical and moral injuries caused thereby—leads to the very opposite conclusion. Whether in the practice of international law or in legal writings in this area, hardly any similarities can be found.

3. The second main feature is that in no other area in the "society of States" is the lack of an adequate institutional framework for present or conceivable future regulation of State conduct so keenly felt. Two aspects in particular of the sovereign equality of States—to the principle of which all are committed by the Charter of the United Nations—come to mind. These are the propensity of States, large, medium or small, to refuse to accept any higher authority, and the contrast between the equality of States in law and their inequality in fact, which tempts stronger States to impose their economic, if not military, power despite the principle of equality. It follows that, except in rare and circumscribed cases, the model offered by the remedies to wrongdoing available in national societies is of little avail to the international "legislator". To put it bluntly, using a very old image, at no time is the Emperor's nakedness so apparent as when we move from what are rather satisfactory rules on the substantive consequences of State responsibility to the study of the available ways and means of redress. The fact that this is obvious to the point of appearing trite does not diminish in any measure the difficulties to be faced at this juncture.

4. Indeed, practice in the matter is abundant but increasingly varied in quality and often very hard to assess. Alongside the bulk of cases of classic reprisals taken within a strictly bilateral framework, the conformity of which with what is presumed to be the best interpretation of the old norms and the rules of the Charter of the United Nations is often dubious, two major developments are to be found. On the one hand, there is the timid and not very successful attempt at institutionalization of impartial ways and means at the worldwide or regional levels. On the other hand, there are cases where measures are taken on a partially collective basis by groups of States coming together for the occasion to take concerted action against the "wrongdoer" of the day, for the most part outside of any worldwide institutional framework. Such practices, while following in some sense the classic bilateral "injured State—author State" pattern, do not seem to offer the essential guarantees of regularity and objectivity, whatever the merits of each particular case. At times, it is difficult to identify the precise content of some of the general rules involved in certain of these unilateral practices. Uncertainty is manifest in the doctrine of the so-called self-contained regimes, and it is hard to identify future trends in the development of the law, as well as the avenues the Commission could prudently explore in seeking to improve it and make proposals thereon to the General Assembly, and ultimately to States. One of the crucial aspects of the Commission's task appears to be to devise ways and means which, by emphasizing the best of *lex lata* or careful progressive development, could reduce the impact of the great inequality revealed among States in the exercise of their *faculté* (and possibly obligation) to apply countermeas-

[1] *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

[2] *Yearbook ... 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1.

[3] *Yearbook ... 1988*, vol. II (Part One) (see footnote 1 above), paras. 6-20.

[4] Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*.

ures, which is such a major cause of concern. It was argued in the second report[5]—though not without challenge—that the secondary rules on cessation and reparation are in a sense relatively more "objective" than many primary rules. In fact, they operate equally to the advantage or disadvantage of all States, because any State, weak or strong, rich or poor, can find itself in the position of injured State or of wrongdoer. While that may apply to substantive consequences however, it could certainly not be said of countermeasures. In the absence of adequate third-party settlement commitments, the powerful or rich countries can the more easily have the advantage over the weak or needy when it comes to exercising the means of redress in question.

5. Whether the Commission will be able to do more in that respect in the future remains to be seen. The elimination of the main source of ideological conflict and division is certainly a positive factor: though thoroughly novel, it is not free of effects which give cause for concern. At the same time, other signs have recently come to the forefront which are still rather difficult to interpret. One of the most recent is the evocation of the hazy and ambiguous concept of a "new international order".[6]

6. The present report has been prepared in the light of the peculiarities of the subject-matter and of the perplexities and preoccupations which they evoke, mainly in the area of crimes. But is there such a clear and firm demarcation line between crimes and the most serious delicts? The main purpose of the present report is to identify problems, opinions and alternatives, and to elicit comment and criticism within the Commission and elsewhere on the basis of which more considered suggestions and proposals could be submitted.

7. In view of the wide variety of terms used to describe the measures discussed in the present report and the problems they pose, the substantive chapters have been prefaced by a preliminary chapter on terminology. This will reduce the ambiguities that would arise from the variety of meanings attached to those terms in the literature as well as in practice.

[5] *Yearbook ... 1989*, vol. II (Part One) (see footnote 2 above), para. 33.

[6] The grave crisis in connection with which the concept of a "new international order" was evoked has also brought about some interesting developments which have a bearing on State responsibility. See the report submitted by the Secretary-General of the United Nations pursuant to paragraph 19 of Security Council resolution 687 (1991) of 3 April 1991 (document S/22559).

CHAPTER I

Kinds of measures to be considered

8. International practice indicates a variety of measures to which States resort in order to secure fulfilment of the obligations deriving from, or otherwise react to, the commission of an internationally wrongful act. Practice and legal writings classify such measures in separate categories according to factual and juridical affinities. Thus, a variety of terms are to be found, some referring to one and the same concept, while others overlap in many ways and are differently understood according to the stage of historical development and scholarship. The most widely used are self-defence (distinguished to a greater or lesser degree from the wider concept of self-help), sanctions, retortion, reprisals, reciprocity, countermeasures, termination and suspension of treaties, *inadimplenti non est adimplendum*. In English one also speaks generally of unilateral remedies; in French of *réactions décentralisées* as opposed, presumably, to *réactions centralisées*.

A. Self-defence

9. Self-defence is perhaps one of the terms most frequently used in practice and analysed in most detail in the literature,[7] mainly in the light of the official positions taken by States and of the *dicta* of international bodies. However, for the purposes of the instrumental consequences of international delicts, it does not seem necessary to deal in detail with all the complex legal problems involved in the notion of self-defence. Indeed, the Commission has taken a position on self-defence within the framework of article 34 of part 1 of the draft articles.[8]

[7] See, *inter alia*, Waldock, "The regulation of the use of force by individual States in international law", *Recueil des cours ..., 1952-II*, pp. 455-515; McDougal and Feliciano, "Legal regulation of resort to international coercion: Aggression and self-defense in policy perspective", *Yale Law Journal* (May 1959), pp. 1057-1165; Brownlie, *International Law and the Use of Force by States*, pp. 214-308; Delivanis, *La légitime défense en droit international public moderne: Le droit international face à ses limites*; Schwebel, "Aggression, intervention and self-defence in modern international law", *Collected Courses ..., 1972-II*, pp. 411-498; Lamberti Zanardi, *La legittima difesa nel diritto internazionale*; Žourek, "La notion de légitime défense en droit international", *Annuaire de l'Institut de droit international, 1975*, pp. 1-69; Taoka, *The Right of Self-Defence in International Law*; Ago, Addendum to the eighth report on State responsibility, *Yearbook ... 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5-7, paras. 82-124; Cassese, commentary on Article 51 of the Charter, in *La Charte des Nations Unies*, pp. 771-794; Combacau, "The exception of self-defence in United Nations practice", in *The Current Legal Regulation of the Use of Force*, pp. 9-38; Dinstein, *War, Aggression and Self-defence*; and Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, pp. 291-335.

[8] See the commentary to article 34 in *Yearbook ... 1980*, vol. II (Part Two), pp. 52-61. For the views of legal writers on the choices made by the Commission regarding self-defence, see Alland, "International responsibility and sanctions: Self-defence and countermeas-

Whatever the present writer's personal view on the choices then made regarding self-defence as a circumstance precluding wrongfulness, it is considered preferable, at least for the time being, not to abandon the meaning adopted at that time.

10. From the commentary to article 34 it appears that self-defence has to be understood as "a reaction to... a specific kind of internationally wrongful act",[9] namely as a unilateral armed reaction against an armed attack. Such a reaction would consist of a "form of armed self-help or self-protection",[10] exceptionally permitted by the "international legal order" which nowadays "contemplate[s] a genuine and complete ban on the use of force" as "a defence against an armed attack by another subject in breach of the prohibition".[11] In particular, the Commission, considering "that no codification taking place within the framework and under the auspices of the United Nations should be based on criteria which, from any standpoint whatsoever, do not fully accord with those underlying the Charter, especially when, as in the present case, the subject-matter concerns so sensitive a domain as the maintenance of international peace and security",[12] concluded that the typical legal meaning of such a notion, for the purposes of the draft articles on State responsibility, can only be "to suspend or negate altogether, in the particular instance concerned, the duty to observe... the general obligation to refrain from the use or threat of force in international relations".[13] In this way the "Commission intends... to remain faithful to the content and scope of the pertinent rules of the United Nations Charter and to take them as a basis in formulating" draft article 34.[14]

11. Even if the Commission did not want to take a stand "on the question of any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence",[15] it is very likely that such an identity exists, as has been asserted by ICJ in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).[16] Just as general (customary) international law included a prohibition of force as broad as that embodied in Article 2, paragraph 4, of the Charter, so it also developed a regime of self-defence identical to the regime set forth in Article 51. As a consequence, there would probably be no room for any of those broader concepts of self-defence which are assumed to have survived the Charter (as inherent customary rights) on the basis of general international law, according to some scholars and to judge from some State practice.[17] Although, as will be demonstrated later, scholarship and practice based upon such a notion are certainly far from negligible, except for the few general remarks in paragraphs 98 and 99 below, their legal merits will be discussed only in connection with the consequences of international crimes, which will be dealt with at a later stage.

12. The more general concept of self-help—avoided so far by the Commission—would not be useful for the purposes of the present report. It could even be misleading. Of course, in a predominantly inorganic society, in which individual States and groups of States must place so much reliance on the unilateral protection of their rights, the concept of self-help ultimately characterizes the whole range of inter-State relations.[18] But the codification of State responsibility requires a more precise and discriminating terminology in order to stress the differences in legal regime among the various forms of reaction to a wrongful act and to distinguish clearly between the lawful and unlawful forms of such reactions, and their specific features.

B. Sanctions

13. The concept of sanctions, already problematic in the general theory of law, is notoriously even more problematic in the literature and practice of international responsibility. Only one thing is clear, namely that it deals with an essentially relative notion which may be defined in a variety of ways. It is proposed, however, to leave aside the broader definitions according to which any one of the consequences of an internationally wrongful act, including not only the measures by which States may secure cessation or reparation but also the substantive right to obtain cessation and/or reparation, could be labelled as a sanction.

14. A relatively recent authoritative work identifies international sanctions with the "consequences of an [internationally] wrongful act, unfavourable to the offender, provided for or admitted under international law". Within such a framework a "sanctioning action" would be "any conduct detrimental to the interests of the offending State designed to pursue reparatory, punitive, or possibly preventive purposes, which is either provided for or simply not prohibited by international law".[19] Understood this way, sanctions would seem to encompass not only such measures as retortion and reprisals—

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ures in the ILC codification of rules governing international responsibility", *United Nations Codification of State Responsibility*, pp. 143 *et seq.*; and Malanczuk, "Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Commission's draft articles on State responsibility", ibid., pp. 197 *et seq.*

[9] See *Yearbook... 1980*, vol. II (Part Two) (footnote 8 above), p. 53, para. (5).

[10] Ibid., p. 54, para. (7).

[11] Ibid., p. 55, para. (9).

[12] Ibid., p. 59, para. (20).

[13] Ibid., p. 60, para. (24).

[14] Ibid., p. 59, para. (20).

[15] Ibid.

[16] *I.C.J. Reports 1986*, p. 14; see also pp. 102-106, paras. 193-201.

[17] On this point, see para. 100 below.

[18] On self-help, see Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen*, pp. 325, 334 and 371; Anzilotti, *Corso di diritto internazionale*, vol. III, pp. 155 *et seq.*; Bowett, *Self-Defence in International Law*, p. 11; Verdross, *Völkerrecht*, p. 428; Forlati Picchio, *La sanzione nel diritto internazionale*, pp. 11 and 83 *et seq.* (and *passim*); Lamberti Zanardi, op. cit., p. 15; Ago, Addendum to the eighth report... (see footnote 7 above), para. 95; and Partsch, "Self-preservation", *Encyclopedia of Public International Law* (1982), pp. 217-220.

[19] Paraphrased from the original Italian, Forlati Picchio, op. cit., p. 40. This work has been reviewed in French by Rousseau in RGDIP (Paris, 1978), pp. 557-558, in English by Ferrari Bravo in *Italian Yearbook of International Law*, vol. 1 (1975), pp. 377-379, and in German by Verdross in *Österreichische Zeitschrift für öffentliches Recht*, vol. 28 (1977), pp. 374-375.

including so-called reciprocal measures (see paras. 28-32 below)—but also self-defence. Other scholars, in recent analyses, submit that the above definition is acceptable in so far as it does not extend the concept to actions taken in self-defence. Such actions would not really be sanctions for the same reasons that distinguish them from reprisals.[20]

15. A more specific, circumscribed meaning of sanctions seems, however, to prevail in contemporary legal scholarship[21] and to find some support in the work of the Commission itself. In particular, by using in draft article 30 of part 1[22] the terms "measures" and "countermeasures", instead of the term "sanction" proposed by Ago, to describe the so-called "unilateral", "horizontal" (State-to-State) forms of reaction to an unlawful act, the Commission reserves the term "sanction" for measures adopted by an international body. It referred notably to international measures adopted by such a body following a wrongful act "having serious consequences for the international community as a whole, in particular... to the... measures [adopted by the United Nations] under the system established by the Charter with a view to the maintenance of international peace and security".[23] It is opined in this report that the rather low degree of "verticality" of the measures taken by international bodies might not really justify the abandonment of a concept which could still serve a useful purpose to describe the function of those strictly unilateral or "horizontal" State measures upon which the effectiveness of international law still so largely depends. Considering the very close relationship between the function of sanctions and the "effectiveness or even the existence of international law" and considering further the essentially inorganic structure of international society and the difficulty of distinguishing between "civil" and "penal" aspects of State responsibility, this concept, like that of reprisals, is still indispensable for the analytical study of international responsibility.[24] However, in line with the choice made by the Commission, it would be better to confine the term "sanctions" to the designation of measures taken by international bodies, except that when it comes to discussing the consequences of crimes, it might be worthwhile to see whether the term "sanctions" could be extended to measures which, although emanating from States collectively, would not qualify as measures taken by an international body.

C. Retortion

16. According to most scholars, the term "retortion" would cover those reactions of a State to an unlawful, hostile act, which while they may be hostile *per se* are not unlawful.[25] The term is used in a slightly different sense by Politis,[26] Oppenheim,[27] Morelli,[28] Skubiszewski[29] and Paniagua Redondo,[30] who confine the term to unfriendly measures taken in response to equally unfriendly acts, thus excluding unfriendly measures taken in response to unlawful acts. The concept would thus exclude (and possibly make it difficult to classify systematically) any unfriendly measures taken by way of reaction to an unlawful act. For the purposes of the present study it is most practical to use the term "retortion" or "retaliation" to indicate hostile but lawful action in response to a prior internationally wrongful act.

17. In describing retortion some writers like to refer to the sphere of discretionary action of each State.[31] Others prefer to speak either of a sphere of non-regulated conduct of States or of international *comitas* of nations.[32] Yet others stress the existence in the habitual behaviour of States of a margin favourable to another State or its nationals.[33] Such a margin would encompass measures of retortion, that is, acts which deprive the allegedly responsible State of an advantage to which it had no proper right prior to the wrongful act.[34] In line with the prevailing legal scholarship, the former Special Rapporteur, Mr. Riphagen, includes the suspension of diplomatic relations among retortionary measures. Since, in his opinion, no *de lege lata* obligation exists in this respect, the suspension of diplomatic relations is neither an unlawful act nor a reprisal. The taking of such a measure is always possible in response to an internationally wrongful act.[35]

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[20] Lattanzi, "Sanzioni internazionali", in *Enciclopedia del diritto*, para. 2.

[21] De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale*, p. 36; Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", *Annuaire français de droit international, 1982*, p. 19. Dupuy takes essentially the same line in "Observations sur la pratique récente des 'sanctions' de l'illicite", RGDIP (1983), p. 517. By using this term to indicate measures adopted by a number of States, presumably in response to *erga omnes* violations, Dupuy seems to differentiate such measures from ordinary "horizontal" reprisals and to place them closer to the "vertical" measures ("sanctions") provided for by international institutions. A similar approach is taken by Dominicé in his "Observations sur les droits de l'État victime d'un fait internationalement illicite", *Droit international 2*, p. 33; and by the Commission in its debate on article 30 of part 1 of the draft articles (*Yearbook... 1979*, vol. I, 1544th and 1545th meetings).

[22] See *Yearbook... 1980*, vol. II (Part Two), p. 33.

[23] See *Yearbook... 1979*, vol. II (Part Two), p. 121, para. (21); and Malanczuk, loc. cit., p. 206.

[24] See Combacau, "Sanctions", in *Encyclopedia of Public International Law* (1986), pp. 337-341; and Partsch, "Reprisals" and "Retorsion", ibid., pp. 330-337.

[25] Akehurst, *A Modern Introduction to International Law*, p. 6; Sur, "L'application du droit international", *Droit international public*, 1975, p. 192; Zemanek, "Responsibility of States: General principles", *Encyclopedia of Public International Law* (1987), p. 370; and Partsch, "Retorsion", loc. cit., p. 335.

[26] "Le régime des représailles en temps de paix", *Annuaire de l'Institut de droit international, 1934*, p. 10.

[27] *International Law: A Treatise*, vol. II, pp. 134-135.

[28] *Nozioni di diritto internazionale*, p. 361.

[29] "Use of force by States. Collective security. Law of war and neutrality", *Manual of Public International Law*, p. 753.

[30] "Las represalias en el derecho internacional: Perspectiva histórica", *Revista Jurídica de Catalunya, 1984*, pp. 160 *et seq.*

[31] Leben, loc. cit., p. 14.

[32] Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, pp. 5 *et seq.* On the restriction of discretionary use of retortion resulting from the concentration of international regulation of trade relations, see Partsch, loc. cit., p. 336; and Gianelli, *Adempimenti preventivi al ricorso a misure di reazione all'illecito internazionale*, p. 22.

[33] Reuter, *Droit international public* (1983), p. 463.

[34] Zoller, "Quelques réflexions sur les contre-mesures en droit international public", in *Droit et libertés à la fin du XXe siècle: Études offertes à Claude-Albert Colliard* (1984), p. 361.

[35] *Yearbook... 1983*, vol. II (Part One), p. 21, document A/CN.4/366 and Add.1, para. 110.

18. Although acts of retortion belong *per se* to the sphere of permissible, lawful conduct, some authors wonder whether resort thereto is not subject to legal limitations. For instance, Schachter refers to the hypothesis where "an otherwise permissible action is taken for an illegal objective".[36] De Guttry mentions the possible contradiction between acts of retortion which may endanger "international peace and security, and justice" and the obligation to settle disputes by peaceful means as provided for in Article 2, paragraph 3, of the Charter.[37]

19. If one accepts the notion of retortion as covering acts not unlawful *per se* (albeit less than friendly), such a concept should not find a place within the framework of a codification of State responsibility. Although retortionary measures are and may be resorted to by way of reaction to an internationally wrongful act, they do not give rise to the legal problems typifying the other forms of reaction to be considered for the purposes of the draft articles on State responsibility. Acts of retortion may nevertheless call for some attention in view of the fact that international practice does not always distinguish clearly between measures constituting violations of international obligations and those which do not cross the threshold of unlawfulness.

D. Reprisals

20. Once self-defence, sanctions and retortion are set aside, a further traditional concept to be considered—the oldest and the most important one—is that of reprisals.

21. It may be useful to recall that the notion of reprisal originally indicated, in systems involving individuals, the measures taken directly by the aggrieved party for the purpose of securing direct reparation. During the Middle Ages a person who had suffered an injustice in a foreign country and was formally denied satisfaction by that country's sovereign, could turn to his own sovereign and request *lettres de marque*. These *lettres de marque* contained an official authorization on the part of the sovereign for the injured party to resort to reprisals against the property of the nationals of the foreign State present in his own country, or at sea.[38] "Private reprisals" were later replaced by "public" or "general reprisals", with only "nations" being entitled to resort to them.[39] Vattel described reprisals as follows:

> Reprisals are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another—if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it—the latter may seize something belonging to the former, and apply it to her own advantage till she obtains payment of what is due to her, together with interest and damages—or keep it as a pledge till she has received ample satisfaction.[40]

22. Most modern authors see a reprisal as conduct which, "*per se* unlawful, inasmuch as it would entail the violation of the right of another subject, loses its unlawful character by virtue of being a reaction to a wrongful act committed by that other subject".[41] Anzilotti defined reprisals as *actes objectivement illicites par lesquels un État réagit contre le tort à lui fait par un autre État.*[42] A less concise definition was adopted in 1934 by the International Law Institute, whereby reprisals are *des mesures de contrainte dérogatoires aux règles ordinaires du droit des gens, prises par un État à la suite d'acte illicite commis à son préjudice par un autre État et ayant pour but d'imposer à celui-ci, au moyen d'un dommage, le respect du droit.*[43]

23. In the contemporary literature a narrow concept of reprisal is proposed by some authors, which would exclude reciprocal measures. The term "reprisal" would thus only cover such reactions to a wrongful act as violate a different norm to that violated by the wrongful act itself: "While reciprocity gives rise to non-performance of an obligation similar (by identity or by equivalence) to the violated obligation, reprisals consist in the non-performance of a different rule".[44] The subject of reciprocity will be taken up again later in this report.[45]

24. According to a widely shared view the term "reprisal" would apply preferably to the measures adopted by way of reaction to an internationally wrongful act by an injured party against the offending State ("horizontal" measures), whereas the term "sanction" would more properly apply, as recalled earlier, to the measures taken against the wrongdoing State by an international body ("vertical" measures).

25. Given that the connotation the term "reprisal" has acquired in the practice and doctrine of unilateral State reactions to internationally wrongful acts is fairly clear, most such reactions—in so far as they do not qualify as retortion or self-defence—are properly covered, in principle, by that classic term. The reasons which may make other terms preferable are either their greater generality (this is particularly the case of "measures" or "countermeasures") or the frequent association of acts of reprisal with the notion of measures involving the use of force.[46]

E. Countermeasures

26. As noted in the preliminary report,[47] the term "countermeasures" is a newcomer in the terminology of the consequences of an internationally wrongful act.[48]

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[36] "International law in theory and practice: General course in public international law", *Collected Courses . . ., 1982-V*, p. 185.

[37] See De Guttry, op. cit., pp. 25-26; and Weber, "Unfriendly act", in *Encyclopedia of Public International Law* (1982), p. 253.

[38] La Brière, "Evolution de la doctrine et de la pratique en matière de représailles", *Recueil des cours . . ., 1928-II*, p. 255.

[39] Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, p. 285, para. 347.

[40] Ibid., pp. 283-284, para. 342. Similar descriptions had already been given by Grotius, *De Jure Belli ac Pacis, Libri Tres*. English translation in *The Classics of International Law*, p. 629, and by Phillimore, *Commentaries upon International Law*, vol. III, p. 32.

[41] Morelli, op. cit., p. 361.

[42] *Cours de droit international*, French translation (1929), p. 515.

[43] *Annuaire de l'Institut de droit international, 1934* (Paris), vol. 38, p. 708.

[44] Zoller, op. cit., p. 43.

[45] See section F below (paras. 28-32).

[46] On this last aspect, see Dominicé, loc. cit., p. 33.

[47] See footnote 1 above.

[48] Ibid., para. 14, footnote 12.

Significant examples of its use are to be found in the *Air Service*,[49] *United States Diplomatic and Consular Staff in Tehran*[50] and *Military and Paramilitary Activities in and Against Nicaragua*[51] decisions. Article 30 of part 1 of the draft articles, as adopted on first reading, uses the term "measure" in the text and "countermeasures" in the title.[52]

27. Although divergent views are expressed in the literature with regard to both the degree of propriety of the term "countermeasures" and the kinds of measures it covers,[53] writers seem generally inclined to consider this concept as best embracing the generality of the measures that may be resorted to in order to seek cessation or redress.[54] A number of authors note that the Commission itself understood the term in question, as used in article 30 of part 1 of the draft, as including the measures traditionally classified as reprisals as well as the "sanctions" decided upon or applied by international bodies.[55] Although there is no obstacle to such a broad interpretation of the term as used in that draft article, it will be used here (and in further developments on the consequences of delicts) to indicate essentially the so-called unilateral or "horizontal" reactions of one or more States to an internationally wrongful act, to the exclusion of self-defence and retortion. Leaving aside for the time being the choice of the term or terms for the draft articles which will most suitably cover the relevant aspects of the instrumental consequences of internationally wrongful acts, the term "countermeasures" seems (despite our initial reservations) to be the most neutral, and as such the most comprehensive, to describe the various kinds of measures injured States may be lawfully entitled to take severally or jointly against the author State or States. This is without prejudice, for the time being, to any subcategories which the present writer or, principally, the Commission may find to be appropriate.

[49] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 443 *et seq.*

[50] *I.C.J. Reports 1980*, p. 3.

[51] See footnote 16 above.

[52] See footnote 22 above.

[53] Elagab seems to exclude "forcible" reprisals (*The Legality of Non-Forcible Countermeasures in International Law*, p. 4); Zoller seems to consider the term to cover all non-armed measures and suspension of treaties, leaving out reciprocity and treaty termination. In her view, an essential feature of countermeasures would be their coercive purpose: such a purpose being present only where the reaction goes beyond the limit of "identity/equivalence" (reciprocity) and excluded in case of adoption of such a definitive measure as termination of the treaty (op. cit., p. 75). The *Restatement of the Law Third* uses the term countermeasures in section 905 (Unilateral Remedies). According to the "Comment", countermeasures are measures that would be unlawful were they not in response to a violation and include suspension or termination of treaty relations generally or of a particular international agreement or provision; freezing of assets of the offending State; and imposition of other economic sanctions (*Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), pp. 380-381).

[54] See, *inter alia*, Reuter, op. cit., p. 465, and Dupuy, loc. cit., p. 527.

[55] Malanczuk, loc. cit., pp. 203 *et seq.*; Leben, op. cit., pp. 15-17; Dominicé, loc. cit., p. 33; and Dupuy, loc. cit., p. 528.

F. Reciprocal measures

28. The main issue here is whether it is justifiable or of practical use to make a distinction between reprisals (or the countermeasures so qualified), on the one hand, and the measures taken by way of mere reciprocity, so to speak, on the other.

29. It is well-known that the concept (as well as "principle") of reciprocity applies in various areas of international law and relations.

La reciprocité exprime l'idée d'un retour, d'un lien entre ce qui est donné de part et d'autre. De ce lien peuvent être tirées un certain nombre de conséquences juridiques, en ce qui concerne notamment l'exigibilité des engagements échangés. En comprenant plus largement encore cette idée de retour, pour justifier toute symétrie des attitudes, on trouve la réciprocité à la base de la rétorsion et des représailles.[56]

Moving from such a very broad meaning, a number of authors use the term "reciprocity" to indicate a certain kind of unilateral reaction to an internationally wrongful act. According to the former Special Rapporteur, for example, "[r]eciprocity meant action consisting of non-performance by the injured State of obligations under the same rule as that breached by the internationally wrongful act, or a rule directly connected therewith".[57]

30. More articulately other writers identify two possible kinds of reciprocity. One is reciprocity "by identity" (*par identité*) in the case where a reaction takes place under "conditions which are exactly the same for both parties". The other is reciprocity "by equivalent" (*par équivalent*) in the case where "identity of conditions cannot be ensured", that is to say, when the States "are not bound by the same obligations".[58] In the latter case, reciprocity will take the form of non-performance of the counterpart's *quid pro quo* obligation (namely, of what Forlati Picchio calls *prestazione corrispettiva*) or of the non-performance of an obligation of "equal value or equal meaning" (as Zoller calls it) of the infringed reciprocal obligation.

31. While most writers do not believe that "reciprocity by equivalent" corresponds to types of measures distinct from reprisals—or, more generally, to countermeasures—a few authors seem to maintain that reciprocal measures are distinct and as such should be subject to a different legal regime.[59] The former Special Rapporteur, for his part, while dealing with measures of reciprocity within the general framework of countermeasures does make them the object of a provision separate from the draft article dealing with reprisals. The distinc-

[56] Virally, "Le principe de réciprocité dans le droit international contemporain", *Recueil des cours..., 1967-III*, p. 100. In the same vein, cf. Simma, "Reciprocity" in *Encyclopedia of Public International Law*, 1984, pp. 402-404. The differing opinion that the basis for reprisals is distinct from that of reciprocity is expressed by Kalshoven, *Belligerent Reprisals*, pp. 24-25.

[57] See *Yearbook ... 1984*, vol. I, 1867th meeting, para. 33.

[58] Zoller, op. cit., pp. 19-20; Virally, loc. cit., pp. 22 *et seq.*; and Forlati Picchio, who speaks of *sospensione della prestazione reciproca* with regard to *réciprocité par identité* and *sospensione della prestazione corrispettiva* with regard to *réciprocité par équivalent*, op. cit., p. 93, footnote 116.

[59] Zoller, loc. cit., p. 364.

tion would be necessary, in his view, because measures by way of reciprocity would be intended to restore the balance between the position of the offending State and that of the injured party, while reprisals would instead be intended to "put pressure" on the offending State in order to secure compliance with the new obligation arising from the wrongful act. As for the conceptual basis of reciprocity, the former Special Rapporteur finds it in the existence of the synallagmatic relationship or *échange de prestations* which is the object and *raison d'être* of the norm infringed. Reciprocity would thus be achieved through the suspension, on the part of the injured State, of compliance with the obligations corresponding to those violated by the offending State. Reprisals, on the contrary, would presuppose that no legal link existed between the infringed obligation and the obligations the performance of which is suspended by the injured State.[60]

32. The question should be settled by a careful study of practice. In particular, the practice of States should indicate whether the reactions qualified as "reciprocal measures" are or should be subject to conditions, limitations or other requirements different from those obtaining for reprisals or countermeasures in general or whether any special features presented by reciprocal measures are simply justified by a more articulate application of the very same principles governing reprisals or countermeasures in general.

G. *Inadimplenti non est adimplendum.* Suspension and termination of treaties

33. An analogous question arises with regard to the measures commonly referred to by the maxim *inadimplenti non est adimplendum* and for the suspension and termination of treaties. It is well known that although the tenet *inadimplenti non est adimplendum* would seem literally to be applicable to non-compliance with *any* international obligation, irrespective of its conventional or customary origin, it is traditionally used to indicate so-called reciprocity within a treaty context.[61]

34. The regime of suspension and termination of treaties of course refers instead to the particular consequences of non-compliance with treaty obligations codified in article 60 of the Vienna Convention on the Law of Treaties. Some scholars consider both these consequences as *inadimplenti non est adimplendum* corollaries. They hold that reciprocity manifests itself when unlawful action and reaction both find a place within the context of the treaty, non-compliance with which would (in given circumstances) justify it. As noted above (paras. 31-32) with regard to the relationship between reprisals and reciprocity, essentially we are dealing again here with just another species of reprisal[62]—except for minor, albeit by no means negligible, specific features. Other scholars, while acknowledging that suspension and termination of treaties are applications of the principle *inadimplenti non est adimplendum*, instead stress the autonomy of suspension and termination whether falling within the framework of article 60 of the Vienna Convention on the Law of Treaties or not.[63] The autonomy

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[60] Cf. *Yearbook... 1985*, vol. II (Part One), p. 3, document A/CN.4/389, commentary on article 8 at pp. 10-11. The distinction proposed by Riphagen is explicitly criticized by Pisillo Mazzeschi, "Termination and suspension of treaties for breach in the ILC works on State responsibility" (*United Nations Codification of State Responsibility* (1987), p. 794). He shares the prevailing concept of reciprocity as a specific form of reprisal. Malanczuk is equally critical in "Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1985), p. 315.

[61] In this respect, the statement contained in the United States Memorial (pp. 37-41) presented to the arbitral tribunal in the *Air Service* case (see footnote 49 above) is significant:

> "... International law recognizes that a party to an agreement which is breached by the other party may reciprocally suspend proportional obligations under the agreement. Available countermeasures range from formal termination of an agreement in the event of a material breach, to an interim withdrawal of corresponding rights of the other party while other rights and obligations remain in effect. As the International Law Commission has stated, a violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take nonforcible reprisals, and these reprisals may properly relate to the defaulting party's rights under the treaty.
>
> "This generally recognized principle serves as one of the most important sanctions behind international law—namely reciprocity. No State can validly claim from other States, as a matter of binding obligation, conduct which it is not prepared to regard as binding upon itself.
>
> "This right to take proportional countermeasures has been specifically affirmed in the context of bilateral international aviation agreements. In his comprehensive treatise, *The Law of International Air Transport* at 482, Bin Cheng focuses specifically on this question in the context of the Bermuda-type bilateral air transport agreements and the practice of the United Kingdom. He concludes that:
>
> '[W]hen in the opinion of one of the parties [to a Bermuda-type agreement] the other contracting party has committed a breach of an agreement [,] ... the principle *inadimplenti non est adimplendum* applies and the party aggrieved is entitled to take proportionate retaliatory measures.' "

(*Digest of United States Practice in International Law 1978*, Department of State Publication 9162 (Washington, D.C.), pp. 769-770.)

Numerous writers use the expressions *inadimplenti non est adimplendum* and *exceptio inadimpleti contractus* indiscriminately. A different view seems to be held by Zoller, who refers to *exceptio inadimpleti contractus* only with respect to treaty obligations and sees the other maxim (*inadimplenti non est adimplendum*) as just another way of expressing the principle of reciprocity, regardless of the source (custom or treaty) of the obligations in question (op. cit., p. 15; and loc. cit., p. 364). See also Reuter, op. cit., p. 464; and Politis, loc. cit., p. 10, who believed that *exceptio inadimpleti contractus* indicated, within a treaty context, the refusal of a State to comply with an obligation by reason of the non-compliance with the correlative (synallagmatic) obligation of the other party: a refusal which would not have been a reprisal but a lawful way of terminating treaty obligations.

[62] In the same vein, see, *inter alia*, Morelli, op. cit., p. 327; Guggenheim, *Traité de droit international public*, vol. I, p. 227; Akehurst, "Reprisals by third States", *The British Year Book of International Law, 1970*, pp. 6-12 and 16; Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, p. 294; and Pisillo Mazzeschi, loc. cit., pp. 57-94.

[63] According to Zoller, who takes an original position, the fact that suspension and termination—as forms of reaction to a wrongful act—do not present such features as identity and equivalence, places them beyond the ambit of reciprocity proper. In her opinion, it is necessary to distinguish between measures resorted to by way of reaction to non-compliance with a treaty *inadimplenti non est adimplendum* (reciprocity), and suspension and termination. The first type of reaction (reciprocity) would consist in mere non-compliance with an obligation deriving from the treaty. Suspension and termination, however, would consist in the obliteration—permanent or temporary—of the very legal existence of the treaty obligation involved (op. cit., p. 28). On this distinction, see also Simma, "Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general in-

(Continued on next page)

of suspension and termination from reprisals would be justified by differences relating, *inter alia*, to the purpose of the measures, directly aimed at securing reparation instead of merely coercing the wrongdoer to make provision for it; to the objective, which in the case of suspension or termination would be confined to responding to non-compliance with a treaty obligation; and to the regulation of procedural conditions, which is more detailed.

35. The problem here is to see whether practice justifies making a distinction between such "conventional" measures as treaty suspension and termination and countermeasures in general, not only for merely descriptive purposes but in view of the legal regime to be codified or otherwise adopted by way of progressive development. As well as the question of so-called reciprocity in general, the issues relating to these two "conventional" measures—issues connected with the relationship between the law of treaties and the law of State responsibility—will require further study before any draft articles are formulated.

(Footnote 63 continued.)
ternational law", *Österreichische Zeitschrift für öffentliches Recht* (1970), pp. 5-83; Forlati Picchio, op. cit., pp. 76-81; and Politis, loc. cit., p. 60.

H. Subject-matter of the following chapters

36. The following chapters are devoted to the identification, in the light of the most authoritative and recent literature, of the various problems of the legal regime of the countermeasures to which States may resort as a consequence of internationally wrongful acts (including reprisals, reciprocity, *inadimplenti non est adimplendum*, and suspension and termination of treaties). For each set of problems, the report will seek, with the help of the literature, to identify in what direction the codification and development of that regime could proceed, the aim being to elicit comment and advice from members of the Commission and possibly from representatives in the Sixth Committee.

CHAPTER II

An internationally wrongful act as a precondition

37. While most writers believe, on the basis of well-known jurisprudential *dicta*, that lawful resort to countermeasures presupposes internationally unlawful conduct of an instant or continuing character,[64] a few scholars seem to believe that resort to measures could be justified even in the presence of a bona fide belief on the part of the injured State that an internationally wrongful act is being or has been committed against it.[65]

38. Faced with the alternatives of the need for a wrongful act to have been committed and a sufficient bona fide belief on the part of the injured State or the mere allegation that a wrongful act has been committed, the inclination is to opt for the first alternative as the prerequisite for lawful resort to countermeasures.[66] However, this problem is of no real relevance for the present purposes. While it is essential in determining whether a cause of exclusion of wrongfulness does come into play under article 30 of part 1 of the draft[67] as a justification for countermeasures, the prior determination that an internationally wrongful act has been committed is simply a necessary assumption from the viewpoint of the regulation of the content, forms and degree of responsibility. It is obvious, in other words, that the lawfulness of any one of the measures, the legal regime of which the Commission is to cover in part 2 of the draft, necessarily presupposes the existence of a prior unlawful act which is governed by part 1.

[64] An exemplary definition of this requirement is to be found in the well-known *Portuguese Colonies* case (Naulilaa incident): "*La première condition*—sine qua non—*du droit d'exercer des représailles est un motif fourni par un acte préalable, contraire au droit des gens*" (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1027). The same tribunal in the "*Cysne*" case emphasized: "There is no legal justification for reprisals except when they have been provoked by an act contrary to international law", *Annual Digest and Reports of Public International Law Cases, 1929-1930*, (London), vol. 5 (1935), p. 490, case No. 287. It is significant that on the occasion of the 1930 Hague Codification Conference the question "What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?" was met by all the answering States with the indication that a prior wrongful act was an indispensable prerequisite (League of Nations, *Conference for the Codification of International Law: Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, pp. 128 *et seq.*). On the same lines, see also, article 1 of the resolution adopted in 1934 by the International Law Institute (footnote 43 above), and article 30 of part 1 of the draft articles on State responsibility (footnote 22 above).

[65] This seems to be the opinion, for example, of the arbitral tribunal in the *Air Service* case (see footnote 49 above) where the arbitrators affirmed that it was quite obvious that the lawfulness of the action must be considered regardless of the answer to the question of substance concerning the alleged violation (ibid., p. 441, para. 74). This understanding is confirmed by the fact that, in the same case, as noted approvingly by Fisler Damrosch, "the tribunal consistently refers to the '*alleged** breach' or '*alleged** violation' as giving rise to the other party's right to take responsive action" ("Retaliation or arbitration or both? The 1978 United States-France aviation dispute", AJIL (1980), p. 796). A similar view is expressed by Dominicé, who deems it unrealistic to require certainty as to the existence of a prior violation and concludes that reprisals are measures intended to react *à un manquement, réel ou allégué* (loc. cit., pp. 40-41). Fenwick too speaks of reprisals or measures in reaction to "alleged illegal acts" (*International Law*, 4th ed., p. 636).

[66] This opinion seems to be shared by Wengler, "Public international law: paradoxes of a legal order", in *Collected Courses..., 1977-V*, p. 20; Zoller, op. cit., pp. 95-96; Elagab, op. cit., pp. 43-50; and Salmon, in "Les circonstances excluant l'illicéité" in *Responsabilité internationale*", p. 179.

[67] See footnote 22 above.

CHAPTER III

Functions and purposes of measures

39. The question of the functions and purposes of measures, albeit controversial, is not without relevance. In the literature, the variety of opinions on the subject is determined to a considerable extent by the general concepts of international responsibility that each scholar takes as a starting point.[68]

40. Scholars writing less recently who start from the concept of an internationally wrongful act as being predominantly "civil" in nature, so to speak, are inclined to see reprisals as instruments for the pursuit of an essentially restitutive/compensatory end.[69] Those who conceive internationally wrongful acts as delicts of a predominantly "penal" or criminal nature assign to reprisals an afflictive, punitive or retributive function.[70] Article 1 of the International Law Institute's 1934 resolution states in this respect:

> Les représailles sont des mesures de contrainte, dérogatoires aux règles ordinaires du droit des gens, prises par un État, à la suite d'actes illicites commis à son préjudice par un autre État et ayant pour but *d'imposer** à celui-ci, au moyen d'un *dommage**, le *respect du droit**.

In this definition two features are of significance from the present point of view. One is the verb *imposer*, indicating the coercive role the injured State performs—in either direction—within the essentially "horizontal" legal relationship which obviously characterizes international responsibility. The other feature is the use of the terms *dommage* and *respect du droit*, which seem to emphasize, along with the reparatory function implied in *respect du droit*, the idea of retribution, implicit both in *dommage* and *respect du droit*. The Institute would thus seem to have adopted an ambivalent stance. Oppenheim seems to support a concept of measures that is largely compensatory when he stresses the element of compulsion together with an essentially reparatory role of reprisals.[71]

41. In the post-Second World War literature the doctrinal debate is characterized by the position of those who see in reprisals a measure exclusively instrumental to cessation and reparation, on one side, and those who believe that reprisals are instrumental to both reparation and retribution (punishment), on the other side. The first trend is represented, *inter alia*, by Skubiszewski,[72] Venezia,[73] Lamberti Zanardi,[74] Žourek,[75] Brownlie,[76] Dupuy,[77] Paniagua Redondo,[78] Zemanek[79] and the American Law Institute's *Restatement of The Law Third*.[80]

42. The second trend is the eclectic or "dual" concept (with some emphasis upon the retributive role) which seems to be preferred by Forlati Picchio,[81] Lattanzi,[82] and perhaps in a more subtle form, by Morelli[83] and Ago. According to the position expressed by the latter:

> The peculiarity of a sanction is that its object is essentially punitive or repressive; this punitive purpose may in its turn be exclusive and as such represent an objective *per se*, or else it may be accompanied by the intention to give a warning against a possible repetition of conduct like that which is being punished, or again it might constitute a means of exerting pressure in order to obtain compensation for a prejudice suffered.[84]

While remaining within this trend, Sereni, Cassese and Conforti do not seem to stress any one of the concurrent functions. Bowett, for his part, while recognizing the punitive function of reprisals, specifies that they serve "to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent State to abide by the law in the future".[85]

43. Some recent works on reprisals have paid particular attention to the study of the function of measures (and the aims the injured State pursues or may pursue thereby). Some give marked predominance to coercion

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[68] For a discussion of the whole question of the purposes of reprisals, see Sicilianos, op. cit., pp. 49-69.

[69] See, for example, Anzilotti, op. cit., pp. 165-167, to be read in the light of his well-known remarks in *Teoria generale della responsabilità dello Stato nel diritto internazionale*, pp. 95-96. In the same vein, see also, La Brière, loc. cit., p. 241; Bourquin, "Règles générales du droit de la paix", *Recueil des cours ..., 1931-I*, p. 222; and the pertinent remarks by Politis, loc. cit., pp. 28-29, in his report to the International Law Institute, in which the reparatory nature of reprisals is confirmed by his observation that the right to act in reprisal begins only after the wrongdoing State refuses reparation and ceases the moment such reparation is obtained.

[70] See, for example, Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (1932), pp. 571 *et seq.*

[71] Op. cit., pp. 136 *et seq.*

[72] Loc. cit., p. 753.

[73] "La notion de représailles en droit international public", RGDIP (1960), pp. 467-468.

[74] Op. cit., pp. 131 *et seq.*

[75] Loc. cit., p. 60.

[76] *System of the Law of Nations: State Responsibility*, part I.

[77] Loc. cit., p. 530.

[78] Loc. cit., p. 158.

[79] "The unilateral enforcement of international obligations", *Zeitschrift für ausländisches öffentliches Recht* (1987), p. 37 and loc. cit., p. 370.

[80] According to the *Restatement* the emphasis would seem to be placed on cessation/reparation: "The principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it". (Op. cit., p. 382.)

[81] Op. cit., pp. 63-65.

[82] Op. cit., pp. 242-243.

[83] Op. cit., p. 363.

[84] Addendum to the eighth report ... (see footnote 7 above), para. 90.

[85] "Reprisals involving recourse to armed force", AJIL (1972), p. 3.

for restitutive/reparatory purposes.[86] Zoller, for example, believes that "peacetime unilateral remedies" serve

> ... three distinct "purposes": "reparation", "coercion", "punishment"; and assigns to "countermeasures" exclusively the second of these purposes, namely "coercion".[87]

Elagab identifies the functions of reprisals in "self-protection", "reciprocity", and inducement to "an expeditious settlement of a dispute". Unlike Zoller and others but like Lamberti Zanardi he does not seem to exclude an "executive" function, namely the use of reprisals by the injured State in order to secure reparation directly.[88]

44. While recognizing the diversity of purposes pursued by reprisals, Dominicé[89] notes that

> *... la doctrine des représailles a été marquée par l'idée qu'il s'agit d'un acte de vengeance, d'un châtiment, ce qu'elles furent sans doute autrefois. L'institution n'a pas entièrement perdu ce caractère, mais ce n'est plus son trait dominant. Elle doit être comprise dans le contexte de l'autoprotection et à la lumière de sa finalité première qui est la contrainte.*[90]

However, he adopts a very elastic concept of the functions of reprisals, such functions varying according to the circumstances, notably to the timing of the injured State's reaction and the attitude of the offending State. Thus, if the injured State reacts to a continuing violation, the purpose of the measure will be to put a stop to the wrongful conduct and revert to compliance with the obligation that has been infringed, the measure will therefore be of a temporary or provisional character.[91] If instead the reaction is to a refusal to make reparation, the reprisal will have an executive or punitive purpose—and will acquire a final or definitive character. As regards their interaction with dispute settlement procedures, Dominicé seems to believe that, depending on the phase at which the settlement commitments come into play, reprisals may be aimed either at inducing implementation of the settlement procedure or at preserving, by interim measures, the chance to obtain the reparation provided for by the settlement which will eventually be achieved through the settlement procedure.

45. In the face of the distinctions proposed in the literature it will be necessary to analyse State practice in breadth and in depth. It will be necessary to try to establish whether and to what extent the legal regime of countermeasures is or should be diversified according to the function the countermeasures may be intended to perform. Though it remains to be verified, it is likely that diversification may be justified particularly with regard to the impact of the prior claim for reparation, *sommation*, compliance with peaceful settlement obligations, and proportionality.

[86] De Guttry, for example, defines reprisals as "a form of pressure" aimed at getting the offending State to "modify its conduct in order to comply with its international obligations" (op. cit., p. 12). Reprisals would thus not perform a directly executive but an "indirect self-help" function by applying a kind of instrumental coercion in order to induce the offending State to comply with its obligations—an aim which would include cessation as well as reparation (ibid., pp. 29 and 150). A coercive rather than "executive" function is identified by Kalshoven, op. cit., p. 26; Paniagua Redondo, loc. cit., p. 158; and Zemanek, "The unilateral enforcement . . .", loc. cit., p. 35.

[87] Op. cit., pp. 46 *et seq.* Like the writers previously cited, Zoller (who addressed the suspension of treaties as well as reprisals) believes that countermeasures are neither punitive-repressive nor directly reparatory (compensatory) or executive but exclusively coercive-reparatory in a broad sense. This would necessarily imply measures of a temporary nature which should cease to operate once their purpose has been attained (ibid., p. 54). De Guttry takes a similar view, op cit., pp. 266-268. Two authors who, less recently, particularly stressed temporariness as a condition for the legitimacy of measures adopted by way of reprisal are Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, p. 568; and La Brière, loc. cit., p. 271.

[88] Op. cit., pp. 44-45.

[89] Loc. cit., pp. 34-35. For a similar approach, see Gianelli, op. cit., p. 42. The indication of at least three different purposes of countermeasures (coercive, conservative/cautionary, executive) appears to be present also in the fourth report of the former Special Rapporteur (*Yearbook ... 1983*, vol. II (Part One) (see footnote 35 above), pp. 19-20, paras. 102-106).

[90] Loc. cit., p. 55.

[91] Ibid., pp. 40 *et seq.*

CHAPTER IV

The issue of a prior claim for reparation

46. A question frequently raised but rarely dealt with adequately is whether and to what extent lawful resort to reprisals should be preceded by intimations such as protest, demand for cessation and/or reparation, *sommation* or any other form of communication to the offending State on the part of the aggrieved State or States.[92] Nevertheless, two main trends can be discerned, both related to the general theories on international responsibility.

47. A minority of legal writers, for whom reprisals are the primary and normal sanction for any internationally wrongful act—reparation being, in a sense, merely a possible "secondary" consequence[93]—take the view, though it is not unanimous, that lawful resort to reprisals is not subject to any intimation, claim or *sommation* of the kind indicated in the preceding paragraph. There is no need, as a matter of law, to address a demand for ces-

[92] An interesting doctoral thesis on the subject has been presented at Rome University by Gianelli (see footnote 32 above).

[93] Kelsen, loc. cit., pp. 481 *et seq.*, particularly pp. 571-573; and *Principles of International Law*, pp. 18 *et seq.* See also Morgenthau, "Théorie des sanctions internationales", in *Revue de droit international et de législation comparée* (1935), pp. 474-503 and 809-836.

sation or reparation to the offending State before reprisals are taken.[94]

48. A different position is clearly taken by those who espouse the classical theory of State responsibility whereby reparation and cessation are seen as the principal consequences of an internationally wrongful act while reprisals are seen essentially (although not exclusively) as a means of coercion for obtaining cessation and/or reparation.[95] According to this theory, it is natural to assume that an act of reprisal cannot, as a rule, be lawfully resorted to before a protest and demand made for cessation and/or reparation has first proved unsuccessful.[96]

49. The essence of the latter view is also held by those scholars who espouse a broader concept of both the substantive and the instrumental consequences of an internationally wrongful act. According to this principle, the consequences of an internationally wrongful act are not merely compensatory or reparatory but also retributive or punitive. The authors who so define the said consequences also share the conventional view that whatever their function (compensatory, retributive or both), reprisals may not lawfully be resorted to unless there has been a prior, unsuccessful demand for cessation and/or reparation.[97]

50. Contemporary scholarship of course elaborates upon the general trend in a variety of ways, especially with regard to the conditions under which this principle applies and to admissible exceptions. Wengler, for example, thinks that the aggrieved State could lawfully resort to reprisals without any preliminaries in the event of *dolus* on the part of the law-breaking State.[98] The view has also been expressed that no preliminaries are required for measures to be taken against a State responsible for an international crime.[99] Others see an exception in the case of an internationally wrongful act of a "continuing character"[100] (article 25 of part 1 of the draft articles),[101] or in the case of economic measures.[102] With regard to the latter it is assumed that no preconditions have to be met in the case of such (supposedly milder) forms of coercion. The rules proposed by the former Special Rapporteur envisage a special regime for the case of synallagmatic obligations. In fact, articles 8 to 10 of part 2 of the draft do not even envisage an obligation of prior resort to (available) settlement procedures in the case where the injured State resorts to a non-compliance measure "by way of reciprocity" instead of "by way of reprisal".[103] More systematically, it has been suggested, in a recent contribution to the subject, that the question whether "a prior demand is a condition of lawful resort to reprisal depends upon the concrete circumstances of the violation and the nature of the obligation breached".[104] The injured State would be relieved from the duty in question, for example, whenever the measures resorted to consisted in an application of the *inadimplenti non est adimplendum* principle and were taken by way of reaction to particularly serious violations.[105]

51. International practice should be a more reliable indicator with regard to the effective legal relevance of a prior demand for reparation. Only on such a basis would it be possible to determine to what an extent a provision which made such a demand a prerequisite for lawful resort to any measures would be the subject merely of codification or of a desirable progressive development of international law. In particular, a study of practice should be more eloquent than is the literature on the frequently mentioned question of *sommation*: namely, as to whether it is a condition *sine qua non* of *any* measure, or a requirement for resort to *certain kinds* of measures, the lawfulness of other kinds of reactions being subject to less stringent conditions. In particular, it is to be hoped that the indications to be drawn from such an analysis would be less vague in identifying in respect of what kinds of measures the injured State would be exempt from the requirement of *sommation*. This might make it easier to determine whether *sommation* would be required for *any* relatively "bland" measures in general or for so-called reciprocal measures, or only for measures

[94] Kelsen, loc. cit., pp. 571 *et seq.* This not so recent theory held that, since a demand for reparation or an injunction would not even be necessary in the most extreme cases, namely when the injured State decided to resort to war, this would *a fortiori* hold true in the case of measures short of war. While adhering to Kelsen's theory, Guggenheim has subsequently maintained that the injured State would be under the obligation to *mettre le violateur en demeure avant de procéder à des représailles* (*Traité de droit international public* (1954), vol. II, p. 64, footnote 2 and p. 85, footnote 5).

[95] See, for an overall view of this subject, Anzilotti, *Corso di diritto internazionale*, part I (1928), pp. 416 *et seq.*, especially pp. 445 *et seq.*; and Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht*, pp. 141-142.

[96] In the same vein, in addition to the authors cited in the preceding note, see, *inter alia*, Strupp, loc. cit., pp. 117-118; Fauchille, *Traité de droit international public* (1926), p. 690; and Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, p. 36, who, however, allows for the existence of one derogation in the case of the so-called *exceptio non adimpleti contractus*: a measure the adoption of which would not require a previous demand for reparation (ibid., pp. 91 *et seq.*).

[97] Oppenheim, op. cit., pp. 136 and 218; Ago, "Le délit international", *Recueil des cours..., 1939-II*, pp. 527 *et seq.*; Morelli, op. cit., p. 363; Čepelka, *Les conséquences juridiques du délit en droit international contemporain*, pp. 42 *et seq.*; Skubiszewski, loc. cit., p. 753; Schachter, loc. cit., p. 170. It would not be right to overlook the conclusions reached recently on this matter by the American Law Institute in its *Restatement of the Law Third*. The comment to section 905, entitled "Unilateral Remedies", states: "Countermeasures in response to a violation of an international obligation are ordinarily justified only when the accused State wholly denies the violation or its responsibility for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiations or third-party resolution" (op. cit., p. 381).

[98] *Völkerrecht*, vol. I, pp. 516-517.

[99] Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses..., 1984-II*, p. 65 and p. 129, footnote 125.

[100] Pueyo Losa, "El derecho a las represalias en tiempo de paz: condiciones de ejercicio", *Revista Española de Derecho Internacional* (January-June 1988), pp. 29-30.

[101] See *Yearbook... 1980*, vol. II (Part Two), pp. 32-33.

[102] Zoller, loc. cit., p. 379.

[103] For the text of these articles, see *Yearbook... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

[104] Lattanzi, loc. cit., p. 542.

[105] Ibid., p. 544. This author develops in substance, within the framework of contemporary international law, the position formerly taken by Reitzer, who indicated as exceptions to the obligation of a previous demand for reparation cases of *non adimpleti contractus* and of *défense légitime* (op. cit., pp. 80 *et seq.*).

intended for interim protection; as well as whether the matter would depend totally or partially upon the degree of urgency of the remedy or the gravity of the wrongful act. Should practice indicate that this area is not covered satisfactorily *de lege lata*, improvements might have to be sought, more especially to ensure better protection of prospective weaker parties, as a matter of progressive development.

CHAPTER V

The impact of dispute settlement obligations

52. Interrelated with the requirement for a prior demand for reparation (*sommation*) is the question of the impact of any existing obligations of the injured State with regard to dispute settlement procedures. To some extent, the existence of any such obligations—and the injured State's prior compliance with them—could well condition the lawfulness of resort to all or some unilateral remedies. The legal duty of the injured State to resort to given means of settlement would then place another restriction on its *faculté* to resort to unilateral measures; and the recognition of such a restriction—*de lege lata* or *de lege ferenda*—would be a not insignificant step towards reducing the undesirable consequences of the unilateral determination and enforcement of the right to reparation, in a broad sense, in a milieu as inorganic as the "society of States". Of course, hitherto efforts to that end have primarily been aimed at curbing arbitrary resort to armed force, whether to assert alleged rights (in legal disputes) or mere interests (in political disputes). Nevertheless, the matter has been rightly recognized as also being of great importance in legally controlling resort to non-forcible measures. Although less dramatic and harmful, such measures can be equally detrimental to the preservation of friendly relations and the development of cooperation among States.

53. It is unnecessary to recall here the various stages in the development of peaceful settlement procedures which have led to the present state of advancement of this vital area of international law. Suffice it to recall that the most important *general* step—probably embodied by now in a rule of general international law—is represented by the principle enshrined in Article 2, paragraph 3 (clearly interrelated with Article 2, paragraph 4) of the Charter of the United Nations and by the more specific, though still very general, provisions of Article 33 of that same instrument. It is in the main those provisions, combined of course with the concrete settlement obligations deriving from bilateral or multilateral commitments of a more specific nature (only the most advanced of which are those deriving from the Statute of ICJ and the various instruments connected with Article 36 thereof), that form the basis for such important reaffirmations of the Charter rules as the less than satisfactory formulation of the principle of peaceful settlement contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[106] and the less disappointing, although very general, Manila Declaration on the Peaceful Settlement of International Disputes.[107]

54. Some legal writers believe that those Charter principles and rules (as presumably reflected in general international law) make it unlawful for any injured State to resort to countermeasures prior to (*a*) the submission of appropriate demands to the allegedly law-breaking State, as considered above; and (*b*) bona fide recourse to the peaceful settlement procedures provided for under Article 33 of the Charter.[108] Other legal writers, however, interpret the second of those requirements as applying only to measures involving force, this in view of the fact that only measures of that kind would be likely to endanger international peace and security.[109] Measures short of force (force being mostly understood as military force) could thus lawfully be resorted to even without prior compliance with that requirement.

55. Whatever the impact of the general rules on peaceful settlement, the question becomes more complex in the presence of dispute settlement obligations which may exist between injured State and law-breaking State by virtue of subjectively and objectively specific instruments (bilateral or multilateral, inorganic or institutional) to which those States may be parties at the relevant time. This means not only the dispute settlement obligations and rights arising from instruments like special agreements (*compromis*), arbitration clauses, general arbitration or judicial settlement treaties or declarations of acceptance of the jurisdiction of ICJ under the so-called optional clause (Article 36, paragraph 2 of the Court's Statute) but also to the statutes of a number of international institutions and to the multilateral instruments covering specific areas. A number of writers believe that at least the commitments deriving from such more specific instruments do have a decisive impact—under given conditions—on the lawfulness of measures to be taken. In other words, in given cases, prior re-

[106] General Assembly resolution 2625 (XXV), annex.

[107] General Assembly resolution 37/10, annex.

[108] Opinions anticipating this view had already been expressed by a number of participants in the *travaux préparatoires* which led to the adoption of the 1934 resolution of the International Law Institute previously cited (see especially Politis, Barclay, and La Brière (*Annuaire de l'Institut de droit international, 1934* (footnote 43 above)), pp. 40-41, 90 and 95). In the more recent literature, see **Žourek**, loc. cit., p. 60; Bowett, "Economic coercion and reprisals by States", in *Virginia Journal of International Law* (1972), pp. 10-11; Cassese, *Il diritto internazionale nel mondo contemporaneo*, p. 270; Pueyo Losa, loc. cit., p. 21; and De Guttry, op. cit., pp. 227-237.

[109] Fisler Damrosch, loc. cit., pp. 805 *et seq.*; Zemanek, "The unilateral enforcement...", loc. cit., p. 37; Lattanzi, loc. cit., pp. 543-544; and less categorically Zoller, op. cit., pp. 120-121.

course to one or more of the procedures envisaged would be a condition of lawful resort to countermeasures.[110]

56. Article 5 of the International Law Institute's 1934 resolution according to which

> Les représailles même non armées sont interdites quand le respect du droit *peut être effectivement assuré** par des procédures de règlement pacifique. En conséquence, elles doivent être considérées comme interdites notamment:
>
> (1) Lorsqu'en vertu du droit en vigueur entre les parties, l'acte dénoncé comme illicite est de la compétence obligatoire de juges ou d'arbitres *ayant compétence aussi pour ordonner, avec la diligence voulue, des mesures provisoires ou conservatoires et que l'État défendeur ne cherche pas à éluder cette juridiction ou à en retarder le fonctionnement**;
>
> (2) Lorsqu'*une procédure de règlement pacifique est en cours**, dans les conditions envisagées au (1), à moins que les représailles n'aient légitimement été prises auparavant, réserve faite de leur cessation décidée par l'autorité saisie.
>
> ....[111]

appears to be less restrictive of the injured State's discretion. Most of the writers who have dealt with the matter consider it an indispensable condition that the legally available procedure should be of such a nature as effectively to ensure respect for the injured State's rights.[112] Some writers, for example, believe, on the one hand, that the mere existence (in a general treaty or in an arbitration clause) of an obligation to go to arbitration by an ad hoc agreement (such an obligation being merely a *pactum de contrahendo*) would not be sufficient to preclude resort to measures. The reprisals resorted to, however, should either have a merely provisional function (interim measures) or be intended to coerce the allegedly law-breaking State to conclude the ad hoc agreement.[113] While believing, on the other hand, that the existence between the parties of a truly compulsory jurisdiction—namely a jurisdictional link allowing the allegedly injured State to start arbitral or judicial proceedings by unilateral application—would normally foreclose direct resort to measures, the same scholars think that no obstacle to resort to unilateral interim measures would exist even in such a case, except where the competent body had no power to issue an order for interim measures or where the allegedly law-breaking State failed to comply with such an order.[114]

57. According to some legal writers, in addition to the nature, availability and degree of effectiveness of a possibly relevant settlement procedure, account must also be taken of the aim of the measures envisaged or resorted to by the injured State, a matter recently explored by Dominicé,[115] who believes it is necessary to distinguish between reprisals aimed at securing reparation and reprisals which, by way of reaction to a continuing wrongful act, also aim, by cessation, at compliance with the obligation which is being infringed. Only in the former case would a prior *sommation*, together with an arbitration proposal, be a precondition for resort to reprisals. Resort to reprisals would be lawful in such a case only if the arbitration proposal—and, of course, *sommation*—had proved of no avail. Where the wrongful conduct was still in progress, interim measures or measures designed to induce cessation and/or arbitration could lawfully be resorted to immediately regardless of settlement procedure commitments. In any event, measures taken by the injured State following non-compliance by the law-breaking State with an arbitral decision, would also be lawful.[116]

58. In article 10 of part 2 of the draft proposed by the former Special Rapporteur,[117] particular attention is paid to the provisional, protective nature of the measures and to the effectiveness of the power of the competent bodies. According to paragraph 1 of that article no measure (other than a reciprocal measure of the kind contemplated in article 8) could be resorted to by the injured State "until it has exhausted the international procedures for peaceful settlement of the dispute available to it". Paragraph 2, however, exempts from the prohibition

> (*a*) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection;
>
> (*b*) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.[118]

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[110] Writers who have already expressed such an opinion are Reitzer, op. cit., pp. 4-35; Dumbauld, *Interim Measures of Protection in International Controversies*, pp. 182 *et seq.*; and, more recently, Bowett, loc. cit., p. 11 and "International law and economic coercion", *Virginia Journal of International Law* (1976), p. 248; Ago in his comment on article 30 of part 1 of the draft articles on State responsibility, *Yearbook ... 1979*, vol. II (Part One), p. 43, document A/CN.4/318 and Add.1-4, p. 43, footnote 191; Malanczuk, "Zur Repressalie ...", loc. cit., p. 739; and Lattanzi, loc. cit., p. 544 (who excludes, however, the hypothesis of *inadimplenti non est adimplendum* and of measures against international crimes).

[111] *Annuaire de l'Institut de droit international* (footnote 43 above), p. 709.

[112] According to Elagab "... if it transpires that there is in reality a definite commitment to peaceful settlement between the parties concerned, resort to countermeasures by either party must be considered as *prima facie* unlawful. This general rule applies particularly where the treaty containing that rule establishes mechanisms for ensuring its implementation. There may, however, be situations in which the desired mechanisms prove inadequate. It is here that an aggrieved State could justifiably resort to countermeasures on the basis of customary law." (Op. cit., p. 183.)

[113] Dominicé, loc. cit., pp. 44 *et seq.*; Zoller, op. cit., pp. 120-124; Fisler Damrosch, loc. cit., pp. 805 *et seq.*; and De Guttry, op. cit., pp. 243-256.

[114] Ibid.

[115] Loc. cit., pp. 33 *et seq.*

[116] In the same vein, see Pueyo Losa, loc. cit., pp. 27 *et seq.* Elagab likewise has recently stressed the need to take account of the different motivations behind the measures taken (op. cit., pp. 183 *et seq.*).

[117] See footnote 103 above.

[118] A further element of the present summary review of the positions taken by writers on the subject is the *Restatement of the Law Third*. The text of section 905 (Unilateral Remedies) does not, in fact, address itself expressly to the relationship between measures, on the one hand, and dispute settlement obligations, on the other (op. cit., p. 380). The relevant comment, however, states that for resort to measures to be lawful it would be necessary, *inter alia*, that "the accused State ... rejects or ignores proposals for negotiation or third-party resolution". Reference is made, on the other hand, not to possible bilateral settlement instruments in force between the parties but only to settlement procedures available within the framework of international organizations: "In a dispute between members of an international organization, there may be a requirement that the dispute be submitted to the dispute settlement procedures of the organization, and countermeasures are precluded before that procedure has been concluded or terminated without success" (ibid., p. 381). In the "Reporters' Notes" it also states that "Necessity" (and hence the lawfulness of countermeasures) "disappears, however, once the case has been submitted to an international tribunal, and the tribunal is in a position to decide on interim measures of protection" (ibid., p. 387).

It remains to be seen whether this provision is wholly satisfactory.

59. Here too, a thorough study of international practice—starting from an articulate categorization of dispute settlement instruments from the viewpoint of their respective degrees of strictness and effectiveness—is indispensable before deciding on the best possible solution. Moreover, the matter should be researched with the dual purpose of precisely assessing *lex lata* and devising improvements that might reasonably be proposed to advance the law of unilateral countermeasures in the interest of justice (see para. 4 above).

60. It will certainly be difficult to get States to accept, in part 3 of the draft articles of the proposed convention on State responsibility as envisaged, really significant innovations on the interpretation and application of the rules with regard to the settlement of disputes. Given that the impact of such rules would extend to all areas of international law—namely to the violation of any of the primary norms or principles of written or unwritten international law and the consequences thereof—whatever binding settlement commitments are eventually accepted by States under part 3 would affect the whole range of their relationships and may give rise to controversy. The paucity of binding settlement commitments envisaged in articles 1-5 of part 3 of the draft as proposed by the former Special Rapporteur[119] and the extreme caution manifested by the members of the Commission in the debate on those provisions clearly reflect the difficulties.[120]

[119] See *Yearbook ... 1986*, vol. II (Part Two), p. 35, footnote 86.

[120] Ibid., vol. I, 1952nd to 1956th meeting, pp. 56-85.

61. While not excluding the possibility that more significant steps might be taken with regard to the content of part 3, the rules to be devised by the Commission with regard to the impact of dispute settlement commitments upon the lawfulness of unilateral reactions to internationally wrongful acts are another matter. In that respect, the view is taken in this report that, once the present status has been adequately assessed, more could and should be done, under appropriate rules, to protect any party in a State responsibility relationship which has accepted dispute settlement commitments and is ready to comply with them. Rules of that kind would simultaneously help to reduce arbitrary resort to measures by the arrogant and, together with the just solution of any controversy arising from any specific internationally wrongful act, to promote the conclusion by States of effective bilateral or multilateral instruments of dispute settlement in increasingly broader areas.

62. It is on the basis of such considerations that answers should be sought to questions such as whether under Article 2, paragraph 3, and the provisions of Article 33 of the Charter of the United Nations an injured State should refrain from taking measures until it has resorted to one or more of the means listed in the latter article; whether there are any measures an injured State would or should be entitled to take without having to wait until an attempt to use any such means of settlement has proved unsuccessful (for example, interim measures or measures intended to induce the counterpart to comply with any settlement obligations); whether and under what conditions the fact that a settlement or quasi-settlement procedure had progressed to a given stage would restrict the *faculté* to resort to certain measures.

CHAPTER VI

The problem of proportionality

63. One of the most crucial aspects of countermeasures is the question of proportionality. In the period following the First World War, the proportionality rule certainly acquired a more stringent and preciser content: a development concomitant with the condemnation of the use of force. Nevertheless, the notion of proportionality was already in evidence more or less explicitly in 17th, 18th and 19th century writings. It was clearly implied in the doctrinal position taken by Grotius, Vattel and Phillimore, for example, that goods seized by way of reprisal were lawfully appropriated by the injured sovereign, "so far as is necessary to satisfy the original debt that caused, and the expenses incurred by the Reprisal; the residue is to be returned to the Government of the subjects against whom reprisals have been put in force".[121]

64. Most 20th century authors are of the opinion that a State resorting to reprisals should adhere to the principle of proportionality. Guggenheim agrees with Oppenheim, who holds that "[r]eprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation".[122] Overcoming the doubts expressed by Anzilotti in the 1920s and by Strupp in the 1930s[123] the rest of the legal writers seem to be unanimous in considering proportionality as a hard and fast rule of international law. Among the distinguished authors who recognize the principle of proportionality as a general requirement for the legitimacy of reprisals, are Bourquin,[124] Kelsen,[125] Morelli,[126]

[121] Phillimore, op. cit., p. 32; Grotius, op. cit., p. 629; and Vattel, op. cit., p. 283.

[122] Oppenheim, op. cit., p. 141.

[123] Anzilotti considered the rule of proportionality merely as a moral norm; Strupp did not believe in the existence of rules establishing proportions which had to be observed in the exercise of reprisals (loc. cit., pp. 568-569).

[124] Loc. cit., p. 223.

[125] Op. cit., p. 21.

[126] Op. cit., p. 262.

Wengler,[127] Schachter,[128] Reuter,[129] Brownlie,[130] Tomuschat,[131] Skubiszewski,[132] Giuliano (with Scovazzi and Treves),[133] Graefrath (with Steiniger),[134] and Bowett.[135]

65. There is no uniformity, however, either in the practice or the scholarship as to the exact concept of proportionality. A difference can be detected, for example, between the doctrine based upon the well-known jurisprudential *dictum* on the Naulilaa case and the International Law Institute's definition. The first held that

> ... même si l'on admettait que le droit des gens n'exige pas que la représaille se mesure approximativement à l'offense, on devrait certainement considérer comme excessives et partant illicites, des représailles *hors de toute proportion** avec l'acte qui les a motivées.[136]

The International Law Institute takes an even stricter line apparently requiring that the measure should be *proportional* to the gravity of the offence and of the damage suffered.[137] A less strict concept seems to emerge from the *dictum* of the scholars from whom emanated the *Air Service Agreement* award,[138] according to which "[i]t is generally agreed that all countermeasures must, in the first instance, have *some degree of equivalence** with the alleged breach" and "[i]t has been observed, generally, that judging the 'proportionality' of countermeasures is not an easy task and can at best *be accomplished by approximation**". On this basis the arbitrators had concluded that "[t]he measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France".[139]

66. According to the former Special Rapporteur's formulation of article 9, paragraph 2, of part 2 of the draft articles, "the exercise of the right (of injured States) shall not, in its effects, be *manifestly disproportionate** to the seriousness of the act".[140] A similar concept seems to be set forth in section 905, paragraph 1 (*b*) of the *Restatement of the Law Third*, according to which an injured State "may resort to countermeasures that might otherwise be unlawful, if such measures ... are not *out of proportion** to the violation and the injury suffered".[141]

67. Another issue emerging from the literature is whether proportionality is required with reference to the wrongful act *per se*, to the effects thereof, to the specific—mediate or intermediate—aim of the measure, or to a combination of two or more of those elements. While proportionality is often referred to in relation to the violation (namely to the importance of the rule breached and the gravity of the breach),[142] there is also frequent reference to the damage or injury caused by the breach.[143] Reference is also made in the literature to the aims pursued by the countermeasures. The question would be to ascertain whether or not the aims pursued by the injured State's measures are relevant and the nature and gravity of the breach and the effects thereof, for the purpose of determining if the principle of proportionality

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[127] Loc. cit., p. 21.

[128] Loc. cit., p. 178.

[129] Op. cit., p. 463.

[130] *International Law* ..., op. cit., p. 219.

[131] "Repressalie und Retorsion: Zu einige Aspekten ihrer innerstaatlichen Durchfürung, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1973), pp. 179-222, and especially p. 192.

[132] Loc. cit., pp. 753-754.

[133] *Diritto internazionale*, vol. I, *La società internazionale e il diritto*, p. 597.

[134] "Kodification der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (1973), pp. 225 *et seq.*, art. 9, second para., p. 228.

[135] "Economic coercion ..." loc. cit., p. 10.

[136] See footnote 64 above. It will be recalled that Germany had destroyed on that occasion six Portuguese military posts in Angola in response to the killing of two German officers and an official in the Portuguese stronghold of Naulilaa. The tribunal rejected the German contention that its action had been justified as a reprisal, on the following grounds: first, the death of the German personnel could not be considered as an unlawful act of the Portuguese authorities; second, the German reaction had not been preceded by any *sommation préalable*; and finally, there had been no *proportion admissible entre l'offense alléguée et les représailles exercées*, p. 1028.

[137] According to article 6, paragraph 2, of the Institute's 1934 resolution, the acting State must

> "*Proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi*".

(*Annuaire de l'Institut de droit international* (footnote 43 above), p. 709.)

[138] See footnote 49 above.

[139] Ibid.; see para. 83 of the award.

[140] See footnote 103 above. Although perhaps not entirely clearly, Riphagen distinguishes between qualitative and quantitative disproportion. Under the first, a measure would be justified only where the breach committed by way of countermeasure responds to an internationally wrongful act consisting in the violation of the same obligation, of an obligation of the same type, or of an obligation closely connected with the infringed obligation. According to him, this hypothesis would be characterized by the coming into play of the concept of "self-protection" and the nature of the wrongful act and of the rights of the offending State:

> "Within the framework of qualitative proportionality, the admissibility of measures of self-help is obviously the most dubious, since such measures necessarily involve an infringement of rights of the author State. Accordingly, reprisals are generally considered as allowed only in limited forms and in limited cases. The nature of internationally wrongful acts and the nature of the rights of the author State infringed by the reprisal are relevant here." (*Yearbook ... 1983*, vol. II (Part One), p. 15, document A/CN.4/366 and Add.1, para. 80).

More simply, *quantitative* proportionality would be the proportionality of the damages (injuries) caused to the offending State by the measure to the damages (injuries) suffered by the acting State. According to Riphagen himself, however, the two kinds of proportionality would not be separable; they would be two sides, so to speak, of the same coin (*Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330, paras. 94-95).

[141] See footnote 53 above. Writers who seem to share the same opinion are Alland, loc. cit., p. 184; Malanczuk, "Countermeasures ...", loc. cit., p. 214; Conforti, *Diritto internazionale*, p. 360; Cassese, op. cit., p. 271. In the present writer's view, proportionality should be linked to the degree of fault (*dolus* or *culpa* in a narrow sense) by which the wrongful act is characterized.

[142] In this respect the arbitral award in the Naulilaa case has been of influence. In that award the notion of proportionality was linked to the act which motivated the reprisals (see footnotes 64 and 136 above). This view is espoused by a number of writers including Kelsen, op. cit., p. 21; Kapoor, *A Textbook of International Law*, p. 625; and Sereni, *Diritto internazionale*, vol. III, *Relazione internazionale*, p. 1559.

[143] Among others, Venezia, loc. cit., p. 476; De Guttry, op. cit., p. 263; Elagab, op. cit., p. 94; Fisler Damrosch, loc. cit., p. 792; Zemanek, "The unilateral enforcement ..." , loc. cit., p. 37; Ago (*Yearbook ... 1979*, vol. II (Part One) (see footnote 110 above), para. 82) and Riphagen in his draft article 9, paragraph 2 (see footnotes 103 and 140 above) refer to proportionality not only in relation to damage suffered. The 1934 resolution of the International Law Institute mentioned above, would appear to refer both to the breach and to the damage suffered.

has been observed.[144] Indeed, some writers seem to link proportionality both to the injury suffered and the aim pursued while keeping the two elements separate. Skubiszewski, for example, asserts that reprisals must be "proportionate to the injury suffered" adding however that they must not involve "the application of compulsion in an amount that goes beyond what would be necessary to secure a settlement".[145] According to McDougal (who presumably had in mind, however, violent reprisals)

> It may be suggested... that if reprisals are to signify something more than an adventitious "survival of *lex talionis*", they should be adapted and related not so much to the past illegality but rather and primarily to the future purpose sought. It is a common emphasis that the legitimate purpose of reprisals is not the infliction of retribution but the deterrence of future unlawfulness. From such emphasis, it would seem to follow that the kind and amount of permissible reprisal violence is that which is reasonably designed so to affect the enemy's expectation about the costs and gains of reiteration or continuation of its initial unlawful act as to induce the termination of and future abstention from such act. The quantum of permissible reprisal violence, so determined, may under certain circumstances, conceivably be greater than that inflicted in the enemy's original unlawful act.[146]

68. Such differences make it advisable to consider State practice and international jurisprudence with the utmost care in order to choose the most suitable formulation of the law. In particular, it must be determined if proportionality should be required not only for the measures qualifying as reprisals *stricto sensu*, but also for the so-called reciprocal measures; whether the latter are subject instead to stricter requirements such as identity or equivalence or whether they do not really differ from other reprisals except for the fact that they are more perfectly proportional, so to speak, to the gravity of the wrongful act and of the injury caused. It must also be determined, in the light of a thorough analysis of practice, whether the requirement of proportionality should be formulated in broader or stricter terms and in connection with what elements: injury suffered, importance of the rule infringed, aim of the measure resorted to, or any combination of two or more of those elements. More satisfactory and articulate formulations could perhaps be found than those noted under paragraphs 65 and 66 above.

[144] On the relevance of these aims, see De Guttry, op. cit., pp. 263-264; Dominicé, loc. cit., pp. 64-66; and Elagab, op. cit., pp. 86 *et seq.*

[145] Loc. cit., p. 753.

[146] McDougal and Feliciano, *Law and Minimum World Public Order*, pp. 682-683.

CHAPTER VII

The regime of suspension and termination of treaties as countermeasures

69. It is a controversial matter to determine whether the legal regime of countermeasures—particularly with regard to prior demand for reparation, impact of dispute settlement obligations and proportionality—should be adapted where the measures resorted to consist in the termination or suspension of a treaty or of any portion thereof. However, before considering the distinctive features that some legal writers appear to identify in a regime of measures of this kind, a few general remarks must be made.

70. Suspension and termination are mainly dealt with by writers on international law as a part of the law of treaties drawing inspiration, implicitly or explicitly, from well-known national law rules on suspension and termination of contracts.[147] Within the framework of the law of treaties, suspension and termination are considered as vicissitudes in the life of a treaty,[148] which obviously include the consequences of non-compliance. It is within that context, around suspension and termination, that scholarship and jurisprudence have developed rules governing (*a*) the kinds of treaty breaches that could justify suspension or termination; (*b*) the conditions in the presence of which a treaty could be suspended or terminated totally or in part; and (*c*) the requirements with which the injured State has to comply in order lawfully to proceed to suspension or termination. By way of codification and/or progressive development of the rules of general international law covering such matters the Vienna Conference on the Law of Treaties adopted article 60 and the auxiliary provisions embodied in articles 65-67, 70 and 72 of the 1969 Convention.

71. The question arises, however, whether the rules of general international law concerning suspension and termination of treaties as unilateral measures are available to the injured State in response to any and every internationally wrongful act. This is a much broader subject, not prejudged by article 60 of the Vienna Convention (or by the above-mentioned auxiliary provisions), as stated explicitly in article 73 of that Convention.[149] It reaches

[147] In the literature and in the practice of private law, both remedies are envisaged as typifying legal relationships circumscribed within the sphere of a contract.

[148] In a manner fairly similar to that in which the more or less analogous vicissitudes of contracts are envisaged in private national law.

[149] Article 73 reads:

> "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States".

Consideration should also be given, of course, to the reason for excluding State responsibility from the Vienna Convention regime as a whole as explained by the Commission itself prior to the adoption of article 73:

not only beyond the vicissitudes of a given, single treaty (as in the case of article 60 mentioned above) but beyond the sphere of treaty law altogether.[150]

72. Indeed, article 60, the only one that is of interest in the present context, contemplates suspension and termination of a given treaty, only as possible reactions on the part of the contracting States or any one of them, to a breach—and a material breach at that—of one or more rules *of that same treaty*. The legal regime of suspension and termination of treaties within the framework of the instrumental consequences of an internationally wrongful act instead covers or should cover (*de lege lata* or *de lege ferenda*) such cases as (*a*) suspension or termination of a treaty (or any rule or part thereof) in response to an infringement of one or more of the obligations deriving from the same treaty; (*b*) suspension or termination of a treaty (or any rule or part thereof) in response to a breach of *any other treaty or treaties* (this goes far beyond the area covered roughly by article 60); and (*c*) suspension or termination of a treaty (or any rule or part thereof) in response to a breach of a *rule of general international law*, whether an ordinary customary rule or principle or a rule of *jus cogens*.

73. It is well known that the interpretation of article 60 is not without controversy. There is also controversy whether and to what extent the content of that article is in line with the existing general law on suspension and termination of treaties.[151] Be that as it may, the provisions set forth in article 60 can in no way be considered as exhausting the legal regime of suspension and termination for the purposes of the general regime of State responsibility. More precisely, the provisions of article 60 do not encompass either (*a*) the regime of *all the measures* that can be resorted to in connection with a breach of a given treaty; or (*b*) the regime of the various measures (suspension and termination included) which may be resorted to in connection with the infringement of any obligation arising from *any rule* of international law, whether created by treaty or by custom.

74. It follows that the legal regime of suspension and termination of treaties must first of all be studied in the light of the rules and principles tentatively explored so far with regard to countermeasures in general.[152] The rules include those concerning the substantive and procedural requirements, conditions, limitations and modalities of countermeasures, namely, the obligations or *onera* to be satisfied by the injured State prior to resort to measures, and the requirement of proportionality. Notably, it must be determined whether the particular features of suspension and termination affect to any extent and, if so, in what sense, the conditions and requirements that have to be fulfilled for any other countermeasure to be lawfully taken, particularly as regards *sommation* and dispute settlement obligations.

75. The very first question that arises is whether suspension and termination may be resorted to by way of reaction to any type—or only to a particular type—of internationally wrongful act. As is known, the law of treaties generally makes a distinction in this regard. While termination would be admissible only in the presence of a material breach of the (same) treaty,[153] suspension would be admissible, under general international law, in case of minor violations. Article 60 of the Vienna Convention is generally considered to have opted for a more restrictive regime of suspension and termination in order to safeguard the continuity and stability of the treaty,[154]

"The draft articles do not contain provisions concerning the question of the international responsibility of a State with respect to a failure to perform a treaty obligation. This question, the Commission noted in its 1964 report, would involve not only the general principles governing reparation to be made for a breach of a treaty, but also the grounds which may be invoked in justification for the non-performance of a treaty. As these matters form part of the general topic of the international responsibility of States, which is to be the subject of separate examination by the Commission, it decided to exclude them from its codification of the law of treaties and to take them up in connexion with its study of the international responsibility of States". (*Yearbook ... 1966*, vol. II, p. 177, para. 31.)

See on this point Rosenne, *Breach of Treaty*, pp. 3-5, and "Vienna Convention on the Law of Treaties", in *Encyclopedia of Public International Law* (1984), pp. 525-533.

[150] Accordingly, this interpretation of the relationship between the law of treaties and the law of State responsibility has recently been supported by the arbitral tribunal in the decision on the "*Rainbow Warrior*" case between New Zealand and France (United Nations, *Reports of International Arbitral Awards*, vol. XIX (Sales No. E/F.90.V.7)). See paras. 73 *et seq.* of the award and the comment by Palmisano, "Sulla decisione arbitrale relativa alla seconda fase del caso 'Rainbow Warrior' ", *Rivista di diritto internazionale*, 1990, pp. 885-889. For a different interpretation of this relationship, see Bowett, "Treaties and State responsibility", in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*.

[151] The coincidence may result either from the fact that the content of article 60 constitutes a mere translation into written form of the existing general law on the matter or from the fact that the content of the relevant part of general international law came at some later stage to reflect (and then to conform to) the regime embodied in article 60. The matter (which remains open for the present time) is somewhat controversial.

[152] Even when resorted to following a violation of treaty rights, suspension and termination are just two of the forms of remedial action available to the injured State. On this point, Cavaglieri has stated:

Parmi les causes qui ne déterminent pas directement, ipso jure, *l'extinction d'un traité, mais réalisent cet effet dans la mesure où l'État intéressé invoque son droit à l'abrogation du traité, il y a sans aucun doute, à notre avis, l'inexécution par une des parties d'une ou de plusieurs dispositions du traité même. Cette inexécution n'entraîne pas nécessairement, automatiquement, la disparition du traité. Celui-ci, malgré l'inexécution plus ou moins grave de la part de l'un des contractants, garde toute sa vigueur, produit tous ses effets. L'autre partie peut, en présence de cette infraction, choisir la voie qu'elle croit la plus conforme à son intérêt. Elle peut tolérer l'inexécution sans aucun réaction de sa part; ou exiger que le traité soit régulièrement exécuté et demander à l'État coupable la réparation des dommages soufferts; ou méconnaitre à son tour, à titre de réciprocité, la règle violée. Mais l'inexécution du traité l'autorise également à se considérer comme dégagée de ses obligations, à déclarer qu'elle n'est plus liée par aucune clause de ce traité.* ("Règles générales du droit de la paix", *Recueil des cours ..., 1929-I*, p. 534.)

See also Sereni, op. cit., p. 1479; Sinha, *Unilateral Denunciation of Treaty because of Prior Violations of Obligations by Other Party*, p. 206; Guggenheim, *Traité ...*, vol. I, op. cit., pp. 219 *et seq.*; Morelli, op. cit., p. 327; Jiménez de Aréchaga, "International law in the past third of a century", *Collected Courses ..., 1978-I*, p. 79; and Dominicé, loc. cit., p. 28.

[153] See the opinion of PCIJ in the *Status of Eastern Carelia* case (*P.C.I.J., Series C, No. 3*, vol. II, pp. 150-151) and the opinion of the arbitrator in the Tacna-Arica case (AJIL, vol. 19 (1925), p. 415). For writings on the subject, see Hall, *A Treatise on International Law*, p. 409; McNair, *The Law of Treaties*, p. 571; Simma, "Reflections ...", loc. cit., p. 31; Guggenheim (*Traité ...*, vol. I, op. cit., p. 226); and Oppenheim, op. cit., p. 947.

[154] Capotorti, "L'extinction et la suspension des traités", *Collected Courses ..., 1971-III*, p. 553.

requiring in both cases a material breach. Under the law of treaties, at least as set forth in article 60, minor violations should not bring about either termination or suspension.

76. A choice will have to be made at that point between two possible ways in which the restrictions might operate. The first possibility would be to envisage them as specific, particular rules applicable to the suspension and termination of treaties, within the wider perspective of the law of State responsibility. The second possibility would be to envisage them merely as the result of the operation, as far as suspension and termination are concerned, of the rules or principles governing countermeasures in general, regardless of the treaty framework within which those two remedies apply. The same problem arises for the issues of "qualitative proportionality" and "separability" of the provisions to be suspended or terminated, which are so familiar to those who study the international law of treaties.

77. It is precisely within the context of suspension or termination of a treaty in response to a violation of the same treaty that the question of "qualitative proportionality" arises. According to Simma, for instance, while qualitative proportionality—or proportionality "in kind"—would not be required by international law for what may be called common reprisals, it would be an essential feature for the lawfulness of suspension or termination within the framework of the law of treaties.[155] Forlati Picchio takes a similar line.[156] The concept of qualitative proportionality (or, what amounts to the same thing, namely the concept of suspension or termination by way of reciprocity) thus leads the majority of writers on the law of treaties to assert that whenever the part of the treaty infringed can be separated from the rest of the treaty, suspension or termination is admissible only in respect of that part of the treaty which is affected by the infringement. The injured State would be bound to honour the rest of the treaty.[157]

78. In connection with "contractual" or "treaty-based" countermeasures another particular problem arises with regard to requirements such as prior demand for cessation or reparation and prior resort to available settlement procedures. Although a prior demand for cessation or reparation seems generally to be a mandatory precondition for resort to unilateral remedial measures consisting in the violation of a general rule, that requirement does not seem to be equally stringent in the case of resort to suspension of compliance with a treaty obligation or to termination. According to some writers, suspension and termination would seem to be among the rare cases where lawful resort to measures would not be dependent on a prior demand for cessation or reparation. That is the line taken, *inter alia*, by Reitzer,[158] McNair,[159] and Lattanzi.[160]

79. Other legal writers instead seem to incline to the view that suspension and termination, like other forms of unilateral reaction, should also be preceded by a demand for compliance with the "primary" or "secondary" obligations. Guggenheim, for instance, thinks that the unilateral termination of a treaty for non-compliance should not take place until a *sommation,* accompanied by a reasonable deadline for the lawbreaker to comply with the injured State's claim, has proved fruitless.[161] Simma considers that both practice and jurisprudence indicate that:

> When a State esteems that it has been injured by a material breach of a treaty, it is not at liberty immediately to resort to unilateral termination, but has to follow a certain procedure. It will normally start with the registering of a reclamation for resumption of performance or for a reply to the claim of termination within a reasonable time. Only on those rather rare occasions where the defaulting State admits from the beginning that it has substantially violated the agreement concerned or where it does not reply at all to the reclamation, may the innocent State then proceed with the termination. In all cases, however, where the allegedly defaulting State denies either the fact of the violation or its character of being a material breach there will be a "difference", a legal solution of which is only possible with the agreement of the parties. In any case, it is a difference highly suitable for settlement by reference to an international court or tribunal. Unilateral termination of the broken treaty is only permitted after the State injured by the breach has tried in vain to arrive at an agreement with the violator.[162]

Fitzmaurice in his reports to the Commission on the law of treaties also took that position. According to him, the parties intending to claim termination or invalidity of the treaty must notify and motivate their claim to the counterpart, and then, after the claim has been rejected or not satisfied within a reasonable time limit, offer to submit the question to the judgement of an arbitral tribunal or, failing acceptance of arbitration, to ICJ. Only if such an offer is not accepted within a reasonable time limit, may performance of the treaty be unilaterally suspended; and only after the lapse of six months without any acceptance of the settlement procedures proposal, may the treaty be terminated by unilateral decision.[163]

80. Once again, a study of international practice will show—*de lege lata* as well as *de lege ferenda*—whether resort to suspension or termination should be subject to any ad hoc regime, and whether such resort should be subject to different, presumably less strict, conditions and requirements than those applying to countermeasures taken outside of a treaty framework.

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[155] "Reflections . . ." loc. cit., pp. 21-22.

[156] According to Forlati Picchio, while the principle of proportionality governs "resort to suspension on the basis of the general principle of self-help (reprisals, self-help in a narrow sense and self-defence)", in the cases of "termination or suspension under the principle *inadimplenti non est adimplendum*, proportionality is replaced by a more specific criterion, namely by the typically synallagmatic principle of *quid pro quo* (*corrispettivo*)" (op. cit., p. 92).

[157] Compare, for example, the comment to article 30 of the Harvard draft (Harvard Law School, *Research in International Law, III. Law of Treaties* (AJIL, vol. 29 (1935), Supplement No. 4), pp. 1134-1144); McNair, op. cit., pp. 570-573; Sinha, op. cit., p. 90. Likewise, article 60 of the Vienna Convention on the Law of Treaties, at least with regard to suspension, uses the expression "suspending [the] operation [of the treaty] in whole or in part".

[158] Op. cit., pp. 80 *et seq.*

[159] Op. cit., p. 571.

[160] Loc. cit., pp. 542 and 544.

[161] *Traité . . .*, vol. I, op. cit., p. 228.

[162] "Reflections . . .", loc. cit., pp. 31-32. A similar position is taken by Pisillo Mazzeschi in *Risoluzione e sospensione dei trattati per inadempimento*, p. 339.

[163] See *Yearbook . . . 1958*, vol. II, pp. 23 *et seq.*, document A/CN.4/115, articles 2, 3, 7-19, and 23; and *Yearbook . . . 1959*, vol. II, pp. 44 and 50-51, document A/CN.4/120, articles 12 and 37-39.

81. A point which is of relevance to the absolute limitations placed on unilateral measures in general but raises particular problems in connection with treaty suspension or termination relates to cases where resort to one or the other of such remedies would affect the rights of States other than the law-breaking State. The question here is whether and to what extent it may be lawful for a State to suspend or terminate a multilateral treaty, by way of countermeasure. Writers are notoriously at odds on this point. Fitzmaurice, for example, considering the range of obligations of various kinds deriving from a multilateral treaty, proposes a distinction. On one side he places reciprocal obligations, that is to say, "reciprocal" or "divisible" obligations. On the other, he places the obligations requiring integral compliance (that is to say, "indivisible" or "integral" obligations).[164] A suspension or termination measure could thus lawfully be taken by the injured State unilaterally under the generally applicable (relative or absolute) limitations or conditions, with respect to any "divisible" or "reciprocal" obligation binding the injured State *vis-à-vis* the wrongdoing State. On the contrary, no suspension or termination measure could lawfully be taken by the injured State unilaterally with regard to any "indivisible" or "integral" obligation (deriving from the multilateral treaty that has been infringed), non-compliance with which would constitute a violation of the treaty to the detriment of States parties to the treaty other than the wrongdoing State and would go beyond the mere legal injury inherent in the infringement of a treaty to which a State is a party.

82. Article 11, paragraph 1, of part 2 of the draft, as proposed by the former Special Rapporteur in 1984, reflects, in part, the views just recalled. It reads:

> 1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:
>
> (*a*) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or
>
> (*b*) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or
>
> (*c*) such obligations are stipulated for the protection of individual persons irrespective of their nationality.[165]

83. The question will be to see whether suspension and termination of multilateral treaties, or of certain kinds of multilateral treaties, should be dealt with separately in the draft or whether the problem should be looked at from the different, broader perspective of the violation, by way of countermeasure, of rules setting forth *erga omnes* obligations. It would thus be covered in a more general way, regardless of the contractual or customary nature of the rules involved.[166]

[164] See *Yearbook ... 1957*, vol. II, p. 16, document A/CN.4/107, article 19 at p. 54. The comment to article 27 of the Harvard draft identifies among the kinds of obligations deriving from a multilateral treaty those the violation of which infringes directly and particularly the rights of only one of the parties (see footnote 157 above, pp. 1092-1093). Sereni, for his part, identifies the type of multilateral treaty where the violation of an obligation, even by one party, frustrates the object and the purpose of the whole treaty for all the parties (op. cit., pp. 1481-1482). Other writers, on the contrary, make no distinction between the various kinds of obligations deriving from a multilateral treaty, for the most part they hold the view, on the one hand, that termination would in principle be inadmissible when any participating States are in the position of "third" States (*vis-à-vis* the violation) which could be injured by the measure (termination) and, on the other hand, that suspension would be admissible (Guggenheim, *Traité ...*, vol. I, op. cit., pp. 228-229; McNair, op. cit., p. 580; Morelli, op. cit., pp. 327-328; and Kelsen, op. cit., p. 358).

[165] *Yearbook ... 1985*, vol. II (Part One) p. 12, document A/CN.4/389.

[166] See paras. 121 and 122 below.

CHAPTER VIII

The issue of so-called self-contained regimes

84. The question of the relationship between the general rules on State responsibility, on the one hand, and, on the other, of any ad hoc rules that a given treaty or set of treaties may establish to cover cases of violation, is linked to that of the possible "specificity" of measures consisting in the infringement of treaty rules. This problem seems to arise in the presence of those treaty-based systems or combinations of systems which tend to address, within their own contractual or special framework, the legal regime governing a considerable number of relationships among the States parties, including in particular the consequences of any breaches of the obligations of States parties under the system. Such consequences include, in some cases, special, sometimes institutionalized, measures against violations. It follows that such systems may, to some extent, affect, with varying degrees of explicitness, the *faculté* of States parties to resort to the remedial measures which are open to them under general international law. It would appear to be in situations of this kind that some legal scholars refer, within the framework of the law of State responsibility, to "self-contained" regimes.[167]

[167] According to Riphagen, for example, the systems under consideration would constitute "subsystem(s)", namely, "an ordered set of conduct rules, procedural rules and status provisions, which formed a closed legal circuit, for a particular field of factual relationships" (*Yearbook ... 1982*, vol. I, 1731st meeting, para. 16). Within any such system primary rules and secondary rules are closely intertwined and are inseparable. The concept is understood differently by Simma, who uses the expression "self-contained regime" in a narrow and more specific sense "to designate a certain category of subsystems, namely

(*Continued on next page.*)

85. The most typical—and perhaps the most likely—example of such regimes is probably the "system" set up by the treaties establishing the European Communities and the relations resulting therefrom.[168] Another example frequently evoked by writers, including the previous Special Rapporteur, would be the "conventional system created by human rights treaties."[169] A self-contained regime consisting of a particularly obvious combination of customary as well as treaty rules would be, according to an ICJ *dictum*, "the law of diplomatic relations".[170] The question arising with regard to these "regimes" is whether the existence of remedies—sometimes more advanced—for which they make specific provision, affects to any degree the possibility for legal recourse by States parties to the measures provided for, or otherwise lawful, under general international law.

86. It should immediately be added, however, that although a problem of "specificity" is generally seen as arising particularly in connection with the regime of countermeasures—and perhaps rightly so—it is not confined thereto. Any real or alleged self-contained regime may also concern other consequences of internationally wrongful acts, first of all the substantive consequences covered by draft articles 6 to 10, which are at present before the Drafting Committee.[171]

87. The problem concerns more or less the entire scope of part 2 of the draft. As such, it should not be dealt with in the section of part 2 that covers countermeasures, but more appropriately in the section or chapter of part 2 covering the general principles of the content, forms and degrees of international responsibility. In particular, it is a matter in many ways close to the general problem covered by draft article 2 of that chapter. While not excluding the possibility of dealing with it provisionally in one of the final provisions of the chapter at present under consideration, it must be kept in mind that the relevant draft article will have to be inserted in its proper place during the second reading of the chapter entitled "General principles".

88. To enter into a discussion here of the so-called self-contained regimes would therefore be premature, all the more so when the substantial volume of material collected so far on the subject raises the question whether and to what extent the concept of "self-contained" regimes is really relevant to the solution of the problems of State responsibility in connection with which it has been brought into the picture so far.

(*Footnote 167 continued*)

those embracing, in principle, a full (exhaustive and definite) set of secondary rules. A 'self-contained regime' would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party" ("Self-contained regimes", *Netherlands Yearbook of International Law* (1985), pp. 115-116). In particular, according to Simma, the concept of "self-contained regime" would not be appropriate for those subsystems which provide that in case of failure of a special remedy built into the treaty, a more general remedy based upon another treaty (subsystem) or customary international law becomes (re-)applicable (ibid., p. 117).

[168] Reuter and Combacau, *Institutions et relations internationales*, p. 386; Sørensen, "Eigene Rechtsordnungen—Skizze zu einige system-analytischen Betrachtungen über ein Problem der internationalen Organisation", in *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift zum 70. Geburtstag von H. Kutscher* (1981), p. 431; Riphagen, *Yearbook ... 1982*, vol. II (Part One), p. 33, document A/CN.4/354 and Add.1-2, paras. 72-73; and Simma, "Self-contained ...", loc. cit., pp. 125 *et seq.*

[169] Riphagen, *Yearbook ... 1983*, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1; Simma, "Self-contained ...", loc. cit., pp. 130 *et seq.*; and Meron, *Human Rights and Humanitarian Norms as Customary Law*, pp. 230 *et seq.*

[170] See on this problem Dominicé, "Représailles et droit diplomatique", in *Recht als Prozess und Gefüge: Festschrift für Hans Huber*, pp. 541 *et seq.*; Simma, "Reflections ..." loc. cit., pp. 120-122; Elagab, op. cit., p. 120; and Sicilianos, op. cit., pp. 346-351.

[171] For articles 6 and 7 as proposed by the Special Rapporteur, see *Yearbook ... 1988*, vol. II (Part One) (footnote 1 above); for articles 8 to 10, see *Yearbook ... 1989*, vol. II (Part One) (footnote 2 above).

CHAPTER IX

The problem of differently injured States

89. A further problem is how to identify precisely the State or States which, in a particular case, are entitled—or in given instances obliged—to react to an internationally wrongful act. Together with the perception of the essentially inorganic nature of the legal relationships normally arising from internationally wrongful acts, the starting point of any consideration of the matter is obviously the concept of an injured State, a definition of which has in fact been envisaged as an essential element of part 2 of the draft. This is to be found in article 5 as proposed in 1984 and adopted on first reading by the Commission in 1985.[172] Whatever the merits of that definition—doubts about the appropriateness of which have been formulated within the Commission and beyond—it seems obvious that differences of degree of involvement surely exist amongst injured States from the viewpoint of the nature and extent of the injury suffered.

90. A number of qualifiers are thus being developed by scholars and in the Commission under the general notion or definition of an "injured State". At one extreme are found terms such as "directly" injured, affected or involved State or States, or "specially" affected State or States, and—at the other extreme—"non-directly" or "indirectly" injured or affected or involved States, or "non-specially" affected or injured States. Between

[172] *Yearbook ... 1985*, vol. II (Part Two), p. 25.

these two extremes are found concepts such as "more directly" or "less directly" affected or involved States. Another concept used is that of "third" State or States. Considering, however, that a State may be in a "third party" position either in relation to a primary obligation or in relation to a given breach (secondary obligation), the term "third" may be misleading. In the latter sense it would merely be a synonym for non-injured State, obviously in the position of "third" party in relation to the wrongful act, and, as such, not meeting any of the conditions of the definition embodied in draft article 5 of part 2, for example. However, while accepting that definition as a starting point for the time being, the problem seems to be not so much to determine whether or not a State belongs to the general class of injured States, as to take account of the fact that that general class includes different categories of States from the point of view of the injury, and to determine what the consequences of that are for each State's position with regard to its rights, *facultés*, and possibly its duties.

91. The attention of scholars has been drawn to this problem—especially since the adoption of article 19 of part 1[173]—in connection with wrongful acts constituting violations of *erga omnes* obligations, more particularly with regard to the consequences of crimes. The problem related in particular to the possible response (against wrongful acts of this kind) by States other than the State which, as a victim of a gross violation, was the "directly" or "most directly" affected—such States acting, jointly or severally, possibly within the framework of an institutionalized regime.[174] It did not take long, however, for scholars and Commission members to realize that similar problems arise in the case of any other wrongful acts—notably delicts—which, in addition to the wrongdoer and one or more directly affected States, involve *other States*.[175] So far, the most frequently studied of these situations has been that of the violation of rules of multilateral treaties or of certain kinds of rules contained in such treaties, notably those which give rise to international or "integral" rights and obligations (peace treaties, disarmament treaties, treaties on the environment);[176] non-compliance with decisions of international judicial bodies;[177] non-compliance, not necessarily gross or on a mass scale, with human rights obligations;[178] violation of the freedom of the high seas;[179] abuse of natural resources of common interest;[180] and other situations.[181] The Commission has expressly considered the case of such other States by covering them in subparagraphs (*e*) (ii) and (iii) and (*f*) of paragraph 2 of the above-cited article 5. According to these provisions "injured State" means:

> (*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:
>
> ...
>
> (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.

92. Once States which have "less-directly" suffered from a wrongful act are defined as "injured" in accordance with article 5, thus qualifying as parties in the responsibility relationship, the problem is to determine whether or not their rights and *facultés* (and possibly duties) stemming from the wrongful act fall under the same regime as those of the "directly" or "specially" affected State and, if not, under which regime.[182] The most

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[173] *Yearbook ... 1980*, vol. II (Part Two), p. 32.

[174] This was indeed the main problem dealt with by Riphagen in the context of what he called the "third parameter", that is "the position of third States in respect of the wrongful act" (*Yearbook ... 1980*, vol. II (Part One) (see footnote 140 above), p. 119, paras. 62 *et seq.*, especially 66 *et seq.*). On the *facultés*, rights and duties of States "non-directly" affected by a crime, see, *inter alia*, Dupuy, "Action publique et crime international de l'État. A propos de l'article 19 du projet de la Commission du droit international sur la responsabilité des États", *Annuaire français de droit international, 1979*, p. 554, and "Le fait générateur de la responsabilité international des États", *Collected Courses ..., 1984-V*, p. 102; Zoller, op. cit., p. 115; Alland, loc. cit., pp. 198 *et seq.*; De Guttry, op. cit., pp. 283 *et seq.*; Spinedi, *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, pp. 115 *et seq.*; Hutchinson, "Solidarity and breaches of multilateral treaties", *British Year Book of International Law, 1988*, pp. 196 *et seq.*; and Sicilianos, op. cit., pp. 135 *et seq.*

[175] *Yearbook ... 1980*, vol. II (Part One) (see footnote 140 above), pp. 114-115, paras. 37-42, and pp. 119-120, paras. 62-65; De Guttry, op. cit., pp. 290-301; Sachariew, "State responsibility for multilateral treaty violations: Identifying the 'injured State' and its legal status", *Netherlands International Law Review*, 1988, pp. 273 *et seq.*; Hutchinson, loc. cit., pp. 164-196; Sicilianos, op. cit., pp. 110-134.

[176] See footnote 164 above, Fitzmaurice, *Yearbook ... 1957*, vol. II, pp. 34 *et seq.* See also, Sachariew and Hutchinson, loc. cit.

[177] Akehurst, loc. cit., p. 14; Schachter, "Enforcement of judicial and arbitral decisions", AJIL (1960), pp. 11-12; Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, pp. 793 *et seq.*; and Sicilianos, op. cit., pp. 103-107.

[178] See, *inter alia*, Rougier, "La théorie de l'intervention d'humanité", RGDIP (1910), pp. 468 *et seq.*; Schindler, "Le principe de non-intervention dans les guerres civiles", *Annuaire de l'Institut de droit international, 1973*, p. 481; Riphagen, *Yearbook ... 1985*, vol. II (Part One), p. 3, document A/CN.4/389, commentary to article 5 of part 2 of the draft articles, para. (22).

[179] Tunkin, *Droit international public: Problèmes théoriques*, p. 223; Oppenheim, *International Law: A Treatise*, vol. I, p. 308.

[180] Tunkin, op. cit., p. 223; Riphagen, *Yearbook ... 1983*, vol. II (Part One) (see footnote 35 above), para. 90.

[181] The situation of "non-directly" or "less-directly" affected States is of course determined, in such instances, by the differing degrees of interest such injured States have, as a category or severally, in the compliance of others with their obligations, and mainly by the extent to which any such interest may be found to be legally protected. References and interesting examples may be found in Sachariew, loc. cit., especially pp. 278 *et seq.*; and Sicilianos, op. cit., pp. 100 *et seq.* The matter deserves further exploration.

[182] This problem was explicitly raised in the Commission by Riphagen, in whose view it seems clear "that there is a distinction to be made—for the purpose of determining the legal consequences of a wrongful act—between a State directly affected by a particular breach of an international obligation (the "injured State") and other States, be they parties to the (multilateral) treaty creating the obligation or not. Within a *scala* of legal consequences, the new legal relationship created by the wrongful act of a State is primarily one between the guilty State and the State (or States) whose material interests are directly affected by that wrongful act" (*Yearbook ... 1980*, vol. II (Part One) (see footnote 140 above), p. 115, para. 42).

difficult problem in that respect is precisely to know whether the so-called "indirectly injured" States are entitled to resort to countermeasures and, if so, whether such resort is subject to different, presumably stricter, limitations or conditions than those applying to the measures taken by the "specially affected" State.[183] The literature, which is not abundant on this point,[184] appears to be divided. Some authors deny the right of "non-directly injured" States to resort to measures.[185] Others, on the contrary, accept that possibility, at least in certain cases.[186]

93. It should be noted, however, that the matter discussed in this chapter concerns more than just countermeasures. Although largely neglected in the literature, there is also—and, in a sense, foremost—the question of determining whether the so-called non-directly injured States are entitled to claim compliance with the substantive obligations involved in the responsibility relationship,[187] namely cessation, restitution in kind, reparation by equivalent and satisfaction, including guarantees of non-repetition. According to Riphagen, for example, a "non-directly" injured State could "not claim damages *ex tunc*, since by definition there is no injury to its material interest. But a re-establishment *ex nunc* (to the direct benefit of the injured State) and a guarantee *ex ante* against further breaches may well be in the (non-material) interest of that State".[188]

94. It is thus clear that the problems arising from the degree to which a State may be injured reach beyond the subject of countermeasures, because they also concern the substantive consequences; with respect to crimes, there are even greater complications, because they concern both substantive and instrumental consequences. For the time being, discussion of the latter will be deferred until the Commission takes up the subject of crimes; at the present juncture efforts should be concentrated on a more thorough analysis of practice and scholarship with regard to the position of the so-called non-directly injured States, the aim being to draft an ad hoc section for the part of the draft covering the consequences of delicts.

95. For this section, it is proposed to determine, in the light of the practice of States and international tribunals, whether, in addition to the differentiation among kinds of injured States made in draft article 5 as already adopted—though not without criticism[189]—mention should be made of the differences in legal status between "specially" affected States, on the one hand, and "non-directly" affected States, on the other. It must be determined in particular whether the so-called non-directly affected States (namely, the injured States envisaged in the provisions cited in paragraph 91 above), should enjoy the right to claim cessation, restitution in kind, reparation by equivalent, and/or satisfaction, including guarantees of non-repetition; the *faculté* to resort to countermeasures and, if so, whether such a *faculté* is or should be subject to conditions and restrictions identical to or different from those obtaining for the measures available to "specially" affected States. It is also necessary to determine whether further differentiation needs to be made within the general category of "non-directly" affected States or whether, contrary to the hypotheses formulated so far, no real differences exist or should exist with respect to the consequences of the wrongful acts currently under discussion, based on the different "position" of "directly" or "indirectly" affected States as "active parties" in the responsibility relationship. In a sense, this distinction may well be a false concept perhaps resulting from some imprecision in the approach to the problem of the determination of the active side of the responsibility relationship. Only after clarifying this point would it be possible to decide whether the rights and *facultés* (and possibly duties) of "non-directly" affected States should be covered in a separate section or chapter, or whether any differences in the position of the "non-directly" affected States should be covered by appropriate amendments to the draft articles dealing with the position of "directly" affected States. There is, of course, a third possibility, namely that neither separate articles nor an adaptation of general articles would really be required. It is possible, in other words, that the position of the "non-directly" injured State with regard to both substantive rights and countermeasures should be left to depend simply on the normal application of the general rules governing the substantive and instrumental consequences of internationally wrongful acts. This third possibility may be the most likely in view of the fact that the peculiarities of the position of "non-directly" affected States may well be just a matter of degree.

[183] This is the kind of distinction envisaged, for example, in article 60 of the Vienna Convention on the Law of Treaties, where resort to suspension or termination of multilateral treaties is different for the "specially affected" State and for any other participating State. According to paragraph 2 of that article:

"2. A material breach of a multilateral treaty by one of the parties entitles:

"(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

"(i) in the relations between themselves and the defaulting State, or

"(ii) as between all parties;

"(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

"(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty."

[184] Reference is made to the literature dealing specifically with the consequences of delicts, leaving aside for the time being writings concerning crimes, which will be considered at a later stage.

[185] Partsch, "Reprisals", loc. cit., Graefrath, loc. cit., p. 86; and Hutchinson, loc. cit., p. 170.

[186] Oppenheim, *International Law...*, vol. I, op. cit., p. 308; Tunkin, op. cit., p. 223; Pisillo Mazzeschi, op. cit., pp. 216 *et seq.*, especially pp. 335 *et seq.*; Zoller, op. cit., pp. 115 *et seq.*; and De Guttry, op. cit., pp. 295-298.

[187] Interesting reflections on this issue can be found in the cited works by Sachariew (see footnote 175 above) and Hutchinson (see footnote 174 above).

[188] *Yearbook... 1980*, vol. II (Part One) (see footnote 140 above), p. 114, para. 40.

[189] See the critical observations made by Sachariew, loc. cit., pp. 274-276; and Sicilianos, op. cit., pp. 116-119.

CHAPTER X

Substantive limitations issues

96. The most important aspect of the area now under review is, of course, the consideration of issues relating to the means injured States may lawfully employ—severally or jointly—in the exercise of their *faculté* of unilateral reaction to an internationally wrongful act. These issues are the following: (*a*) the unlawfulness of resort to force; (*b*) respect for human rights in the widest sense; (*c*) the inviolability of diplomatic and consular envoys; (*d*) compliance with imperative rules and *erga omnes* obligations. The nature of the difficulties are such that separate, albeit brief, assessments are required of each of the main issues involved.

A. The prohibition of the use of force

97. The main proposition advanced by legal writers—and confirmed by a number of authoritative pronouncements of international political and judicial bodies[190]—is of course the condemnation of any form of armed reprisals or countermeasures. More precisely, the prevailing view is that such a condemnation is not just a matter of contractual law, in the form of the Charter of the United Nations, but that, together with the whole content of Article 2, paragraph 4, of the Charter, the prohibition of the use of force could be considered as part and parcel of general, unwritten international law.[191]

98. According to other views, based on the persistence of certain practices, there could be forms of unilateral (individual or collective) resort to force that have survived the sweeping prohibition of Article 2, paragraph 4, or been revived as a justifiable form of reaction, under the concept of forcible or armed reprisals or self-defence.[192] For some of the writers who hold that view—with varying degrees of conviction—"a total outlawry of armed reprisals ... presupposed a degree of community cohesiveness and, with it, a capacity for collective action to suppress any resort to unlawful force which has simply not been achieved".[193] A further cause for resort to forcible measures would seem to be the enormous increase in guerrilla activities in recent decades. With respect to the law on armed reprisals these activities pose a special problem.[194] Analysing incidents in the Israeli-Palestinian context brought before the Security Council, one writer concluded that the Security Council has never been able to stop the practice of reprisals and may now be moving towards a partial acceptance of "reasonable" reprisals.[195] He observed that if this trend continues, we

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[190] The main elements upon which the prohibition of armed reprisals is considered to rest include: the position taken by ICJ in the *Corfu Channel* case with respect to the minesweeping of the Corfu Channel by the British Navy ("Operation Retail") (*ICJ Reports 1949*, p. 35, see also *Yearbook ... 1979*, vol. II (Part One) (footnote 110 above), p. 42, para. 89; Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964; paragraph 6 of the first principle of the Declaration (see footnote 106 above); para. 2, sect. II (*c*) of the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (General Assembly resolution 36/103, annex); and the ICJ judgment in the *Military and Paramilitary Activities in and against Nicaragua* case (see footnote 16 above), p. 127, paras. 248-249). The Final Act of the Conference on European Security and Cooperation (signed at Helsinki on 1 August 1975) also contains an explicit condemnation of forcible measures. Part of Principle II reads: "Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force" (Final Act, Lausanne, Imprimeries réunies, n.d.), p. 79.

[191] In the sense that the prohibition of armed reprisals has acquired the status of a general ("customary") rule, the contemporary doctrine (in conformity with the 1986 ICJ judgment cited in footnote 190 above) is almost unanimous (see Brownlie, *International Law ...*, op. cit., pp. 110 *et seq.*, in particular pp. 281-282; Reuter, op. cit., pp. 510 *et seq.*, in particular pp. 517-518; Cassese, op. cit., p. 160; Thierry and others, *Droit international public* (1986), pp. 192, 493 *et seq.*, particularly p. 508; Conforti, op. cit., p. 356; Dominicé, "Observations ...", loc. cit., p. 62; Lattanzi, op. cit., pp. 273-279; Venezia, loc. cit., pp. 465 *et seq.*, in particular p. 494; Salmon, loc. cit., p. 186; Riphagen, *Yearbook ... 1983*, vol. II (Part One) (see footnote 140 above), p. 15, para. 81). The minority who doubt the customary nature of the prohibition are equally firm in recognizing the presence of a unanimous condemnation of armed reprisals in Article 2, paragraph 4, of the Charter as reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (see footnote 106 above), for example, Kunz, "Sanctions in international law", AJIL (1960), pp. 325 *et seq.*; Morelli, op. cit., pp. 352 and 361 *et seq.*; Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *Collected Courses ..., 1972-III*, p. 536). It is also significant that the majority of the recent monographs on reprisals are expressly confined to "non-armed" or, perhaps less precisely, "non-forcible" reprisals or measures (reference is made, in particular, to the previously cited works by De Guttry, Zoller, and Elagab). These authors obviously assume that "the prohibition on resort to reprisals involving armed force had acquired the status of a rule of general international law" (De Guttry, op. cit., p. 11).

[192] Falk, "The Beirut raid and the international law of retaliation", AJIL (1969), pp. 415-443; Bowett "Reprisals ...", loc. cit, pp. 1-36; Tucker, "Reprisals and self-defense: The customary law", AJIL (1972), pp. 586-596; Lillich, "Forcible self-help under international law", *United States Naval War College—International Law Studies* (vol. 62): *Readings in International Law from the Naval War College Review 1947-1977*, vol. II, *The Use of Force, Human Rights and General International Legal Issues*, p. 129; Levenfeld, "Israeli counter-*fedayeen* tactics in Lebanon: Self-defense and reprisal under modern international law", *Columbia Journal of Transnational Law* (1982), p. 148; Dinstein, op. cit., pp. 202 *et seq.* For a critical review of this literature, see Barsotti, "Armed reprisals", in *The Current Legal Regulation of the Use of Force*, pp. 81 *et seq.*

[193] Bowett, "Reprisals ...", loc. cit., p. 2 (but similar considerations had been put forward earlier: see, for example, Colbert, *Retaliation in International Law*, and Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, especially pp. 92 *et seq.*). Bowett continues "[A]s States have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in doing so, they will not incur anything more than a formal censure from the Security Council", p. 2.

[194] In this respect, Taulbee and Anderson have written:

> "Guerrilla forces seeking to overthrow established governments often operate from safe havens located in adjoining States ... The State of refuge often pleads lack of competence or knowledge ..., leaving the target State no viable legal recourse beyond measures within its own borders." ("Reprisal *redux*", *Case Western Reserve Journal of International Law* (1984), pp. 309 *et seq.*, particularly p. 322).

[195] Bowett, "Reprisals ...", loc. cit., p. 21.

shall achieve a position which, while reprisals remain illegal *de jure*, they become accepted de facto.[196] Another writer goes decidedly further when he observes that the use of armed coercion has in practice proved essential to protect the purposes of the Charter:

> There is a need perhaps for some kind of reinstitution of reprisal—if not in the most classical sense, then in a more limited sense—as some kind of sanctioning instrument under international law.[197]

As regards the legal or quasi-legal responses proposed, three different lines of thought have been put forward in order to reduce the discrepancy between the law and the actual practice. One writer tries to develop a framework of criteria (of reasonableness); armed measures which met those criteria would not be condemned.[198]

> The result redefines the right of an individual State to use violence in a manner that minimizes the devolution from the generally agreed interpretations of Charter norms.[199]

Another writer suggests that the legal notion of self-defence should be interpreted in a broad sense so as to comprise forcible measures.[200] Yet another seems to attempt to combine both methods, while stressing the need for effective international fact-finding missions.[201]

99. The practice of States which has prompted such writings—though not very abundant and geographically limited—certainly raises questions. The main question is whether the absolute prohibition on the use of force contained in Article 2, paragraph 4, of the Charter of the United Nations applies even in cases of wrongful acts involving force but not qualifying as armed attacks (aggression) and therefore not justifying self-defence as strictly defined, or whether exceptions to that strict rule are admissible or tolerable and, if so, under what circumstances and what legal conditions. According to the writings in question, examples would presumably include armed reaction to forms of indirect aggression and terrorism. It should not be overlooked, however, that the problem of lawfulness arises also in connection with forcible reprisals resorted to by way of reaction to par-

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[196] Ibid., pp. 10-11. Bowett and other authors stress that these realities of State practice cannot be ignored, especially since the United Nations Security Council on several occasions has appeared to condone forcible measures.

[197] Lillich, loc. cit., p. 133.

[198] In his article on the Beirut raid and the international law of retaliation, Falk maintains that it is impossible, or at least unrealistic to hold on to the unqualified prohibition of armed reprisals. He suggests a framework embodying general guidelines or policies for States to restrain their resort to, and the intensity and duration of forcible measures in periods of peace:

"(1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;

"(2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;

"(3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;

"(4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;

"(5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution is taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;

"(6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;

"(7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ"(s) of community review and seek vindication therefrom of its course of action;

"(8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constitutes the unacceptable provocation are clearly conveyed;

"(9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign State;

"(10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;

"(11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1)-(10), and that a disposition to accord respect to the will of the international community be evident;

"(12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terroristic enterprises." (Loc. cit., pp. 440-442.)

[199] Taulbee and Anderson, loc. cit., p. 325.

[200] In 1972, Tucker argued that the right to have recourse to forcible reprisals formed part of the customary right to self-defence included in the broad interpretation of Article 51 of the Charter: "the substance of the measures forbidden by Article 2, paragraph 4, may, in effect, be permitted under the guise of self-defense by Article 51" (loc. cit., p. 594). "Indeed, so broad is the license afforded by the customary right of self-defense that it is difficult to see what forcible reprisals added of significance to the State's right to use force in self-help that was not already implicit in self-defense" (ibid., p. 593). "While there is a difference in the conditions held to govern the exercise of forcible reprisals and self-defense [in case of forcible reprisals a State must first have sought to obtain redress for the alleged injury by peaceful means], (ibid., p. 590), "even this difference appears quite modest when applied to provocative unlawful behavior occurring within the context of a generally antagonistic relationship between States" (ibid., p. 593). Dinstein too recently tried to justify certain kinds of armed reprisals (namely those against acts of terrorism) extending the scope of the exception of self-defence provided for in Article 51 of the Charter. In particular, this author distinguishes between "offensive reprisals", which would be prohibited under Article 2, paragraph 4, and "defensive reprisals", which would be exempted from the prohibition by virtue of Article 51 (op. cit., pp. 201 *et seq.*).

[201] Although he also thought that the discrepancy between the law and actual practice would be reduced if "the Council took a broader view of self-defense", contrary to Tucker, Bowett still held armed reprisals to be prohibited in international law.

> The clear position is that the Council, as a matter of principle, condemns armed reprisals as illegal. The unclear position emerges from the Council's failure to condemn in certain circumstances ... The principle as part of the broader prohibition of the use of force, is *jus cogens*, and *no spasmodic, inconsistent practice of one organ of the United Nations could change a norm of this character** ... This is the more so because ... in the context of the General Assembly's adoption of the Declaration on Principles of International Law ... in October, 1970, *the reiteration of the formal principle of the illegality of armed reprisals was quite categorical** ("Reprisals ..., loc. cit., pp. 21-22).

Nonetheless, since States sometimes ignore this prohibition, and because one has to guard against a serious degeneration of the law, Bowett proposes a three-fold approach to the problem of restraining resort to forcible reprisals. He first endorses, with some qualification, Falk's framework as "guides to moderation by decision makers ... so as to contain reprisals within limits of reasonableness" (ibid., p. 32). Secondly, he proposes: "the establishment of *appropriate and effective machinery for fact-finding and intermediate review by impartial agencies, with authority derived from competent international organs rather than the parties**" (ibid.). Bowett's last suggestion for the restraint of resort to forcible reprisals is the "application of constraint *in the form of sanctions by competent organs** of final review such as the Security Council or, exceptionally, an appropriate regional body, designed to ensure compliance with authoritative censure of any policy of reprisals or illegal activities likely to give rise to reprisals" (ibid.).

ticularly serious wrongful acts, although not involving armed force. We refer to cases of resort to force by way of reaction to "economic aggression", to violations of self-determination,[202] or in order to safeguard the lives of nationals in a foreign State or in pursuit of other, non-national, humanitarian purposes.[203]

100. While reserving any conclusion as to resort to force by way of reaction to wrongful acts qualified as crimes of States under article 19 of part 1 of the draft, no definite conclusions can be reached with regard to the applicability of the positions taken by the legal writers in question to countermeasures against ordinary wrongful acts. It is only possible to indicate, subject to closer analysis, an inclination towards the view that they should have no place, even *de jure condito*, within the framework of the consequences of international delicts. It was not possible to envisage how the Commission could accept any derogation from the prohibition of armed reprisals as implied in Article 2, paragraph 4, of the Charter and emphasized in the relevant part of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[204] The arguments on the necessity of altering current prohibitions in order to adapt them to the realities of State practice are not convincing.[205]

101. Another problem which has been raised in legal writings and practice with reference to the prohibition of the use of force, is its possible impact on the lawfulness of economic coercion (or certain kinds thereof) as a form of countermeasure. According to the most widely accepted interpretation of the prohibition of force, notably of Article 2, paragraph 4, of the Charter of the United Nations (and any "equivalent" rule of general international law), the term "force" means military force only. Any objectionable forms of economic coercion could only be condemned—as some of them are expressly in international instruments other than the Charter—as part of a separate rule prohibiting intervention or certain forms of intervention.[206] In particular, economic coercive measures would be prohibited—by the OAS Charter,[207] General Assembly resolution 2625 (XXV), and other instruments, including Principle VI of the Final Act of the Conference on Security and Cooperation in Europe[208]—whenever they were resorted to against a State "in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".[209]

102. The opposite argument, according to which Article 2, paragraph 4, of the Charter of the United Nations would prohibit not only armed reprisals but also economic coercion, was found initially in official statements and legal writings from developing and socialist countries[210] but, following the Arab oil embargo of 1973, even some Western authors supported this position.[211] According to a different opinion, based *inter alia* on the absence from the Charter of the United Nations of any provision, other than Article 2, paragraph 4, condemning individual coercive measures, it would be more correct to think that whenever a measure of economic coercion assumed such features and dimensions as to give rise to consequences amounting to a "strangulation" of the target State, the form of violence it implies does not differ in aim or result from the exercise of a resort to armed force. It must be admitted, in the presence of such a possibility, that the term "force" means more than just armed force. Indeed, the prohibition contained in Article 2, paragraph 4, of the Charter should be logically understood to "embrace also measures of economic or political pressure applied *either* to such extent and with such intensity as to be an equivalent of an armed aggression *or*, in any case—failing such an extreme—in order to force the will of the victim State and secure undue advantages" for the acting State.[212] In view of the variety

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[202] On these issues, see Sicilianos, op. cit., pp. 389-395 and pp. 427-455.

[203] See, *inter alia*, Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, and Bowett, "The use of force for the protection of nationals abroad", in *The Current Legal Regulation . . .*, op. cit., pp. 39-55.

[204] See footnote 106 above.

[205] As Taulbee and Anderson have put it, "[t]hose arguments rest upon events and situations that are transitory or which are not amenable to control through legal means" (loc. cit., p. 333). Such arguments are even less convincing because "the idea that the law should authorize what it cannot constrain is especially pernicious . . . the prudent course is to tolerate certain practices when necessity demands rather than investing them with the sanctity of a legal rule. The seeming disorder of contemporary life should not diminish the vision of the Charter" (ibid., pp. 333-334). Similarly, Barsotti observes that "from a *quantitative** point of view (that is, judging from the frequency of relevant actions) the divergence between the prohibition of armed reprisals embodied in the Charter and actual practice, is not so serious as to give grounds to the belief that there is a process of degeneration of the ban in question" (loc. cit., p. 90).

[206] Waldock, loc. cit., pp. 493-494; Oppenheim, *International Law . . .* vol. II, op. cit., p. 153; Bowett, "Economic coercion . . .", loc. cit., p. 1; Lillich, "The status of economic coercion under international law: United Nations norms", in *Conference on Transnational Economic Boycotts and Coercion*, pp. 116-117; Beirlaen, "Economic coercion and justifying circumstances", *Belgian Review of International Law* (1984-85), p. 67; Virally, "Commentaire du paragraph 4 de l'Article 2 de la Charte", in *La Charte des Nations Unies*, pp. 120-121; Leben, loc. cit., pp. 63-69; Malanczuk, "Countermeasures . . .", loc. cit., p. 737; Elagab, op. cit., p. 201; Seidl-Hohenveldern, "International economic law", *Collected Courses . . ., 1986-III*, pp. 200-201, *Restatement of the Law Third*, op. cit., p. 383; and Sicilianos, op. cit., pp. 248-253.

[207] Signed at Bogota on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 324).

[208] See footnote 190 above.

[209] For this interpretation, see Bowett, "Economic coercion . . ., loc. cit., pp. 2-3; Blum, "Economic boycotts in international law, in *Conference on Transnational Economic Boycotts . . .*, op. cit., p. 96; Malanczuk, "Countermeasures . . .", loc. cit., p. 737; Beirlaen, loc. cit., p. 67; Seidl-Hohenveldern, "The United Nations and economic coercion", *Belgian Review of International Law* (1984-85), p. 11; and Salmon, loc. cit., p. 186. On this point, see also, Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques*, pp. 149-151.

[210] See, *inter alia*, the position of Žourek, "La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?", in *Mélanges offerts à Henri Rolin*, pp. 530 *et seq.*; and Obradovic, "Prohibition of the threat or use of force", in *Principles of International Law concerning Friendly Relations and Cooperation*, pp. 76 *et seq.*

[211] Paust and Blaustein, "The Arab oil weapon: A threat to international peace", AJIL (1974), pp. 410 *et seq.*

[212] Arangio-Ruiz, "Human rights and non-intervention in the Helsinki Final Act", in *Collected Courses . . ., 1977-IV*, p. 267. A similar position is taken by Cassese, op. cit., p. 163.

of opinions, a precise investigation of the practice of States is essential in order to determine whether resort to certain kinds of economic measures against a wrongdoing State constitute, under certain extreme conditions, an unlawful resort to force. If that were so, it would further have to be determined whether such a practice would be prohibited under the same (written and unwritten) rule prohibiting armed force or under the rule prohibiting given forms of intervention.

B. Respect for human rights and other humanitarian values

103. The need to set limits on reprisals in response to the "supreme dictates of civilization and humanity" seems initially to have manifested itself mainly in the regulation of belligerent reprisals. It was indeed principally in time of war that compliance with those dictates was most often sacrificed. However, the belief in the existence of inviolable ethical limits to the exercise of reprisals led to early recognition that the limits placed on reprisals in wartime should apply *a fortiori* in time of peace.[213] Again, a case in point is the principle applied in the *Portuguese Colonies* case (Naulilaa incident),[214] according to which, for a reprisal to be lawful it must be *limitée par les expériences de l'humanité et les règles de la bonne foi applicables dans les rapports d'État à État.*[215]

104. The "supreme dictates" in question (as applying in peacetime) affected in the first place the limits to be placed on reprisals so that they could not unlawfully cause injury to foreign nationals. Whatever the seriousness of the violation involved, the injured State could not take measures which trampled upon certain fundamental principles of humanity to the detriment of the offending State's nationals present in its territory, for example, by violating their right to life or their right not to be subjected to physical or moral violence, notably to torture, slavery or any other indignity.[216]

105. In addition to the requirement to protect foreign nationals, the importance of the respect for fundamental humanitarian principles in general was also stressed early on. For example, in the course of the debates in the Assembly of the League of Nations on the implementation and amendment of Article 16 of the Covenant with regard to the economic measures to be applied in case of aggression, the concern was repeatedly voiced that in no event should humanitarian relations be endangered.[217] The 1934 resolution of the International Law Institute states in paragraph 4 of article 6 that in the exercise of reprisals a State must *s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique.*[218]

106. The impact of the general principles in question has been strengthened and specified thanks to the relatively recent development of that substantial *corpus* of rules which constitutes the contemporary law of human rights. Leaving aside the question whether and to what extent the treaty rules in the field of human rights have become or are close to becoming a part of general international law, there can be no doubt that this development brings about a further restriction of the liberty of States to resort to forms of reprisal likely to imperil the human interests for the protection of which such a development has taken place.[219]

107. Explicit indications to that effect are contained in provisions of international instruments on human rights. Article 4 of the International Covenant on Civil and Political Rights provides that States "may take measures derogating from their obligations under the present Covenant" only "in time of public emergency which threatens the life of the nation"; and even under circumstances of that kind States are not to take measures derogating from certain fundamental principles of humanity. It has been inferred that the rights contemplated in the Covenant cannot be infringed by measures taken by way of reaction to an internationally wrongful act.[220] Article 60, paragraph 5, of the Vienna Convention on the Law of Treaties according to which suspension or termination—in whole or in part—of a treaty in case of a material breach shall in no case be resorted to with regard "to provisions relating to the protection of the human person contained in treaties of a humanitarian character"[221] is also relevant. Schachter is of the opinion that "treaties

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[213] See Lattanzi, op. cit., pp. 293-302; and, in similar vein, De Guttry, op. cit., pp. 268-271. After explaining that resort to one or other of the possible coercive measures depends on the choice of States, Anzilotti noted that States do not have absolute freedom of choice and, after listing a number of actions which were condemned by the laws of warfare although they amount to less than warfare itself, he concluded that *a fortiori* they were to be condemned in peacetime (*Corso di diritto internazionale*, 3rd ed., pp. 166-167).

[214] See footnote 64 above.

[215] Ibid., p. 1026.

[216] As early as 1888, for example, following the violation by the United States of America of the 1880 treaty on the immigration of Chinese nationals (the "Chinese Exclusion Act"), China, while suspending performance of its treaty obligations towards the United States, decided nevertheless to respect, for reasons of humanity, the rights of United States nationals under Chinese jurisdiction (*Foreign Relations of the United States*, 1889, p. 132). Recently, in its comment to section 905, the *Restatement of the Law Third* affirms that "Self-help measures against the offending State may not include measures against the State's nationals that are contrary to the principles governing human rights and *the treatment of foreign nationals**" (op. cit., p. 381).

[217] League of Nations, *Reports and Resolutions on the subject of Article 16 of the Covenant, Memorandum and Collection of Reports, Resolutions and References prepared in Execution of the Council's Resolution of December 8th, 1926*, Geneva, 13 June 1927 (League of Nations publication, *V.Legal, 1927.V.14* (document A.14.1927.V)), p. 11.

[218] See *Annuaire de l'Institut de droit international* (footnote 43 above).

[219] In this regard, see, *inter alia*, Morelli, op. cit., p. 362; Reuter, op. cit., p. 463; Riphagen, *Yearbook ... 1983*, vol. II (Part One) (footnote 35 above), p. 17, paras. 88-89; Dominicé, "Observations ..." loc. cit., p. 62; Zoller, loc. cit., p. 376; and Schachter, "Self-help in international law: U.S. action in the Iranian hostages crisis", *Journal of International Affairs* (1983-1984), pp. 231-233.

[220] De Guttry, op. cit., p. 271.

[221] On the inapplicability of the principle of reciprocity in case of violations of human rights treaty obligations, see Lattanzi, op. cit., pp. 302 *et seq.*; and Sicilianos, op. cit., pp. 352-358. On the same lines, article 11, paragraph 1, of part 2 of the draft articles proposed by Riphagen states that:

"1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

covered by this paragraph clearly include the Geneva Conventions for the protection of victims of war, the various human rights treaties, and conventions on the status of refugees, genocide and slavery".[222]

108. It remains, of course, to be seen to what extent rules such as those in which no explicit mention is made of measures of reaction to an internationally wrongful act condition the choices of injured States with regard to measures under general international law. In particular, the question may be asked whether and to what extent the choices might be limited by the International Covenant on Economic, Social and Cultural Rights.

109. The rules evoked in the preceding paragraphs are interpreted quite extensively by some authors. They affirm, for example, that limitations cannot only be derived from treaties and general rules on human rights (or from the humanitarian law of armed conflicts) but from any rules intended in any way to safeguard the moral and material interests of the human person. An injured State could thus not react by terminating (or even suspending) a treaty[223] providing forms of economic assistance to the offending State intended to better the conditions of a part of the latter's population. This should safeguard, for example, the obligations of injured States in the area of international cooperation for development as envisaged within the framework of the New International Economic Order.[224] Others, such as Conforti,[225] take the contrary view.

110. The difficulty of establishing the threshold beyond which countermeasures are or should be condemned as infringing humanitarian obligations in a broad sense lies in the precise definition of the human rights and interests the violation of which would not be permitted even in reaction to a State's unlawful act. It is certain that not all human rights or individual interests could reasonably qualify.

111. An obvious instance is the question whether the *faculté* to resort to reprisals is in any way limited by the rules protecting the property of nationals abroad, particularly business assets. A variety of trends may be identified among legal writers. According to some writers, reprisals against the private property of nationals of the offending State would be unlawful in that ownership would qualify among the wider category of human rights covered by the rules considered in the preceding paragraphs.[226] Other writers believe that, *a fortiori* in peacetime, the *jus in bello* prohibition on the taking of private property should be applied: "The taking by a State of the property of foreigners in the pursuit even of actual hostilities against their home-country is not justified under general international law. It will therefore be justified even less as a mere measure of reprisal".[227] Schachter believes, however, that this opinion is not confirmed by the prevailing practice:

> Blocking and confiscation of private property of nationals of an enemy State have been common in time of war and generally condoned as wartime measures. However, the seizure of private property as countermeasure against an offending State in time of peace has been characterized as illegal by some jurists but nonetheless carried out by States in recent years.[228]

112. Some commentators on the use of measures involving foreign private property propose a distinction between definitive confiscation of property, on the one hand, and temporary measures such as seizure, blocking, freezing, and the like, on the other hand, the first being generally considered unlawful while the second would not be prohibited.[229] In Schachter's view, the inadmissibility of the first type of measure stems from the criterion of reasonableness rather than from incompatibility with the *raison d'être* of reprisals. It would be on grounds of reasonableness, in particular, that the injured State should exercise relative restraint.[230] According to De Guttry, there is increasingly a feeling that it is unjust to sacrifice the private property of individuals who normally have no part whatsoever in the wrongful conduct of the offending States: this would gradually lead—albeit not without contradictions—to confining reprisals of this kind to extreme cases.[231] More than half a century ago, the International Law Institute took a similar line in its resolution relating to the regime of reprisals in peacetime, containing a suggestion to:

> Limiter les effets des représailles à l'État contre qui elles sont dirigées, *en respectant, dans toute la mesure du possible**, tant *les droits des particuliers** que ceux des États tiers.[232]

113. Although the most obvious issue is to determine how far countermeasures may go before they encounter

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"(*a*) ...

"(*b*) ...

"(*c*) such obligations are stipulated for the protection of individual persons irrespective of their nationality." (See footnote 103 above).

[222] Schachter, loc. cit., p. 181. The inviolability of these rules (by way of reprisal) is also maintained by Zemanek, "Responsibility of States...", loc. cit., p. 371.

[223] Cassese, op. cit., p. 271. In the same vein, see Boisson de Chazournes, op. cit., p. 153.

[224] Similarly, Elagab (op. cit., p. 194) is of the opinion that cases of economic coercion of particular severity should be identified, for instance, by applying the "concept of dependence and reliance", that is, by examining whether and to what extent measures have as their object commodities or services that are vital to the well-being of the State against which the measures are directed. This consideration would be of particular importance in case of measures directed against developing countries.

[225] Op. cit., p. 360.

[226] Higgins, "The taking of property by the State: Recent developments in international law", *Collected Courses..., 1982-II*, p. 355.

[227] Seidl-Hohenveldern, "Reprisals and the taking of private property", in *Netherlands International Law Review, De Conflictu Legum: Essays presented to Roeland Duco Kollewijn and Johannes Offerhaus*, p. 475. See also the other authors quoted by De Guttry, op. cit., p. 277, footnote 121.

[228] Loc. cit., p. 181; see also, Borchard, "Reprisals on private property", AJIL (1936), pp. 108-113. The admissibility of violations of property rights as a form of countermeasure has also recently been maintained by Boisson de Chazournes (op. cit., p. 156), who underlines, however, the need for *respect du principe du règlement pacifique de différends et [du] respect de la condition de la proportionnalité.*

[229] Among recent commentators, this is the view taken, for example, by Zoller, op. cit., pp. 73-74; Elagab, op. cit., p. 11; and Malanczuk, "Countermeasures...", loc. cit., p. 225, based on the irreversible nature of definitive confiscation and the reversible nature of the temporary measures.

[230] Loc. cit., p. 182.

[231] De Guttry, op. cit., p. 280. Similarly, Sicilianos, op. cit., p. 360.

[232] Article 6, paragraph 3 (see footnote 43 above).

the barrier of the right to private property, more thought should be given to other areas of humanitarian interests where similar problems arise. Examples are the property of cultural institutions, works of art, pharmaceutical industries, and public health facilities.

C. Inviolability of specially protected persons

114. Among authors there is a widespread notion that acts of reprisal would be unlawful if taken in violation of international obligations aimed at the protection of diplomatic envoys and heads of State. Oppenheim states that:

> ... individuals enjoying the privilege of extra-territoriality while abroad such as heads of States and diplomatic envoys, may not be made the object of reprisals, although this has occasionally been done in practice.[233]

Only a few authors, it seems, question the existence of a rule of general international law condemning acts of coercion, though not otherwise unlawful, when directed against diplomatic envoys.[234]

115. Some of the writers who discuss the rationale for the limitation in question seem to believe that it derives from the primary—and peremptory—rules concerning the protection of diplomatic envoys.[235] Other writers argue the matter on the ground of the "self-contained" nature or peculiarities of the law of diplomatic relations.[236] Among them is the former Special Rapporteur, according to whom the limitation in question would be a case "which does not lend itself to generalization within the context of the inadmissibility of specific reprisals. Indeed, the case seems rather to fall within the scope of a deviation from the general rules concerning the legal consequences of internationally wrongful acts, implicitly provided for at the time the primary relationship is established".[237]

116. A more articulate position is taken by others. One of them, for example, wonders which of the obligations among those intended for the protection of diplomatic envoys, would be inviolable by way of reprisals. According to this writer, international practice indicates that not all the forms of reprisal against diplomats are considered unlawful. It would be difficult, for example, to categorize as such measures enacted to restrict the freedom of movement of diplomatic envoys.[238] It would consequently be possible, according to this writer, to affirm that the unlawfulness of reprisals against diplomatic envoys encompasses essentially those measures directed against the physical person of diplomats and consisting mainly, but not exclusively, in a breach of the rule of inviolability of the person. The rationale for the restriction would, of course, reside in the need to safeguard, in all circumstances, the special protection which is reserved to diplomatic envoys in view of the particular functions they perform.[239]

117. An adequate analysis of the practice should make it possible to adopt the most appropriate solution, *de lege lata* and from the viewpoint of progressive development. Here as elsewhere it should be considered that any restrictions inevitably reduce the possibility of reaction in even more sensitive areas than that of diplomatic relations. These concern areas of more general humanitarian interest, including vital economic relations.

D. The relevance of *jus cogens* and *erga omnes* obligations

118. In addition to the absolute limits considered so far (as deriving from specific rules or principles of general international law), the fact that reprisals may be subject to further restrictions should also be considered, in particular, those which may derive from *jus cogens*.[240]

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[233] Oppenheim, *International Law...*, vol. II, op. cit., p. 140. This opinion was expressed by Grotius, op. cit. According to Twiss, diplomatic agents "cannot be the subjects of reprisals, either in their persons or in their property, on the part of the Nation which has received them in character of envoys (*legati*), for they have entrusted themselves and their property in good faith to its protection" (Twiss, *The Law of Nations (considered as Independent Political Communities)*, p. 39). See also Cahier, *Le droit diplomatique contemporain*, p. 22; Tomuschat, loc. cit., pp. 179 *et seq.*, and especially p. 187; and Dominicé, "Représailles...", loc. cit., p. 547.

[234] Anzilotti, op. cit., 3rd ed., p. 167. See also Conforti, op. cit., pp. 360-361.

[235] According to Röling, who recalls the ICJ judgment in the *United States Diplomatic and Consular Staff in Tehran* case (see footnote 50 above):

> "It would have been a good thing if the Court had had or taken the opportunity to make a clear statement that those involved were persons against whom reprisals are forbidden in all circumstances, according to unwritten and written law—even if the wrong against which a State wished to react consisted of the seizure of its diplomats! The provisions of the Convention are so formulated that 'reprisals in kind' are also inadmissible. It is possible to dispute the wisdom of this legal situation, but the arguments in favour of the current law—total immunity of diplomats because of the great importance attached to unhindered international communication—prevail." ("Aspects of the case concerning United States diplomats and consular staff in Tehran", *Netherlands Yearbook of International Law* (1980), p. 147).

The same opinion is held by Dominicé, who wonders: *Que deviendraient les relations diplomatiques, en effet, si l'État qui, fût-ce à juste titre, prétend être victime d'un fait illicite, pouvait séquestrer un agent diplomatique ou pénétrer dans les locaux d'une mission en s'appuyant sur la doctrine des représailles?* ("Observations...", loc. cit., p. 63).

[236] Lattanzi, op. cit., pp. 317-318; and Elagab, op. cit., pp. 116 *et seq.*

[237] *Yearbook... 1983*, vol. II (Part One) (see footnote 35 above), p. 17, para. 91. It has to be recalled that article 12 (*a*) of part 2 of the draft articles (see footnote 103 above), providing that reprisals and reciprocity do not apply "to the suspension of obligations... of the receiving State regarding the immunities to be accorded to diplomatic and consular mission and staff", met with some reservations among the members of the Commission (Reuter, *Yearbook... 1984*, vol. I, 1858th meeting, para. 30; Sinclair, ibid., para. 27; and Arangio-Ruiz, *Yearbook... 1985*, vol. I, 1900th meeting, para. 21) and representatives in the Sixth Committee (Qatar (A/C.6/40/SR.23, para. 106); Czechoslovakia (A/C.6/40/SR.29, para. 18); and United Kingdom (A/C.6/40/SR.32, para. 26)).

[238] De Guttry, op. cit., p. 282.

[239] Ibid., p. 283. See similar reasoning on the part of Sicilianos, according to whom *il y a certainement un noyau irréductible du droit diplomatique ayant un caractère impératif—l'inviolabilité de la personne des agents diplomatiques, l'inviolabilité des locaux et des archives—qui est de ce fait réfractaire aux contre-mesures. Il y a en revanche d'autres obligations qui ne semblent pas s'imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l'objet de contre-mesures proportionnées* (op. cit., p. 351).

[240] On these problems, see Lattanzi, op. cit., p. 306.

119. Restrictions on the right of reprisal deriving from *jus cogens* are generally not mentioned by legal writers prior to the Second World War. More recently Reuter,[241] Riphagen,[242] Zemanek,[243] Lattanzi,[244] Gaja,[245] Alland,[246] Elagab,[247] and Sicilianos[248] refer to *jus cogens* as a general limitation. Although *jus cogens* was originally considered (in the Vienna Convention on the Law of Treaties) in connection with the inadmissibility of conventional derogation from fundamental general rules,

> It would be illogical . . . at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation. The same applies when the previous violation also concerns an obligation imposed by a peremptory norm; the very existence of such a category of norms implies that there is a general interest in international society that they should be respected.[249]

120. Indeed, some writers lament the absence from the text of article 30 of part 1 of the draft articles[250] of a clear reference to contrast it with *jus cogens* rules as an exception to the exclusion of unlawfulness of measures taken by way of reaction to an internationally wrongful act. However, Gaja's comment that such an exception is implied in the expression "measure legitimate under international law" appearing in article 30[251] is correct. By its implied reference to the regime of reprisals, that expression would exclude the lawfulness of measures involving a violation of a peremptory rule. Such an interpretation is also supported by the express inclusion of the restriction in Riphagen's draft article 12 (*b*).

121. The restriction presently under discussion is extended by Lattanzi (from *jus cogens* rules) to any rule creating *erga omnes* rights and obligations. According to him:

> . . . there can be no doubt that the lawfulness of a reprisal consisting in a violation of *erga omnes* rules is excluded precisely by the fact that the violation of an obligation to the detriment of one State in such a case simultaneously represents a violation of the same obligation to the detriment of all those to whom the rule applies. It would be inadmissible for the sanction imposed on one State to constitute the violation of an obligation towards another State.[252]

In Lattanzi's view, *erga omnes* rules are so structured that, on the one hand, any State party can claim compliance and, on the other hand, no State party may lawfully react to the breach of those rules by another breach.[253] The same point is made by Gaja when he states:

> . . . one of the cases in which international law cannot allow countermeasures . . . is when the obligation which is violated operates in specific cases towards all other States: the rights of innocent States would then necessarily be infringed.[254]

122. It will not be overlooked that a problem largely similar to that of *erga omnes* obligations has already been touched upon with regard to suspension and termination of treaties.[255] In formulating the draft articles it will therefore be necessary to give careful thought, always in the light of practice, to the absolute limitations traditionally recognized with regard to the admissibility of countermeasures (force, human rights, diplomatic envoys) to see whether they need to be supplemented by the prohibition not only of countermeasures taken in contravention of *jus cogens* rules, but also of measures in breach of the rules setting forth *erga omnes* obligations.

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[241] Op. cit., p. 463.

[242] Riphagen covered the point under his article 12 (*b*) (see footnote 103 above), according to which countermeasures and reciprocity would not be applied with respect to the obligations incumbent upon a State "by virtue of a peremptory norm of general international law".

[243] "La responsabilité des États pour faits internationalement illicites ainsi que pour faits internationalement licites", in *Responsabilité internationale*, p. 84.

[244] Op. cit., pp. 306 *et seq.*

[245] "*Jus cogens* beyond the Vienna Convention", *Collected Courses . . ., 1981-III*, p. 297.

[246] Loc. cit., p. 185.

[247] Op. cit., p. 99.

[248] Op. cit., pp. 340-344.

[249] Gaja, loc. cit., p. 297.

[250] See footnote 22 above.

[251] Loc. cit., p. 297.

[252] Op. cit., p. 314.

[253] Ibid.

[254] Loc. cit., p. 297.

[255] See paras. 81-83 above.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 4]

DOCUMENT A/CN.4/435 and Add.1*

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

[Original: French]
[8 February and 15 March 1991]

CONTENTS

* Incorporating document A/CN.4/435/Corr.1-A/CN.4/435/Add.1/Corr.1.

Introduction

1. In his eighth report,[1] the Special Rapporteur completed the list of offences constituting crimes against the peace and security of mankind, which are classified in the draft Code as "crimes against peace", "crimes against humanity" and "war crimes". The Special Rapporteur considers that at a later stage, probably on second reading, this tripartite division, which he had adopted on a purely provisional basis for the purposes of analysis, should be eliminated. In his third report, a section entitled "Unity of the concept of offences against the peace and security of mankind"[2] was devoted to an account of the doctrinal debate on the unity and homogeneity of this concept, which concluded thus:

> To sum up, the expression "peace and security of mankind" has a certain unity, a certain comprehensiveness, linking the various offences. Although each offence has its own special characteristics, they all belong to the same category, and are marked by the same degree of extreme seriousness.[3]

2. The first part of the present report deals with a complementary aspect of the draft Code: consideration of the penalties applicable to the offences referred to in the Code.

3. The second part concerns the question of the establishment of an international criminal jurisdiction. This is in response to General Assembly resolution 45/41 of 28 November 1990, in which the Assembly:

> *Invites* the International Law Commission, as it continues its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism.

[1] *Yearbook... 1990*, vol. II (Part One), p. 27, document A/CN.4/430 and Add.1.

[2] *Yearbook... 1985*, vol. II (Part One), pp. 67-68, document A/CN.4/387, paras. 26-39.

[3] Ibid., p. 68, para. 38.

PART ONE. PENALTIES APPLICABLE TO CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

4. The principle *nulla poena sine lege* requires that provision be made for penalties in the draft Code. Such an undertaking, however, entails certain difficulties. Some difficulties stem from the diversity of legal systems; others are related to procedural problems.

A. Diversity of legal systems

5. In domestic law, there exists within each State a certain uniformity of moral and philosophical approach which justifies a single system of punishment applicable to all offences. In international law, on the other hand, the diversity of concepts and philosophies is hardly conducive to a uniform system of punishment.

6. Certain penalties which are current in some countries are unknown in others, as in the case of the death penalty, which has been variously applied in different countries and at different times. Some countries have successively abolished and reinstated it according to circumstances, often in response to the emotion aroused by specific criminal acts at a given time. Thus, the movement to abolish the death penalty has suffered various fates according to time and place.

7. In France, the death penalty was limited at one point to certain crimes under ordinary law (such as murder, parricide, kidnapping and subsequent death of a minor, arson committed on inhabited premises) and was no longer applicable to political offences except in the case of crimes against national security. The death penalty was not totally abolished until 1981.

8. In the United Kingdom, the first step in abolishing the death penalty was partial abolition, which was progressively extended until 1965. In that year, the death penalty was temporarily abolished for a five-year period pending a parliamentary vote on its definitive abolition, which occurred in 1970. Sweden had also partially abolished the death penalty in 1921, before opting for total abolition in 1972.

9. Switzerland and the Federal Republic of Germany abrogated the death penalty with no intermediate stage of partial abolition, in 1937 and 1949 respectively.

10. However, in those European countries which have abolished the death penalty there have from time to time been calls for its reinstatement, often because of circumstances related to the commission of crimes that have strongly influenced public opinion. In Europe there is nonetheless a general trend towards abolition of the death penalty, as illustrated by the adoption of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, of 28 April 1983.[4]

11. On the other hand, the death penalty has not been completely abolished in the United States of America, where it is still in force in 36 out of the 50 States. It does not yet appear to have been abolished or completely abolished in Eastern Europe.

[4] Council of Europe, *European Treaty Series*, No. 114.

12. As to the African countries, a recent report by Amnesty International[5] shows that, although the death penalty is still in force in many of them, there is a growing trend in favour of abolishing it. Thus, following the example of Cape Verde, which abolished it after acceding to independence in 1975, Namibia, Sao Tome and Principe and Mozambique each abolished the death penalty in 1990. Other African countries, although they have not completely abolished the death penalty in law, no longer apply it in practice. This is true of the Comoros, Côte d'Ivoire, Madagascar, Niger, Senegal and Togo. In 1981, Côte d'Ivoire even abolished the death penalty in law for political crimes. In Seychelles, the death penalty has remained in force only for the crime of treason.

13. In Asia, the death penalty is still in force in many countries.

14. It may thus be affirmed that there is a universal trend towards abolition, as is shown by the report by Amnesty International cited above.[6] It appears from that report that by the end of 1990 the death penalty had been abolished, either *de jure* or de facto in almost half the countries of the world, and that it remained in force and was applied in 92 countries. In this connection, it should be remembered that on 15 December 1989 the General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.[7] The Protocol was adopted by 59 votes to 26, with 48 abstentions.

15. However, it is still difficult to institute a single, internationally and uniformly applicable system of penalties. It is not only the death penalty that is at issue, but also other penalties involving corporal punishment or personal restraint, particularly those consisting of physical mutilation, which are still applied in some regions of the world.

B. Procedural difficulties

16. The difficulties relating to the diversity of legal systems are compounded by procedural difficulties. Should a penalty be laid down for each crime against the peace and security of mankind or, since all such crimes are characterized by the same degree of extreme gravity, should the same penalty be laid down, under a general formula, for all cases, with a minimum and a maximum according to whether or not there are extenuating circumstances?

1. The debate in the International Law Commission at its 1954 session

17. It should be noted that the 1954 draft Code did not lay down any penalties. This was not an oversight but an intentional omission. At its third session the Commission had adopted the following draft article 5:[8]

Article 5

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

18. This draft article was similar to article 27 of the Charter of the Nürnberg Tribunal[9] in that it assigned to the judge the responsibility for determining the applicable penalty, but it nevertheless respected the principle *nullum crimen sine lege*, because the draft Code specified the crimes to which the penalties were applicable. It was, however, strongly criticized by the Governments which submitted comments to the Commission.

19. For example, the Government of Bolivia[10] expressed the opinion that "in deference to the generally accepted principle *nulla poena sine lege* it will be necessary to lay down in the code, in a separate article, that the competent tribunal will be authorized to impose the most adequate penalty, taking into consideration not only the gravity of the offence but also the personality of the offender." Apart from the reference to the personality of the offender, this proposal does not appear to differ from that of the Commission.

20. The view of the Government of Costa Rica[11] that if article 5 "was allowed to stand as drafted, the code would be open to the same criticisms as were levelled against the Nürnberg Tribunal, which had to institute and apply penalties that had not been previously determined by any rule of positive law." In addition, according to that Government, the principle *nulla poena sine lege* presupposed "a clear determination beforehand of the penalty applicable to each category of offence".

21. In the opinion of the Egyptian Government,[12] under draft article 5 "the power to determine the penalty for each offence is delegated to the competent court". It saw in that delegation of power "a real danger, given that the judges' evaluation could be influenced by various circumstances not necessarily related to the law". It believed that it was "preferable to try to establish an adequate penalty for each crime, with a minimum and maximum if necessary".

22. In the view of the Government of the United Kingdom,[13] draft article 5 was completely inappropriate in the context of the draft Code. In so far as the various crimes mentioned in the Code constituted crimes or would be considered as such under the domestic legislation of the various countries, it was for the legislatures of those countries to establish the penalty appropriate to each crime. In so far as the question of punishment and penalties to be imposed was governed by an international con-

[5] Amnesty International, "Africa—Towards abolition of the death penalty" (May 1991), AI INDEX:AFR 01/01/91, pp. 1 and 3.

[6] Ibid., p. 2.

[7] General Assembly resolution 44/128, annex.

[8] See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, p. 14, para. 59.

[9] Charter of the International Military Tribunal 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). Article 27 reads:

"The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just."

[10] See the third report of Mr. J. Spiropoulos, *Yearbook ... 1954*, vol. II, p. 121, document A/CN.4/85, sect. XVI (*b*) (Comments of Governments).

[11] Ibid.

[12] Ibid.

[13] Ibid.

vention, it would be for the convention to prescribe the penalties to be imposed. In the view of that Government, it seemed more judicious to omit article 5.

23. In the end, the Commission was deterred by the difficulties involved, judging that it seemed inappropriate to address the question of penalties.

2. The current situation

24. If the Commission takes the view that it is appropriate to return to the question of penalties, it should be aware of the fact that two approaches are open to States for adoption of the Code, and that the solution of the problem of penalties depends on the approach selected.

25. The first approach would be to incorporate the provisions of the Code directly in domestic law and, at the same time, to establish appropriate penalties. This solution could, of course, have the disadvantage of creating an imbalance by instituting different penalties for the same crime, especially between States where the death penalty has been abolished and those where it still exists, or between States which impose certain forms of corporal punishment—under the shariah for example—and those which do not.

26. The second approach would be to include the penalties in the Code itself and to adopt it by means of an international convention. This solution would clearly be conducive to some uniformity in sentencing. The only problem would be to determine whether a separate penalty is to be provided for each crime in the Code, or whether a single penalty, applicable to all the crimes, would suffice.

27. He would favour the latter solution. In effect, the crimes in the Code are, by reason of their extreme gravity, foremost in the hierarchy of international crimes, whether they be crimes against peace, crimes against humanity or even war crimes. Actually, as regards the latter, the Commission had considered as crimes against the peace and security of mankind only the most serious war crimes.

C. Draft article on applicable penalties

28. In the light of the above considerations, the Special Rapporteur is proposing a single draft article, covering all crimes against the peace and security of mankind.

1. Draft article Z

29. The Special Rapporteur proposes the following draft article Z:

Any defendant found guilty of any of the crimes defined in this Code shall be sentenced to life imprisonment.

If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 10 to 20 years.

[In addition, the defendant may, as appropriate, be sentenced to total or partial confiscation of stolen or misappropriated property. The Tribunal shall decide whether to entrust such property to a humanitarian organization.]

2. Comments

First paragraph

30. Despite the reservations concerning life imprisonment voiced by those who believe that it makes the prisoner's rehabilitation and reintegration into society impossible, it is difficult to imagine how the maximum penalty for crimes such as those in question could be imprisonment for a definite period of time, a sentence sometimes imposed for ordinary offences. Inasmuch as the death penalty has been ruled out, it seems difficult to rule out life imprisonment as well.

Second paragraph

31. This paragraph, however, proposes an exception to the principle established in the first paragraph, in cases where pertinent extenuating circumstances make it more acceptable to impose a prison sentence for a definite period of time.

Third paragraph

32. This paragraph is placed in square brackets. It proposes a supplementary and optional penalty, such as that provided for in article 28 of the Charter of the Nürnberg Tribunal.[14] It must be noted however that, other than for economic offences and threats to national security, this penalty is viewed with some disfavour, because it is felt that it punishes not only the convicted person but also sometimes his relatives (a spouse who has joint ownership of property, and heirs). It will be for the Commission to decide whether or not to include it.

33. The other problem raised by this supplementary penalty is that of deciding to whom the confiscated property will be awarded. In domestic law, it is generally given to the State but the problem is more complex regarding international crimes referred to an international tribunal. The Charter of the Nürnberg Tribunal had decided, in article 28, that property would be delivered "to the Control Council for Germany", the Allied body that had instituted the tribunals under its law No. 10[15] to try war criminals other than the major criminals referred to the International Military Tribunal.

34. In the present case, it will be up to the Commission, if it retains the provision regarding confiscation of property, to decide to which body confiscated property should be entrusted. This might be, for example, ICRC, UNICEF, or an international body set up to combat illegal drug trafficking.

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[14] Article 28 provides:

"In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany."

[15] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

PART TWO. QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

A. Introductory remarks

35. As indicated above (para. 3), resolution 45/41 invited the Commission "to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism". The General Assembly thus refrained, at least at that stage, from choosing between the various options proposed by the Commission. Moreover, the Assembly failed to take a position on the possible options and main trends evidenced in the Commission with regard to some very specific and significant areas related to the establishment of an international criminal court, an account of which was given in the Commission's report on its forty-second session.[16]

36. The Special Rapporteur is therefore not submitting in the present report a draft statute for an international criminal court. The aim of the report is to provoke detailed discussion of two major issues that must be resolved in order to provide him with the necessary guidance. The issues in question are the court's jurisdiction and the requirements for instituting criminal proceedings.

37. Thus, the two provisions submitted below do not represent draft articles for referral to the Drafting Committee or for incorporation, as they stand, into the draft statute of a court. They are simply intended to provide a basis for discussion and perhaps to reveal an overall trend that would be a useful guide for the Special Rapporteur.

B. Jurisdiction of the court

1. Possible draft provision

38. For the purposes indicated in the preceding paragraph, the Special Rapporteur has drafted the following text:

1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security of mankind [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction upon it.

2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals.

3. The Court shall have cognizance of any challenge to its own jurisdiction.

4. Provided that jurisdiction is conferred upon it by the States concerned, the Court shall also have cognizance of any disputes concerning judicial competence that may arise between such States, as well as of applications for review of sentences handed down in respect of the same crime by the courts of different States.

5. The Court may be seized by one or several States with the interpretation of a provision of international criminal law.

2. Comments

Paragraphs 1 and 2

39. Since paragraph 1 refers to the code of crimes against the peace and security of mankind or a text defining such crimes annexed to the statute, it observes the principle of *nullum crimen sine lege*. It takes into account the comments by some members of the Commission who expressed their opposition to the concept of a crime under international law or to any reference to the general principles of law in order to define crimes. This provision will perhaps meet with their approval.

40. Moreover, the purpose of the alternative wording in square brackets, namely the words "accused of crimes defined in the annex to the present statute", is to avoid limiting the choice of States to the crimes specified in the draft code, thus making the court's rules on jurisdiction *ratione materiae* more flexible, which could make it more readily acceptable to States.

41. Paragraph 1 makes the court's jurisdiction *ratione personae* subject to the consent of the States concerned. Here again, the Special Rapporteur has thus taken account of the comments of the members of the Commission who expressed concern that the criminal jurisdiction of States should be respected. It would, of course, be of no avail to draw up a rule that would remain a dead letter, or to set up an institution that would be incapable of taking any action right from the outset.

42. On the issue of the number of States whose conferment of jurisdiction is required, the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction[17] provides in article 27 that: "No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed." While using that draft article as a basis, the present Special Rapporteur has departed from it in a number of respects.

[16] *Yearbook ... 1990*, vol. II (Part Two), p. 24, para. 155.

[17] See the report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645), annex.

43. First, in paragraph 1 of his draft provision the Special Rapporteur has made conferment of criminal jurisdiction upon the court subject to the consent of the State or States in which the crime is alleged to have been committed. In his view, although in international law there is no general rule limiting criminal jurisdiction to the law of the place where the crime is committed, it has to be acknowledged that the principle of the territoriality of criminal law is the principle generally applied. The trend towards having crimes tried in the place where they are committed was confirmed by the Nürnberg[18] and Tokyo[19] charters. It is thus the principle of the territoriality of criminal law that is confirmed in paragraph 1.

44. Secondly, the Special Rapporteur is aware that there are other principles, including the principle of personality under criminal law, that have been applied in the field of criminal law. However, that principle has several aspects, of which the 1953 draft statute takes only one into account, namely the aspect giving jurisdiction to the court of the country of which the perpetrator is a national and excluding the jurisdiction of the court of the country of which the victim is a national and the jurisdiction of the court of the victim State. This latter system, which, depending on the particular case in question, is also referred to as the system of passive personality or real protection, has also been applied in the area of war crimes, for example in the French statute of 28 August 1944,[20] which gave the French courts jurisdiction over war crimes committed abroad against French nationals or French-protected persons, or against foreign soldiers or stateless persons serving in the French armed forces. Similarly, article 7 of the former French code of criminal procedure,[21] now article 694 of the new Code of Criminal Procedure,[22] gives the French courts jurisdiction over crimes against the security of the State and crimes involving the counterfeiting of the State seal, coins, securities or bank notes committed outside French territory by foreigners. This system was also applied, immediately after the Second World War, under the legislation of other countries, as in the case of the Danish Act on the Punishment of War Crimes of 12 July 1946,[23] the Norwegian provisional decree of 4 May 1945[24] and Act of 13 December 1946[25] on the punishment of foreign perpetrators of war crimes.

45. This trend also took hold in international law. In 1927 the first International Conference for the Unification of Penal Law, held at Warsaw, adopted model texts, article 5, paragraph 1, of which recognized the jurisdiction of the victim State over a crime or an offence against the security of that State or one involving counterfeiting of the State seal, marks, imprints or stamps.[26] The text in question is virtually identical to that of the French code of criminal procedure just mentioned.

46. The trend was also confirmed in the *Lotus* case. According to PCIJ, there is no rule of international law preventing a State from exercising jurisdiction over foreigners in respect of offences committed abroad against the State in question.[27]

47. In view of the background to which reference has just been made, it might be asked why the 1953 draft statute required only conferment of jurisdiction by the State where the crime is committed or by the State of which the victim is a national, thus restricting the range of States that can claim jurisdiction over the offences in question. In paragraphs 1 and 2 of the possible draft provision, the Special Rapporteur has therefore combined the territoriality system, the active and passive personality system, and the so-called real-protection system, thus better demonstrating the complexity of the matter and better reflecting the state of existing law.

48. The Special Rapporteur is aware, however, of the reservations to which an excessive broadening of the range of States whose conferment of jurisdiction would be required could give rise. Such a broadening would lay down a set of conditions to which the court's jurisdiction would be subject, conditions which would constitute a veritable obstacle course. It could, moreover, give rise to numerous jurisdictional disputes among all the States whose consent would be required. Even if, under paragraphs 3 and 4 of the possible draft provision, the court had jurisdiction over such disputes, it would seem pref-

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[18] See footnote 9 above.

[19] Charter of the International Military Tribunal for the Far East (*Documents on American Foreign Relations*, vol. VIII (July 1945-December 1946) (Princeton University Press, 1948), pp. 354 *et seq.*).

[20] France, *Journal officiel de la République française*, 30 August 1944, p. 780.

[21] *Code d'instruction criminelle*, 51st ed., *Jurisprudence générale Dalloz* (Paris, 1959), pp. 6-7.

[22] *Code de procédure pénale*, 23rd ed., *Jurisprudence générale Dalloz* (Paris, 1981), p. 381.

[23] *Lovtidende for Kongeriget Danmark for Aaret 1946*, (Copenhagen, J.H. Schultz, 1947), No. 395, pp. 1376 *et seq.*

[24] *Registre til Norsk Lovtidend* (Oslo, Grondahl & Sons Boktrykkeri, 1952), pp. 445 *et seq.*

[25] Ibid., pp. 679 *et seq.*

[26] Resolution on international penal law, adopted by the first Conference (Warsaw, 1-5 November 1927), see Conférence internationale pour l'unification du droit pénal, *Actes de la Conférence* (Paris, Sirey, 1929), p. 132.

[27] The Court, in its judgment of 7 September 1927, stated the following:

"... the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present ..." .

"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." (PCIJ, *Collection of Judgments, Series A, No. 10*, Judgment No. 9, pp. 18-20).

erable to reduce to the extent possible the likelihood of disputes occurring in the first place. It must be acknowledged that, apart from the system of the territoriality of criminal law, which is the general rule governing domestic criminal law, basically the systems in question are simply exceptions resulting from the realism of States. It is, however, in order to take account of such realism that, in addition to the principle of territoriality, formulated without any restrictions in paragraph 1 of the draft provision, the active and passive personality system and the real-protection system have been included in paragraph 2, but only to the extent that the domestic legislation of the States concerned requires their application in a specific case.

49. This solution is not without drawbacks. Conferring jurisdiction upon a State of which the perpetrator is a national is, in some cases, tantamount to entrusting a State that may have ordered the commission of a criminal act, or may have organized or tolerated such an act, with trying the crime in question. Moreover, conferring jurisdiction upon the victim State or upon the State whose nationals have been the victims of a crime does not always appear to provide sufficient guarantees of impartiality and objectivity.

50. Furthermore, in general it must be recognized that the principle of conferment of jurisdiction is a makeshift solution, a necessary concession to State sovereignty. It is a principle that makes the court's jurisdiction subject to a requirement that is difficult to meet, and that will not facilitate access to the court. It is therefore to be hoped that the requirement in question will be of an entirely temporary nature, no more than a stage in the process of establishing a body of international criminal law freer of ties to domestic law and less subject to its rules.

Paragraph 3

51. Paragraph 3 lays down a commonplace rule whereby any court before which a case is brought shall decide whether it has jurisdiction when faced with a challenge to its jurisdiction, unless an appeal in respect of its decision is lodged with a higher court, where appropriate. However, since the international criminal court would be regarded as the highest criminal court at the international level, it would be normal that it should decide on its own jurisdiction, without any possibility of appeal.

Paragraph 4

52. Paragraph 4 deals with another example. In this case it is not the court's jurisdiction that is being challenged, as in the hypothesis dealt with in the preceding paragraph. Instead, it is a question of a dispute between two or more States concerning the jurisdiction of one of the States concerned, or a dispute in which the States challenge one another's jurisdiction. This is a very familiar kind of dispute. Such disputes arise from the fact that each State sets its own rules governing criminal jurisdiction; conflicts between different forms of domestic legislation inevitably arise as a result. States attempt to settle such disputes by means of agreements, which are often difficult to reach.

53. The solution proposed in paragraph 4 would make it possible to overcome such difficulties because, as just indicated, the court would have jurisdiction over such disputes. Furthermore, it would facilitate the standardization of judicial practice in the area of conflicting laws and jurisdiction.

54. Lastly, the hypothesis must not be excluded whereby the courts of two or more States would institute proceedings in respect of the same crime and hand down decisions resulting in either a conviction or an acquittal; this would be contrary to the *non bis in idem* principle. In such a case, the court could review or rescind the most recent of the decisions.

Paragraph 5

55. Paragraph 5 is based on the idea that the court could also play a very important role in the unification of international criminal law, a new and currently fast-developing field of law. It could help to remove some uncertainties regarding terminology and the definition of concepts such as complicity and conspiracy and the attempt to commit such crimes, which vary in content from one national legal system to another. It could also facilitate clarification of the meaning and the content under international law of a number of principles, such as the principles *nullum crimen sine lege* and *nulla poena sine lege* or the *non bis in idem* rule.

C. Criminal proceedings

1. Possible draft provision

56. For the purposes indicated in paragraph 37 above, the Special Rapporteur proposes the following text:

1. Criminal proceedings in respect of crimes against the peace and security of mankind shall be instituted by States.

2. However, in the case of the crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes.

2. Comments

57. It is possible to envisage that the Security Council, the guardian of international peace and security, might itself be competent to institute criminal proceedings directly. However, such an interpretation of the Security Council's role would exceed the powers vested in the Council by the Charter of the United Nations. The Council's role is either to take preventive measures to forestall a breach of the peace or to take steps to restore peace. However, all such measures are political and are not of a judicial nature at all. It is therefore hard to see what basis there would be for sole jurisdiction for the Security

Council in the area of criminal proceedings instituted in respect of the crimes in question.

58. However, it is legitimate to ask whether in some cases criminal proceedings should not be made subject to the Security Council's prior consent. Some of the crimes covered by the draft Code constitute significant violations of international peace. This is so particularly in the case of the crimes of aggression and the threat of aggression. Under Article 39 of the Charter of the United Nations, the Security Council has the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression". It must therefore be agreed that in such cases criminal proceedings should depend on the determination by the Security Council of the existence of an act of aggression or a threat of aggression. Consequently, should a State attempt to refer a case to the court directly, without the prior consent of the Security Council, the court should in turn refer the complaint to the Security Council for its prior consideration and consent.

59. Where other offences are concerned—war crimes, crimes against humanity and, in particular, genocide or international trafficking in narcotic drugs—the consent of a United Nations organ would, on the contrary, appear to be unnecessary.

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 5]

DOCUMENT A/CN.4/436*

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

[*Original: English*]
[*15 March 1991*]

CONTENTS

* Incorporating documents A/CN.4/436/Corr.1, 2 and 3.

Conventions and treaties cited in the present report**

ABBREVIATIONS

Legislative Texts — United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (Sales No. 63.V.4).

AFRICA

Multilateral treaties

	Source
Cameroon, Chad, Dahomey, Guinea, Ivory Coast, Mali, Niger, Nigeria and Upper Volta: Act regarding Navigation and Economic Cooperation between the States of the Niger Basin (Niamey, 26 October 1963)	United Nations, *Treaty Series*, vol. 587, p. 9.
Cameroon, Chad, Niger and Nigeria: Convention and Statutes relating to the development of the Chad Basin (Fort Lamy, 22 May 1964)	United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 8.
African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968)	United Nations, *Treaty Series*, vol. 1001, p. 3.
Burundi, Rwanda and the United Republic of Tanzania: Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin (Rusumo, 24 August 1977)	Ibid., vol. 1089, p. 165.
Gambia, Guinea and Senegal: Convention relating to the Creation of the Gambia River Basin Development Organization (Kaolack, 30 June 1978)	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. 42.
Benin, Cameroon, Chad, Guinea, Ivory Coast, Mali, Niger, Nigeria and Upper Volta: Convention creating the Niger Basin Authority (Faranah, 21 November 1980)	United Nations, *Treaty Series*, vol. 587, p. 56.
Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System (Harare, 28 May 1987)	*International Legal Materials*, Washington, D.C., vol. 27 (1988), p. 1109.

Bilateral treaty

United Arab Republic and Sudan: Agreement for the full utilization of the Nile waters (Cairo, 8 November 1959)	United Nations, *Treaty Series*, vol. 453, p. 51.

AMERICA

Multilateral treaty

Argentina, Bolivia, Brazil, Paraguay and Uruguay: Treaty of the River Plate Basin (Brasilia, 23 April 1969)	Ibid., vol. 875, p. 3.

** The instruments are listed in chronological order, by continent.

Bilateral treaties

	Source
Great Britain and United States of America: Treaty relating to boundary waters and questions concerning the boundary between Canada and the United States (Washington, D.C., 11 January 1909)	*British and Foreign State Papers, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260, No. 79.
United States of America and Canada: Treaty relating to the cooperative development of the water resources of the Colombia Basin (Washington, D.C., 17 January 1961)	United Nations, *Treaty Series*, vol. 542, p. 245.

ASIA

Bilateral treaty

India, Pakistan and IBRD: Indus Waters Treaty 1960 (Karachi, 19 September 1960)	Ibid., vol. 419, p. 125.

EUROPE

Multilateral treaty

Belgium, France, Great Britain, Greece, Italy, etc.: Convention establishing the definitive Statute of the Danube (Paris, 23 July 1921)	League of Nations, *Treaty Series*, vol. XXVI, p. 173.

Bilateral treaties

Union of Soviet Socialist Republics and Hungary: Convention concerning measures to prevent floods and to regulate the water regime on the Soviet-Hungarian frontier in the area of the frontier River Tisza (Uzhgorod, 9 June 1950)	*Legislative Texts*, p. 827, No. 227.
Yugoslavia and Hungary: Agreement concerning water economy questions, together with the Statute of the Yugoslav-Hungarian Water Economy Commission (Belgrade, 8 August 1955)	Ibid., p. 830, No. 228.
Yugoslavia and Albania: Agreement concerning water economy questions, together with the Statute of the Yugoslav-Albanian Water Economy Commission and with the Protocol concerning fishing in frontier lakes and rivers (Belgrade, 5 December 1956)	Ibid., p. 441, No. 128.
Yugoslavia and Bulgaria: Agreement (with annex) concerning water economy questions (Sofia, 4 April 1958)	United Nations, *Treaty Series*, vol. 367, p. 89.
Poland and the Union of Soviet Socialist Republics: Agreement concerning the use of water resources in frontier waters (Warsaw, 17 July 1964)	Ibid., vol. 552, p. 175.
Greece and Yugoslavia: Agreement concerning the study of the overall improvement of the Axios-Vardar basin (Belgrade, 12 June 1970)	*Službeni List*, Socijalističke Federativne Republike Jugoslavije, Belgrade, No. 48, text 124, p. 723.
Finland and Sweden: Agreement concerning frontier rivers (with annexes) (Stockholm, 16 September 1971)	United Nations, *Treaty Series*, vol. 825, p. 191.
Italy and Switzerland: Convention concernant la protection des eaux italo-suisses contre la pollution (Rome, 20 April 1972)	*Revue générale de droit international public* (Paris), 3rd series, vol. LXXIX (1975), pp. 265 *et seq.*
Federal Republic of Germany/European Economic Community and Austria: Agreement on cooperation on management of water resources in the Danube Basin (Regensburg, 1 December 1987)	*Official Journal of the European Communities*, vol. 33, 5 April 1990, p. 20.

General conventions

	Source
Treaty of Versailles (Versailles, 28 June 1919)	G.F. de Martens, *Nouveau Recueil général de Traités*, 3rd series, vol. X (Leipzig, Weicher, 1923), p. 323.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, p. 331.
Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	*United Nations Conference on Succession of States in Respect of Treaties, Official Records, vol. III, Documents of the Conference* (United Nations publication: Sales No. E.79.V.10), p. 185.
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Introduction

1. With the sixth report[1] the submission of provisions recommended for the Commission's consideration for inclusion in the draft articles on the law of the non-navigational uses of international watercourses was completed.[2] The present report addresses principally the matter of the use of terms and, in particular, the definition of "international watercourse". Before turning to that fundamental question, however, the Commission's attention is drawn to the matter of the order of the articles on the "scope" of the draft and the "use of terms", respectively.

[1] *Yearbook ... 1990*, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

[2] For the texts of the draft articles provisionally adopted so far by the Commission (arts. 1-27), see *Yearbook ... 1990*, vol. II (Part Two), pp. 54-57.

CHAPTER I

Structure of part I of the draft articles

2. At present, part I of the draft articles, entitled "Introduction", begins with an article tentatively entitled "Use of terms" (art. 1), which is followed by an article entitled "Scope of the present articles" (art. 2). It is recommended that the Commission consider reversing the order of these articles, so that the first article of the draft would define its scope and the second would define the terms employed.

3. Such a structure would seem more logical and would further seem to be more helpful to the reader than the present organization. The first thing that one would normally want to know about a set of articles is what it covers, not how certain technical terms utilized therein are defined. It is perhaps for this reason that a number of conventions based on Commission drafts have adopted the structure here recommended. Examples include the Vienna Convention on the Law of Treaties, the Vienna Convention on Succession of States in Respect of Treaties, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. In addition, the Commission has followed the same pattern in the two sets of draft articles it has most recently completed: the draft articles on ju-

risdictional immunities of States and their property, the first reading of which was completed in 1986[3] and the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the second reading of which was completed in 1989.[4, 5] A final example may be drawn from the Commission's work on this very topic: the set of six draft articles originally adopted by the Commission in 1980 began with article 1, entitled "Scope of the present articles".[6]

4. While changes of this nature have in the past been made principally during the second reading process, there would seem to be no reason why such a change could not be made before the entire set of draft articles is adopted on first reading. It would seem unlikely that a simple reversal of the order of the first two articles of the draft would give rise to confusion on the part of States. Indeed, as indicated above, it is believed that to address the scope of the draft in its first article would be more helpful to the reader than beginning with a list of technical definitions. Those definitions are addressed in the following section of the report.

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

[4] See *Yearbook ... 1989*, vol. II (Part Two), pp. 14 *et seq.*

[5] This approach has not been followed in all of the Commission's efforts, however. For example, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character begins with use of terms and covers the scope of the Convention in article 2.

[6] *Yearbook ... 1980*, vol. II (Part Two), p. 110.

CHAPTER II

Use of terms

5. The present chapter will first deal with the definition of the term "international watercourse" and will then identify several additional expressions the Commission might wish to define in the article on "use of terms".

A. Definition of "international watercourse"

6. Since 1976, there has been "general agreement in the Commission that the question of determining the scope of the term 'international watercourses' need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses."[7] In the second (1986) report, the the view was expressed that "leaving this question aside for the time being might well expedite work on the topic" and it was recommended that "the Commission proceed on the basis of the provisional working hypothesis which it developed and accepted in 1980".[8] At its thirty-ninth (1987) session, the Commission adopted the first provisions of the present set of draft articles (arts. 2-7). The Commission at that session decided "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".[9] The hypothesis reads 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.[10]

7. Now that the Commission has adopted the bulk of the provisions of the draft, and is in the process of considering those that remain, the time has come to decide upon the scope of the term "international watercourse". Indeed, the Commission's task has been made easier by the very fact that the basic rules of the draft articles are now clear; it remains only to decide upon the scope of their application. There are, in effect, two issues before the Commission in this connection. The first is whether the draft articles should apply to all of the hydrographic components of international watercourses,[11] and to all of the forms of those watercourses,[12] including rivers, their

[7] *Yearbook ... 1976*, vol. II (Part Two), p. 162, para. 164.

[8] See *Yearbook ... 1986*, vol. II (Part One), p. 99, document A/CN.4/399 and Add.1-2, para. 63.

[9] *Yearbook ... 1987*, vol. II (Part Two), p. 25, footnote 83.

[10] *Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.

[11] As explained below in connection with the discussion of the hydrologic cycle, a watercourse system will always have certain kinds of components (such as streams, their tributaries and groundwater) and may have others (such as lakes, reservoirs and canals) as well. (This statement does not take into account the case of an aquifer (groundwater) that is unrelated to surface water. Such unrelated groundwater will be discussed later in the present chapter.)

[12] The notion of a "form" of international watercourses is here utilized to refer to certain components of a watercourse system that may or may not be present in any given drainage basin. These would include lakes, reservoirs and canals. The term "form" thus refers to possible components of a watercourse system other than those that are present in every case (see footnote 11 above).

tributaries, lakes, canals, reservoirs and groundwater. The second issue is whether, for the purposes of the draft articles, watercourses should be treated as having a "relative" international character.[13]

1. Components of a watercourse to be included in the definition of "international watercourse"

8. Certain aspects of the answer to the first issue are already implicit in many of the provisions of the draft that have been adopted so far, at least with respect to surface waters. Perhaps the most prominent of these aspects is that the spatial scope of the articles is not necessarily confined to watercourses, or parts thereof, situated in the immediate border region. Unless the scope of the draft articles was limited to contiguous watercourses and boundary lakes—a suggestion that has not been made in the Commission, to the knowledge of the present writer—the rules of the draft by their very nature will require watercourse States to consider the possible impact on other watercourse States of activities that may not be in the immediate vicinity of a border. That is to say that the regime of equitable utilization (art. 6), for example, could be upset just as much by activities distant from the frontier on a tributary of, or canal leading into, a boundary-crossing river as by conduct on the river itself in close proximity to the border. The same would be true of the capacity to cause appreciable harm (art. 8). For example, toxic chemicals discharged into a minor watercourse flowing into a boundary lake may ultimately make their way across the lake, causing harm on the other side of the border to another watercourse State.[14] Likewise, the provisions of part III of the draft articles (Planned measures) would be no less applicable to uses of a tributary that was distant from a boundary than to uses of the main stem of a successive river in the border region itself: the question in both cases would be whether the planned measures "may have an appreciable adverse effect upon other watercourse States" (art. 12). The criterion under the draft articles in all of these cases is whether the activity or use in question would amount to an inequitable and unreasonable utilization; would cause appreciable harm to, or might have an appreciable adverse effect upon,[15] other watercourse States; would harm the ecosystem of the international watercourse; or would amount to a condition that might be harmful to other watercourse States.[16] Furthermore, other rights and obligations under the draft articles would also have to apply to portions of an international watercourse other than the main stem in order for them to be meaningful. This is true, for example, of the right to participate in the formulation and conclusion of agreements concerning a part of a watercourse (art. 5, para. 2), the obligation to take into account all factors and circumstances relevant to equitable utilization (art. 7) and the duty to exchange data and information on a regular basis (art. 10).

9. It is proposed that the term "international watercourse" should be defined in a way that makes plain the foregoing implications of the draft articles adopted thus far. A definition of "international watercourse" that focused upon the portion of a stream, lake, or so forth, that formed or crossed an international boundary would seem too narrow to be helpful to those responsible for applying the draft articles. That is, such a definition would not alert the authorities to the implications as described above and the consequent need, *inter alia*, to take into account the potential trans-border impacts of existing or planned activities. Likewise, even a definition of "international watercourse" that referred, for example, to "any watercourse . . . which crosses or forms frontiers between two or more States"[17] could lead to uncertainty and difficulty of application because the precise meaning of the term "watercourse" would remain undefined. It is therefore recommended that the draft articles should include a definition of the term "watercourse" and, for the reasons explained below, it is believed that the rights and obligations of watercourse States under the draft articles would be made most clear, and cooperative planning and management of international watercourses most effective, by defining "watercourse" as, in essence, a *system* of waters consisting of hydrographic components which, by virtue of their physical interrelationship, constitute a unitary whole. This was the approach taken in the tentative working definition, set forth in paragraph 6 above, on the basis of which the draft articles have been prepared. While it has been discussed in previous documents of the Commission,[18] the concept of a "watercourse system" will be revisited briefly in section (*a*) below in order to place these recommendations in context.

(a) *The concept of a "watercourse system"*

10. The starting-point for understanding the functioning of watercourses is the hydrologic cycle. Since this phenomenon was treated extensively in the first report of Mr. Schwebel,[19] only its main features will be summarized here.

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[13] The concept of the "relative international character" of a watercourse stems from the provisional working hypothesis accepted by the Commission as the basis of its work in 1980 (see footnote 10 above).

[14] See, for example, *Ohio* v. *Wyandotte Chemicals Corp.* et al., (*United States Reports of Cases Adjudged in the Supreme Court*, vol. 401 (1971), p. 493 *et seq.*), which was a suit by the State of Ohio (United States of America) against, *inter alia*, a Canadian company that had allegedly dumped mercury into a Canadian tributary of Lake Erie, resulting in damage in and to Ohio. The State of Ohio sought "monetary damages for the harm done to Lake Erie, its fish, wildlife, and vegetation, and the citizens and inhabitants of Ohio".

[15] The "appreciable adverse effect" standard is utilized in part III of the draft articles. See, for example, article 12.

[16] "[C]onditions that may be harmful to other watercourse States" are dealt with in article 26. The list of criteria is not exhaustive, but it is hoped that it illustrates the point.

[17] See ECE, Note by the secretariat on "Possible elements for a draft framework convention on the protection and use of transboundary watercourses and international lakes", document ENVWA/WP.3/R.17, element II, para. 1 (*a*).

[18] See, for example, paragraphs (2)-(8) of the commentary to article 1 as adopted in 1980 (*Yearbook . . . 1980*, vol. II (Part Two), pp. 110-111; and the second report of Mr. Schwebel (*Yearbook . . . 1980*, vol. II (Part One), pp. 167-169, document A/CN.4/332 and Add.1, paras. 53-58).

[19] *Yearbook . . . 1979*, vol. II (Part One), pp. 146-149, document A/CN.4/320, paras. 9-21.

11. Nebel has offered a relatively concise and non-technical description of the hydrologic cycle,[20] with an accompanying diagram (see annex, fig. 1).

12. It may be said in general that water is constantly in motion, whether between gaseous, solid and liquid states or from the mountains to the sea. This fact would seem to mean that any attempt to confine water completely, or to bring it entirely under exclusive dominion and control, would be an exercise in futility. Even

> . . . [t]he apparently inert tumblerful that stands beside a dinner plate may simultaneously convert ice cubes into liquid, release tiny amounts of vapour into the air above it and condense vapour into droplets on its smooth glass sides.[21]

13. In another sense, however, water is the essence of stability:

> The total supply [of water] neither grows nor diminishes. It is believed to be almost precisely the same now as it was 3 billion years ago. Endlessly recycled water is used, disposed of, purified and used again. Last night's potatoes may have boiled in what was, ages ago, the bath water of Archimedes.[22]

14. While "the knowledge that the world supply of this vital substance cannot be depleted should offer comfort",[23] the ever-increasing demands placed on the enduring yet finite resource by the Earth's burgeoning human population[24] require that all possible measures should be taken to ensure that it is conserved. One way in which the Commission can help to promote conservation and protection of freshwater resources is to make responsible governmental officials aware that their international obligations may be affected by the characteristics of water and, specifically, the interrelationship between various components of those watercourse systems, parts of which traverse their borders. This can be accomplished by explicitly recognizing the interrelationship of the relevant components in the draft articles. These components—those that might be described as "terrestrial", as opposed to atmospheric or oceanic—are the subject of the following section.

(b) *Components of a watercourse system*

(i) *General*

15. The various components of a watercourse system may be divided into surface waters and groundwater. Surface waters may take several natural forms, including rivers, lakes and ponds, and various artificial forms, such as canals and reservoirs. Glaciers, which may be conceptualized as surface water in a solid state, are important contributors to some watercourse systems. Groundwater will be discussed further in section (iii) below.

(ii) *The components of a watercourse system illustrated in an international context*

16. John Kolars, an expert in the fields of geography and international watercourses, has prepared a diagram (see annex, fig. 2) which provides a convenient illustration of the manner in which various of the components of a watercourse system are interrelated. It is particularly appropriate for the Commission's purposes, since it places the hypothetical system in an international context.[25] In his explanation of the diagram[26] he demon-

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[20] "The water cycle, also called the hydrological cycle, . . . basically consists of water entering the atmosphere through evaporation and returning through condensation and precipitation. However, there are additional aspects that bear more consideration.

"*Water into the atmosphere*

"Since oceans cover about 70 per cent of the Earth's surface, it is not surprising that the largest amount of water vapour enters the atmosphere by evaporation from the ocean surfaces. Additional water evaporates from lakes, rivers, moist soil, and other wet surfaces; over vegetated land, large amounts of water enter the atmosphere by transpiration from plants. The combination of both evaporation and transpiration is called evapotranspiration.

". . .

"*Water over and through the ground*

"Water from precipitation landing on the ground may follow two alternative pathways. It may soak into the ground, infiltration, or it may run off the surface, runoff . . . Runoff flows over the surface into streams and rivers which make their way to the ocean, or other points of evaporation. All ponds, lakes, streams, rivers and other waters on the surface are referred to as surface waters.

"For water that infiltrates, there are also two alternatives. Water may be held in the soil, the amount depending on the water-holding capacity of the soil . . . This water, called capillary water, returns to the atmosphere by way of evapotranspiration.

"Infiltrating water that is not held in the soil is called gravitational water because it is pulled by gravity and trickles or percolates down through pores or cracks in the earth. Sooner or later, however, gravitational water comes to an impervious layer of rock or dense clay. Free water accumulates, completely filling all the cracks, pores, and spaces above such an impervious layer. This accumulated water is called groundwater, and its upper surface is the water table . . . Gravitational water becomes groundwater as it hits the water table in the same way rainwater becomes lake water as it hits the surface of the lake. Wells must be dug to below the water table; then groundwater, which is free to move, seeps into the well and fills it to the level of the water table.

"Underground rock layers frequently slope, causing groundwater to move slowly like great underground rivers. The layers of porous material through which groundwater moves are called aquifers. The actual location of aquifers is complex. Layers of porous rock are often found between layers of impervious material and the entire formation may be folded or fractured in various ways. Thus groundwater may be found at various depths between layers of impervious rock. Also, the recharge area, the area where water actually enters an aquifer, may be many miles from where it is withdrawn.

"*Summary of the water cycle*

"In summary, the water cycle always consists of evaporation, condensation and precipitation. But in completing the cycle there are three principal 'loops': (1) the surface runoff loop, in which water runs off the surface and becomes part of the surface water system; (2) the evaporation-transpiration loop, in which water enters the soil and is held as capillary water and then returns to the atmosphere by way of evaporation from soil or through absorption by plants and transpiration; and (3) the groundwater loop, in which water enters and moves through the earth, finally exiting through springs, seeps, or wells, thus rejoining the surface water system." (B. J. Nebel, *Environmental Science*, 3rd ed., Englewood Cliffs (N.J.), Prentice-Hall, 1990, pp. 194-198).

[21] L. B. Leopold and K. S. Davis, *Water* (New York, Time, 1966), p. 33.

[22] Ibid.

[23] Ibid.

[24] In 1968, the United Nations estimated that, at then current rates of increase, the world's population would exceed 6 billion by the year 2000 (*World Population Prospects as assessed in 1968* (United Nations publication, Sales No. 72.XIII.4)).

[25] "Hydro-geographic background to the utilization of international rivers in the Middle East", in American Society of International Law, *Proceedings of the 80th Annual Meeting*, Washington, D.C., 9-12 April 1986, pp. 250 *et seq.*

[26] "Stream flow begins with natural precipitation at the headwaters of one country. Water may be impounded for the generation of hydropower with some possible loss through evaporation off reservoir sur-

(*Continued on next page*)

strates how different components of a watercourse system interact with each other. Against this background, the following section will take a closer look at one of these components, groundwater, which it is believed merits the special attention of the Commission.

(iii) *Groundwater and its importance*

a. *The quantity of groundwater*

17. Perhaps the most astonishing feature of groundwater is its sheer quantity in relation to surface water. It has been estimated that 76 per cent of all fresh water on Earth is "locked" in polar ice-caps and glaciers. Of the world's fresh water 13 per cent is located between 800 and 4,000 metres below the Earth's surface, while 10 per cent is found within 800 metres of ground level. Lakes contain only 0.33 per cent, soil moisture 0.18 per cent, the atmosphere 0.036 per cent and rivers a comparatively minuscule 0.004 per cent of the world's fresh water.[27] Thus, groundwater constitutes approximately 97 per cent of the fresh water on Earth, excluding polar ice-caps and glaciers. The volume of groundwater alone lends weight to the argument for including it within the scope of the draft articles, for it is bound to be subject to increasing demands by watercourse States in the coming years and decades.

b. *The use of groundwater*

18. Even today, however, groundwater is relied upon heavily to satisfy basic human needs. According to a study recently prepared by the Secretariat at the request of the present writer—which he commends to the Commission's attention—a majority of the world's population is currently dependent upon groundwater.[28] In many countries, however, the percentage is even higher. Groundwater is, in fact, the only source of water in many arid and semi-arid regions, where it is vitally important to development and, indeed, to human life itself.[29] For example, "[s]urface waters are in short supply in most of Africa", and "today even most of Africa's principal cities are heavily dependent upon groundwater".[30] It has been concluded that the recent sharp increase in the use of groundwater in Africa "goes hand in hand with the continent's rapid entry into the modern world", and "is almost always one of the fundamental conditions for economic and social development, for it is an essential factor in the life or survival of many existing centres of population and a fundamental condition for the establishment of new centres".[31] The great aquifers of north-eastern Africa provide a concrete illustration:

> Groundwater is regarded as the only hope for development in many desert regions, such as Libya and the northern Sudan. The underground flow from the Sudan's Nubian sandstone formations into Egypt has been estimated at over seven million cubic metres annually; it is of good quality and was not taken into account in the Egypt-Sudan 1959 treaty on the division of Nile waters.[32]

19. In the Eastern Mediterranean and Western Asia there has also been "a rapidly increasing demand for water, especially groundwater, which is the only source of water supply in most of the region".[33] In the Indus basin, running from India into Pakistan, the interaction between surface water and groundwater gives rise to problems of a different sort:

> The Indus valley is one of the world's largest irrigated regions. The principal canals traverse recharge areas and so plentifully supply the underground waters that the high water table has caused salinization of the soil, a serious problem calling for special withdrawals from the better quality reaches of the aquifer to lower the water table, and the application of these waters to surface use according to a carefully designed scheme.[34]

20. Groundwater is relied upon heavily in the Americas as well. In Mexico, "where desert and arid and semi-arid conditions prevail over two thirds of the territory,

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(Footnote 26 continued.)

faces. This is particularly true in mountain catchment areas, where there are good dam sites for hydropower purposes. Water then continues downstream to the next reservoir, which is used to generate electricity and also serves to irrigate fields. Similar evaporation losses can occur from these reservoir surfaces. Losses also can occur from fields through evapotranspiration and through leakage from ditches, etc. Return flows may or may not be unacceptably polluted. Farther downstream pumpage from independent aquifers irrigates additional fields and provides some return flow which may increase downstream quantities but may also increase their salinity. Losses also occur through local evapotranspiration. Return seepage from fields may restore some depletion due to pumping but may also pollute spring waters. Excessive pumping may diminish spring flow across the international border. (Lag time because of storage capacity of the aquifer as well as difficulty of observation may make cause and effect difficult to establish in this case.) In the next downriver country similar occurrences are repeated, all of which can have implications for countries farther downstream. At all points along the river changes in the same amounts and quality of water may affect domestic and industrial use. These situations can and do occur in numerous permutations and combinations." (Loc. cit., pp. 257-258).

[27] *The New Encyclopaedia Britannica*, 15th ed. (Chicago, University of Chicago, 1987), vol. 20, p. 789.

[28] "The law of international ground water", United Nations, Office of Legal Affairs, Codification Division, December 1990 (mim.), p. 3 (hereinafter the "Secretariat study").

[29] Ibid., p. 4. See also E. Fano and M. Brewster, "Issues in ground water economics", in United Nations, Department of Technical Cooperation for Development, *Ground Water Economics*, Report of a United Nations International Symposium and Workshop Convened in Cooperation with the Government of Spain, Barcelona (Spain), 19-23 October 1987, document TCD/SEM.88/2, p. 31 (hereinafter "*Ground Water Economics*"). See also the discussion of "the increasingly critical nature of the pressures on groundwater", in R. D. Hayton and A. E. Utton, "Transboundary groundwaters: The Bellagio Draft Treaty", *Natural Resources Journal* (Albuquerque (N.M.)), vol. 29, No. 3 (1989), p. 663, particularly pp. 673 *et seq.*; and the similar discussion in ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987), pp. 231 *et seq.* (hereinafter the "ILA, Seoul report"), particularly pp. 238-241.

[30] ILA, Seoul report (see footnote 29 above), p. 239. The report continues: "Many of these urban areas are on or near the coast; overpumping has already led to saltwater intrusion where the aquifers are linked to the adjacent seas."

[31] *Ground Water in North and West Africa*, Natural Resources/Water Series No. 18 (United Nations publication, Sales No. 87.II.A.8), p. 17.

[32] ILA, Seoul report (see footnote 29 above), pp. 238-239. See generally R. B. Salama, "Ground water resources of Sudan" (United Nations Water Conference, document E/CONF.70/TP27), and *Ground Water in North and West Africa* (footnote 31 above).

[33] *Ground Water in the Eastern Mediterranean and Western Asia*, Natural Resources/Water Series No. 9 (United Nations publication, Sales No. 82.II.A.8), p. 4. This rapid increase "has been brought about due to industrial development and urbanization, especially following the discovery of huge reserves of oil..." Secretariat study (see footnote 28 above), p. 6.

[34] ILA, Seoul report (see footnote 29 above), p. 238.

groundwater is a priceless resource . . .''[35] In the United States, subterranean sources supply half of all drinking water, and even in Canada, "a predominantly humid country where surface water is extremely abundant, groundwater accounts for more than 10 per cent in urban, rural and individual water supply, and it is also increasingly utilized for irrigation and industrial use.''[36] The same is true in other humid (that is to say, non-arid) parts of the world, where groundwater has come into increasing demand as supplies of surface water have been depleted or contaminated.[37]

21. Groundwater accounts for 70 per cent of all drinking water in European Community countries.[38] The percentage is significantly higher in Germany and the Benelux countries, reaches 93 per cent in Italy,[39] and has been reported to be as high as 98 per cent in Denmark.[40]

c. *Characteristics of groundwater*

22. While the general characteristics of groundwater have already been noted,[41] two of them deserve particular emphasis. The first is that while its flow is slow in comparison with that of surface water, groundwater "is constantly in motion . . . It may move only a few thousandths of a centimetre per day in soil and some fine-grained pervious rocks, to as much as several thousands of metres in fissured geologic formation.''[42] While it may not move quickly, however, "[m]ost of the rainfall which percolates through the soil layer to the underlying groundwater will eventually reach the main stream channels . . .'' [43,44]

23. A second characteristic of groundwater that bears emphasis is that while it may, in exceptional cases, exist in areas where there is virtually no surface water,[45] it is normally closely associated with rivers and lakes. This interrelationship, which was touched upon in connection with the discussion of the hydrologic cycle (para. 11 above), has often been ignored by planners, legislators and lawyers:

> We have been discussing groundwater more or less as if it were separate and distinct from the rest of the hydrologic cycle. Such segregation has been common among hydrologists as well as the general public, and is reflected in legislation, in the division of responsibility among government agencies, in development and regulation . . . Any water pumped from wells under equilibrium conditions is necessarily diverted into the aquifer from somewhere else, perhaps from other aquifers, perhaps from streams or lakes, perhaps from wetlands—ideally, but not necessarily, from places where it was of no use to anyone. There are enough examples of streamflow depletion by groundwater development, and of groundwater pollution from wastes released into surface waters, to attest to the close though variable relation between surface water and groundwater.[46]

24. These two features of groundwater—its mobile nature and its interrelationship with surface water—indicate that actions of one watercourse State with respect to its groundwater (such as pumping) may affect groundwater or surface water in another watercourse State. The reverse is also true. For example, pollution of surface water in State A may contaminate groundwater in State B.[47] One expert has identified four different situations in which groundwater in one State may be related to ground or surface water in another State:

> (i) . . . where a confined aquifer is intersected by an international boundary . . .;
>
> (ii) where an aquifer lies entirely within the territory of one State but is hydraulically linked with an international river. Here it is necessary to distinguish between the situations where the river is influent and where it is effluent. Thus,
>
> — if one is dealing with an influent river and the aquifer lies in the downstream State, the use of the river water by an upstream State may affect the recharge regime; and
>
> — if the river is effluent, excessive withdrawals from the aquifer feeding it may reduce the volume of flow in the latter.
>
> . . .
>
> (iii) where the aquifer is situated entirely within the territory of a single State and is linked hydraulically with another aquifer in a neighboring State, the connection may arise through the presence of a semi-permeable layer of, for example, clayey loam.
>
> . . .
>
> (iv) where an aquifer is situated entirely within the territory of a given State but has its recharge zone in another State.[48]

25. Because surface water and groundwater cannot be separated factually, these components of watercourse systems should not, in the view of water resource specialists, be treated separately for legal and planning purposes. This latter point is the subject of the following section.

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[35] *Ground Water in the Western Hemisphere*, Natural Resources/Water Series No. 4 (United Nations publication, Sales No. 76.II.A.5), p. 2.

[36] Ibid.

[37] *Ground Water Economics*, op. cit., p. 31.

[38] Secretariat study (see footnote 28 above), p. 3, citing L. A. Teclaff and E. Teclaff, "Transboundary ground water pollution: survey and trends in treaty law'', *Natural Resources Journal* (Albuquerque (N.M.)), vol. 19 (1979), p. 629.

[39] Secretariat study (see footnote 28 above), p. 3.

[40] Ibid., p. 4. The study quotes OECD, *Water Resource Management, Integrated Policies* (Paris, 1989), p. 117.

[41] See footnote 20 above.

[42] *The New Encyclopaedia Britannica*, op. cit., p. 781.

[43] R. Ward, *Principles of Hydrology*, 2nd ed. (London, McGraw-Hill, 1975), p. 241.

[44] The movement of groundwater is illustrated in the diagrams contained in the annex to this report (figs. 3-5).

[45] Groundwater may be "free'' or "confined''. In the case of free groundwater, the upper boundary of the saturation zone is the water-table; in the case of confined groundwater, on the other hand, the upper boundary is formed by a dense stratum of rock (*The New Encyclopaedia Britannica*, op. cit., p. 780). "[Confined] aquifers, like the one stretching across the Sahara desert from Libya to the Atlas mountains, can be very large. Confined aquifers are rare, however . . .'' (*Yearbook . . . 1979*, vol. II (Part One), p. 148, document A/CN.4/320, para. 19).

[46] H. E. Thomas and L. B. Leopold, "Ground water in North America'', *Science* (Washington, D.C.), vol. 143, No. 3610 (1964), pp. 1001 *et seq.* See also article 2 (Hydraulic interdependence) of the Rules on International Groundwaters (hereinafter the "Seoul Rules''), and accompanying commentary (ILA, Seoul report (footnote 29 above), pp. 259-267). The Seoul Rules are discussed later in this report (paras. 46-47).

[47] This interrelationship is expressly recognized in article 2 of the Seoul Rules (see footnote 46 above), which is reproduced in footnote 89 below.

[48] J. A. Barberis, *International Groundwater Resources Law*, FAO, Legislative Study No. 40 (1986), p. 36.

d. *The importance of including groundwater in water resources planning and management*[49]

26. The need to take into account groundwater resources, and their interaction with surface waters, in efforts to achieve optimum utilization at the drainage basin level has been recognized at a number of meetings held under United Nations auspices. One of the conclusions reached by the group of government officials and international experts at the Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, held at Addis Ababa in 1988, was the following:

It is recommended that:

. . .

2. Governments recognize that the system approach to the management of a basin's water resources is the necessary point of departure for regulating and managing the resources, given the interdependence and diversity of the components of the hydrologic cycle—surface water, underground water, the water-atmosphere interface and the fresh water-marine interface . . .[50]

27. The same basic point was emphasized at the Interregional Meeting of International River Organizations held in Dakar in 1981. At that meeting,

The failure, with notable and noted exceptions, to recognize the interrelationships between surface waters and groundwaters—even where the system State agreements employ language that does not exclude groundwater—was cited. Official awareness of the interaction of the "underground environment" with the surface (and the atmosphere) is only recently becoming widespread. Conjunctive use and protection of the shared groundwater resources and the shared surface-water resources in the same system will become imperative in many basins, as it has become in many internal basins, if the needs of our populations are to be met.[51]

One of the conclusions reached at the Dakar meeting was therefore that "those cooperating States that have not yet included groundwater as a part of the shared water resources system need to recognize this part of the hydrologic cycle as intimately linked to the quantity and quality of their shared surface waters . . ." One of the rapporteurs at that meeting pointed out that it may take contamination of water in one hydrographic component by that in another to make the interrelationship evident:

Given the continued spread of contamination, ultimately the existence and importance of groundwater resources shared between two or more States, and their interconnection often with surface streams and lakes, will not be deniable, nor will it be possible to exclude shared underground waters from efforts to achieve optimum utilization and the conservation and protection of fresh water resources, most of which in fact lie below the surface.[52]

28. The need to include groundwater in water resources planning and management is well summed up in the report of the Seminar on the Role of Groundwater in Optimal Utilization of Hydraulic Resources:

Surface and groundwater sources cannot be considered as separate entities if proper management of the total water supply is to be achieved. Maximum efficiency and productivity with minimum deleterious effects, caused by man, can be achieved by intelligent management and assessment of water resources on a basin-wide basis.[53]

29. Various international organizations have recognized the importance of including groundwater in water resources planning and management efforts. ECE has adopted a number of declarations and decisions embodying this principle. The 1980 Declaration of Policy on Prevention and Control of Water Pollution, including Transboundary Pollution, states, in principle 1, that:

The rational utilization of water resources, both surface and underground, as a basic element in the framework of long-term water management, should be viewed as an effective support to the policy of prevention and control of water pollution . . .[54]

In 1982, ECE adopted a Decision on International Cooperation on Shared Water Resources. In the first preambular paragraph of the decision, ECE recognized "the growing significance of economic, environmental and physical interrelationships between ECE countries, in particular where streams or lakes and related groundwater aquifers cross or are located on international boundaries".[55] In its Declaration of Policy on the Rational Use of Water, ECE adopted in 1984 a set of Principles of Rational Use of Water.[56] One of those principles states, *inter alia*, that "special emphasis should be given to: . . . (*e*) Coordinated utilization of both surface water and groundwater, taking into account their close interrelation".[57] Finally, in its recently adopted Charter on Groundwater Management, ECE calls for integrated water management, including both surface water and groundwater, "while taking into account the distinguishing features of groundwater as compared to surface water which necessitate special protective measures for aquifers".[58]

30. In its 1978 Recommendation on Water Management Policies and Instruments, the OECD Council stated that one of the main objectives of water management is "to safeguard and improve the hydrological cycle in general . . ."[59] In that document, the Council recommended that member countries take into account a number of principles "in their national and, where possible, in their international water management policies". The first such principle is that:

1. Water resources, both surface (lakes, rivers, estuaries and coastal waters) and underground, should be managed on the basis of

[49] See generally the section on integrated water resources management in the Secretariat study (footnote 28 above), pp. 16 *et seq.*

[50] *River and Lake Basin Development*, Proceedings of the United Nations Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, Addis Ababa, 10-15 October 1988, Natural Resources/Water Series No. 20 (United Nations publication, Sales No. E.90.II.A.10), p. 18.

[51] *Experiences in the Development and Management of International River and Lake Basins*, Proceedings of the United Nations Interregional Meeting of International River Organizations, Dakar, 5-14 May 1981, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. 82.II.A.17), p. 11, para. 32.

[52] Ibid., pp. 72-73.

[53] *Ground Water Seminar in Granada*, Report of the FAO/UNDP/Government of Spain Seminar on the Role of Groundwater in Optimal Utilization of Hydraulic Resources, Granada (Spain), 1971, p. 16.

[54] ECE Declaration of Policy on Prevention and Control of Water Pollution, including Transboundary Pollution, adopted by ECE at its thirty-fifth session (1980) in decision B (XXXV), reproduced in ECE, *Two Decades of Cooperation on Water*, document ECE/ENVWA/2 (1988), p. 3.

[55] Ibid., decision D (XXXVII), p. 8.

[56] Ibid., decision C (XXXIX), p. 12.

[57] Ibid., principle 3, p. 15.

[58] United Nations publication, Sales No. E.89.II.E.21, p. 2.

[59] Recommendation adopted on 5 April 1978, C(78)4(Final), reproduced in OECD, *OECD and the Environment* (Paris, 1986), p. 46.

long-term water management plans so as to follow an integrated approach regarding all relevant aspects of water quantity and quality, abstraction and discharge, supply and protection.[60]

A set of explanatory notes is appended to the recommendation, the first of which reads in part as follows:

1. Underground and surface waters constitute a closely interrelated hydrologic system which should be managed as a single entity in order to prevent uncontrolled pollution and depletion of these resources. In particular, all quantitative and qualitative aspects, and the activities of abstraction and discharge, are so interdependent that they should be managed in an integrated manner and should not be dissociated; thus they should whenever possible be under the same authority and fully coordinated.[61]

31. Finally, ILA included in its 1986 Seoul Rules[62] an article (art. 4) which encourages States to manage ground and surface water in an integrated manner.[63] This provision follows logically from the comprehensive approach taken by ILA in its Helsinki Rules on the Uses of the Waters of International Rivers,[64] adopted in 1966. The commentary to those Rules contains the following passages which explain why it is necessary for the legal regime of international watercourses to cover the entire system of waters:

[C]oncern is no longer limited to the navigable portion of the international river, but rather encompasses all waters included in the entire system . . .

The drainage basin is an indivisible hydrologic unit which requires comprehensive consideration in order to effect maximum utilization and development of any portion of its waters.[65]

32. Perhaps with the assistance of meetings and drafts such as those mentioned above, States are increasingly including groundwater within the scope of their agreements concerning international watercourses. Examples of these agreements will be noted in section *e.* below.

e. *Groundwater in State practice*

33. The present section will first review illustrations of international agreements relating to groundwater. It will then discuss briefly a case involving groundwater decided according to principles of international law.

i. International agreements[66]

34. Perhaps because the characteristics and extent of groundwater have until recently been little understood, this integral part of watercourse systems has often been ignored in State treaty practice concerning international freshwater resources. Nevertheless, a number of international agreements do address groundwater, or at least include it within their scope. One study contains a compilation of treaties concerning international groundwater[67] which are arranged in the following categories: international agreements concerning the use of wells and springs in frontier areas; frontier waters agreements indirectly protecting ground waters; comprehensive agreements specifically including ground waters within their scope (5 agreements); and agreements recognizing the effects of surface water development on ground waters, and of ground water development upon surface waters (10 agreements). It may be surprising that some of these treaties date back to the early part of the present century.

35. Yugoslavia is party to several agreements (with Albania, Bulgaria, and Hungary, respectively) which apply to "all water economy questions, measures and works on watercourses which form the State frontier and watercourses and water systems intersected by the State frontier, and in particular to "Questions of groundwater".[68] The Yugoslav agreements with Albania and Hungary define the expression "water system" to mean "all watercourses (surface or underground, natural or artificial), installations, measures and works which may affect watercourses from the standpoint of water economy, and installations forming or intersected by the State frontier" (art. 1, para. (3)). Similarly, the 1964 Treaty between Poland and the Soviet Union defines "frontier waters" to include "groundwaters intersected by the State frontier" (art. 2, para. 3) and provides that the parties will cooperate with regard to "The protection of surface and ground waters against depletion and pollution" (art. 3, para. 7).[69]

36. The 1968 African Convention on the Conservation of Nature and Natural Resources recognizes the importance of common groundwater resources in article V, paragraph 2:

Where surface or underground water resources are shared by two or more of the Contracting States, the latter shall act in consultation, and if the need arises, set up inter-State Commissions to study and resolve problems arising from the joint use of these resources, and for the joint development and conservation thereof.

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[60] Ibid., p. 47.

[61] Ibid., p. 48.

[62] See paras. 46-47 below.

[63] Article 4 reads as follows:

"Article 4. Groundwater management and surface waters

"Basin States should consider the integrated management, including conjunctive use with surface waters, of their international groundwaters at the request of any one of them." (ILA, Seoul report (see footnote 29 above), p. 272.

[64] ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.* (hereinafter the "Helsinki Rules").

[65] Ibid., article II, comment (*a*), p. 485.

[66] See generally the compilation of treaties relating to groundwater in L. A. Teclaff and A. E. Utton, *International Groundwater Law* (New York, Oceana Publications, 1981), p. 189; the analytical survey of treaty provisions concerning groundwater in J. Barberis, op. cit., pp. 20 *et seq.*; and the section on State practice concerning transboundary groundwater in the Secretariat study (footnote 28 above), pp. 13-16.

[67] *International Groundwater Law*, op. cit., pp. 193 *et seq.*

[68] The quotation is from the agreement between Hungary and Yugoslavia of 8 August 1955 (art. 1, para. (2) (*g*)); the other agreements mentioned contain similar language. For example, the agreement between Bulgaria and Yugoslavia of 4 April 1958 refers to "The study and utilization of groundwater . . ." (art. 1, para. (2) (*f*)).

[69] See also the 1972 Convention between Italy and Switzerland concerning the protection of frontier waters against pollution, which provides for the establishment of a joint commission to investigate the pollution of surface and groundwaters; and the Agreement concerning frontier rivers of 16 September 1971 between Finland and Sweden, the provisions of which apply, *inter alia*, to "measures taken in any waters which may affect groundwater conditions" (chap. 3, art. 1). The latter treaty (but not the provision in question) is summarized in *Yearbook . . . 1974*, vol. II (Part Two), p. 319, document A/CN.4/274, paras. 307-321.

37. Aquifers are an important water source in the arid region along the border between Mexico and the United States of America.[70] In an effort to control the adverse effect which pumping near the border by one country has on the other, a 1973 agreement between Mexico and the United States limits groundwater pumping to 160,000 acre-feet (197,558 cubic metres) annually within five miles (eight kilometres) on either side of the Arizona-Sonora boundary.[71] The agreement further requires the two countries to consult each other "prior to the undertaking of any new development of either the surface or the ground water resources . . . in its own territory in the border area that might adversely affect the other country".[72]

38. The case reviewed in the following part of this section involves allegations of just such actions having trans-border effects, and illustrates the complex interplay between surface water and groundwater.

ii. The *Donauversinkung* case

39. In 1927 the German Staatsgerichtshof ruled on a case in which the German States of Württemberg and Prussia sued the State of Baden, seeking relief from the phenomenon of the "sinking of the Danube", or *Donauversinkung*.[73] In deciding the case, the Staatsgerichtshof applied rules of international law, it having found that it was impossible to apply the municipal law of one of the federal states, and that there were no applicable provisions of the German Constitution.[74] The facts of the case were as follows: after emerging from the Black Forest, the Danube in its upper reaches passes the Swabian Jura mountains between Baden and Württemberg, the latter State lying downstream of the former. While in the State of Baden, the Danube

> . . . loses during certain periods of the year a considerable part of its water in consequence of the water sinking under the bed of the river and flowing to the lower levels of the Lake of Constance and of the Rhine. The reason for this loss of water . . . is the geological composition of the banks and of the bed of the river. They are composed of chalk through the cracks and pores of which the water of the Danube in this section flows south in subterranean passages in order to emerge eventually as the source of the river Aach in Baden.[75]

In hydrologic terms, the flow from the Danube into the aquifer would be described as "influent" flow, or seepage, and that from the aquifer into the Aach as "effluent" flow.[76] As the above passage makes clear, the infiltration of the Danube waters occurred in Baden, and the waters reappeared in the same state but flowed into a different drainage basin, that of the River Rhine; they did not return to the Danube basin. The court described the source of the River Aach, formed by Danube waters, as "one of the most powerful in Germany. As [a] result, the River Aach, in . . . its short course through Baden terminating in the Lake of Constance, is very rich in water which is extensively utilized for industrial purposes".[77] In Württemberg, on the other hand, "in a portion of the river extending from 10 to 12 kilometres, there occurs, for varying periods of time, a so-called total sinking of the Danube, that is, a complete drying up of the river. The number of days on which the river was thus dried up was 309 in 1921, 29 in 1922, 148 in 1923."[78]

40. Württemberg asked the court to grant an "injunction restraining Baden from constructing and maintaining certain [works] . . . as well as for an order instructing Baden to render possible, by removing the natural obstacles which accumulate in the bed and on the banks of the river . . ., an unimpeded flow of water". For its part, Baden requested an injunction restraining Württemberg from constructing and maintaining certain works that were allegedly intended to prevent the natural flow of the Danube waters to the Aach. Prussia, which was then downstream of Württemberg and was also injured by the loss of water from the Danube, intervened in the suit on the side of Württemberg.

41. The court held that "Baden must refrain from causing such increase in the natural sinking of the waters of the Danube as is due (*a*) to the artificially erected . . . works . . . and (*b*) to the accumulation of sand and gravel in the bed of the Danube . . ., but that it is not bound to undertake the responsibility for the permanent improvement of the bed of the river;"[79] and that Württemberg was required to refrain from causing such decrease in the natural sinking of Danube waters as was due to certain works and artificial damming of avenues of sinking.

42. In its decision, the court made several interesting statements concerning relevant legal principles and the manner in which they applied to the case before it:

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[70] For a survey of the literature concerning groundwater between Mexico and the United States of America, see J. Barberis, op. cit., p. 60, footnote 74, referring to 15 studies.

[71] Exchange of notes between the United States and Mexico of 30 August 1973 confirming minute No. 242 of the International Boundary and Water Commission, setting forth a permanent and definitive solution to the international problem of the salinity of the Colorado River, Mexico City and Tlatelolco, United Nations, *Treaty Series*, vol. 915, p. 203; *United States Treaties and Other International Agreements*, vol. 24, part two (1973) (Washington D.C., United States Government Printing Office, 1974), p. 1968.

[72] A. W. Rovine, *Digest of United States Practice in International Law 1973* (United States Department of State, Washington D.C., 1974), p. 426.

[73] *Streitsache des Landes Württemberg und des Landes Preussen gegen das Land Baden, betreffend die Donauversinkung*, German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen (Berlin)*, vol. 116, appendix, pp. 18 *et seq.* The report of the case upon which the following discussion is based is found in *Annual Digest of Public International Law Cases, 1927 and 1928*, A. McNair and H. Lauterpacht, eds. (London, Longmans, 1931), p. 128. The case is discussed in Lederle, "Die Donauversinkung", *Annalen des Deutschen Reichs, 1917* (Munich, 1917), p. 693. See also the discussion of this case in J. Barberis, op. cit., pp. 40-41.

[74] The court found that "[t]he members of the [German] Federation have, subject to considerable limitations, preserved their position as independent States . . . [I]n matters subject to State legislation they may, subject to the confirmation of the *Reich*, conclude treaties with foreign Powers. In so far, therefore, as these States act as independent communities, i.e., in matters reserved for their exclusive competence, their relations are governed by international law . . ." (*Annual Digest* . . . (see footnote 73 above), p. 130). Today the two States of Baden and Württemberg are combined, forming the *Land* of Baden-Württemberg.

[75] Ibid., p. 128.

[76] R. Ward, op. cit., p. 194.

[77] *Annual Digest* . . . (see footnote 73 above), pp. 128-129.

[78] Ibid., p. 129.

[79] Ibid.

C. *The rule of international law as to the utilization of the flow of international rivers. The duty to abstain from injurious interference.* . . . The exercise of sovereign rights by every State in regard to international rivers traversing its territory is limited by the duty not to injure the interests of other members of the international community . . . No State may substantially impair the natural use of the flow of such a river by its neighbour. This principle has gained increased recognition in international relations . . . The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another . . .

D. *The duty to perform positive acts.* The above principle merely prohibits artificial alterations in the flow of the river. It follows that every State must submit to the natural flow of the water in spite of its consequences. Barring an express contractual undertaking, no State is under a duty to interfere, in favour of another State, with the natural flow of the water . . . The sinking of the Danube is a natural, though rare, phenomenon, and Württemberg and Prussia must submit to it. They cannot demand from Baden that it should close the cracks which suck away the water of the Danube. Neither is Baden bound to counteract such diminution in the waters of the Danube as is due to the natural enlargement of and accretion to the banks. It is only within certain closely defined limits that Baden is bound to act in a positive manner.

The principle that a State is under no duty to regulate, in the interest of another State, the natural phenomena affecting an international river, is subject to one limitation grounded in the modern practice of States in regard to rivers. Rivers, including those which are non-navigable, are today no longer merely the product of natural forces. Their banks are inhabited, and it is in the interest of the inhabitants, both in the upper and lower parts of the rivers, that the banks be strengthened and that the flow of the water be subject to regulation, not only on account of possible inundation, but as a matter of normal policy. Thus, while a State is under a duty to abstain from altering the flow of the river to the detriment of its neighbours, it must not fail to do what civilized States nowadays do in regard to their rivers. If a Government fails to undertake, or even prohibits, measures which it must be expected to undertake in accordance with generally recognized rules of law and economic policy—with the intention or with the result that the interests of persons outside its territory are thereby injuriously affected—then such an attitude cannot be regarded as being in accordance with the nature of a community of nations. This ceases to be a mere passive attitude, and becomes an unlawful furthering, through acts of omission, of certain natural events. This duty to perform positive acts has been clearly recognized in regard to the requirements of navigation on international rivers. There is no reason why it should not apply to questions relating to the utilization of the flow of rivers for industrial purposes.[80]

It will be noted that the legal principles applied by the court are generally consonant with those contained in the draft articles adopted so far—especially those on equitable utilization and the obligation not to cause appreciable harm. The court's discussion of the duty to regulate natural phenomena through the performance of positive acts goes somewhat beyond the article proposed on the regulation of international watercourses (art. 27); the analysis is instructive, however, as it illustrates the manner in which regulatory measures can benefit watercourse States.

43. The agreements referred to in the first part of this section do not all evidence an appreciation of the close interrelationship between surface waters and groundwaters of the kind involved in the *Donauversinkung* case; but they do demonstrate that States have for some time been aware of the importance of protecting groundwater resources. Recent efforts by groups of experts to enhance such protection are dealt with in the next section of the report.

[80] Ibid., pp. 131-132.

f. *Drafts relating specifically to transboundary groundwater*

44. A number of aquifers relied upon by human populations are intersected by international boundaries. Some of the most important are situated in North Africa, where they may underlie as many as four or more States.[81] This fact, together with the interrelationship between surface waters and groundwaters discussed above, has led various organizations and groups of experts to prepare draft rules or agreements concerning international, or transboundary groundwaters. In the words of R. D. Hayton, Rapporteur for the efforts of ILA in this field,

> The growing groundwater crisis, the legal implications of surface-underground interactions, and the characteristics of aquifers and their waters have moved States generally to prescribe uncommon measures internally and, now, to call for analogous treatment for those transboundary aquifers already under stress.[82]

45. Indeed, the Helsinki Rules defined the term "international drainage basin" as being "determined by the watershed limits of the system of waters, including surface and *underground waters**, flowing into a common terminus."[83] Thus, groundwater was expressly included within the scope of that important set of draft rules concerning international watercourses.

i. Seoul Rules

46. The Seoul Rules adopted by ILA in 1986,[84] consist of four articles. These articles deal specifically with aquifers that are intersected by international boundaries (art. 1),[85] since, under article II of the Helsinki Rules,

[81] Examples are the Nubian sandstone aquifer beneath portions of Chad, Egypt, Libya and the Sudan; the aquifer in the northern Sahara basin shared by Algeria, Tunisia and Libya; the Chad aquifer underlying parts of Chad, Niger, the Sudan, the Central African Republic, Nigeria and Cameroon; and the Maestrichian basin shared by Senegal, Gambia, Guinea-Bissau and Mauritania. See the Secretariat study (footnote 28 above), p. 10, citing Caponera and Alheritiere, "Principles for international groundwater law", *Natural Resources Journal* (Albuquerque, N.M.), vol. 18 (1978), pp. 590 *et seq.*; A. E. Utton, "The development of international ground water law", ibid., vol. 22 (1982), pp. 100 *et seq.*; and United Nations, Department of Technical Cooperation for Development, *Transnational Project on the Major Regional Aquifer in North-East Africa, Egypt and the Sudan, Project findings and recommendations*, document DP/UN/RAB-82-013/1, p. 7.

[82] ILA, Seoul report (see footnote 29 above), p. 244. Hayton has explained to the present writer that the word "uncommon" as used here refers to the fact that it is still relatively unusual for States to recognize the interdependence of surface waters and groundwaters and the special characteristics of groundwater and aquifers.

[83] Article II, p. 484 (see footnote 64 above).

[84] ILA, Seoul Report (see footnote 29 above), pp. 251 *et seq.*

[85] Article 1 provides as follows:

> "*Article 1. The waters of international aquifers**
>
> "The waters of an aquifer that is intersected by the boundary between two or more States are international groundwaters and such an aquifer with its waters forms an international basin or part thereof. Those States are basin States within the meaning of the Helsinki Rules whether or not the aquifer and its waters form with surface waters part of a hydraulic system flowing into a common terminus."

"* The term 'aquifer' as here employed comprehends all underground water bearing strata capable of yielding water on a practicable basis, whether these are in other instruments or contexts called by another name such as 'groundwater reservoir', 'groundwater catchment area', etc., including the waters in fissured or fractured rock formations and the structures containing deep, so-called 'fossil waters'." (Ibid., p. 251.)

these would not have been covered unless they constituted a part of a system of waters, "including surface . . . waters . . ."[86] The articles provide that the States within whose territories such groundwaters are located are "basin States" within the meaning of the Helsinki Rules (art. 1). In the light of its direct bearing upon the decision currently before the Commission, it perhaps bears emphasis that by including States that share an international aquifer within the term "basin States", this key provision makes the Helsinki Rules applicable to the use of international groundwaters; it thus represents the considered judgement of ILA and its committee of specialists on international water resources law that the rules governing surface waters are applicable not only to the entire *system* of waters, including groundwater—a fundamental principle underlying the Helsinki Rules[87]—but also to those groundwaters which do not "form with surface waters part of a hydraulic system flowing into a common terminus".[88] This would support the inclusion of groundwater in the Commission's draft articles, whether or not it was related to surface water.

47. Special concern with international groundwater is further demonstrated in the provisions of the Seoul Rules dealing with hydraulic interdependence (art. 2),[89] protection of groundwater (art. 3),[90] and groundwater management and surface waters (art. 4),[91] some of which have been referred to earlier in the present report.

[86] See footnote 83 above. Thus the Seoul Rules both apply the Helsinki Rules to aquifers that are not related to significant international surface waters and prescribe specific rules concerning international groundwater, whether or not related to surface water.

[87] See footnotes 64 and 83 above.

[88] See article 1 (footnote 85 above) and article 2, paragraph 2 (see footnote 89 below) of the Seoul Rules.

[89] Article 2 provides as follows:

"*Article 2. Hydraulic interdependence*

"1. An aquifer that contributes water to, or receives water from, surface waters of an international basin constitutes part of that international basin for the purposes of the Helsinki Rules.

"2. An aquifer intersected by the boundary between two or more States that does not contribute water to, or receive water from, surface waters of an international drainage basin constitutes an international drainage basin for the purpose of the Helsinki Rules." (ILA, Seoul Report (see footnote 29 above), p. 259.)

[90] Article 3 provides as follows:

"*Article 3. Protection of groundwater*

"1. Basin States shall prevent or abate the pollution of international groundwaters in accordance with international law applicable to existing, new, increased and highly dangerous pollution. Special consideration shall be given to the long-term effects of the pollution of groundwater.

"2. Basin States shall consult and exchange relevant available information and data at the request of any one of them:

"(*a*) for the purpose of preserving the groundwaters of the basin from degradation and protecting from impairment the geologic structure of the aquifers, including recharge areas;

"(*b*) for the purpose of considering joint or parallel quality standards and environmental protection measures applicable to international groundwaters and their aquifers.

"3. Basin States shall cooperate, at the request of any one of them, for the purpose of collecting and analysing additional needed information and data pertinent to the international groundwaters or their aquifers." (Ibid., p. 268)

[91] See footnote 63 above.

ii. Bellagio Draft

48. Another major effort to formulate legal rules concerning the use, protection and management of international groundwater resources is the Bellagio Draft Agreement concerning the Use of Transboundary Groundwaters.[92] Prepared by an independent group of international experts, it consists of a complete draft treaty containing 20 articles, together with supporting commentaries. Article II (General purposes), provides that "[t]he Parties recognize their common interest and responsibility in ensuring the reasonable and equitable development and management of groundwaters in the border region for the well-being of their Peoples" (para. 1).[93] The draft contemplates the establishment or utilization of a joint commission[94] for the implementation of the provisions of the articles (art. III). It further provides, *inter alia*, for the establishment and maintenance of a database (art. V), water quality protection (art. VI), the establishment of transboundary groundwater conservation areas (art. VII), the preparation of comprehensive management plans (art. VIII), measures to deal with public health emergencies (art. IX), planning for drought (art. XII), public participation (art. XIII), accommodation of differences (art. XV) and resolution of disputes (art. XVI).

49. The Bellagio Draft represents an important set of proposed rules and institutional mechanisms for the rational use, protection and management of international groundwater resources. It reflects the belief of a multidisciplinary group of water resource specialists[95] that international groundwater must be included within water resources planning and management efforts if it is to be utilized in an equitable and reasonable manner by the States concerned.

2. Use of the "system" or related concepts in international agreements

50. The concept of a "watercourse system" is not a new one. The expression has long been used in international agreements to refer to a river, its tributaries and related canals, and has even been used in some rather venerable treaties in the sense here proposed, namely as the entire set of terrestrial hydrologic components forming a unitary whole.

51. The Treaty of Versailles contains a number of references to "river systems". For example, in declaring various rivers to be "international", the Treaty refers to "all navigable parts of these river systems . . . together with lateral canals and channels constructed either to duplicate, or to improve naturally navigable sections of the specified river systems, or to connect two naturally navi-

[92] Hayton and Utton, loc. cit.

[93] Ibid., p. 682.

[94] Should a joint commission already exist, the draft contemplates that its "powers and functions may readily be expanded to deal with the added responsibilities of transnational groundwater". (Comment 1 to article III) (Ibid., pp. 684-685).

[95] Those participating in the preparation of the draft or earlier formulations are listed in Hayton and Utton, loc. cit., p. 666, footnote 2.

gable sections of the same river'' (art. 331).[96] While the article in question is concerned with navigational uses, there is no doubt that equitable utilization could be affected, or appreciable harm caused, through the same system of waters by virtue of their very interconnectedness.

52. Provisions similar to those of the Treaty of Versailles may be found in the 1921 Convention instituting the definitive Statute of the Danube. That agreement refers, in article 1, to the ''internationalized river system'', which article 2 defines to include ''[a]ny lateral canals or waterways which may be constructed . . .''

53. More recently, the 1950 Convention between the Union of Soviet Socialist Republics and Hungary refers in articles 1 and 2 to ''the water systems of the Tisza river basin''. It has already been seen that a series of Yugoslav treaties (see para. 35 above) concluded in the mid-1950s include within their scope, *inter alia*, ''watercourses and water systems'' and, in particular, ''groundwater''. The broad definition of the expression ''water system'' under two of those treaties, to include ''all watercourses (surface or underground, natural or artificial)'', has been noted above (ibid.).

54. The Indus Waters Treaty of 1960 also utilizes the system concept. In the preamble to that agreement, the parties declare that they are ''desirous of attaining the most complete and satisfactory utilisation of the waters of the Indus system of rivers . . .'' The treaty applies to named rivers, their tributaries and any connecting lakes (art. 1, para. 3), and defines the term ''tributary'' broadly as follows:

> The term ''Tributary'' of a river means any surface channel, whether in continuous or intermittent flow and by whatever name called, whose waters in the natural course would fall into that river, e.g., a tributary, a torrent, a natural drainage, an artificial drainage, a *nadi*, a *nallah*, a *nai*, a *khad*, a *cho*. The term also includes any subtributary or branch of a subsidiary channel, by whatever name called, whose waters, in the natural course, would directly or otherwise flow into that surface channel.'' (art. 1, para. 2).

55. Among more modern treaties, the Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, and the Action Plan annexed thereto, are noteworthy for their holistic approach to international water resources management. In article 1, paragraph 1, of the Agreement the parties declare that they adopt ''the Action Plan for the Environmentally Sound Management of the Common Zambezi River System''. The article further provides that ''[t]he region covered by the Zambezi Action Plan encompasses the territories within or related to the Zambezi river basin . . .'' (para. 2). The Action Plan itself (para. 15) states its objective as being to overcome certain enumerated problems and thus to promote the development and implementation of environmentally sound water resources management in the whole river system. It will contribute to the incorporation by the river basin States of environmental considerations in water resources management while increasing long-term sustainable development in the river basin. To this end, the Plan sets forth actions to be taken in the areas of environmental assessment, environmental management, environmental legislation and supporting measures.

56. This brief survey should not be concluded without mention of other agreements using an approach that is related to the ''system'' concept, namely, that of the drainage basin. Reference to these treaties does not overlook the rejection, early in the Commission's discussions on this topic, of the drainage basin as the basis for its work. That decision, however, was based on the view of certain Governments and Commission members that the drainage basin was an unsuitable basis because it implied that the draft articles would apply to land territory as well as to watercourses. The decision was taken notwithstanding the fact that, as the articles adopted so far demonstrate, it is almost impossible to exclude totally actions on land from the scope of the draft (except to the extent that they would have no effect, through an international watercourse, upon another watercourse State).[97]

57. Certain of the agreements referred to earlier in this section employ the concept of the river ''basin''.[98] Other prominent examples include the 1963 Act regarding Navigation and Economic Cooperation between the States of the Niger Basin,[99] the 1964 Convention and Statutes relating to the development of the Chad Basin, the 1977 Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin, the 1978 Convention relating to the Creation of the Gambia River Basin Development Organization, the 1969 Treaty of the River Plate Basin, and the 1961 Treaty relating to cooperative development of the water resources of the Columbia River basin.[100] In employing the concept of a river or drainage basin, these

[96] See also, for example, article 362, which refers to ''the Rhine river system''. Further, in the River Oder case (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929*), PCIJ held that the international regime of the River Oder extended, under the Treaty of Versailles, to ''... all navigable parts of these river systems ... together with lateral canals or channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems ...'' (*P.C.I.J., Series A, No. 23*). The case is discussed in *Yearbook ... 1986*, vol. II (Part One), p. 113, document A/CN.4/399 and Add.1-2, para. 102.

[97] It is clear, for example, that appreciable harm caused to watercourse State A by waste discharged into a watercourse from a plant located on the bank of the watercourse in State B would be covered by the draft articles. The draft articles (*in fine*, part III) would also apply to such a plant that was being planned in watercourse State A. It seems equally clear that the draft articles would apply, for example, to harm caused to State A by a plant located not on the bank of the international watercourse in State B, but at a distance therefrom, where the plant discharged toxic waste onto the land, and the waste made its way into the watercourse, ultimately harming State A.

[98] See the excerpts from the 1950 Convention between the Soviet Union and Hungary and the Zambezi River Agreement. See also, for example, the 1970 Agreement between Greece and Yugoslavia concerning the study of the overall improvement of the Axios/Vardar basin, summarized in *Yearbook ... 1974*, vol. II (Part Two), p. 319, document A/CN.4/274, para. 305; and the Agreement between the Federal Republic of Germany and the European Community, on the one hand, and the Republic of Austria on the other, on cooperation on management of water resources in the Danube Basin.

[99] See also the Convention creating the Niger Basin Authority.

[100] See also the 1944 exchange of notes relating to a study of the use of the waters of the Columbia River Basin, United Nations, *Treaty Series*, vol. 109, p. 191. It is interesting to note that at least one of the States through whose territory the watercourse in question flows has used the term ''system'' in referring to international watercourses. See ''Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay river system under customary international law and the Treaty of 1909'', Memorandum of the [United States] State Department, 85th Congress, Second Session, document No. 118 (Washington, D.C., 1958), p. 89.

agreements treat the water resources within a particular watershed as a unitary whole, for purposes of protection, planning, management and development. The same would be true of the international watercourse system approach.

58. These treaties demonstrate that States recognize in their practice the importance of dealing with international watercourse systems in their entirety. International organizations and independent experts have reached similar conclusions, as shown in the following section.

3. Use of the "system" or related concepts in other international instruments, drafts and studies[101]

59. As early as 1958, ILA adopted its New York resolution, which includes the following "principle of international law" that is of direct relevance to the question of the definition of "international watercourse":

> A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal).[102]

This approach was confirmed in the Helsinki Rules, which employ the expression "system of waters" in defining the term "international drainage basin".[103]

60. The Institute of International Law has also followed a holistic approach in its drafts concerning international watercourses. Article 1 of the 1961 Salzburg resolution on the use of international non-maritime waters provides:

Article 1

> The present rules and recommendations apply to the use of waters which are part of a river or of a watershed extending upon the territory of two or more States.[104]

The term "watershed" may be considered in hydrologic terms to be equivalent to "drainage basin" or "watercourse system". Perhaps influenced by the Helsinki Rules, the Institute's Athens resolution on the pollution of rivers and lakes and international law, adopted in 1979, provides that it applies "to international rivers and lakes and to their basins".[105]

61. Another early effort by a private group of legal experts that is worthy of note is a resolution adopted in 1957 by the Inter-American Bar Association at its Buenos Aires meeting. The resolution begins with the following paragraph, which defines its scope:

> [T]he following general principles, which form part of existing international law, are applicable to every watercourse or system of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more States; such a system will be referred to hereinafter as a "system of international waters".[106]

62. ECE has adopted a variety of declarations, decisions and recommendations concerning the use and protection of fresh water,[107] many of which expressly refer to the different components of a watercourse system or use the term "drainage basin". For example, the Declaration of policy on the rational use of water, adopted in 1984, states that:

> In formulating and adopting a future-oriented national water policy . . . special emphasis should be given to: . . . (*e*) Coordinated utilization of both surface water and groundwater, taking into account their close interrelation . . .[108]

In addition, the recommendations to ECE Governments on long-term planning of water management urge that the "river basin be considered as the general basis for the long-term planning of national water management . . ." They go on to recognize that "in the case of transboundary river basins the active cooperation of riparian countries is therefore necessary and useful . . ."[109] Finally, mention should be made of the work of ECE on the subject of the "ecosystems approach to water management".[110] This approach, which "has been discussed in scientific circles for well over a decade, . . . provides a holistic way of viewing planning, research and management of water resources, taking into account not only the sustainability of such resources but the environment as a whole".[111]

63. It has already been noted that a number of meetings held under United Nations auspices have recognized the need to take into account the interdependence of the various components of watercourse systems in efforts to achieve optimum utilization at the drainage basin level.[112] Certainly one of the most resounding endorsements of the system approach in recent years by such a meeting takes the form of one of the recommendations made by the group of government officials and international experts at the Interregional Meeting on River and Lake Basin Development held at Addis Ababa in 1988. According to that recommendation:

> Governments recognize that the system approach to the management of a basin's water resources is the necessary point of departure for regulating and managing the resources, given the interdependence and diversity of the components of the hydrologic cycle—[including] surface water, [and] underground water . . .[113]

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[101] See generally, McCaffrey, "International organizations and the holistic approach to water problems", in *The International Law of the Hydrologic Cycle* (*Natural Resources Journal* (Albuquerque, N.M.), vol. 31, No. 1 (1991)).

[102] ILA, *Report of the Forty-eighth Conference, New York, 1958* (London, 1959), annex II, p. 99, "Agreed principles on international law", principle 1.

[103] See the wording of article II of the Helsinki Rules (footnote 64 above).

[104] *Annuaire de l'Institut de droit international* (Basel), vol. 49, part II (1961), p. 87.

[105] *Yearbook of the Institute of International Law* (Basel), vol. 58, part II (1980), p. 197.

[106] Inter-American Bar Association, *Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957* (2 vols.) (Buenos Aires, 1958), reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 208, document A/5409, para. 1092.

[107] See generally ECE, *Two Decades of Cooperation on Water* (see footnote 54 above).

[108] Ibid., pp. 19-20.

[109] Ibid., p. 49.

[110] See, for example, the revised draft report prepared by government rapporteurs at an informal meeting held in Bergen (Norway), from 5-7 June 1989 and submitted to the ECE Working Party on Water Problems (document ENVWA/WP.3/R.7/Rev.1).

[111] Ibid., p. 1.

[112] See footnote 50 above.

[113] *River and Lake Basin Development* . . . op. cit., p. 16.

Another relevant recommendation, which complements the one just excerpted, states:

> Governments recognize that the drainage basin provides the most useful context within which to achieve cooperation and agreement between or among the basin States for integrated development, including the application of legal principles governing an international water resources system and the interrelationships between water, other natural resources and the peoples affected.[114]

64. These recommendations are only the latest in a series of pronouncements by groups and meetings under United Nations auspices. The interdisciplinary Panel of Experts appointed by the Secretary-General pursuant to resolution 1033 (XXXVII) of the Economic and Social Council dated 14 August 1964 recognized that circumstances may force States to limit the territorial extent of their watercourse agreements, but stated that "the 'system' approach, rather than a 'territorial' approach, is the superior concept when dealing with water resources . . ."[115] The experts go on to note that "for groundwater resources, it is widely understood that the hydrologic system of which the international aquifers are a part are to be taken into account".[116]

65. A broad definition of international watercourse is also to be found in the World Bank Operational Directive concerning projects on international waterways, according to which:

> . . . the Bank . . . attaches the utmost importance to riparians entering into appropriate agreements or arrangements for the efficient utilization of the entire waterway system or any part of it . . .
>
> . . .
>
> 2. This directive covers the following:
>
> (*a*) types of international waterways:
>
> (i) river, canal, lake or any similar body of water which forms a boundary between, or any river or body of surface water which flows through two or more States . . .;
>
> (ii) any tributary or any other body of surface water which is a part or a component of any waterway described in (i) above . . .[117]

The scope of the directive's applicability is important inasmuch as later paragraphs require that States proposing a project for Bank funding notify other riparian States of the proposal and follow a set of procedures very similar to those contained in part III of the Commission's draft articles.

66. Finally, the "system" or related concepts have long been employed in a variety of legal and technical works. Only a few representative examples will be noted here. An appropriate place to begin is the seminal work by H. A. Smith who, in stating a set of principles applicable to the uses of such rivers, wrote the following:

> The first principle is that every river system is naturally an indivisible physical unit, and that as such it should be so developed as to render the greatest possible service to the whole human community which it serves, whether or not that community is divided into two or more political jurisdictions. It is the positive duty of every Government concerned to cooperate to the extent of its power in promoting this development . . .[118]

67. The same conclusion was reached by another eminent international lawyer from the United Kingdom of Great Britain and Northern Ireland, and a former member of the Commission, James Brierly:

> The practice of States, as evidenced in the controversies which have arisen about this matter, seems now to admit that each State concerned has a right to have a river system considered as a whole, and to have its own interests weighed in the balance against those of other States; and that no one State may claim to use the waters in such a way to cause material injury to the interests of another, or to oppose their use by another State unless this causes material injury to itself.[119]

68. A holistic approach is also taken by Johan Lammers in his treatise on pollution of international watercourses in which he defines "inland surface waters of an international drainage basin" for the purpose of his study to mean:

> . . . the interconnected system of rivers, lakes, canals or marshes, etc., the waters of which tend to flow into a common terminus and which extends over two or more States. The geographical area which constitutes the drainage basin is not only determined by this interconnected system of inland surface waters but also by the diffused surface water and groundwater which flows into the common terminus. In general the drainage basin, also called the "catchment area" or "watershed", is the area from which all precipitation flows into a common terminus.[120]

69. It is perhaps appropriate to close this section by noting that the term "system" is routinely employed with reference to watercourses in scientific and technical works. W. C. Walton, for example, has written the following:

> All river systems appear to have basically the same type of organization. The river system is dynamic in that it has portions that move and can cause events and create changes. There is not only unity displayed by important similarities between rivers in different settings, but also an amazing organization of river systems.[121]

70. The foregoing survey indicates that the idea of a watercourse as a "system of waters" is by no means novel, either in scientific, technical and legal literature or in State practice. The system is composed of a number of interrelated components which function as a unitary whole. It would seem to follow logically from this scientific fact that legal rules governing the relations of States with regard to international watercourses should take this interrelationship into account, so that the operation of the rules—and thus the protection of fresh water as well as the rights of watercourse States—will not be frustrated. Such frustration would be bound to occur where the scope of the legal regime is not coextensive with the scope of the regime's subject matter. As Kolars' diagram clearly illustrates (see annex, fig. 2), there are many ways in which the non-navigational use of water in one

[114] Ibid.

[115] United Nations, Department of Economic and Social Affairs, *Management of International Water Resources: Institutional and Legal Aspects*, Report of a Panel of Experts, Natural Resources/Water Series No. 1 (United Nations publication, Sales No. 75.II.A.2), p. 48, para. 143.

[116] Ibid., para. 144.

[117] The World Bank Operational Manual, Operational Directive 7.50: Projects on international waterways, April 1990.

[118] *The Economic Uses of International Rivers* (London, King, 1931), pp. 150-151.

[119] *The Law of Nations*, 5th ed. (Oxford, Clarendon Press, 1955), p. 204.

[120] *Pollution of International Watercourses* (The Hague, Martinus Nijhoff, 1984).

[121] *The World of Water* (London, Weidenfeld and Nicolson, 1970), p. 212.

State can have impacts upon another State. The Commission's draft articles should take these ways into account.

71. The following section of the report will deal with a final aspect of the definition of an "international watercourse": "whether, for the purposes of the draft articles, that expression should have a "relative" character.

4. THE CONCEPT OF THE "RELATIVE INTERNATIONAL CHARACTER" OF A WATERCOURSE

72. The third paragraph of the provisional working hypothesis accepted by the Commission in 1980, and again in 1987, as the basis for its work[122] introduced the novel concept of the "relative international character" of a watercourse. This legal fiction did not result from a proposal by the then Special Rapporteur, nor does the Commission's report explain its genesis. The concept would appear to be without precedent in scientific and technical works, in State practice or in legal studies, reports or recommendations. It appears that it may have been intended to limit the scope of the draft articles by excluding "parts of the waters in one State [that] are not affected by or do not affect uses of waters in another State". Thus, for example, if a particular component or part of a watercourse in one State were not affected by uses of the international watercourse in another State, that component or part would not be considered for the purposes of the draft articles as being "included in the international watercourse system".

73. This idea has a superficial appeal. It purports to free sections or components of an international watercourse system from the legal constraints imposed by the draft articles and thus might appear to enhance the freedom of action of watercourse States. It suffers from two fundamental flaws, however, on grounds of which the Commission is urged to abandon the notion of the "relative international character" of a watercourse.

74. The first is that this fluvial theory of relativity comes very close to being incompatible with the hydrologic reality recognized in the first paragraph of the hypothesis—namely, that the hydrographic components of a watercourse system "constitut[e] by virtue of their physical relationship a unitary whole . . ." The suggestion that uses of a part of an international watercourse in State A may have no effect upon another part, situated in State B, does not take into account the interrelationships between different parts and components of a watercourse system discussed in the present report and, as such, may ultimately do more to produce than to avoid intractable disputes between watercourse States, one or more of which has embarked on a course of action in reliance on that suggestion. This effect of the notion of relativity has not escaped notice by members of the Commission. One member remarked in 1980 that "the approach "adopted by the majority would, in treating a watercourse as international for some uses but not for others, lead to uncertainty and difficulty of application".[123]

75. An apt illustration of the difficulty of knowing in advance whether "parts of the waters in one State [would be] affected by or . . . affect uses of waters in another State" is the Flathead River case, which was discussed in the sixth report.[124] It will be recalled that that case involved requests by the Canadian and United States Governments for the International Joint Commission established by the 1909 Boundary Waters Treaty between the two countries to examine and report on the transboundary water quality and quantity implications of a proposed coal mine on Cabin Creek, a tributary of the Flathead River. Specifically, plans called for the mine to be situated on Cabin and Howell Creeks, 10 kilometres (6 miles) upstream of the point at which the North Fork of the Flathead River crosses the international boundary.[125]

76. The Joint Commission found that the two streams which the proposed mine would straddle formed an important spawning and rearing ground for prime game fish in the Flathead River basin. It noted that definitive conclusions concerning effects of the mine upon fisheries in Canada and the United States would require, *inter alia*, more complete data as to the interaction between groundwaters and surface waters in the vicinity of the mine site:

> Understanding fully the degree of impact on fish populations is dependent on further data concerning the inflows and outflows of groundwater and associated chemical and physical pollutants between the stream bed and the mine site, and on measures taken to protect the stream habitat and/or mitigate for productive habitat loss.[126]

77. The Commission nevertheless determined, based on what it regarded as "overwhelming evidence", that a "significant loss of fish population will occur as a result of a combination of the adverse effects of one or more of the predicted changes . . ."[127] It therefore concluded that:

> . . . damage will inevitably occur to this [fish] habitat which would be located in the midst of a major mining development, and consequently to the fishery dependent on that habitat. Furthermore, such losses would be such as to cause a reduction in the quantity and quality of the sport fishing activity in the United States and create a negative impact on the associated economic infrastructure since the affected fish populations migrate for much of their adult lives to United States waters.
>
> . . .
>
> In this case . . . it is not the pollution which crosses the boundary, but rather that the pollution on one side will cause a loss to the fishery, a loss which is felt on the other side of the boundary . . . With respect to the present proposal, the pollution expected to cause these consequences to the fishery would thus clearly constitute a breach of article IV [of the Boundary Waters Treaty].[128]

The Commission noted that article IV of the Boundary Waters Treaty "does not require that the pollution itself cross the boundary, but rather that water which crosses

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[122] See para. 6 above.

[123] See *Yearbook . . . 1980*, vol. II (Part Two), p. 109, para. 94.

[124] See *Yearbook . . . 1990*, vol. II (Part One), p. 70, document A/CN.4/427 and Add.1, paras. 60-61. See also International Joint Commission, *Impacts of a Proposed Coal Mine in the Flathead River Basin*, December 1988 (hereinafter the "Flathead report").

[125] Flathead report, p. 19.

[126] Ibid., p. 7.

[127] Ibid., p. 8.

[128] Ibid., pp. 8-9.

the boundary shall not be polluted in one country to the injury of property on the other side".[129]

78. This case demonstrates that it will not always be clear in advance, even to experts, whether a particular project or use will have negative transboundary effects. Even the admittedly incomplete data on which the Joint Commission based its recommendation was the result of a technical assessment conducted by an interdisciplinary group of experts. Yet, the very uncertainty of transboundary impacts could have exempted the proposed mine completely from the draft articles according to the idea that watercourses may have a "relative international character". A "system" or other hydrology-based approach, on the other hand, would recognize that tributaries (such as Cabin Creek) of a border-crossing watercourse (such as the Flathead River), as well as groundwater that contributes to them, are part of the network of waters that function as a unit physically, and thus must be treated as a unit legally.

79. The second flaw inherent in the notion of relative internationality is potentially even more serious than the first because it could eviscerate entire sections of the draft articles. The hypothesis states in its third paragraph that:

> 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.

From part I of the draft articles, a State would not know whether it was a "watercourse State" within the meaning of article 3 unless it was established that parts of the waters in its territory were affected by or affected uses of the waters in another State. This would in turn throw into doubt the applicability of article 4, as well as the right of the State to participate in the negotiation of any watercourse or system agreement under article 5, paragraph 2, and to become a party to such an agreement.

80. The applicability of the key provisions of part II of the draft articles would likewise be uncertain, for the same reasons. This is true of the obligation of equitable and reasonable utilization and participation (art. 6), the obligation not to cause appreciable harm (art. 8), the general obligation to cooperate (art. 9) and the obligation to exchange data and information on a regular basis (art. 10). It is also true of the provisions of parts IV (Protection and preservation) and V (Harmful conditions and emergency situations).

81. But the incompatibility of the notion of relative internationality with the draft articles is perhaps nowhere more evident than with regard to part III (Planned measures). The whole idea of part III is to prevent harm before it happens and to nip potential problems in the bud, before they grow into serious disputes. The provisions of part III are triggered in the case of "*possible** effects of planned measures" (art. 11) or, more specifically, if "planned measures . . . *may have** an appreciable adverse effect upon other watercourse States . . ." (art. 12). Yet without an *actual** effect having occurred, the watercourse might not be "international" under the third paragraph of the hypothesis, in which case the entire set of draft articles, including part III, would not apply.

82. This is certainly not the effect the Commission intended, but it would seem to follow ineluctably from the terms of the hypothesis. It is understandable that this result may not have been foreseen when the hypothesis was drafted, since the Commission had not at that stage of its work considered the range of provisions that it now has before it in the form of articles already adopted provisionally or proposed.

83. Indeed, the concerns that may have prompted the addition of the idea of relative internationality would seem to have been addressed in the draft articles already adopted provisionally by the Commission. That is, none of the fundamental obligations under the draft articles (in particular those under arts. 6, 8, 23 and part III) would apply unless there was an actual or possible effect upon another watercourse State or the regime of the watercourse (the latter case refers to art. 6). Thus there is no danger of the draft articles applying to activities having no actual or potential effect upon other watercourse States.

84. It is therefore recommended that this portion of the "scaffold" for the Commission's work—the notion of relative internationality—should be allowed to fall away. It is recommended, however, that the remainder should be preserved and incorporated into the finished structure as set out in the draft article proposed in the concluding portion of the present report. Before turning to that proposal, a brief indication will be given of additional terms that could be included in the article on "use of terms".

B. Other terms that could be included in the article

85. The Commission will recall that the draft articles adopted so far, as well as two that have been proposed, contain definitions that could be included in an article on "use of terms". These definitions are listed here for ease of reference: "Watercourse States" (currently defined in art. 3); "pollution" (currently defined in art. 23); "emergency" (currently defined in art. 27); "regulation" (the subject of art. 25 as proposed in the fifth report of the Special Rapporteur);[130] and "management" (the subject of art. 26 as proposed in the sixth report).[131] The draft article proposed below contains only one of these definitions; it is included because of its close relationship with the definition of "international watercourse". The fact that other definitions are not included in the proposed article should not be taken as an indication that their inclusion is not recommended. On the contrary, it is believed that it would be useful eventually to consolidate all definitions in a single article entitled "use of terms". A proposal for at least a portion of that article follows.

[129] Ibid., p. 9.

[130] *Yearbook . . . 1989*, vol. II (Part One), p. 125, document A/CN.4/421 and Add.1-2, para. 140.

[131] *Yearbook . . . 1990*, vol. II (Part One), pp. 48-52, document A/CN.4/427 and Add.1.

C. The proposed article

Article [1] [2].[132] *Use of terms*

ALTERNATIVE A

For the purposes of the present articles:

(*a*) A watercourse system is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(*b*) An international watercourse system is a watercourse system, parts of which are situated in different States.[133]

(*c*) A [watercourse][134] **[system] State is a State in whose territory part of an international watercourse system is situated.**

ALTERNATIVE B

For the purposes of the present articles:

(*a*) A watercourse is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(*b*) An international watercourse is a watercourse, parts of which are situated in different States.[135]

(*c*) A [watercourse][136] **[system] State is a State in whose territory part of an international watercourse is situated.**

Comments

(1) Two alternatives are offered to define "international watercourse". Alternative A employs the term "international watercourse system" and alternative B uses "international watercourse". The writer is inclined to favour alternative A. Its virtue is that by making the operative term "watercourse system"—a term which would then be used throughout the draft articles—it keeps before the reader the fact that the waters of an international watercourse form a *system*. This will help to reinforce appreciation of the fact that all components of watercourses are interrelated; and thus, by implication, that it is important to take into account the impact of actions in one watercourse State upon the system-wide condition of the watercourse. The advantage of alternative B is that it begins with the term that is contained in the title of the topic—"watercourse"—and defines it as a "system of waters". Thus, it does not repeat the word "system", one of the words that is defined in alternative A.

(2) Finally, both alternatives include a paragraph (*c*), which contains a definition of "watercourse" or "system" State. The expression "watercourse State" is at present defined in article 3. Because this definition is closely related to the definition of "international watercourse" or "watercourse system", it is recommended that it should be moved to the article on use of terms, as proposed above.[137]

[132] Whether this article is numbered "1" or "2" depends upon the Commission's decision on the matter of structure addressed in chapter I of the present report.

[133] This wording follows that of the present article 3, which defines "watercourse States". It recommended that article 3 should be moved to the use of terms article, placing it in paragraph (*c*), as indicated above.

[134] Article 3, as it presently stands, uses the expression "watercourse State".

[135] See footnote 133 above.

[136] See footnote 134 above.

[137] Ibid.

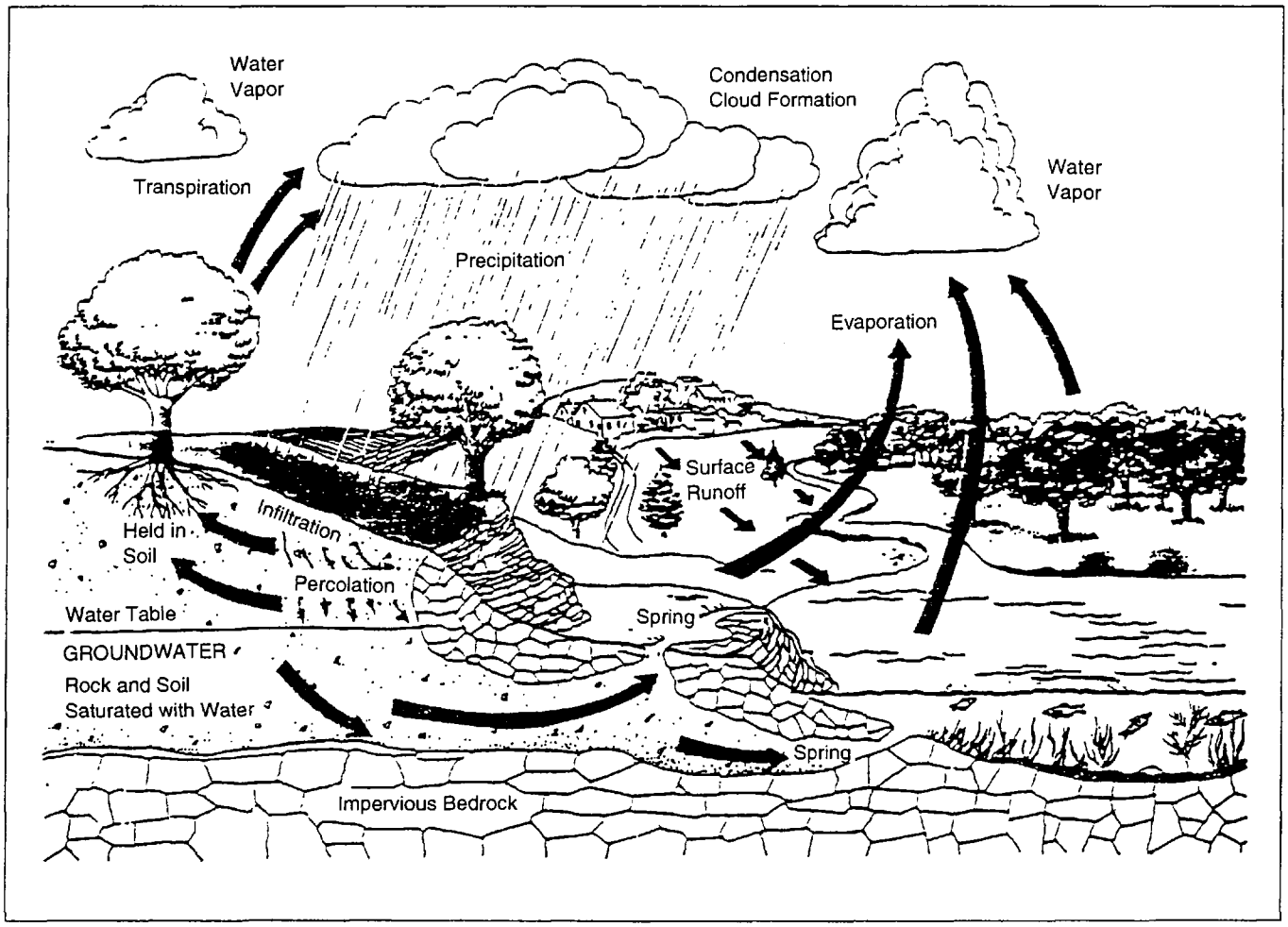
CHAPTER III

Conclusion

86. With the present report, the submission of the provisions which the writer believes should be contained in the Commission's draft articles on the law of the non-navigational uses of international watercourses has been completed.

ANNEX

FIGURE I



Source: Bernard J. Nebel, *Environmental Science: The Way the World Works*, 3rd ed., copyright 1990, p. 196. Reprinted by permission of Prentice-Hall, Englewood Cliffs, N.J.

FIGURE 2

Elements of a hypothetical international river use system

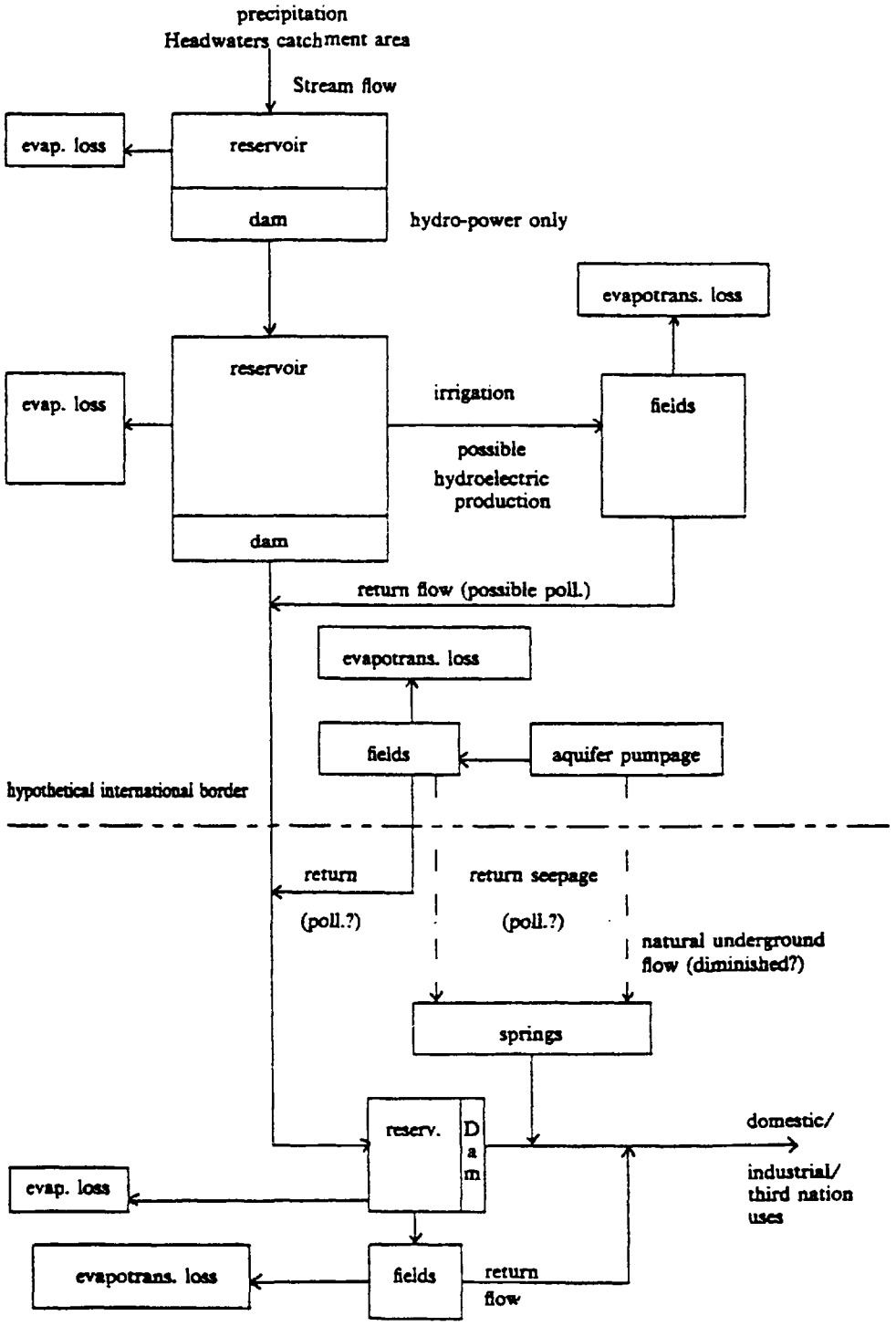
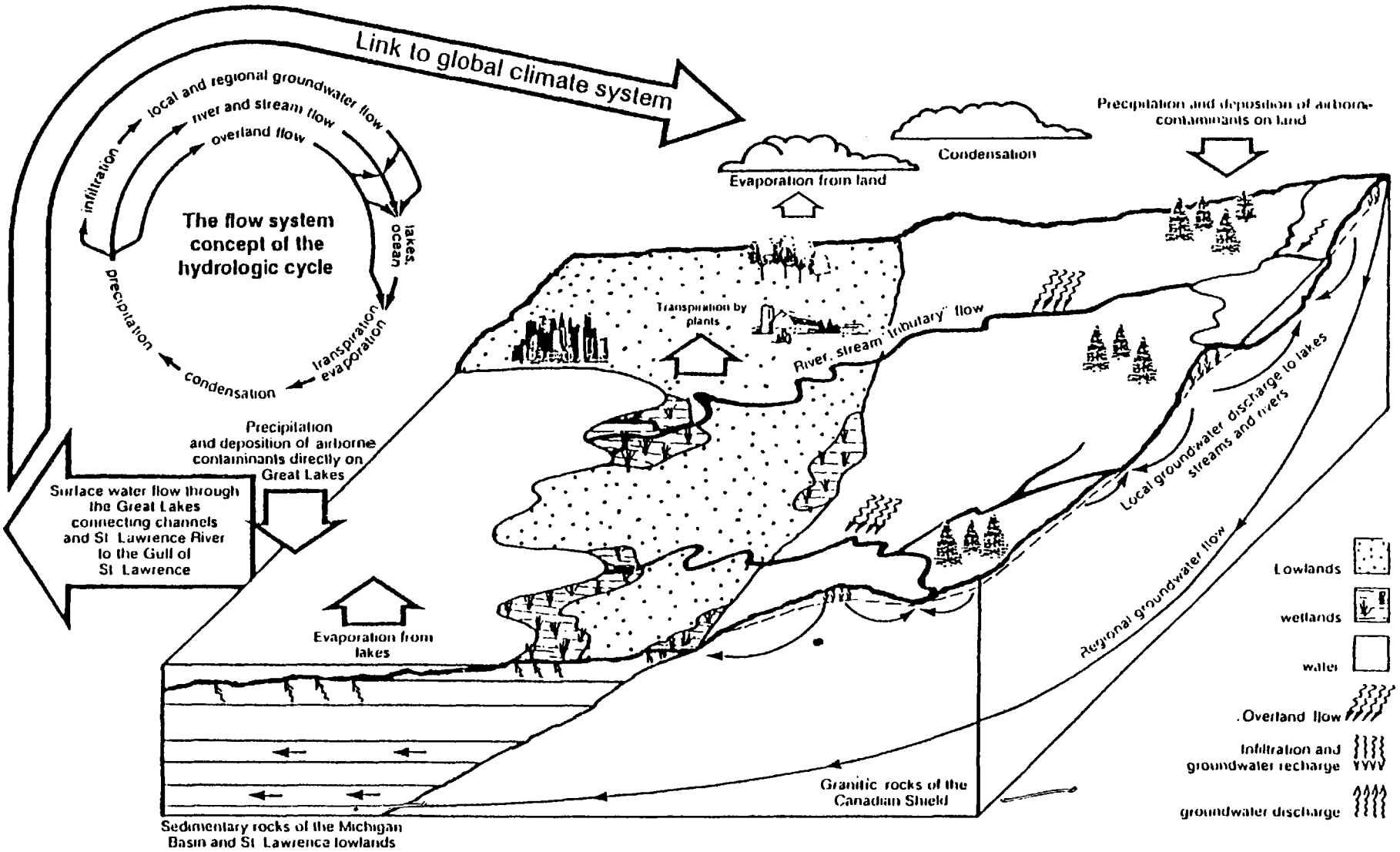


FIGURE 3

The flow system concept of the hydrologic cycle

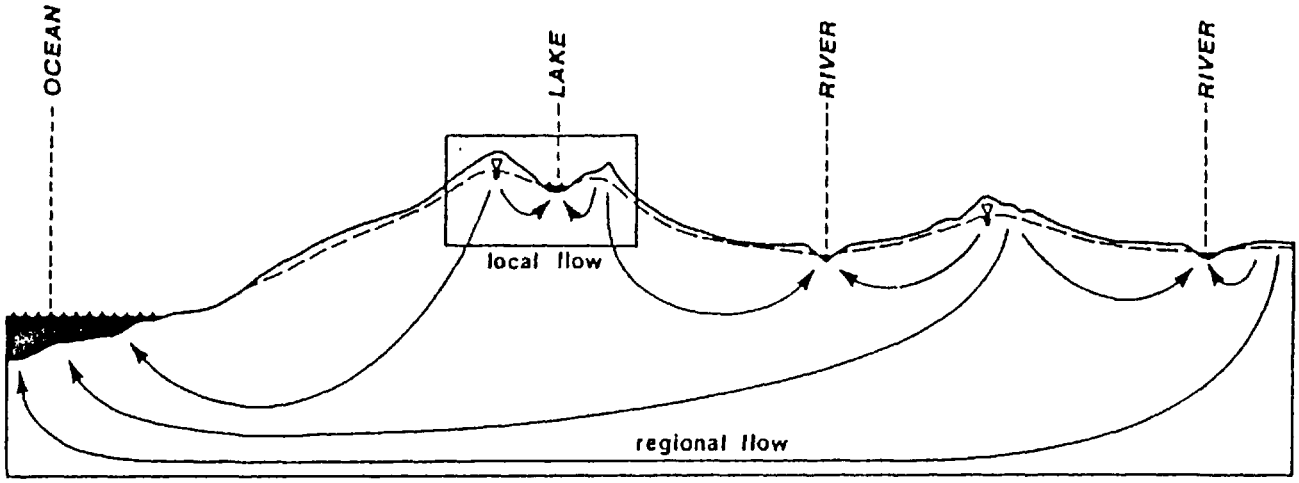


Source: T. Colborn, A. Davidson, S. Green, R. Hodge, I. Jackson & R. Liroff, *Great Lakes, Great Legacy?* 76 (1989). Reprinted by permission of World Wildlife Fund.

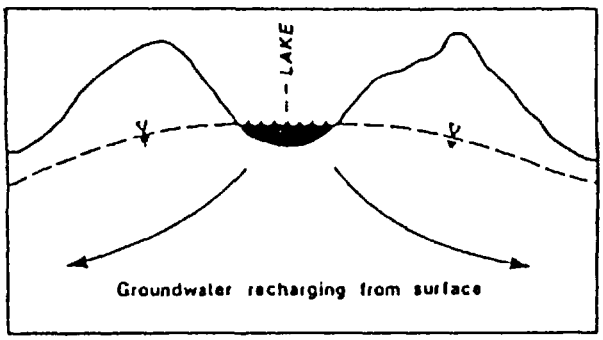
FIGURE 4

Flow system characteristics

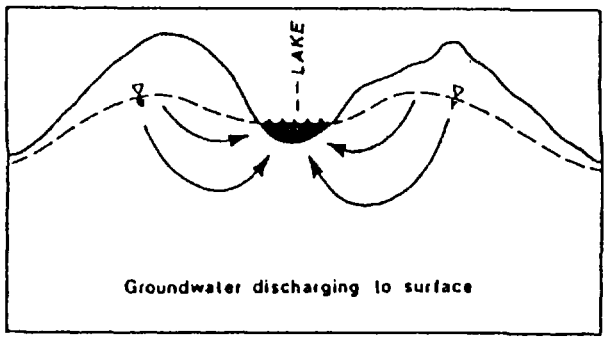
A.—LOCAL AND REGIONAL FLOW SYSTEMS



B.—VALLEY AS A RECHARGE ZONE
(conditions in late summer, early fall)



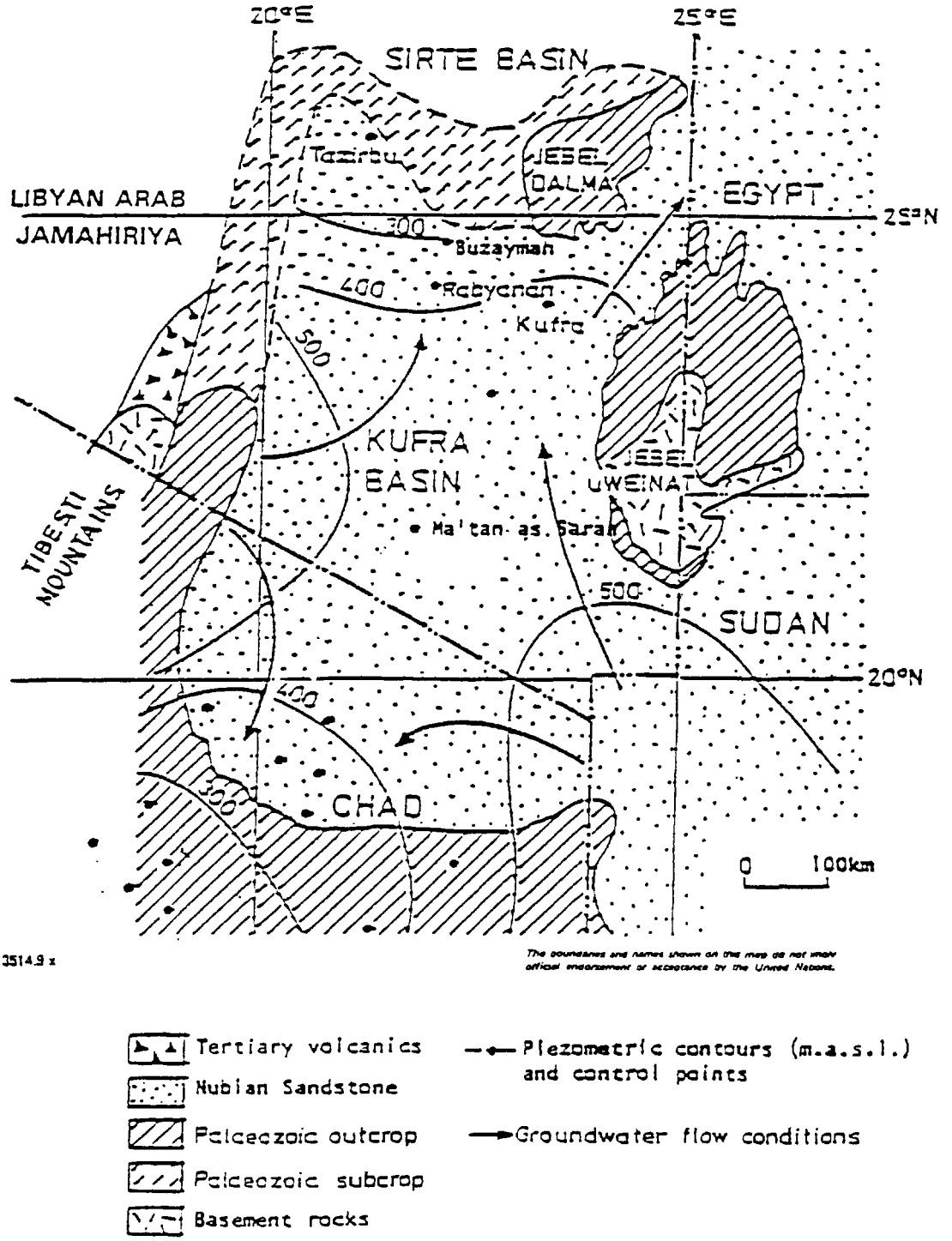
C.—VALLEY AS A DISCHARGE ZONE
(conditions in late winter, early spring)



Source: Province of British Columbia, *Report of the Royal Commission of Inquiry, Health and Environmental Protection, Uranium Mining*, 1 Commr's Rep. 98 (1980). Reprinted by permission of Province of British Columbia, Ministry of Energy, Mines and Petroleum Resources, Communications and Public Affairs Branch.

FIGURE 5

Groundwater head distribution, Kufra basin, Libya



Source: United Nations Department of Technical Cooperation for Development: *Transnational Project on the Major Regional Aquifer in North-East Africa, Egypt and the Sudan*. Technical Report: *Hydrogeology and Economic Potential of the Nubian Sandstone Aquifer*, doc. DP/UN/RAB-82-013/2 p. 37.

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

[Agenda item 6]

DOCUMENT A/CN.4/437*

Seventh report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

[*Original: English/Spanish*]
[*16 April 1991*]

CONTENTS

* Incorporating document A/CN.4/437/Corr.1.

NOTE

Multilateral conventions cited in the present report

	Source
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)	United Nations, *Treaty Series*, vol. 956, p. 251.
Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962)	IAEA, *International Conventions relating to Civil Liability for Nuclear Damage*, Legal Series, No. 4, rev. ed., (Vienna, 1976), p. 43.
Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963)	United Nations, *Treaty Series*, vol. 1063, p. 265.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.
Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, 29 March 1972)	Ibid, vol. 961, p. 187.
Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Sea-bed Mineral Resources (London, 17 December 1976)	UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983) p. 474.
European Convention on Products Liability in Regard to Personal Injury and Death (Strasbourg, 27 January 1977)	Council of Europe, *European Treaty Series*, No. 91 (Strasbourg, 1977).
Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988)	*International Legal Materials*, vol. XXVII (1988) p. 868.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, England, 1991), vol. 2, p. 449.
Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail or Inland Navigation Vessels (CRTD) (Geneva, 20 October 1989)	United Nations publication, Sales No. E.90.II.E.39.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	E/ECE/1250.

Introduction

A. Methodology of the report

1. During the debate in the Sixth Committee of the General Assembly at its forty-fifth session on the report of the International Law Commission on the work of its forty-second session,[1] one delegation suggested that it might be worthwhile for the Commission to prepare an overall review of the current status of the topic and also to indicate the direction it intended to take in the future instead of continuing with the article-by-article analysis (A/CN.4/L.456, para. 450). In this report an attempt has been made to follow that sensible suggestion. However, in the process, the suggested method of work has undergone some modification, since it seemed that it would also be useful to dwell on those articles which had been the subject of commentaries of some significance during the debates in both the General Assembly and the Commission. In that way, attention could be drawn to the most important problems that had been raised and possible solutions and alternatives could be suggested. For, while it is true that there is no consensus on several aspects of the topic—including some of the basic premises—it appears that majority views are emerging and that they do coincide in important areas. It is not the present writer's function to arbitrate the differences or to decide that a majority or minority feels one way or another, but simply to try to offer alternatives to make negotiation viable, possibly at a later stage of development of the topic, particularly on those aspects of the draft articles which call more for progressive development than for codification of what already exists. The debates have revealed the existence of a strong demand for the Commission to take a stand on the subject, and a pronouncement should be made without too much delay, owing to the pace at which treaty norms on specific activities are being developed.

B. Nature of the instrument

2. Some delegations in the Sixth Committee had come out in favour of refraining from codifying international law on the subject at the present stage, expressing a preference for a code of conduct or mere guidelines for States. Many others, however, had supported mandatory norms. Within this latter group, some favoured considering activities involving risk separately from those with harmful effects.

3. As to whether or not the provisions resulting from the combined efforts of the Commission and the Sixth Committee on this topic should be mandatory, it is worth referring to one of the Commission's earlier sessions at which, following a suggestion by one member that "if the Commission were not concerned about drafting rules for a convention which required acceptance by States, it could more easily accept certain hypotheses and draft articles",[2] he had said he did not believe "that at the present stage the Commission should be concerned about the eventual form of the articles on the topic"[3] nor did he think that the eventual form of the articles should affect the method of work of the Commission.

In his view, the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles. Factors or criteria should be scientific, identifiable and logical, with the aim of improving international law and inter-State relations. In the final analysis, the provisions on the present topic would win support and compliance because of these factors and not necessarily because of the form in which they appeared.[4]

4. That is the criterion which has been applied so far. To announce right now that the Commission will deal only with recommendations or guidelines would be to reject a current of opinion that is favoured by a large number of delegations in the Sixth Committee and by members of the Commission who have spoken of the need for a binding instrument in this field. At the end of this exercise, the Commission will decide what to recommend to the General Assembly regarding the nature of the articles to be proposed, and it is the General Assembly which ultimately will resolve the matter. It seems therefore neither possible nor desirable to anticipate the action of the Assembly.

[1] *Yearbook ... 1990*, vol. II (Part Two).

[2] See *Yearbook ... 1987*, vol. II (Part Two), para. 191.

[3] Ibid., para. 192.

[4] Ibid.

CHAPTER I

Title of the topic

5. In English, the title seems to be more restrictive in terms of the Commission's mandate than it is in French. In fact, in English it reads as follows: "International liability for injurious consequences arising out of acts not prohibited by international law". In French, on the other hand, the word "acts" is replaced by *activités*. Whereas the English title would not, strictly speaking, allow the Commission to deal with anything but the aspects relating to reparation or compensation for those injurious consequences, the French title considerably broadens the picture. To deal with "acts" rather than "activities" would mean that prevention would have no place in the draft, first because it is expressed in primary obligations or, in other words, prohibitions, and the articles would not therefore be dealing with acts "not prohibited by international law". This has been one of the classic objections among critics of the topic in general. Furthermore, the English title speaks of liability for such injurious consequences, which means that it takes the hypothesis that the harm (injurious consequence) has already occurred. It would then be a legal development of what in Spanish is generally called *responsabilidad objetiva o causal* and in English "strict liability". Thus, notwithstanding a suggestion that has repeatedly been made in previous debates in the General Assembly and in the Commission to the effect that prevention is an indispensable chapter of this topic, according to a strict interpretation of the English title there would be no place for such prevention.

6. If, on the other hand, the focus of the topic is shifted to "activities", the picture broadens considerably. The Commission's mandate would be to try to come up with a legal regulation of certain activities the conduct of which produces, or may produce, injurious consequences. The word "responsibility" in relation to "activities" acquires two legal meanings: one relates to the consequences of deeds and the other refers to the imposition of obligations.[5] In that case, given the injurious consequences of certain activities, the aim would be to impose primary obligations of prevention, the violation of which would entail certain legal consequences (secondary obligations), and also to establish other primary obligations in which harm would be a condition for reparation, irrespective of whether there was failure to observe any obligation. The establishment of norms on prevention would be within the mandate of the General Assembly, since they would fall under the concept of responsibility, that is to say, the imposition of obligations in view of the injurious consequences of certain activities. They would primarily be the activities covered in chapter III of the draft articles. Matters relating to reparation (chap. IV) would come under the aegis of liability. Perhaps the full scope of this aspect of the topic could be expressed in English by a term which has won considerable acceptance in present-day international law: "responsibility and liability". There would be no problem whatsoever in either Spanish or French because *responsabilidad* and *responsabilité* cover the meanings expressed by these two English words.

7. This was already discussed in the Commission[6] and the general consensus was that "activities" was preferable to "acts". This and previous reports, as well as the work of the Commission itself, have been based upon that assumption ever since. If international practice is to be taken into account in the development of this topic in the Commission, it is clear that it should opt for "activities", since nearly all conventions dealing with transboundary harm refer to the "activities" which produce such harm. At the time, however, it was agreed that discussion of the change in title should be postponed to a later stage in the development of the topic, at which time it would be possible to see clearly all the possible suggested changes that would need to be made. Perhaps that time has come.

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[5] See the discussion of the topic in the preliminary report by the previous Special Rapporteur, Mr. Quentin Baxter, *Yearbook ... 1980*, vol. II (Part One), pp. 250-252, document A/CN.4/334 and Add.1-2, particularly footnote 17 which, *inter alia*, when commenting on the use of the English terms "responsibility" and "liability", in the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea, gives the following examples:

"(*a*) Responsibility and liability = *responsabilités et obligations qui en découlent*; liability = *obligation de réparer*.

"(*b*) Responsibility and liability = *obligation de veiller au respect de la convention et responsabilité en cas de dommages*; States are responsible ... = *il incombe aux États de veiller ...*; international law relating to responsibility and liability = *droit international relatif aux obligations et à la responsabilité concernant l'évaluation et l'indemnisation des dommages*."

The second report of the present Special Rapporteur on the same topic concurs with this assessment and, quoting Goldie, states that:

"The terms 'responsibility' and 'liability' here and in articles VI and XII of the 1972 Convention on International Liability for Damage Caused by Space Objects are used with different connotations. Thus in both treaties, responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required." (*Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402, para. 4).

Those, undoubtedly, were the meanings of the terms "responsibility" and "liability", at least in international practice and without venturing into the dangerous territory of the meanings of those terms in the common law system.

[6] "A number of members supported the Special Rapporteur's proposal that, at some stage in the study of the topic, it should be suggested to the General Assembly that the word "acts", in the title of the topic, be replaced by "activities" so that all the language versions would be aligned with the French. There was no opposition to this proposal or to the basic reasoning by which the Special Rapporteur justified the change." (*Yearbook ... 1986*, vol. II (Part Two), para. 216).

CHAPTER II

The first 10 articles

A. General provisions (arts. 1-5)[7]

8. These articles were transmitted to the Drafting Committee and, as explained in the sixth report, would have been amended—particularly article 2[8]—had the concept of "dangerous substances", introduced on a wholly experimental basis in that report, been accepted. Of the texts in question, at least those relating to principles should be considered by the Drafting Committee at the current session. In the most recent debate in the Sixth Committee several delegations had drawn attention "to the United Nations Conference on Environment and Development scheduled for 1992, and the hope was expressed that the work of the Commission would be, if not finished, at least brought to an advanced stage so that it could be presented at that Conference" (see A/CN.4/L.456, para. 439). Perhaps the best contribution that could be made to this extremely important international meeting would be the drafting of principles in this area, which it was suggested should be considered by the Drafting Committee at the current session.

1. SCOPE OF THE PRESENT ARTICLES (ART. 1)

9. Article 1 (Scope of the present articles) may require drafting changes on the basis of suggestions put forward during various debates but it appears to have secured majority support regarding the activities it seeks to

[7] Articles 1-5 read as follows:

"*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 recombinations, 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;

"(*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."

"*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."

[8] *Yearbook . . . 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1, paras. 18-21.

cover, that is to say activities involving risk, namely those which have a higher than normal probability of causing transboundary harm, and activities with harmful effects, namely those which cause transboundary harm in the course of their normal operation.

10. As to whether the two types of activities covered by the draft should be dealt with severally or jointly, it would appear useful to deal with them jointly, on the understanding that if at the end of the exercise this method proves to have been inappropriate, the Commission could still decide to consider them separately. The reason for this is that, to date, it has not been convincingly demonstrated that the two categories of activities are in fact so different as to warrant separate treatment. It should be recalled that, initially, the present articles were intended to introduce acceptable general principles in this area, namely limits to a State's freedom of action within its territory, cooperation, non-discrimination, prevention and reparation. All these are clearly applicable to both types of activities. Thus, to focus the regime governing activities involving risk solely on prevention would be to overlook the fact that the harm normally caused by such activities must be compensated, and this requires that the principle of compensation should be explicitly set out in the articles, since it is not specified in international law, at least according to one school of thought. Furthermore, the notion of prevention is applicable to both types of activities. This notion covers two distinct concepts:

(*a*) In so far as unilateral measures are concerned, States have identical duties *vis-à-vis* both types of activities: the State must set down legislative and administrative measures which specify the precautions to be taken in each case by operators and it must monitor their implementation. A State's liability in the event of non-compliance would be the same irrespective of the type of activity involved, as will be seen below. If the operator, for his part, failed to comply with his obligations, he would ultimately be penalized by the domestic law of his State; if transboundary harm occurred, the matter would become first and foremost one of civil liability, to be decided by the competent court.

(*b*) As for procedural measures, they are obviously useful and necessary regardless of the type of activity involved. In dealing with any activity described in article 1, it is of fundamental importance that, in accordance with article 11 (Assessment, notification and information),[9] the transboundary effects should be assessed, notification given and consultations held in all cases. The regime that is ultimately accepted may differ, depending on the specific type of activity involved, but the formal steps will be the same for all activities.

11. Although there was little discussion of the idea, one delegation suggested that the article should refer only to new activities, that is, to activities to be undertaken in the future, and not to existing, ongoing activities. While this issue is of major importance and will have to be settled, it does not call into question the two basic types of activity covered by this article.

[9] See footnote 24 below.

12. There is another point of view that has nothing to do with separate or joint treatment, as it seems to accept all of the above. It would extend the draft to cover unforeseeable harm. The thrust of this view is not clear. If it refers to harm which is caused by an activity which, though inherently harmful, is conducted under circumstances that make it impossible to foresee or identify the harm at the outset, the situation would seem to be covered already by virtue of the way the articles operate. In fact, from the moment harm is caused through the normal operation of an activity or when risk is established as being inherent, the activity falls under the definition in article 1 and thus under article 3. It would be sufficient for a State to know—or to have the means of knowing—that an activity referred to in article 1 was being, or was about to be, carried out in its territory for the activity to be subject to the obligations established in the draft articles.

13. However, if the point is that any transboundary harm must be compensated, even if it is caused by an activity that is normally harmless and remains harmless after the harmful incident, the question requires further study. If an activity is not deemed to be hazardous and has no harmful effects, there is little likelihood of its actually causing transboundary harm. Such may be the case if an auxiliary cause exists, that is, a cause not related to the activity in question which interferes with the normal course of events and has an unexpected effect. Such interference may or may not be foreseeable, but it is in any event unrelated to the activity itself. Thus, in order to consider such a hypothesis attention would have to be diverted from activities, which are the crux of the matter, to harm, whatever form it may take. This would lead to a change in the approach to the draft, which would hardly seem warranted, given the small number of instances of harm occurring this way. To look at the topic exclusively from the standpoint of the harm caused would be to ignore the most pressing demand of our time, namely the establishment of legal norms to govern liability for the consequences of certain human activities. It is these norms, and not the relatively academic concern to spell out all possible forms of harm, which have become a veritable obsession today. This is not to say that damage of the type just mentioned should go uncompensated; it may be appropriate to deal with it by virtue of the general principles of international law. In the absence of any evidence to the contrary, however, the matter would not seem to be important enough to warrant a change in the approach to the articles.

2. Knowledge or means of knowing (art. 3)

14. Although some doubts were raised regarding the central idea that liability is contingent upon the fact that a State "knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried out in its territory", they were not pursued. The presumption in the final paragraph would seem to restore a sense of balance to this provision.

3. Articles 4 and 5

15. Article 4 seeks to express the idea that where the provisions of the present articles are incompatible with

those of a treaty governing a specific activity between the same States parties, the provisions of the treaty shall prevail. To bring the text into line with the language of article 30, paragraph 2, of the Vienna Convention on the Law of Treaties, it might be redrafted as follows:

> "In the case of States parties to the present articles which are also parties to another international agreement concerning an activity or activities referred to in article 1, the present articles shall not be considered incompatible with the provisions of that other international agreement."

16. Article 5 did not require other than editorial changes, which were incorporated into the new draft.

B. Principles (arts. 6-10)[10]

1. The fundamental principle (art. 6)

17. Article 6 sets out the basic principle, inspired by the wording of Principle 21 of the Stockholm Declaration.[11] Although drafting changes have been suggested, many of which are acceptable, there is a broad consensus on the central idea.

2. Cooperation (art. 7)

18. Article 7 sets out the principle of international cooperation to achieve the objectives of the draft. One original aspect is the obligation of affected States to cooperate with the State of origin in containing or minimizing the harmful effects of an activity occurring in the territory of the State of origin, whenever possible and reasonable. Once again, the principle cannot be said to have elicited any substantive objections, although important suggestions were made with a view to improving it. One was to word the principle in such a way that it would cover actions by private parties. Thus, anyone exposed to the effects of an activity in the affected State could have access to information about the activity available to both the State of origin and private entities or individuals of that State. In addition, such entities or individuals ought to have access to any administrative proceedings that may take place in the State of origin to assess the transboundary impact and also to the permit, if any, authorizing the activity.

3. Prevention (art. 8)

19. Although the notion of "prevention" after an incident gave rise to some misgivings, the sound international practice which establishes it is unquestionable.[12] However, the wording of this article will need to be amended if some of the suggestions put forward in recent debates are accepted. As it stands, article 18 (Failure to comply with the foregoing obligations),[13] which eliminates any consequences for failure to comply with obligations in respect of prevention, was not well received by the Commission or the General Assembly.

20. When the commentary to article 18 is taken up, the suggested changes will be considered in greater detail; for the time being, however, one change should be made to article 8, which sets out the principle of prevention and anticipates the procedural measures contained in articles 11 to 15,[14] as well as the unilateral measures set out in article 16.[15] This would make it clear that those provisions confer upon States only obligations which are proper to States, that is to say, the obligation to take legislative, regulatory and administrative measures to "guarantee" or "ensure that" the activities referred to in article 1 which take place under their jurisdiction or control do not cause significant transboundary harm, if they have harmful effects; or that the risk of causing such harm is minimized, if the activities are dangerous; or that the harm is contained and minimized, if the harmful effect has already been unleashed. The last paragraph of article 8 should be deleted, since under normal conditions States appear to be able to take the necessary legis-

[10] Articles 6-10 read as follows:

"*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."

"*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."

"*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."

[11] *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.

[12] *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1, para. 22.

[13] See footnote 24 below.

[14] Ibid.

[15] Ibid.

lative, administrative or police action. It will be seen from chapter III below that a different approach may be possible in the case of the procedural obligations set out in articles 11, 13 and 14 of chapter III, which are also considered obligations of "prevention"—although some believe that they can only have their basis in cooperation.

4. Reparation (art. 9)

21. Article 9 ought to be drafted in such a way as to reflect the interrelationship between the liability of a State and that of operators under the regime of civil liability. During the most recent debate in the Sixth Committee many delegations let it be known that they generally favoured the inclusion of norms that would clarify this interrelationship. Coming back to the notion of the innocent victim, which has been somewhat overlooked along the way, the principle could perhaps stipulate that the important thing is for the victim to obtain compensation for the injury suffered, thereby making it clear that if compensation is awarded, the State may, in cases specified in the instrument, assign liability to private parties. This would give expression to a widely held view in the Sixth Committee and the Commission that the State should have residual liability *vis-à-vis* that of the operator. Some delegations, albeit fewer in number, expressed the view that the State must have primary liability. A middle way can be sought. On the one hand, it is quite clear that many of the conventions[16] governing specific activities place primary liability with the operator or another responsible party, as will be seen, and assign to the State a measure of subsidiary liability when the operator is unable to make the appropriate restitution in full. Perhaps this liability of the State should be extended to other cases in which innocent victims are unable to obtain compensation. The State, then, might be liable for reparations in cases where the injury cannot be compensated in full through private channels, either because: (*a*) the operator at fault or his insurer is unable to compensate the injury in full or (*b*) the responsible party or parties cannot be identified (long-range pollution, it is impossible to identify those responsible among multiple operators, for example, in cases where the harmful effect originates in an entire region within a State).

22. The State may of course discharge its responsibility in various ways, for instance, by establishing a fund, as provided for in the Brussels Convention on the Liability of Operators of Nuclear Ships, if the situation described in case (*a*) in paragraph 21 above applies, or by requiring operators or, whenever possible, multiple operators who collectively cause transboundary harm, in the region of the country where the harmful effects originate to set up a special fund to compensate the harm or to take specific precautions to prevent the occurrence of the harmful effect. Ideally, in such cases the State of origin would participate in the consultations with the affected States referred to in articles 11 *et seq.* in order to establish a regime at the international level that would govern the activity in question. Finally, it should be noted that only in case (*b*) described in paragraph 21 above, or whenever a State has primary, rather than assigned, liability, can the negotiations between the State of origin and the affected State called for in articles 9 and 21[17] as currently drafted take place; this is not so in the case described in (*a*), where private channels under the regime of civil liability would be available.

23. Some delegations in the Sixth Committee, as well as some members of the Commission, will surely maintain that the State has primary liability. This report will, of course, take an entirely neutral line on the matter, except to confirm that the number of delegations and members who have spoken in favour of "residual" responsibility of the State is considerable. In addition, the idea of primary liability on the part of the State in situations such as those described in case (*b*) in paragraph 21 above will surely be resisted by some States and by members of the Commission as well. The question is one that should be negotiated if the articles are one day to form the basis of a convention. It is therefore suggested to the Commission that both alternatives should be retained, namely article 9 as it stands and a new article that would reflect the aforementioned ideas.

5. Non-discrimination (art. 10)

24. Article 10 was generally well received, as it sets out a principle that is almost perfect in the abstract. Of the few objections raised one was that the principle can operate only between States with similar or comparable legal systems. Yet, if the regime of civil liability is to be applied, this principle is absolutely necessary and will compel States to confer upon citizens or residents of other countries treatment no less favourable than that which they accord to their own residents. The objection raised here is that some countries may treat their own residents in a manner that does not match up to what is generally considered to be the international standard. In reality, the draft articles will set an international standard once they establish the principle of prevention and reparation, as well as other principles which, precisely because of non-discrimination, must be applied by all States parties. For example, article 29, paragraph 2,[18] states that "States parties shall make provision, in their domestic legal systems, for remedies that permit prompt and adequate compensation or other reparation of transboundary harm caused by activities referred to in article 1 carried out under their jurisdiction or control." It will be recalled that the phrase "prompt and adequate compensation or other reparation" in itself constitutes an international standard.

[16] With the exception of the one concerning liability for space objects; however, attention has already been drawn to the special nature of this legal instrument, which was based on strict State control not only over activities conducted by the State but also over private activities carried out under its authority. As Doeker and Gehring point out, "The stipulation of liability of the controlling State corroborates its obligation continuously to supervise and control governmental, as well as private, space enterprises." (G. Doeker and T. Gehring, "Private or international liability for transnational environmental damage: The precedent of conventional liability regimes", *Journal of Environmental Law* (Oxford), vol. 2, No. 1 (1990), p. 13.)

[17] See footnote 33 below.

[18] See footnote 43 below.

C. Article 2

1. Dangerous activities (subparagraphs (*a*) to (*d*))

25. Subparagraphs (*a*) to (*d*) of article 2 define what is involved in the concept of "dangerous activities". They were inserted simply on a trial basis to satisfy the long-standing objection that the scope of the articles should be well defined. At the same time they make it easier to apply the key concept of "significant risk", since there is the presumption that all activities involving the use of dangerous substances carry such a risk; this presumption is confirmed when borne out by other simpler assessments such as a consideration of the quantities or concentrations of the dangerous substances or the situations in which they are used (subparagraph (*b*) *in fine*). The subparagraphs help to define the "significance" of the risk and, at the same time, to circumscribe the scope of the articles. For a risk to fall within their scope, it must be fairly substantial. It is easy to see that so-called ultra-hazardous activities fall within the scope of this article, but moving down the scale, where should the line be drawn? How are the concepts of "significant risk", or better still, "higher than normal risk"—which is perhaps the exact idea we are trying to convey—to be defined? All human activities present some risk, as was pointed out during the earliest debates on the topic. As far as possible the Commission should identify the risk that concerns it, since it is impossible to quantify.

26. The Sixth Committee was not generally favourable to the idea of a list of dangerous substances. "Most representatives favoured a general definition and found a list of substances to be unhelpful and inappropriate" (see A/CN.4/L.456, para. 451). There were a number of objections, of which the main ones to be addressed are: (*a*) some substances like water are not dangerous *per se*, yet a dam forming a lake can create a serious risk of transboundary harm; (*b*) a list of dangerous substances is unnecessary because an activity involving the use of a dangerous substance must in every case be assessed as to the "quantities or concentrations or in relation to" the "risks or situations in which [the substance] may occur" (art. 2 (*b*)), and it must always be determined if it really poses a "significant risk" of transboundary harm; (*c*) it would be necessary to update the list frequently—a laborious task—and even then it could never really be exhaustive and so would create loopholes; and (*d*) it would change the nature of the draft articles, so that instead of constituting a framework agreement encompassing all activities they would become an instrument intended to regulate specific activities.

27. Some additional comments on this question of dangerous substances may perhaps help to gain acceptance for an alternative that would satisfy everyone to some degree, although not satisfy anyone entirely. A first point to be borne in mind is the importance of the precedent established by the Council of Europe draft rules on compensation for damage caused to the environment[19] which, if they eventually become a convention, will be the only instrument similar to the draft on which the Commission has been working. Indeed, all the existing conventions on liability for transboundary harm refer to a specific activity. The Council of Europe draft rules instead deal with any dangerous activity; they would constitute a general convention just as the Commission's draft articles are intended to be. The approach taken by that draft is accordingly the most appropriate model for the Commission's own work.

28. Some lists of dangerous substances already exist. The one contained in appendix I to European Community Directive 67/548 includes 1,200 substances. Whether we adopt this list or adapt it to the needs of a global convention, it is obvious that it covers an extremely broad spectrum. Add to this the fact that subparagraph (ii) broadens that scope to all activities which use technologies that produce hazardous radiation and that subparagraph (iii) includes activities which introduce into the environment genetically altered organisms and micro-organisms, both of which may be dangerous, and the spectrum becomes still broader. Furthermore, a list that is exhaustive, a *sine qua non* for some delegations in the Sixth Committee and some colleagues in the Commission, is an impossibility: (*a*) because there are close to 60,000 chemical substances in existence and the technical experts believe that their effects cannot be known with certainty, especially in view of the lengthy experimentation period often required[20] and (*b*) because any activity involving the use of one or more of the substances or technologies contained in the list must be assessed by the authorities to determine, as already mentioned, the presence of the other circumstances that constitute the "significant risk of transboundary harm" required for including the activity within the scope of the present draft articles. So much for the purported "exhaustive" nature of any list, especially if it is borne in mind that there are substances that cannot be included in the list—water, for instance—which nevertheless can be dangerous in some cases.

29. The objection based on substances like water also goes against the idea of an exhaustive list: it is obvious that the European draft Rules are directed towards substances handled by industry or stored, transported, and so on. Although the statement at the end of the Commission's article 2 (*b*)—that a substance may be considered dangerous if it occurs in certain quantities or in relation to certain risks or situations in which it may occur—could, if taken to the extreme, be applied to water, it seems clear that this was not the drafters' intention and it would be very strange to see water heading any list. In view of this, and in order to ensure that the draft articles[21] do not become an instrument limited to certain

[19] Draft prepared by the Committee of Experts on Compensation for Damage caused to the Environment. See Council of Europe, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (89) 60), Strasbourg, 8 September 1989.

[20] See document CJ-EN (90) 11 (Committee of Experts on Compensation for Damage caused to the Environment, Report on the work of the meeting of the Working Party), p. 5.

[21] This must be done because, in addition to the reasons given, it is technically almost impossible to specify in the abstract the quantities or concentrations required to classify a substance as harmful. That was the conclusion of the technical experts who worked on the Council of Europe draft Rules in question (ibid., p. 6, para. (*d*)). This supports the contention that it is impossible to draw up a list of substances whereby the procedure for classifying an activity as dangerous would become automatic.

specific activities instead of the framework convention originally envisaged, any such list should be merely illustrative and form an annex to a general, yet as far as possible complete, definition of dangerous activities. Such a list would not serve the purpose of automatically indicating activities that were dangerous for the purposes of the draft articles, but it could serve as a useful illustration, in that any activity involving the use of one or more of the substances listed would have to be examined to assess the potential for transboundary harm and thus the nature of the risk posed. This, then, is the alternative referred to earlier.

2. Transboundary harm (subparagraph (*g*))

30. Subparagraph (*g*) deals with the essential concept of transboundary harm. It has been suggested that it is too important to form part of an article on the use of terms; that, however, is the approach taken in various major instruments.[22] It could also appear separately under the heading of "Transboundary harm and compensation" and include the concepts in article 24.[23] In any case, the various concepts of harm should appear in separate subparagraphs. Compensation for harm to the environment should, according to comments received repeatedly, encompass only the cost of reasonable measures actually taken to restore the *status quo ante*.

3. "Appreciable" [significant] harm (subparagraph (*h*))

31. The reaction to subparagraph (*h*) indicates that difficulties still exist with regard to the definition of "appreciable" or "significant" harm, although it was not the intention that that subparagraph should give a definition in the strict sense but only that it should give a certain idea of what was involved. For the time being, opinion seems to be leaning towards the concept of "significant" harm, because it conveys something rather more substantial or of greater magnitude than does the word "appreciable". One criticism of the definition has been directed at the use of the word "nuisance" in the English version, because naturally that expression has a different technical meaning in the common law system. Actually, the word used in the original Spanish version was *molestia*, which means a slight disturbance. At any rate, it may perhaps be preferable not to define something that is so difficult to define in such a general framework. In the watercourse regime, the Commission also refrained from defining that same concept.

[22] The Council of Europe draft Rules (see footnote 19 above) include it among the definitions in article 1, as do the Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail or Inland Navigation Vessels, the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Sea-bed Mineral Resources (art. 1, para. 6), the Convention on the Regulation of Antarctic Mineral Resource Activities (art. 1, para. 15), the Convention on International Liability for Damage Caused by Space Objects (art. 1 (*a*)), and the Vienna Convention on Civil Liability for Nuclear Damage (art. 1 (*k*)), among others.

[23] See footnote 33 below.

Chapter III

Prevention[24]

A. Procedure

1. Articles 11 (para. 1), and 13-14

32. The substantive articles relating to procedure are articles 11 (para. 1), and 13-14. Paragraph 2 of article 11 deals with a particular case arising under paragraph 1 and articles 12 and 15 deal with related subjects, that is, the participation of international organizations (or bodies) and the protection of national security or industrial secrets. Basically, the procedure is that the State of origin is to assess the transboundary impact of any activity

[24] Chapter III (Prevention) of the draft consists of articles 11-20, reading as follows:

"*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."

suspected of coming under article 1 that is about to be [or is being] carried out under its jurisdiction or control. If it is indeed an activity involving risk or with harmful effects, the State of origin shall notify the States presumed to be affected, providing them with whatever information is available. If the affected States deem it necessary, consultations may be held under article 14 which could lead to the establishment of a regime for the activity that would make it tolerable and take into account the interests of all States parties. It would essentially be an international regime, since it would be based on an accord between the participating States, but it would, of course, also encompass aspects of their internal law, in particular that of the State of origin. The agreement may cover such things as cooperative measures to prevent the transboundary harm or to reduce the risk thereof to an acceptable level; safety measures to be required by the State of origin when authorizing the activity; identification of the private parties responsible; participation by individuals affected in the administrative procedures of the State of origin; establishment of a compensation system for those injured; decision whether or not to have an insurance scheme; possible limitation of the responsibility of the operators; the degree of responsibility attaching to the State of origin and the cases in which that would apply. This will all be easier to determine and will proceed more smoothly if the negotiations focus on one activity in particular.

33. One objection was raised to the idea of establishing a procedure such as that described above, namely that a State cannot be burdened with obligations such as those mentioned above under a legal regime as general as that provided for in these articles. However, the obligations to assess the environmental impact—and accordingly, any transboundary impact—of any activity under the jurisdiction or control of the State, to notify those concerned, to provide them with all the necessary information, as well as to carry out the necessary consultations,

"*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."

"*Article 17. Balance of interests*

"In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, those States may, in their consultations or negotiations, take into account the following factors:

"(*a*) the degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

"(*b*) the existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

"(*c*) the possibility of carrying on the activity in other places or by other means, or the availability of alternative activities;

"(*d*) the importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

"(*e*) the economic viability of the activity in relation to possible means of prevention;

"(*f*) the physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

"(*g*) the standards of protection which the affected State applies to the same or comparable activities, and the standards applied in regional or international practice;

"(*h*) the benefits which the State of origin or the affected State derive from the activity;

"(*i*) the extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

"(*j*) the willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

"(*k*) the extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

"(*l*) the extent to which assistance from international organizations is available to the State of origin;

"(*m*) the applicability of relevant principles and norms of international law."

"*Article 18. Failure to comply with the foregoing obligations*

"Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings unless that is provided for in other international agreements in effect between the parties. If, in those circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23."

"*Article 19. Absence of reply to the notification under article 11*

"In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory. This period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it."

"*Article 20. Prohibition of the activity*

"If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated for, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives."

are fairly well established in international law.[25] The justification for this is that individuals affected cannot interfere in what is happening in a foreign jurisdiction and thus they have no control over the authorization or development of activities that may affect them. The responsibility of the State of origin arises naturally from its exclusive and exclusionary territorial jurisdiction.[26] The list of dangerous substances, if accepted, will facilitate the operation considerably, since any activity using them must be reviewed to assess its degree of risk. Furthermore, it must be borne in mind that, when dealing with this type of activity, all States as a rule insist on prior authorization so as to protect their own people, and ask for information from the applicant for that purpose. It is, therefore, entirely logical for the State of origin to brief the States presumed affected on the possible conduct under its jurisdiction or control of activities that are likely to have transboundary effects.

34. This does not mean that the State must make that assessment itself; naturally, it may require the operator to do so as a condition of granting the authorization. But it does mean that the State in question must review and check the accuracy of the assessment, since in a way it would be engaging its own responsibility *ad exteros*.

35. In any case, because of the above-mentioned objection an attempt was made to simplify the procedure as far as possible. This desire for simplification should not, however, as was pointed out by some delegations in the debate in the Sixth Committee, exclude the obligation of the State of origin to permit access by private legal entities and individuals of the affected States to its administrative procedures for authorization of the activity concerned. Such access would give any possible victims the best guarantee that their interests would be defended.

36. During that same debate, it was also observed that the proposal makes no mention of whether authorization for development of an activity coming under article 1 would be subject to the outcome of the consultations mentioned in article 14. Of course, the idea is not to give those affected a veto over development of an activity in States of origin, nor even to mandate a delay that may not be justified. That, too, was clearly brought out in the Commission and in the Sixth Committee. One option would be the one adopted in the draft article, namely that if the State of origin considers it appropriate on the basis of the studies carried out, it would authorize the commencement of the activity in question, always provided that: (*a*) if the activity produces transboundary harm, the State must assume liability for the whole of the compensation and (*b*) it may be obliged to take measures that will involve costly changes to existing investments and facilities, particularly if, owing to the conditions mentioned in article 20, the authorization granted has to be withdrawn. If these two conditions, which are implicit in the wording, were to be made explicit, the objections may perhaps be withdrawn.

37. Another conceivable option in this area is that the State of origin may not authorize new activities under article 1 until the international obligations were entirely discharged. Although the Commission has so far agreed with him in preferring the previous solution, that does not mean that it cannot be reconsidered if development of the topic reaches the stage of negotiation of the terms.

38. As for article 14, it simply confirms the obligation of the State of origin to consult with those affected. The previous article 16,[27] which it replaced, went further, since it spoke of the obligation to negotiate a regime for the activity for which the procedure was being instituted. That obligation to negotiate was to be understood as it exists in international law, particularly following the *North Sea Continental Shelf*,[28] *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*,[29] and *Lake Lanoux*[30] cases, and particularly the paragraph of the advisory opinion of PCIJ in the case of *Railway Traffic between Lithuania and Poland* which states that the obligation to negotiate is an obligation not only to listen to the other party, "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements".[31] In other words, with the old article 16, the

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[25] See the Convention on Environmental Impact Assessment in a Transboundary Context, which sets forth the obligation of the State of origin to assess the environmental impact of any activity before authorizing it (art. 2); to notify promptly States it thinks may be affected (art. 3); and to consult on measures to mitigate the transboundary effects, other forms of possible mutual assistance to reduce transboundary impacts from the planned activities, and any other appropriate subject relating to the above-mentioned activity (art. 7).

[26] These concepts were well established in the *Island of Palmas* case:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." (United Nations, *Reports of International Arbitral Awards*, vol. II, p. 838.)

To this sovereign right corresponds an obligation that the arbitrator Max Huber points out a little further on:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has, as corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." (Ibid., p. 839.)

In one of the debates on this matter in the Commission it was said that if a State is responsible for the harm that activities in its territory may cause to foreigners within that territory, *a fortiori* it must be responsible for harm caused to persons who reside in the territory of the affected State. Something similar may be said of expeditions organized within the territory of one State against the Government, or the public order, of another State.

[27] See *Yearbook ... 1989*, vol. II (Part Two), para. 322.

[28] Federal Republic of Germany *v.* Denmark, and Federal Republic of Germany *v.* Netherlands, judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

[29] Judgment of 25 July 1974, *I.C.J. Reports 1974*, p. 3.

[30] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook ... 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

[31] *P.C.I.J., Series A/B, No. 42*, p. 108.

State of origin was, of course, under no obligation to succeed, by any means possible, in working out some regime for the activity in question with the affected State. It simply had to comply in good faith with the obligation to try to do so; as ICJ stated concerning the *North Sea Continental Shelf* case:

> "The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it".[32]

39. Some opposition to that idea was voiced in the Commission, on the grounds that it was excessive, and hence the level of the obligation has been lowered to one of mere consultation. This accounts for the permissive atmosphere surrounding initiation of activities and the prior obligations of the State of origin to inform and consult, but naturally the responsibility would lie with that State should any harm occur.

40. The foregoing takes into account articles 11 and 14. Article 13 simply transfers the initiative to the affected State and would come into play in the event that the State of origin failed to fulfil its obligation under article 11. What happens if the State of origin, even after being warned, still does not fulfil the obligation? Here, too, there would be alternatives. One option would be to grant to the affected State access to all the means offered by general international law when an international obligation is violated. Another would be to allow the State of origin to pursue the activity at issue under its own responsibility, and only in the event of transboundary harm occurring would the process indicated in paragraph 33 take effect. That is the course followed hitherto by the draft articles.

2. Articles 11 (para. 2), 12 and 15

41. Article 11, paragraph 2, is meant to facilitate identification of States presumed to be affected by an activity in the State of origin, since it is probable that an international organization or body would be in a better position than an individual State to make such a determination. UNEP, for instance, has a Global Environmental Monitoring System (GEMS), which receives information from all over the world to help individual States determine the magnitude of a given transboundary impact. Even though the principle of participation of international organizations was warmly received at first, some scepticism has been expressed in the Commission. Those which have general competence in the area may not have competence under their statutes to take action on questions such as these. Some Commission members have also wondered what would happen in the case of non-member States or who ultimately would meet the costs incurred. Such obstacles can be overcome. Article 11, paragraph 2, involves a service that an organization such as UNEP, at any rate, whose competence in this area it would be difficult to question, is perfectly able to provide—not to mention other regional organizations that may have similar information capabilities. There would seem to be no reason why the statutes of such organizations would in any way prohibit the provision of such a service, in the final analysis, as long as the funding is assured. Even if a non-member State is among those presumed to be affected, the costs could, in principle, be defrayed by the State of origin and be the subject of a prior agreement between the organization concerned and that State. In some cases, it may be possible to increase the budget of an organization that has shown by experience that it can provide assistance in such circumstances.

42. That is the essence of the participation of an international organization called for in article 11, paragraph 2, and it would be as well to make that explicit, so as to avoid confusing this action with that of article 12, which is completely different in nature. It is no longer simply a matter of detecting transboundary effects of a given activity. The aim is also to bring the parties together, facilitate their consultations, clarify any technical points that may arise during the talks, and so forth. Needless to say, if the international body in question refuses to participate as requested under article 12, it is under no obligation to comply, but it is part of the general mandate of international organizations to foster cooperation between their members, and possibly between them and non-member States. That is what they were created for, and few international organizations are likely to refuse to take the action authorized in article 12, as long as the costs are defrayed. There may be difficulties dealing with States in other regions if the organization concerned is a regional body, but such situations would normally be few and far between. If they did arise, it would be better to have recourse to an organization with a worldwide mandate.

3. Balance of interests (art. 17)

43. Article 17 sets out some useful guidelines for the possible negotiation of a regime to govern the activity. Although it was generally well received, some thought that the provision should be placed in an annex, since in fact it does not reflect a mandatory legal norm.

4. Threshold for prohibition (art. 20)

44. With respect to article 20, some delegations in the Sixth Committee expressed concern as to the *threshold* of harm or risk that would trigger the obligation (see A/CN.4/L.456, para. 459). This question is similar to that of *significant* harm or risk; unfortunately, such thresholds are not *a priori* quantifiable. It is clear, however, that no State can be compelled to tolerate either significant harm or significant risk of harm originating from activities conducted under the jurisdiction of another State, unless these are accompanied by acceptable compensation to the State affected. If negotiations with respect to the *threshold* of the harm or the risk fail because the parties cannot agree on what constitutes an adequate threshold for the specific case, they will have to resolve the difference in the only way open to them under international law, a good indication of which is to be found in Article 33 of the Charter of the United Na-

[32] *I.C.J. Reports 1969*, p. 47, para. 85 (*a*).

tions. Certainly it was no easy task arriving at treaties like the nuclear test-ban treaty, or those prohibiting the emplacement of weapons of mass destruction in certain areas of the seabed or the use of environmental modification techniques for military or other hostile purposes, but such difficulties are inherent to international relations, where there are no courts having compulsory jurisdiction, nor police, nor any centralized power.

B. Nature of the preventive measures

1. Article 16

45. In both the Commission and the Sixth Committee many were of the opinion that the unilateral measures provided for in article 16 should be compulsory. The violation of this article would therefore incur the consequences arising under general international law, or those established by a convention on State responsibility for wrongful acts, as the case may be. This seems logical: once it has been established that a given activity causes or may cause transboundary harm, the State of origin shall be obliged to take measures to ensure the maximum safety conditions recommended in accordance with the best available technology, or what it may be preferred to call *reasonable* safety measures. Accordingly, the State shall exercise "due diligence" in that regard. The obligations imposed by this article are typically those of a State: enacting appropriate legislation, adopting the administrative and police measures necessary to enforce compliance with such legislation, and so on. During the debate in the Sixth Committee, it was quite rightly pointed out that what the article said concerning compulsory insurance for the operators or other financial safeguards to cover transboundary harm would more appropriately come under the chapter on reparation than under prevention.

2. Article 18

46. The substance of article 18 has been considered earlier. However, there would appear to be a difference between the obligations arising under articles 11, 12 and 14, which are the backbone of the procedure, and the unilateral obligations arising under article 16. With regard to the procedural obligations, there would be several possibilities: (*a*) the obligations arising under article 11 would be either mandatory (in view of the fact that they are fairly well established in general international law), not mandatory, or compulsory only if article 13 was applied (namely if a presumed affected State sets the procedure in motion); (*b*) the obligation arising under article 14 could simply be an obligation on the part of the States concerned to consult with each other, or it could be converted into an obligation to negotiate a regime within the meaning of paragraph 35. In any case, the most practical solution would be to delete article 18 and to draft the provisions of the other articles in such a way as to ensure that they have the effects stated above.

Chapter IV

Liability

A. State liability[33]

1. The title

47. If it is agreed that State liability under this topic is of a residual nature, then chapter IV could be entitled "State liability", and could be inserted after the chapter on civil liability.

2. Article 21

(a) *The obligation to negotiate*

48. Since liability was originally envisaged in these draft articles in terms of the State's strict liability, article 21 sought to mitigate a situation which was both Draconian and lacking in precedents. Indeed, the extensive

[33] Chapter IV (Liability) of the draft consists of articles 21-27, reading as follows:

"*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]."

discussions during the general debate on the topic in both the Commission and the Sixth Committee revealed the conviction on the part of some members that there was no specific norm of general international law which imposed upon States a type of liability which would arise irrespective of whether there had been a failure to comply with an obligation; accordingly, those members were not prepared to accept an instrument which imposed such liability. Hence, the way to attenuate the harshness of a State's strict liability was to ensure that it did not arise automatically, but was negotiated on a case-by-case basis.

49. Accordingly, the obligation to negotiate derived from the premise that whoever causes harm should repair it in some way. Negotiation is the primary method of resolving international disputes and it is the method prescribed in this article for establishing the mode of reparation. The text states that the harm must "in principle" be fully compensated, that is to say in accordance with principles such as that of *sic utere tuo*, and others which are part of international jurisprudence as a result of cases such as the *Corfu Channel* case,[34] the *Island of Palmas* case,[35] the *Lake Lanoux* case,[36] and, especially, the *Trail Smelter* case.[37] Hence, the point was not for the parties to commence negotiations in order to determine whether or not compensation should be paid, but rather to decide what type of reparation would be appropriate, bearing in mind that there should be full compensation, according to the principles laid down in this area. Obviously, if negotiation did not yield a solution to the predictable differences between the parties, they could resort to all the other means afforded by general international law and by Article 33 of the Charter of the United Nations. The Commission might find that this method of negotiation is still possible in those cases—if any—in which compensation is negotiated directly between Governments, as contemplated in paragraph 52 below.

"*Article 24. Harm to the environment and resulting harm to persons or property*

"1. If the transboundary harm proves detrimental to the environment of the affected State, the State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore those conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.

"2. If, as a consequence of the harm to the environment referred to in paragraph 1, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm.

"3. In the cases referred to in paragraphs 1 and 2, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply."

"*Article 25. Plurality of States of origin*

"In the cases referred to in articles 23 and 24, if there is more than one state of origin,

ALTERNATIVE A

they shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.

ALTERNATIVE B

they shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused."

"*Article 26. Exceptions*

"1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

"(*a*) if the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

"(*b*) if the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

"2. If the State of origin or the operator, as the case may be, proves 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."

(b) *Changes to article 21*

50. In the light of the alternatives presented in previous chapters, and considering that liability may fall exclusively on private operators, article 21 requires to be amended significantly. In the first place, it should establish that civil liability is primary and specify the cases in which it would fall to the State to respond, either by supplementing the liability of individual operators (or any other party responsible) when they or their insurers are unable fully to cover the harm caused or by substituting for them when they cannot be identified or located. The State would then assume responsibility for reparation.

51. In the first case, the competent court which heard the claim against the liable private party may also hear the case against the State for the residual liability or the case against a fund which the latter may have constituted for that purpose.

(c) *Unidentifiable authors*

52. The second case, namely that of transboundary harm the authors of which cannot be identified, is somewhat more complicated. This situation may arise, for example, if the damage is caused by a large number of sources the cumulative effect of which causes the harm in question. In such cases, under the provisions of article 13[38]—if the affected State has not been notified, and all the more so if it has—negotiations may be initiated between the States concerned with a view to reaching agreement on a regime appropriate to the activity which causes the harm. This may be the time to consider compensation for harm which may already have been caused,

[34] *I.C.J. Reports 1949*, p. 4.

[35] See footnote 26 above.

[36] See footnote 30 above.

[37] United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

[38] See footnote 24 above.

together with any appropriate means to reduce the harm. Thus, one of the two possible channels would be State-to-State negotiations to consider compensation for the harm caused and potential ways of reducing it. In addition, it should always be borne in mind that private parties who have suffered the harm and who have a right of action—for example, those who have suffered injury to their persons or property as a result of the activity in question—may wish to pursue the domestic channel in the hope of obtaining greater compensation.

53. The other channel would be proceedings before the courts of the State of origin or the affected State, as the case may be, if either of the States concerned refuses to negotiate compensation. The injured parties—including the affected State, if applicable—would be allowed to lodge a claim against the State of origin under the terms of article 29, paragraph 3, as currently worded.[39] Alternatively, the two possibilities may coexist, meaning that the affected State could either initiate negotiations for compensation or lodge a claim for compensation in the courts of the affected State, and individuals could await the results of their State's negotiations or initiate the claim directly. Individuals, in accordance with article 29, paragraph 3, would have a choice between the courts of the State of origin and those of the affected State.

54. In cases of harm to the environment of the affected State, only the State could institute proceedings before the competent courts, since private parties would have no right of action in such cases unless the damage to the environment had caused harm to their persons or property, in which case the normal channel would be open to them. In a recent draft report on elements which might be included in a protocol on liability to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the following provisions are made in point X (Claims procedures):

> Claims for damage should primarily be made through domestic courts.
>
> For the assessment of clean-up and remedial action costs, *as well as for a valuation of environmental damage**, an internationalized approach should be considered, e.g.:
>
> (*a*) Domestic courts, assisted by an international technical advisory body to be consulted on an optional or a mandatory basis;
>
> ...
>
> (*d*) An international Commission with exclusive jurisdiction.[40]

55. In other words, when dealing with issues such as those raised by the environment, which could go beyond the usual ability of ordinary courts, there would be the possibility of intervention—optional or mandatory—by an international technical assistance body. Point X of the draft cited in the preceding paragraph includes the possibility of a specific jurisdiction for the environment, an international commission or tribunal, along the lines of the proposal made by the Intersessional Working Group of Experts of the Standing Committee on Civil Liability for Nuclear Damage in its report of 15 February 1991 (annex VI) for a new article XI A to amend the Vienna Convention on Civil Liability for Nuclear Damage. This international tribunal would have competence if the parties concerned gave their agreement after an incident occured, and there would be various alternatives (certain majority or unanimity of the parties); these will be considered by the future conference to amend the Conventions of Vienna and Paris.[41] Individuals and States could litigate before this commission or tribunal without constraint.

56. In such circumstances, article 21 should adopt language reflecting the alternatives described, which would remain subject to any subsequent negotiations. This, of course, is on the understanding that the norm set forth in this article is based on strict liability, which means that if there is no doubt about the causal relationship between the activity and the transboundary harm in question compensation should, in principle, be paid. Negotiations would start from that premise and would focus more on the "quantum" of the compensation; if the method chosen is the tribunal, strict liability would be applicable there too.

3. Participation of international organizations (art. 22)

57. Article 22 would remain essentially the same, taking into account, however, some drafting changes proposed during the debate in the Sixth Committee. For example, instead of "an international organization [body] may intervene" it should say that such an organization [body] "shall take action".

4. Reduction of compensation (art. 23)

58. Notwithstanding its definite heterodoxy, article 23 did not give rise to any fundamental objections. Here, too, changes should be considered regarding the parties responsible for reparation, and it should be limited to cases of State liability. The phrase between square brackets would be moved to the commentary, as was quite correctly observed in the latest debate.

5. Harm to the environment (art. 24)

59. Article 24 could be moved to form one or more subparagraphs of the article on harm in general. In this provision, account should be taken of several objections that were raised to the last part of paragraph 1 since compensation would be limited to reasonable measures of restoration actually taken or to be taken, and to loss of earnings.

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[39] See footnote 43 below.

[40] Report of the Ad Hoc Working Group of Legal and Technical Experts to develop elements which might be included in a Protocol on Liability and Compensation for Damage resulting from the Transboundary Movement and Disposal of Hazardous Wastes and other Wastes, second session, Nairobi, 6-9 March 1991, UNEP/CHW/WG.1/2/3, paras. 27-28.

[41] Convention on Third Party Liability in the Field of Nuclear Energy.

6. Joint liability (art. 25)

60. In recent debates on article 25 preference was expressed for alternative B. This article, unlike articles 26 and 27 which apply indiscriminately to the State or to the operator found to be liable, could be divided into two parts to include joint and several liability in the case of private operators. In such cases, most conventions on liability for transboundary harm assign joint and several liability to operators.[42]

7. Exceptions and limitations (arts. 26-27)

61. Articles 26 and 27 should form part of a separate chapter, since they apply to any type of liability, whether of the operator or the State.

B. Civil liability[43]

1. Interrelationship between civil liability and State liability

62. During the discussions that took place in 1990, to which this report has already repeatedly referred, the need was stressed for the relationship between civil liability and the State's liability to be clarified. In our view, there are two such relationships: one between the two types of liability as such, and the other between the channels used to assert them. Three possibilities emerge in this area:

(*a*) The first possibility is the approach taken up to and including the fifth report, namely not to deal with civil liability in the draft articles. This means that the proposed instrument would have addressed only the State's responsibility and the diplomatic channel, with negotiation between States being the means of asserting it. On the other hand, by not prohibiting the use of the domestic channel—which was meant to assert the liability of individuals and also conceivably of the State—it left open the possibility that the aggrieved parties would use that channel, while of course remaining subject to whatever was established by internal legislation in regard to civil liability, access to domestic courts, law enforcement, and so on. The introduction, in this context, of the principle of non-discrimination contained in article 10[44] would naturally help avoid the possibility of access being denied in some legislations, thus preventing victims in the States concerned from using the domestic channel in the relevant States of origin. However, if the draft articles do not make specific reference to civil liability, that principle may lose some of its efficacy in this field.

(*b*) The draft articles would regulate only the interrelationship between State liability and civil liability; they would in no way regulate any aspect of the latter. In this case, the Commission would only establish the priority to be assigned to the different types of liability, as well as determining in which cases the diplomatic channel should be used and in which recourse may be had to do-

[42] The Council of Europe draft rules (see footnote 19 above) envisage the possibility of incidents arising in various installations or sites where dangerous activities are taking place, and establish the principle of joint and several liability, except when an operator can prove that only a part of the harm could have been caused by the incident at his installation or site.

[43] Chapter V (Civil liability) of the draft consists of articles 28-33, reading as follows:

"*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 judgement*

"1. When a final judgement 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 judgement 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 judgement is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

"2. A judgement 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."

[44] See footnote 10 above.

mestic courts of law. It should be added that the victims' situation as described under (*a*) above would be the same in this case.

(*c*) The third possibility is that proposed for the draft articles in the sixth report, namely that in addition to regulating the interrelationship between State and civil liability, they should also include some provisions on civil liability designed to establish within the treaty regime regulations that will ensure the application of the principle of non-discrimination (equal access), enforcement of national law in accordance with certain standards, and other minimum guarantees regarding the utilization of the domestic channel.

63. In the sixth report, article 28 basically provided for the simple coexistence of both channels, so that if the affected State decided to represent the individuals injured, it could do so without waiting for them to initiate, much less exhaust, the local remedies which in fact were available under the domestic legislation of many countries in the international community (para. 1). There was nothing in the articles, as was indicated in the second part (para. 2) of the same provision, to prevent the State or the individual affected from submitting a claim for compensation in the courts of the State of origin, or, where individuals were concerned, in the affected State as well. In any case, a single claim could not be pursued simultaneously through both channels, diplomatic and domestic. In that part of the present report dealing with State liability, it has been suggested that the relationship between the two kinds of liability should be such that the liability of the private party responsible should be invoked initially and that of the State only residually. The channel to be selected will depend on the circumstances. If it was impossible to identify the parties responsible, negotiations could be opened, although normally the matter would be handled by the domestic courts (or the international tribunal if that concept is accepted in cases of environmental damage). Moreover, it should always be kept in mind that the State may make a claim in case of a denial of justice; accordingly, it should be established that the State must, except in the cases of negotiation mentioned above, wait until local remedies have been exhausted before seeking diplomatic protection.

64. According to this logic, chapter V should be placed after the present chapter IV, and article 28 should be amended to distinguish in its present paragraph 1 between cases where a denial of justice is claimed and those in which the State initiates a claim on the basis of these articles. The article would then be placed under State liability, although if one State litigates in the courts of another State, the domestic remedy is in fact being used.

2. Channelling of liability

65. During the debates it was said that those bearing responsibility must be identified. Why should liability not be "channelled", as it is in most of the existing agreements on civil liability for transboundary harm? Thus, it was suggested that the operator would be the most appropriate person to bear liability. However, various instruments assign liability to various persons. For example, under the proposed protocol on liability to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, liability would be assigned, some maintained, to the generator, with subsidiary (but joint and several) liability of the person disposing of the waste in some cases.[45] Others held that liability should fall on whoever was responsible for the transboundary movement or the disposal of the waste, or arranged those operations (perhaps also with joint and several liability). According to this approach, the persons responsible would be the generator(s), exporter(s), middlemen, importer(s) and disposer(s).[46] Article 2 (*b*) of the European Convention on Products Liability in Regard to Personal Injury and Death places the responsibility on the producer. However, later in article 3, paragraph 2, it extends the concept of producer to those who have imported a product with a view to distributing it in the course of business, and to any person that has presented it as his own product by putting his name, trademark or other distinguishing marks on it. In other cases, if there is no producer, the supplier is responsible. The Vienna Convention on Civil Liability for Nuclear Damage channels liability toward the operator (art. II, para. 1), but in certain cases (art. II, para. 2) a carrier of nuclear material or a person handling radioactive waste may be considered an operator and so liable. Also, under the International Convention on Civil Liability for Oil Pollution Damage the owner of the vessel at the time of the incident (or of the first incident if there is a series of them) is liable for all pollution damage. Article 5 of the Convention on Civil Liability for Damage During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels assigns liability to the carrier at the time of the incident. In article 4 of the draft Convention on Civil Liability for Damage caused by Small Craft,[47] it is assigned to the owner and user. When dealing with articles having such general application as these, use could be made of the technique employed in a proposal of the Committee of Experts on Compensation for Damage to the Environment of the Council of Europe, article 6, paragraph 1, of which states: "Except as provided for in article 8 and in article 9, the operator in respect of a dangerous activity mentioned under article 2, paragraph 1, subparagraphs (*a*) to (*d*) shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he is in control of that activity."[48] In turn, article 1, paragraph 6, which defines the "operator" as ". . . the person who exercises the actual control of a dangerous activity" appears between square brackets pending a decision.[49]

[45] See Report of the Ad Hoc Working Group of Legal and Technical Experts to develop elements which might be included in a Protocol on Liability and Compensation for Damage resulting from the Transboundary Movement and Disposal of Hazardous Wastes and other Wastes, first session, Geneva, 2-6 July 1990 (UNEP/CHW/WG.1/3, chap. IV, paras. 13-15.

[46] Ibid.

[47] International Institute for the Unification of Private Law, *Uniform Law Review* (Rome), 1981, vol. I, p. 71.

[48] CJ-EN (91) 1, p. 23.

[49] The commentary to article 2, paragraph 6 (ibid., p. 8, paras. 31-32) states that:

"The CJ-EN noted that the Working Party, after considering possible definitions (e.g., person in charge of a dangerous activity, person who is in overall control), decided that this matter should be examined in greater detail and invited experts to send written comments and proposals for a new text.

Lastly, the ECE draft Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[50] provides, in article XV, that:

> In order to ensure prompt and adequate compensation in respect of all damage caused by accidental pollution of transboundary inland waters, countries should in accordance with their national legal system provide for the identification of the physical or legal person or persons liable for damage resulting from hazardous activities. Unless otherwise provided, the operator should be considered liable; and where more than one organization or person is liable such liability should be joint and several.

66. The solution chosen in the sixth report was not to become involved in identifying the persons responsible, but to leave that to be decided by the judge in the case in accordance with the principles of national law. Under the present article 30, the applicable law is the national law of the competent court, which, therefore, should govern such cases. Our choice should be between leaving that formula in and introducing some extra criterion to help the court decide, for instance "channelling" liability towards whoever had control of the activity at the moment the incident occurred, unless the national law clearly assigns liability—depending on the activity in question—to certain other persons. In that way, there would be a certain latitude and there should be some flexibility so as not to hinder the action of the court.

3. Miscellaneous

67. This section should also provide for the case of more than one operator (all operators being jointly and severally liable, as was recommended in the Code of Conduct mentioned in paragraph 65 above and as is the rule in many other conventions and drafts on civil liability). The reasons for exemption from liability, which would be those of the present article 26,[51] could also be spelled out in articles that would cover civil liability as well as State liability, as suggested above. The limitation established in article 27[52] could apply both to the State and to the individuals liable. It might also be worth considering the possibility of authorizing a limit on the amount of compensation under national law.[53]

68. Articles 29 and 30 appear necessary and appropriate for the reasons given above. It is suggested that article 31 should be harmonized with the corresponding provisions of the draft on jurisdictional immunity being considered by the Commission.[54] Articles 32 and 33 have not been commented on. In any event, their usefulness consists in improving the application of the other articles and in making possible the "prompt and adequate compensation" that the draft seeks to provide.

"The CJ-EN decided to keep this provision between brackets and examine the question in the light of any written comments or proposals from the Working Party."

[50] Adopted by ECE by its decision C (45) of 27 April 1990. For the text, see *Code of Conduct on Accidental Pollution of Transboundary Inland Waters* (United Nations publication, Sales No. E.90.II.E.28).

[51] See footnote 33 above.

[52] Ibid.

[53] "ALTERNATIVE I

"Provisions of national law may limit the liability of the operator to a maximum amount [provided that such maximum is not fixed at a level lower than what can reasonably be covered by insurance or a similar financial security]."

"ALTERNATIVE II

"1. The liability of the operator for claims arising from any one incident may be limited by provisions of national law. However, this limit shall not be less than:

"(*a*) With respect to claims for death or personal injury . . .

"(*b*) With respect to claims for any other damage. . .

"2. The operator shall not be entitled to limit his liability under this Convention if it is proved that the damage resulted from his personal act or omission or an act or omission of his servants or agents, committed with the intent to cause the damage or recklessly and without knowledge that such damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

[54] *Yearbook . . . 1990*, vol. II (Part Two), paras. 217-228 and footnote 121.

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

[Agenda item 7]

DOCUMENT A/CN.4/438*

Fifth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur

[*Original: Spanish*]
[*7 May 1991*]

CONTENTS

* Incorporating document A/CN.4/438/Corr.1. This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432.

Agreements and conventions cited in the present report

ABBREVIATIONS

Legislative Texts — United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, 2 vols. (Sales Nos. 60.V.2 and 61.V.3).

Diplomatic relations

	Source
Convention regarding Diplomatic Officers (Havana, 20 February 1928)	League of Nations, *Treaty Series*, vol. CLV, p. 259.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, *Treaty Series*, vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	Ibid., vol. 596, p. 261.

Privileges and immunities and headquarters agreements

UNITED NATIONS

Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946)	United Nations, *Treaty Series*, vol. 1, p. 15.
United Nations and Switzerland: Interim Arrangement on Privileges and Immunities of the United Nations (Bern, 11 June 1946)	Ibid., p. 163.
United Nations and United States of America: Agreement regarding the Headquarters of the United Nations (Lake Success, 26 June 1947)	Ibid., vol. 11, p. 11.
United Nations and Chile: Agreement regulating conditions for the operation, in Chile, of the headquarters of the United Nations Economic Commission for Latin America (Santiago, 16 February 1953)	Ibid., vol. 314, p. 59.
United Nations and Thailand: Agreement relating to the headquarters of the Economic Commission for Asia and the Far East in Thailand (Geneva, 26 May 1954)	Ibid., vol. 260, p. 35.
United Nations and Egypt: Exchange of letters constituting an agreement concerning the status of the United Nations Emergency Force in Egypt (New York, 8 February 1957)	Ibid., p. 61.
United Nations and Ethiopia: Agreement regarding the headquarters of the United Nations Economic Commission for Africa (Addis Ababa, 18 June 1958)	Ibid., vol. 317, p. 101.
United Nations and Congo (Leopoldville): Agreement relating to the legal status, facilities, privileges and immunities of the United Nations Organization in the Congo (New York, 27 November 1961)	Ibid., vol. 414, p. 229.

	Source
United Nations and Cyprus: Exchange of letters constituting an agreement concerning the status of the United Nations Peacekeeping Force in Cyprus (New York, 31 March 1964)	Ibid., vol. 492, p. 57.

SPECIALIZED AGENCIES AND INTERNATIONAL ATOMIC ENERGY AGENCY

Articles of Agreement of the International Monetary Fund (Washington, 27 December 1945)	As amended: IMF, *Articles of Agreement of the International Monetary Fund* (Washington, D.C., 1978).
Articles of Agreement of the International Bank for Reconstruction and Development (Washington, 27 December 1945)	As amended: IBRD, *Articles of Agreement of the International Bank for Reconstruction and Development* (Washington, D.C., 1980).
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	United Nations, *Treaty Series*, vol. 33, p. 261.
Switzerland and ILO: Agreement concerning the legal status of the International Labour Organisation in Switzerland, and Arrangement for the execution of the Agreement (Geneva, 11 March 1946)	Ibid., vol. 15, p. 377.
Switzerland and WHO: Agreement concerning the legal status of the World Health Organization, and Arrangement for the execution of the said Agreement (Geneva, 17 July 1948)	Ibid., vol. 26, p. 331.
Italy and FAO: Agreement regarding the headquarters of the Food and Agriculture Organization of the United Nations (Washington, [D.C.], 31 October 1950)	*Legislative Texts*, vol. II, p. 187.
ICAO and Canada: Agreement regarding the headquarters of the International Civil Aviation Organization (Montreal, 14 April 1951)	United Nations, *Treaty Series*, vol. 96, p. 155.
Argentina and Pan American Sanitary Bureau: Agreement regarding the establishment of a Zone Office in the City of Buenos Aires (Buenos Aires, 21 August 1951)	*Legislative Texts*, vol. II, p. 290.
Egypt and FAO: Agreement regarding the Near East Regional Office of the Food and Agriculture Organization of the United Nations (17 August 1952)	Ibid., p. 212.
UNESCO and France: Agreement regarding the headquarters of UNESCO and the privileges and immunities of the Organization on French Territory (Paris, 2 July 1954)	United Nations, *Treaty Series*, vol. 357, p. 3.
WMO and Switzerland: Agreement to govern the legal status of the World Meteorological Organization in Switzerland (Geneva, 10 March 1955)	Ibid., vol. 211, p. 277.
ICAO and Mexico: Agreement regarding the International Civil Aviation Organization's Regional Office for North America and the Caribbean (Mexico City, 20 December 1956)	*Legislative Texts*, vol. II, p. 180.
Thailand and FAO: Agreement regarding the Far East Regional Office of the Food and Agriculture Organization of the United Nations (entered into force on 6 February 1957)	Ibid., p. 220.

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	Source
Agreement on the Privileges and Immunities of the International Atomic Energy Agency (Vienna, 1 July 1959)	United Nations, *Treaty Series*, vol. 374, p. 147.
IAEA and Austria: Agreement regarding the headquarters of the International Atomic Energy Agency (Vienna, 11 December 1957)	Ibid., vol. 339, p. 111.

OTHER INTERGOVERNMENTAL ORGANIZATIONS

Agreement on Privileges and Immunities of the Organization of American States (15 May 1949)	OAS, *Law and Treaty Series*, No. 31 (Washington, D.C., 1949); *Legislative Texts*, vol. II, p. 377.
General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949)	United Nations, *Treaty Series*, vol. 250, p. 13.
Convention on the Privileges and Immunities of the League of Arab States (10 May 1953)	*Legislative Texts*, vol. II, p. 414.
Agreement establishing the Inter-American Development Bank (Washington, [D.C.], 8 April 1959)	United Nations, *Treaty Series*, vol. 389, p. 69.

Postal agreements

United Nations and Switzerland: Agreement on the supply of official stamps to the European Office of the United Nations at Geneva (Geneva, 14 September 1949)	Ibid., vol. 43, p. 327.
United Nations and United States of America: Postal Agreement (New York, 28 March 1951)	Ibid., vol. 108, p. 231.
United Nations and Lebanon: Exchange of letters constituting an agreement concerning the United Nations Emergency Force postal arrangements (Gaza, 21 December 1957 and 5 February 1958, and Beirut, 20 January 1958)	Ibid., vol. 286, p. 199.
United Nations and Switzerland: Postal Agreement (Geneva, 11 December 1968)	Ibid., vol. 692, p. 373.

Telecommunications

United Nations and Switzerland: Exchange of letters of 22 October and 4 November 1946, annexed to the Interim Arrangement of 11 June 1946	*Legislative Texts*, vol. I, pp. 202-204.
International Telecommunication Convention, Atlantic City, 1947 (2 October 1947)	United Nations, *Treaty Series*, vol. 193, p. 189.
International Telecommunication Convention, Buenos Aires, 1952 (22 December 1952)	ITU, *International Telecommunication Convention, Buenos Aires, 1952* (Geneva, 1953).
International Telecommunication Convention, Geneva, 1959 (21 December 1959)	ITU, *International Telecommunication Convention, Geneva, 1959* (Geneva, [1960]).
International Telecommunication Convention, Montreux, 1965 (12 November 1965)	ITU, *International Telecommunication Convention, Montreux, 1965* (Geneva, [1966]).

I. Introduction

1. This report, except for the section containing the proposed texts of draft articles 13 to 17, was originally submitted to the Commission at its forty-second session as document A/CN.4/432. Owing to lack of time, the report could neither be introduced nor considered by the Commission.[1] The report was therefore resubmitted in its present form at the forty-third session.

2. The present report consists of two parts. The first part concerns the archives of international organizations and contains an article on this question that completes part III (Property, funds and assets) of the draft articles. The second part concerns the publications and communications of international organizations and contains provisions constituting part IV (Publications and communications facilities) of the draft articles.

[1] *Yearbook . . . 1990*, vol. II (Part Two), p. 84, para. 422.

II. Archives

A. Presentation of the subject

3. Like States, international organizations are in permanent communication with member States and with each other. They maintain a steady correspondence with public and private institutions and private individuals. They keep files on their staff, on projects, on studies and on any other action in which they may be involved with a view to achieving the aims for which they were created. Lastly, they possess a body of documentation which is the backbone of their operations.

4. All this documentation, which is protected and kept safe, is what constitutes the archives of international organizations. International intergovernmental organizations must enjoy inviolability of their archives in order to preserve, protect and safeguard the confidentiality of these archives and to protect not only their own security and their right to privacy and private property but also the security and privacy of documentation addressed or entrusted to them, particularly by member States.

5. International organizations are subjects of international law and, like States, enjoy inviolability of their archives.

6. For States, the inviolability of archives is closely linked to the inviolability of diplomatic premises. This principle is enshrined in article 24 of the Vienna Convention on Diplomatic Relations:

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

7. Likewise, the inviolability of the archives of international organizations is closely linked to the inviolability of the premises occupied by those organizations. The Convention on the Privileges and Immunities of the United Nations[2] expands on the principle of the inviolability of archives when it provides, in its article II, section 4, that:

The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

We are thus talking about not only all the Organization's own documents but also those held by it, in other words those in its safekeeping.

8. The concept of the archives of international organizations has been spelt out in a number of international instruments concluded by some international organizations, in particular in the Agreement between the United Nations and Chile concerning the headquarters of the United Nations Economic Commission for Latin America (ECLA).[3] Article I, section 1 (*g*), of that agreement states:

(*g*) The expression "archives of ECLA" means the records, correspondence, documents, manuscripts, photographs, cinematograph films and sound recordings, belonging to or held by ECLA.

9. The Vienna Convention on Consular Relations adopts a similar definition in its article 1, paragraph 1 (k):

(*k*) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

10. The Committee of Ministers of the Council of Europe has adopted a similar definition,[4] and article 31 of the regulation of the Commission of the European Communities of 1 July 1969 on mail and archives defines archives as comprising files and collections.

11. The issue, then, is one of protecting not only secrecy but also the place where the secret is kept. In the case of diplomatic and consular missions, the receiving State is under an obligation not only to refrain from trying to penetrate the secret but also to protect it by re-

[2] Hereinafter the "General Convention".

[3] Now ECLAC.

[4] Council of Europe, *Privileges and Immunities of International Organisations*, Resolution (69) 29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969 and explanatory report (Strasbourg, 1970), p. 29, para. 50.

specting the place where it is kept, and even to prevent third parties from violating it. This is the right to secrecy defined by the late Paul Reuter, in a famous article on the problem, when he says that there can be "no personality or freedom without some degree of privacy, some private life, without a protective screen which hides a number of secrets from the public eye".[5]

12. Article 24 of the Vienna Convention on Diplomatic Relations (see para. 6 above) refers only to the inviolability of archives and makes no mention whatsoever of the receiving State's obligation to protect them against third parties. However, it has always been tacitly understood that the customary rule whereby the receiving State is bound to protect the archives of a mission remains in force (article 14 (*d*) of the Havana Convention regarding Diplomatic Officers). Similarly, the draft convention on diplomatic privileges and immunities drawn up by the Harvard Law School[6] provides, in article 5, that a receiving State "shall protect the archives of a mission from any violation and shall safeguard their confidential character, wherever such archives may be located within the territory of the receiving State".

13. This duty to protect can clearly be inferred from the commentary to article 22 (Inviolability of the archives) of the draft articles on diplomatic intercourse and immunities,[7] on which the Vienna Convention on Diplomatic Relations was based.

14. Reuter, in the above-mentioned article, goes a step further by establishing a close relationship between autonomy, a prerequisite for the proper functioning of an international organization, and the right to privacy. He says that a certain right to privacy also gives recognition to the autonomy of the group and that without privacy there can be no freedom, without freedom there can be no autonomy.[8]

15. There does not seem to be any valid reason for not applying this rule to the archives of international organizations.

16. The question was raised by Cahier whether there was any need for a separate article on the inviolability of archives in the Vienna Convention on Diplomatic Relations.[9] It was, in fact, argued that, since diplomatic premises were inviolable, the inviolability of their archives was automatically guaranteed. Both the Commission and the 1961 United Nations Conference on Diplomatic Intercourse and Immunities took the view that a separate provision was necessary since the case might arise, and had in fact arisen, where the archives of a mission were not located, even if only temporarily, on the premises occupied by the mission. What we have here is a special duty of oversight and protection.[10]

17. This inviolability is absolute, for it continues to apply to diplomatic missions even in the event of war or the severance of diplomatic relations. There are a number of legal precedents for this which have come to be viewed as typical. One concerns the archives of the former Imperial Russian Legation at Bern. In the absence of diplomatic relations between the Soviet and Swiss Governments, the Swiss authorities placed the archives of the Imperial Russian Legation under seal and refused to open them to individuals wishing to consult them for the benefit of private interests.[11]

18. The principle of the inviolability of archives has at times been disregarded, but only rarely. The two most serious cases recorded in the legal literature are the search by the French authorities of the archives of the Apostolic Nunciature in Paris on 11 December 1906, after the severance of diplomatic relations between the Holy See and France on 30 July 1904, and the violation of the archives of the British Embassy in Petrograd by the Soviet Government in 1918.[12]

19. Aside from these sporadic occurrences, which are by now part of history, the principle has been universally accepted. The United Nations itself has interpreted section 4 of article II of the General Convention as necessarily implying the inviolability of information contained in archives and documents as well as the actual archives and documents themselves.[13]

20. In connection with judicial proceedings against United Nations staff members, questions relating to the inviolability of the documents of the Organization have been raised on several occasions. In March 1949, the United States police arrested a member of the United Nations Secretariat on charges of espionage. The Permanent Representative of the State of which the staff member concerned was a national protested against this action on the ground that the official held the rank of Third Secretary in the Ministry of Foreign Affairs of his country and that, consequently, the diplomatic immunity protecting him remained in force even after his appointment to the United Nations. In addition, the Permanent Representative alleged that information from United Nations files had been made known to officials of the Federal Bureau of Investigation. The Secretary-General replied stating that information regarding the status of the official had been made known solely to his attorney.

21. A somewhat different situation arose in the case of *United States* v. *Keeney*, where the defendant was prosecuted for contempt of Congress following her refusal to answer, when testifying before a Senate Sub-Committee, the question whether anyone in the State Department had aided her in obtaining employment with the United Nations. The main issue in the case was whether the defendant, as a former employee of the United Nations,

[5] P. Reuter, "Le droit au secret et les institutions internationales", *Annuaire français de droit international, 1956* (Paris), vol. II, p. 60.

[6] Harvard Law School, *Research in International Law. I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 15 et seq.

[7] *Yearbook... 1958*, vol. II, p. 96, document A/3859.

[8] Reuter, loc. cit., p. 61.

[9] P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), pp. 209-210.

[10] See C. Rousseau, *Droit international public*, vol. IV, *Les relations internationales* (Paris, Sirey, 1980), p. 183.

[11] See the letter from the Swiss Political Department dated 10 January 1923, in *Répertoire suisse du droit international public*, vol. III (Bern, 1975), pp. 1501 *et seq.*

[12] See Rousseau, op. cit., p. 184.

[13] See the study prepared by the Secretariat in 1967 on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities (*Yearbook... 1967*, vol. II, p. 238, document A/CN.4/L.118 and Add.1 and 2), para. 132.

was herself privileged from answering that question. The District Court held that her motion of privilege should be denied.[14] The Court of Appeals reversed the earlier conviction and granted a new trial on the ground that the answer sought by the Sub-Committee, in so far as it depended upon data in United Nations files or upon information derived from those files, was rendered privileged by the Charter and the Staff Rules of the United Nations and could not legally be revealed by an official. One of the judges of the Court stated that the question posed

> related to "unpublished information". The United Nations does not tell the world what recommendations underlie appointments of staff members. The United Nations Administrative Manual even defines unpublished information to include "the appointment ... [of] or any other confidential information concerning" a staff member. I think it plain that staff members would not have such unpublished and confidential information unless it had been made "known to them, by reason of their official position".[15]

22. The last words quoted in the above statement by the judge were from staff rule 7 (now regulation 1.5 of the Staff Regulations of the United Nations), requiring staff members not to communicate unpublished information "except in the course of their duties or by authorization of the Secretary-General". The Court also stated, with reference to Article 105, paragraph 2, of the Charter of the United Nations, that the privilege of non-disclosure as it applied to officials was "necessary for the independent exercise of their functions in connection with the Organization".[16]

23. There have, however, been instances where information was supplied, not amounting to access to United Nations files, as in a case which arose in 1956. A person who had previously held a United Nations short-term appointment submitted a claim to the United States authorities for unemployment insurance benefits. There was some question as to whether or not there was an overlap between the period of her employment by the United Nations and that for which the claim was being made. The United Nations informed the United States Department of Labor that, though it would not grant access to United Nations files or permit the production and delivery of the entire personnel file, it would be prepared in the circumstances to produce its record of the employment of the person concerned, together with a brief qualified testimony necessary to explain it.[17]

24. More recently, according to reports from the United Nations, the specialized agencies and IAEA, there has been no controversy regarding recognition of the inviolability of the archives and documents of the United Nations, the specialized agencies and IAEA. However, IMF, whose staff members on mission carry an IMF briefcase for papers and documents, notes that on a few occasions customs officials have insisted on searching the briefcase even when informed of the inviolability of the organization's archives, and that documents, including codes, have been examined. In no case, however, have documents been confiscated. IMF has, of course, protested against these actions, and assurances have been received that such incidents would henceforth be avoided. Similarly, there have been some incidents reported of interference with IMF documents sent by private courier.[18]

25. In addition to the general conventions on the privileges and immunities of the United Nations and the specialized agencies, the headquarters agreements contain express provisions on the inviolability of archives. Such provisions differ little in their wording; in substance, they set out the principle of the absolute inviolability of archives more or less broadly, depending on the case. To be noted in this connection, among others, are: the Articles of Agreement of IMF (art. IX, sect. 5); the Agreement between Switzerland and WHO (art. 8); the Agreement on Privileges and Immunities of OAS (art. 4); the General Agreement on Privileges and Immunities of the Council of Europe (art. 5); the Convention on the Privileges and Immunities of the League of Arab States (art. 4); the Agreement between UNESCO and France (art. 14, para. 2); the Agreement between WMO and Switzerland (art. 8); the Agreement between IAEA and Austria (art. VIII, sect. 21); and the Agreement establishing IDB (art. XI, sect. 5).

26. The question of the inviolability of the archives of an international organization has two aspects. First, for practical reasons, the archives of the organization must be open to its officials, who are bound by the obligation of professional secrecy. This aspect, which concerns the internal affairs of the organization, is regulated by the organization itself and is covered by its internal regulations. Through appropriate legal mechanisms, international organizations determine the way in which their archives are to be used and the persons who are authorized to use them, and regulate the arrangements for their use. It would not be appropriate for the Commission to discuss or examine this aspect of the question.

27. The second aspect involves the inviolability of the archives of international organizations in relation to the exterior. It is this second aspect which the Commission is required to study in conformity with the mandate given to it by the General Assembly. The inviolability of the archives of international organizations in relation to the exterior is, as we have seen, absolute, just as in the case of States. It can be said that in the case of international organizations such inviolability should be even stricter, since its purpose is to protect not only the secrets of the international organizations themselves but also those of their member States.

28. In accordance with doctrine and State practice, national authorities must refrain from any kind of administrative or jurisdictional coercion and are obligated to protect the archives of international organizations against any external interference.

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[14] Judgement of 17 March 1953 of the District Court of the District of Columbia (*Federal Supplement*, vol. III, 1953, p. 223).

[15] *Keeney* v. *United States*, judgement of 26 August 1954 of the Court of Appeals of the District of Columbia (*Federal Reporter, 2nd series*, vol. 218, 1955, pp. 843-844).

[16] Ibid., p. 845.

[17] See document (A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 239, para. 136.

[18] See the supplementary study prepared by the Secretariat in 1985 on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities (*Yearbook ... 1985*, vol. II (Part One), *Addendum*, p. 191, document A/CN.4/L.383 and Add.1-3), para. 69.

29. Even when an international organization waives immunity from jurisdiction, it cannot be obliged to comply with national procedural rules and, in particular, with the obligation to produce documents requested by the courts. We know that waiver of immunity from jurisdiction does not entail a simultaneous waiver of immunity from measures of execution. There is no doubt that an order for discovery of documents constitutes coercion, and the privilege in these circumstances is just as broad as that accorded to foreign States.[19]

30. Jenks has expressed a categorical opinion on this point, stating that, as regards inviolability of archives, international organizations enjoy a fuller measure of immunity than the Government in English law. He observes firmly: "No order for discovery of documents can be made against an international body corporate which is entitled to inviolability of archives . . .".[20]

31. In the course of an inquiry concerning United Nations staff members of United States nationality, the United States Government called upon them to produce certain documents belonging to the archives of the Organization, declared inviolable by United States law itself. The Secretary-General of the United Nations opposed such a step because he considered that it violated the Organization's archives. The United States grand jury did not object to the position adopted by the Secretary-General. Nevertheless, on 22 October 1952 the Secretary-General set up an international commission of jurists which was requested to advise him on five specific questions, including the following:

> (iv) In the course of inquiries by agencies of the United States Government, should the Secretary-General make available archives of the Organization or authorize staff members to respond to questions involving confidential information relating to official acts?[21]

32. In its opinion of 29 November 1952 the Commission of Jurists replied in the following terms:

> All the relevant documents declare the archives of the United Nations to be inviolable. In our opinion, the Secretary-General should never waive this privilege. Indeed, we doubt whether he has any power to do so. . . .[22]

33. The United Nations interprets strictly the principle of the absolute inviolability of its archives, which is, moreover, in accordance with the relevant United States legislation, the International Organizations Immunities Act, which states: "The archives of international organizations shall be inviolable".[23]

34. Protection by States of the inviolability of the archives of an international organization against any interference by persons from outside the organization involves preventing such persons from taking possession of the archives or obtaining information about their contents. The State is therefore under an obligation to refrain and protect. This is the rule in diplomatic law,[24] and it applies also in the case of international organizations.

35. The Vienna Convention on Diplomatic Relations expressly provides in article 45 for the protection of the archives of diplomatic missions in case of emergency:

Article 45

> If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
>
> (*a*) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
>
> . . .

36. The same Convention does not refer specifically in article 24 to the duty of the receiving State to protect the archives against any interference by third parties. As Cahier states, the wording of this article is defective because "this inviolability would obviously be illusory if the receiving State were not obliged to protect the archives".[25]

37. Nevertheless, despite this omission in the Vienna Convention, it is understood, as noted above (para. 12), that the customary rule according to which a State is obliged to protect the archives of a diplomatic mission remains in force. This can clearly be deduced from the Commission's commentary to article 22, on inviolability of the archives, adopted in 1958.[26]

38. This absolute inviolability of archives was demonstrated in practice in connection with the closing of the German Legation at Bern in 1945. The premises were placed under the protection of the Political Department of the Swiss Confederation, and the archives were sealed.[27]

39. The customary rule was also applied in the case of the Romanian Legation at Bern which was attacked by a group of individuals who occupied the Legation for 38 hours on 15 and 16 February 1951. They read a number of documents forming part of the Legation archives and destroyed them. The Swiss Government was criticized for not having taken appropriate steps to restore the inviolability of the archives immediately. In fact, the Swiss authorities preferred to negotiate with the attackers so as not to endanger human lives by storming the Legation premises.[28] The Swiss authorities were nevertheless under the obligation not only to protect the premises but also to prevent violation of the secrecy of the archives.

40. In another case, on the other hand, Switzerland complied fully with its obligations. In 1958, when two armed Hungarian refugees entered the Hungarian Legation at Bern in order to seize documents, the police, alerted and given permission by the head of the mission, entered the premises and arrested the perpetrators.[29]

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[19] See J. Duffar, *Contribution à l'étude des privilèges et immunités des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 1982), p. 169.

[20] C. W. Jenks, *The Proper Law of International Organisations* (London, Stevens, 1962), pp. 234-235.

[21] See the report of the Secretary-General on personnel policy, of 30 January 1953 (*Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 75, document A/2364), para. 62.

[22] Ibid., annex III, sect. VII.

[23] *United States Code, 1988 Edition*, vol. 9, title 22, sect. 288a, (*c*).

[24] Cahier, op. cit., pp. 216 *et seq.*

[25] Ibid., p. 210.

[26] See footnote 7 above.

[27] Cahier, op. cit., p. 210.

[28] Ibid., pp. 217-218.

[29] Ibid., p. 218, footnote 76.

41. There is no doubt that the principle is equally valid in the case of international organizations. It is clear that when the archives are kept on the premises occupied by an international organization, protection of the premises entails protection of the inviolability of the archives. But when the archives are carried out of the premises, it must be acknowledged that the host State is obliged, should the circumstances so require, to provide the protection necessary to preserve the secrecy of their contents or to allow the organization itself to do so.

42. The States members of an international organization should therefore refrain from exercising any administrative coercion whatsoever against the individuals or means of transport that may be carrying archives. They should not invoke the prerogatives of the judicial authorities in order to infringe the secrecy of the archives. They also have the obligation to protect the archives of international organizations against interference by third parties.

43. In conclusion, international instruments, whether in the form of treaties or headquarters agreements, and even unilateral declarations or acts (for example, the International Organizations Immunities Act of the United States), like doctrine and State practice, fully support the principle of the inviolability of the archives of international organizations. The right to a private life, to privacy, in other words to secrecy, is recognized to be a basic element guaranteeing the freedom of action and functional efficiency of international organizations. Respect for privacy and the preservation of secrecy constitute the very basis of the independence of international organizations, to which they must be entitled if they are to fulfil properly the purposes for which they were established.

B. Draft article 12

44. In accordance with the foregoing, the Special Rapporteur proposes the following draft article:

Article 12

1. The archives of international organizations and, in general, all documents belonging to or held by them shall be inviolable wherever they are located.

2. Archives of international organizations shall be understood to mean all papers, documents, correspondence, books, films, tape recordings, files and registers of the international organization, together with ciphers, codes, and the filing cabinets and furniture intended to protect and conserve them.

45. Paragraph 2 of the article could be included in the section on definition of terms at the beginning of the draft articles. The Special Rapporteur has no preference in that regard but feels that it might perhaps make the text clearer if the definition of archives were included in the body of the draft article itself, thus obviating the need to refer to another draft article.

III. Publications and communications facilities

A. Preliminary observations

46. In the case of international organizations, freedom of communication cannot be dissociated from freedom of publication. The effectiveness of any international organization depends largely on the means of expression and communication available to it, on the exchange and dissemination of ideas, or, in other words, on its capability to express itself freely. International organizations must have the most extensive communications facilities if they are to function properly: they must be able to communicate freely with member States or other organizations, and be able to propagate and disseminate ideas and the results of the work entrusted to them. In short, they must enjoy freedom of publication and communication in order to protect the right to freedom of expression. As Duffar has observed, quoting article 11 of the 1789 Declaration of the Rights of Man, "the unrestrained communication of thoughts or opinions is one of the most precious rights of man",[30] a right also set forth in article 19 of the Universal Declaration of Human Rights,[31] article 18 of the International Covenant on Civil and Political Rights[32] and article 10 of the European Convention on Human Rights.[33]

47. If this freedom has been recognized in the case of individuals, there is all the more reason why it should be recognized in the case of international organizations, which are called upon to act, inform and consequently communicate on a much greater scale. This observation applies in particular to international organizations of an operational character, as the basic condition for all their activities is freedom of communication and information.

B. Publications

1. General considerations

48. Publications constitute the chief—indeed, it might be said, the most basic—form of expression for international organizations. Consequently, the scope of the term "publications", as employed by international organizations both in the legal documents and in practice, is

[30] Duffar, op. cit., p. 196.

[31] General Assembly resolution 217 A (III).

[32] United Nations, *Treaty Series*, vol. 999, p. 171.

[33] Convention for the Protection of Human Rights and Fundamental Freedoms (ibid., vol. 213, p. 221).

much broader than is usual in domestic law. The scope of the term varies, of course, from document to document. One of the broadest uses is found, for example, in the wording contained in the Agreement between Austria and IAEA, which provides in article VI, section 15 (*a*):

> (*a*) All official communications directed to the IAEA, or to any of its officials at the headquarters seat, and all outward official communications of the IAEA, by whatever means or in whatever form transmitted, shall be immune from censorship and from any other form of interception or interference with their privacy. Such immunity shall extend, without limitation by reason of this enumeration, to publications, still and moving pictures, films and sound recordings.

That provision clearly establishes the indivisibility that exists in the protection afforded to privacy irrespective of the vehicle used to communicate thoughts, whether correspondence, publications, moving pictures, sound recordings or other medium.[34]

49. The concept of publications is stated in a similar, albeit less sweeping, manner in other international instruments. Thus, for example, in the Agreement between ICAO and Mexico, exemption from prohibitions and restrictions is granted in respect of the "import or export of its publications, photographs, films and phonograph records" (art. III, sect. 6 (*c*)). In the Agreement between UNESCO and France, the list of exempted items includes "publications, cinematograph films, photographic slides and documents which the Organization may import or publish in the course of its official activities" (art. 15, para. 2 (*b*)). Similar provisions are to be found in the Agreement between Italy and FAO (art. VI, sect. 13), the Agreement between Egypt and FAO (art. V, sect. 13 (*b*)), the Agreement between Thailand and FAO (art. VIII, sect. 15 (*c*)) and the Agreement on Privileges and Immunities of OAS (art. 5 (*c*)).

2. Practice

50. In accordance with the General Convention, the United Nations is "exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications" (art. II, sect. 7 (*c*)). Similar provisions are contained in other agreements, for example the Interim Arrangement between the United Nations and Switzerland (art. II, sect. 5 (*e*)), the Agreement between the United Nations and Chile relating to the headquarters of ECLA (art. IV, sect. 10 (*c*)) and the Agreement between the United Nations and Thailand relating to the headquarters of ECAFE (art. IV, sect. 8 (*c*)).

51. As regards the specialized agencies, the Convention on the Privileges and Immunities of the Specialized Agencies grants to the agencies exemption from duties and prohibitions and restrictions on imports and exports in respect of their publications (art. III, sect. 9 (*c*)).

52. The term "publications" has been widely interpreted to encompass not only printed matter but also films, records, recorded radio programmes and audio tapes, as well as books, periodicals and other printed matter published by the organization in question. Note should be taken of the statement made by the Legal Counsel of the United Nations to the Fifth Committee of the General Assembly at its seventeenth session, in which he referred to a problem that had arisen regarding the interpretation of the term "official use". The Legal Counsel stated:

> Now, if the United Nations sent a film or recording produced by it as a part of its public information operations to a distributing agent for distribution in a Member State, is the film so imported into the territory of that Member State for the "official use" of the United Nations? The Secretariat took the affirmative view and the Member concerned, I am glad to report, graciously agreed.[35]

53. Furthermore, in an internal memorandum prepared by the Office of Legal Affairs in 1952 it was stated, in connection with the General Convention:

> . . . the term "official use" in section 7 (*b*) must be regarded as comprehending the distribution of United Nations films within Member States not only by the United Nations itself but through the various distributors which contract with the United Nations under the film rental agreements, so long as the United Nations is carrying out an official purpose in effecting the distribution.[36]

54. We can therefore see from the different interpretations given to the term "publications" by the various international organizations that the term covers a rather wide gamut of means of information and dissemination. It encompasses not only publications *stricto sensu* but also a range of means of information, including motion pictures. The United Nations and the specialized agencies have until now claimed as of right a regime of complete freedom—though with certain specific exceptions—in all matters relating to the publications of international organizations.

55. A possible way of establishing more direct means of control by States is through censorship or government licence. In 1962, the United States of America sought to require the United Nations to obtain a licence to export public information materials to certain States. Following an exchange of correspondence, the United States acknowledged that the United Nations was exempt from that obligation, since such a restriction might cripple its information activities in the States in question. The United Nations based its protest on the provisions of Article 105 of the Charter and article II, section 7 (*b*), of the General Convention.[37]

56. A Member State requested the United Nations Information Centre situated in its territory to stop showing United Nations films until they had been cleared with the authorities of the host State. The Secretariat wrote in 1966 to the Permanent Mission of the State concerned, setting out the basis on which exemption from this requirement was claimed in the following words:

> The United Nations is not in a position to submit its films to censorship since this would be contrary to the Charter and to the Convention on the Privileges and Immunities of the United Nations of which your country is a party. The position of the United Nations in this regard derives, in general terms, from Article 105 of the Charter and more specifically from sections 3, 4 and 7 (*c*) of the Convention on the Privileges and Immunities of the United Nations.[38]

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[34] Duffar, op. cit., p. 199.

[35] See document A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 250, para. 182.

[36] Ibid., p. 251, para. 193.

[37] Ibid., p. 250, para. 184.

[38] Ibid., p. 252, para. 199.

57. It may be noted that the Agreement between the United Nations and Chile relating to the headquarters of ECLA expressly provides that the freedom from censorship enjoyed in respect of ECLA correspondence and other communications is extended, "without limitation by reason of this enumeration, to printed matter, still and moving pictures, films and sound recordings" (art. III, sect. 6). Similar provisions are contained in the Agreement between the United Nations and Ethiopia regarding the headquarters of ECA (art. III, sect. 6 (*a*)) and the Agreement between the United Nations and Thailand relating to the headquarters of ECAFE (art. V, sect. 13 (*a*)).

58. The information received since 1966 on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities[39] indicates that, in practice, no serious problems relating to the recognition of the freedom of the organizations mentioned with respect to their publications have arisen. However, the United Nations has noted two cases that concern the interpretation of the term "publications" and problems of distribution.

59. In one case, a new press law in a Member State required that all periodical publications should carry a record of the name of the editor. In a memorandum dated 16 January 1970 addressed to the Office of Public Information, the United Nations Office of Legal Affairs gave the following opinion:

> The purpose of the provision referred to above of the press law in question is obviously to identify the author of any periodical publication so as to hold him responsible under the law of the Member State concerned. In the distribution of United Nations publications in that State, the Director of the United Nations Information Centre would be performing a United Nations function in his capacity as a United Nations official. He cannot be held accountable to the Government concerned or, for that matter, to any other authority external to the United Nations, in virtue of Article 105 of the Charter and section 18 (*a*) of the Convention on the Privileges and Immunities of the United Nations. The said provision of the law in question obviously has no application with respect to United Nations publications, including those issued by the Information Centre.
>
> Accordingly, the Director of the Centre should take the necessary steps to request recognition of the exemption from the application of the law in question.[40]

60. The other case refers to the censorship of United Nations films under the censorship laws of a Member State. In a memorandum to the Office of Public Information dated 7 January 1970,[41] the Office of Legal Affairs addressed this question, stating *inter alia*:

> The United Nations is not in a position to submit its films to censorship, since it would be contrary to the Charter and to the Convention on the Privileges and Immunities of the United Nations to which the Member State concerned acceded without reservations. The position of the United Nations in this regard derives, in general terms, from Article 105 of the Charter and, more specifically, from sections 3, 4 and 7 (*c*) of the Convention on the Privileges and Immunities of the United Nations. . . .

61. The legal provisions cited by the Office of Legal Affairs refer to the inviolability of the premises of the United Nations; the immunity of the property and assets of the United Nations, wherever located and by whomsoever held, from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action; the inviolability of the documents belonging to it or held by it; and, lastly, the exemption accorded to the United Nations from prohibitions and restrictions on imports and exports in respect of its publications.

62. As to the distinction between United Nations films intended "for screening in commercial cinemas" and films "shown at public or private group-screenings", the Office of Legal Affairs rejects the notion that any such distinction could be made in relation to the General Convention. According to the Office of Legal Affairs, the establishment of an information centre in the territory of a Member State is effected in accordance with resolutions of the General Assembly, under which both Member States and the Secretary-General are to further the public information work of the United Nations, as spelt out in General Assembly resolutions 13 (I), 595 (VI) and 1405 (XIV).

63. According to paragraph 8 of the "Basic Principles Underlying the Public Information Activities of the United Nations"[42] approved by the General Assembly in its resolution 595 (VI), the United Nations Department of Public Information should

> promote and where necessary participate in the production and distribution of documentary films, film strips, posters and other graphic exhibits on the work of the United Nations.

Concerning the mode of distribution, paragraph 10 of the Basic Principles states:

> 10. Free distribution of materials is necessary in the public information activities of the United Nations. The Department should, however, as demands increase and whenever it is desirable and possible, actively encourage the sale of its materials. Where appropriate, it should seek to finance production by means of revenue-producing and self-liquidating projects.

The Office of Legal Affairs concludes its memorandum of 7 January 1970 by stating:

> It is thus a long-established principle that distribution of United Nations public information material may take place through commercial channels. . . . there is no foundation for distinguishing between various forms of distribution as long as the activities are performed within the scope of the above-mentioned General Assembly resolutions.

64. In practice, then, the term "publications" has been interpreted to cover films, photographs and sound recordings (produced as part of the public information programme of an international organization and exported or imported for exhibition or retransmission), as well as books, periodicals and other printed matter. While no disputes have arisen concerning the scope of the term "publications", some specialized agencies, such as FAO, IBRD and IDA, have encountered difficulties in applying the relevant provisions, and also with regard to the 1949 Agreement on the free circulation of educational materials.[43] For instance, some countries levy import duties on the publications and documents of international organizations, and the distribution of books, films

[39] See document A/CN.4/L.383 and Add.1-3 (footnote 18 above).

[40] Ibid., p. 167, para. 39.

[41] Ibid., para. 40.

[42] See the annex to the report of Sub-Committee 8 of the Fifth Committee on Public Information (*Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 41, document A/C.5/L.172).

[43] Agreement for facilitating the international circulation of visual and auditory materials of an educational, scientific and cultural character (United Nations, *Treaty Series*, vol. 197, p. 3).

and microfiches is sometimes hindered by restrictions or long delays in clearing them through customs.

65. The subcommittee on privileges and immunities of international organizations of the European Committee on Legal Cooperation noted in its report that agreements on the privileges and immunities of international organizations usually do not contain express provisions on the dissemination of publications once they have been imported, but pointed out that article 10 of the Protocol on the Privileges and Immunities of the European Space Vehicle Launcher Development Organization specifically provides that publications must be circulated without restriction. While agreeing that States should facilitate distribution of the publications of an organization of which they are members, it took the view that member States should reserve the right to take the necessary steps to protect public order.[44]

C. Communications

1. Definition and legal texts

66. The Convention on the Privileges and Immunities of the Specialized Agencies provides in article IV, section 11:

> Each specialized agency shall enjoy, in the territory of each State party to this Convention in respect of that agency, for its official communications, treatment not less favourable than that accorded by the Government of such State to any other Government, including the latter's diplomatic mission, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications, and press rates for information to the press and radio.

67. This provision is similar to the one in the General Convention, which states in article III, section 9:

> The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communication; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

68. Similar provisions can be found in other international agreements, for instance in article III of the Agreement between the United Nations and Chile relating to ECLA; in Article V, sections 11 and 13, of the Agreement between the United Nations and Thailand relating to ECAFE; in article III, sections 5 and 6, of the Agreement between the United Nations and Ethiopia relating to ECA; and in article III, section 7, of the Interim Arrangement between the United Nations and Switzerland, to which the words "in conformity with the International Convention on Telecommunications" were added at the end of the first sentence.

69. The General Agreement on Privileges and Immunities of the Council of Europe is more specific; it provides in article 8 as follows:

Article 8

> The Committee of Ministers and the Secretary-General shall enjoy in the territory of each Member, for their official communications, treatment at least as favourable as that accorded by that Member to the diplomatic missions of any other Government.
>
> No censorship shall be applied to the official correspondence and other official communications of the Committee of Ministers and of the Secretariat.

This article refers specifically to diplomatic treatment and is clearly intended to protect freedom of communication effectively against any attempt by a State to obstruct or impede the Council's mission if it considers that mission potentially detrimental to its own interests. Reference to this provision is justified by the similarity of situations. Like international organizations, diplomatic missions conduct their activities in a territory which is not their own. Moreover, the international nature of their functions requires, as we have seen, that secrecy be respected.[45]

70. The inviolability of the communications of international organizations would thus seem to be defined by reference to the law of diplomatic missions. There could be no more favourable system than that which States agree to apply to each other. Such a system is provided for in the Vienna Convention on Diplomatic Relations, which states in article 27, paragraph 1:

> 1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. . . .

71. It may also be noted that the internal law of most Western countries confirms the inviolability of communications between persons. By extension, international law might be said to recognize that such inviolability is guaranteed in the case of international organizations.

72. The term "communications" encompasses all means of transmitting ideas: correspondence, telegraph, telephone and radio. Most legal systems guarantee the inviolability of communications. Thus, for example, article 63 of the Constitution of Venezuela states: "Correspondence in all its forms is inviolable. Letters, telegrams, private papers and any other means of correspondence may not be seized except by judicial authority". It nevertheless establishes a limitation which is not applicable to international organizations. A similar provision is to be found in article 25 of the Constitution of Mexico; in articles 10, 18 and 44 of the Basic Law of the Federal Republic of Germany; and in article 36, paragraph 4, of the Constitution of Switzerland.

73. Although the principle is formulated in absolute terms, *de jure* and de facto derogations from it, such as that noted above in the case of the Venezuelan Constitution, exist in all countries. However, it would seem that such derogations do not apply to international organizations.

74. The inviolability of the communications of diplomatic missions implies on the part of the receiving State both abstention and a positive obligation to protect freedom of communication; the communications of international organizations are entitled to the same treatment.

[44] Council of Europe, *Privileges and Immunities . . .*, explanatory report (see footnote 4 above), para. 73.

[45] See Duffar, op. cit., p. 197.

Furthermore, the State must refrain from using against them any of the means available to it in internal law. Its responsibility may be entailed if it does not protect the communications of international organizations.

75. The protection provided by the State may be direct or indirect, depending on the arrangements involved.[46] The protection is direct when the State conducts or operates the means of communication itself. It would seem that in such cases the obligation of the State consists in doing everything possible to fulfil its undertakings and is not, therefore, an obligation of result. In order to avoid any controversy, various headquarters agreements simply require the State to enter into an obligation of this kind rather than an obligation of result. For example, the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations states in article VII, section 17 (*a*):

> ... In case of any interruption or threatened interruption of any such services, the appropriate American authorities will consider the needs of the United Nations as being of equal importance with the similar needs of essential agencies of the Government of the United States, and will take steps accordingly to ensure that the work of the United Nations is not prejudiced.

76. The obligation to guarantee absolute inviolability is indirect when the communications are not carried out by the services of the State itself. The State must then intervene to see that non-governmental institutions are ensuring the fulfilment of its international obligations. The responsibility of the host State is not diminished in international law by the fact that the communication service involved is a private one. In practice, it seems to be considered that the State has fulfilled its obligations when it proves that it has sought with due diligence to protect the communications of the organization.

77. According to the studies prepared by the Secretariat in 1967 and 1985 on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities,[47] the provisions of section 9 of the General Convention have in general been well observed. In three Latin American countries, Bolivia, El Salvador and Mexico, the United Nations has received the benefit of special postage rates or franchise in respect of official mail posted in those countries. In Bolivia the United Nations Information Centre was allowed free postage within the country. In Mexico the matter was governed by an official decree, published in the *Diario Oficial* No. 19 of 24 September 1963, whereby the Mexican Government granted postal and telegraphic franchise to the organizations participating in the Technical Assistance Board programme for the duration of the Basic Agreement on Technical Assistance between Mexico and the United Nations signed on 23 July 1963. In El Salvador a similar franking privilege was given in 1961, in connection with which mention was made of the Convention of the Postal Union of the Americas and Spain, under which members of the diplomatic corps in El Salvador of the countries of the Union were entitled to that privilege.[48]

78. Following the adoption in 1966 of a convention between the Latin American States, Canada and Spain which granted special franking privileges to the correspondence of diplomatic missions of the members of the Postal Union of the Americas and Spain, the Secretary-General, in a letter of 24 August 1971 to the Permanent Representatives of those countries to the United Nations, claimed those privileges for the United Nations under article III, section 9, of the General Convention.[49]

79. There is a reason for the addition of the words "in conformity with the International Convention on Telecommunications" at the end of the first sentence of article III, section 7, of the Interim Arrangement between the United Nations and Switzerland. In effect, the International Telecommunication Convention adopted at Atlantic City in 1947 provides that telegrams sent and telephone calls made by the United Nations should be treated as though sent or made by a Government. The assimilation to telegrams and telephone calls sent or made by a Government was made in the following terms:

> *Article 36. Priority of Government telegrams and telephone calls*
>
> Subject to the provisions of Article 45, Government telegrams shall enjoy priority over other telegrams when priority is requested for them by the sender. Government telephone calls may also be accorded priority, upon specific request and to the extent practicable, over other telephone calls.

80. Article 45 of that Convention gives "absolute priority" to "distress calls and messages". Furthermore, annex 2 of the Convention, in defining the terms used, includes the following clause:

> *Government Telegrams and Government Telephone Calls:* These are telegrams or telephone calls originating with any of the authorities specified below:
>
> ...
>
> (*f*) the Secretary-General of the United Nations and the Heads of the subsidiary organs of the United Nations;
>
> ...

81. In 1949 the Administrative Council of ITU adopted resolution No. 142,[50] in which it requested the Secretary-General of ITU *inter alia*

> ... to keep up to date the list of the subsidiary organs of the United Nations and to forward to the Members and Associate Members of the Union a copy of such list and to advise them of any modifications therein;
>
> ...

82. Difficulties arose, however, over the question of determining which were the subsidiary organs of the United Nations. Faced with a refusal to grant governmental treatment to a particular United Nations information centre, the United Nations wrote to ITU in 1951, pointing out that information centres formed part of the Secretariat and were not subsidiary organs; telegrams and telephone calls originating with them were therefore

[46] Ibid., p. 210.

[47] See footnotes 13 and 18 above.

[48] Document A/CN.4/L.118 and Add.1 and 2 (see footnote 13 above), p. 259, paras. 217-219.

[49] See document A/CN.4/L.383 and Add.1-3 (footnote 18 above), p. 169, para. 46.

[50] Resolution on the application of article IV of the Convention on the Privileges and Immunities of the Specialized Agencies ("Resolutions of the Administrative Council of the International Telecommunication Union, 4th session, Geneva, August-September 1949") (mim.).

entitled to governmental treatment, as having been sent or made on behalf of the Secretary-General, without needing to be specially listed. In the International Telecommunication Convention adopted at Buenos Aires, the definition quoted above (para. 80) was amended and the corresponding clause, appearing in annex 3 of the Convention, read as follows:

Government Telegrams and Government Telephone Calls: These are telegrams or telephone calls originating with any of the authorities specified below:

...

the Secretary-General of the United Nations and the Heads of the subsidiary organs of the United Nations;

...

83. In annex 3 of the International Telecommunication Convention of 1959 adopted at Geneva this definition was changed again so as to refer to telegrams and telephone calls originating with "the Secretary-General of the United Nations; Heads of the principal organs of the United Nations".

84. Apart from this problem of definition, it can be confirmed that United Nations telegrams and telephone calls (unlike those of the specialized agencies) now receive treatment at least as favourable as that granted to the telegrams and telephone calls of Governments.[51]

85. As regards priority (the only aspect covered expressly by the International Telecommunication Convention), it may be noted that, under the provisions of chapter XVII, article 62, paragraph 7, of the Telegraph Regulations, as revised at Geneva in 1958,[52] a special priority, over and above that afforded to government telegrams, is granted to telegrams relative to the application of the provisions of Chapters VI, VII and VIII of the Charter of the United Nations sent in an emergency by the President of the Security Council, the President of the General Assembly, the Secretary-General and certain other officials. However, in addition to receiving priority for its telecommunications on terms at least as favourable as those afforded to Governments, the United Nations has also been granted the benefit of the same rates as are enjoyed by Governments in respect of their intercommunications.

86. No cases have been reported in which the national authorities have applied censorship to official correspondence and other communications of the United Nations.

87. According to the two studies by the Secretariat on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities,[53] there has been faithful compliance with the treatment accorded to the specialized agencies under article IV, section 11, of the Convention on the Privileges and Immunities of the Specialized Agencies, with one important exception. The exception concerns privileges in respect of telecommunications, since, under the various international telecommunication conventions, not all the specialized agencies have enjoyed treatment in respect of priorities, rates and taxes not less favourable than that accorded to Governments.

88. The International Telecommunication Convention adopted at Atlantic City, at approximately the same time as the Convention on the Privileges and Immunities of the Specialized Agencies was adopted by the General Assembly, provides that priority shall be given to United Nations telegrams and telephone calls, but does not do so for those of the specialized agencies. Since the Atlantic City Convention did not accord governmental treatment for communications of the specialized agencies, the Administrative Council of ITU, at its third session, in 1948, adopted a resolution inviting the Secretary-General and the member States of ITU to interpret article IV of the Convention on the Privileges and Immunities of the Specialized Agencies in the light of the Atlantic City Convention.[54] There followed a series of exchanges between the Secretaries-General of the United Nations and of ITU. By a letter dated 30 August 1948, the Secretary-General of the United Nations informed the Secretary-General of ITU that the Convention on the Privileges and Immunities of the Specialized Agencies had become applicable to ICAO and WHO, and expressed the opinion that States parties to the Convention would have the duty to apply the provisions of article IV, section 11, to those agencies.[55]

89. Despite lengthy correspondence between the parties concerned and negotiations and discussions in ITU, the latter has systematically refused to include the specialized agencies among those empowered to send government telegrams or to place government telephone calls. Indeed, it has urged the United Nations to amend article IV, section 11, of the Convention on the Privileges and Immunities of the Specialized Agencies in order to resolve the problem. As of 1 June 1985, eight Governments had declared that they were unable to comply fully with the provisions of article IV, section 11, until such time as all other Governments had decided to cooperate in granting such treatment to the agencies.[56] Thus, except in certain extreme cases (e.g., urgent epidemiological telegrams of WHO, under article 61 of the Telegraph Regulations,[57] or where strikes prevent the dispatch of ordinary cables, so that the procedure envisaged in resolution No. 27 of the Buenos Aires Conference[58] comes into play), the specialized agencies have not enjoyed the privilege of priority for their telecommunications, nor the advantages of government rates.

[51] See document A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 259, para. 222.

[52] ITU, *Telegraph Regulations (Geneva Revision, 1958), annexed to the International Telecommunication Convention (Buenos Aires, 1952)* (Geneva, 1959), p. 88.

[53] See footnotes 13 and 18 above.

[54] Resolution No. 36 concerning privileges and immunities of specialized agencies ("Resolutions of the Administrative Council of the International Telecommunication Union, 3rd session, Geneva, September-October 1948") (mim.).

[55] See document A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 309, para. 77.

[56] See United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1990* (Sales No. E.91.V.8), chap. III.2.

[57] ITU, *Telegraph Regulations*, op. cit., p. 86.

[58] See ITU, *International Telecommunication Convention, Buenos Aires, 1952*, p. 156.

90. In the case of international agencies of a financial nature—IBRD, IDA, IFC and IMF—the facilities to be accorded to their communications are set forth in their respective constitutions in closely similar terms. Article VII, section 7, of the Articles of Agreement of IBRD, for example, provides: "The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members."

91. Except for a dispute that arose in 1949 between the United States of America on the one hand and IBRD and IMF on the other concerning a problem of interpretation, which was solved in favour of the two agencies, the right of the financial agencies mentioned in the preceding paragraph, whose constitutions contain the same provisions, to enjoy the same treatment as that granted to Governments in respect of telecommunications has not been challenged.[59]

92. Lastly, it may be noted that in article VI, section 13, of the Agreement between IAEA and Austria and in article IV, section 10, of the Agreement on the privileges and immunities of IAEA, communications facilities are granted to IAEA in the territory of each State party on the same terms as those enjoyed by Governments only to the extent that such action is "compatible with any international conventions, regulations and arrangements" to which the State concerned is a party. A similar provision is contained in article 10 of the Agreement between UNESCO and France.[60]

93. The scope of the obligations assumed by the United States towards the United Nations is much vaguer. Article VII, section 17 (*a*), of the Headquarters Agreement stipulates that "the headquarters district shall be supplied on equitable terms with the necessary public services, including . . . post, telephone, telegraph, . . .".

2. Means of communication

(a) *General considerations*

94. The means of communication to be made available to international organizations cannot but be identical to those employed by States or diplomatic missions. Accordingly, in this case also, international organizations are assimilated or equated to diplomatic missions so as to enable them to use the same means of communication.

95. The subcommittee of the European Committee on Legal Cooperation issued the following opinion on this matter:

> . . . Not all international organizations need to use couriers and to have special facilities for the use of sealed bags, codes and ciphers. In the case of many organizations the use of ordinary mail and telecommunications services should be sufficient. . . .[61]

96. The Special Rapporteur does not think that it should be of major concern whether all international organizations invariably use all of the exceptional means of communication. The principle should be recognized, as it generally is, and applied in appropriate cases. In those cases where the functions of the organization do not warrant the application of the principle, the organization should have the authority to waive it.

97. In any event, with the increasingly sophisticated advances in communications technology, using means of radiotelephony and radiotelegraphy, such as telex and facsimile transmission, the issue would become less and less important. Indeed, in future—as is the case to a large extent, even today—the priority will simply be to have the appropriate equipment installed, and to be accorded preferential tariffs and rates for the applicable taxes and serv« ice charges.

98. As far as the relevant treaties are concerned, the Vienna Convention on Diplomatic Relations stipulates, in article 27, that:

> *Article 27*
>
> 1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
>
> 2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
>
> 3. The diplomatic bag shall not be opened or detained.
>
> . . .

99. The means of communication, as can be seen from the above article, comprise four main categories: codes, the diplomatic bag, couriers and telecommunications. As it would be impossible to compile an exhaustive list, the Commission[62] and the 1961 Vienna Conference on Diplomatic Intercourse and Immunities preferred to adopt a criterion of a general character.

100. For its part, the General Convention stipulates, in article III, section 10, that the United Nations "shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags", while the corresponding provision of the Convention on the Privileges and Immunities of the Specialized Agencies (art. IV, sect. 12) reads:

> No censorship shall be applied to the official correspondence and other official communications of the specialized agencies.
>
> The specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

[59] See document A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 312, paras. 95-96.

[60] Ibid., para. 97.

[61] Council of Europe, *Privileges and Immunities* . . ., explanatory report (footnote 4 above), para. 81.

[62] See the discussion in the Commission, at its ninth and tenth sessions, on article 16 of the draft articles on diplomatic intercourse and immunities (*Yearbook . . . 1957*, vol. I, pp. 74 *et seq.*, 398th meeting, paras. 27-100; and *Yearbook . . . 1958*, vol. I, pp. 127 *et seq.*, 455th meeting, paras. 55-78).

Nothing in this section shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between a State party to this Convention and a specialized agency.

It should be noted that article III, section 10, of the General Convention contains no reference to security precautions, and that the prohibition of censorship figures separately in article III, section 9, of that Convention.

101. As may be seen from the above texts, the privileges and immunities of international organizations are defined in relation to those of diplomatic missions, as they are specified in article 27 of the Vienna Convention on Diplomatic Relations.

102. In addition to the aforementioned conventions concerning the privileges and immunities of the United Nations and the specialized agencies, there are many other international instruments under which the treatment accorded to international organizations is assimilated to that accorded to diplomatic missions. Examples include the Interim Arrangement between the United Nations and Switzerland (art. III, sects. 7 and 8); the Agreement between Switzerland and ILO (arts. 12 and 13) and the Arrangement for the execution of that Agreement (arts. 5 and 6); the Agreement between Switzerland and WHO (arts. 12 and 13); the Agreement between Italy and FAO (art. VI, sects. 11, 12 and 13); the Agreement between ICAO and Canada (art. II, sects. 9 and 10); the Agreement between UNESCO and France (arts. 10 and 11); and the Agreement between Switzerland and WMO (arts. 12 and 13).

(b) *Codes*

103. Whenever international organizations have been allowed the benefit of diplomatic status, they have also been fully authorized to use coded correspondence, without there being any need for a specific reference to such authorization. The United Nations enjoys that right by virtue of article III, section 10, of the General Convention. The Organization has of course used codes in cases where it considered this advisable, and no legal problems appear to have arisen as a result.[63]

104. With respect to the specialized agencies, as noted above, article IV, section 12, of the Convention on the Privileges and Immunities of the Specialized Agencies authorizes them to use codes. The majority of the specialized agencies, however, do not use them in their correspondence.[64] In general, there has always been recognition of the rights and the corresponding immunities and privileges referred to in the second paragraph of article IV, section 12, of the Convention on the Privileges and Immunities of the Specialized Agencies, including "the right to use codes".

105. The draft convention on diplomatic privileges and immunities drawn up by the Harvard Law School states specifically, in article 14 (Freedom of communications), that international organizations have the right to use codes and ciphers:

1. A receiving State shall freely permit and protect official communications by whatever available means, including the employment of messengers provided with passports *ad hoc* and the use of codes and cipher:

...

(*e*) Between a mission of the sending State and the agents of public international organizations, such as ...[65]

106. Accordingly, there seems to be no dispute as to the application of that right and the granting of the privileges which international organizations are guaranteed on the basis of that right.

(c) *The diplomatic bag*

107. We have seen that the General Convention and the Convention on the Privileges and Immunities of the Specialized Agencies recognize that the United Nations and those agencies are entitled to use the diplomatic bag for their correspondence.

108. For its part, the Commission, with a view to closing the loophole in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, gave the following definition of "diplomatic bag" in article 3, paragraph 1 (2), of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and a similar one in article II (*b*) of draft Optional Protocol Two thereto.[66] The definition given in article 3 reads as follows:

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

(*a*) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(*b*) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963; or

(*c*) a bag of a permanent mission, a permanent observer mission, a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975.

109. It should be noted that no mention was made in article 3 of the diplomatic bag of international organizations. However, article 2, which deals with couriers and bags outside the scope of the draft articles, provides:

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

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

(*a*) the legal status of such couriers and bags;

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

110. In the commentary to article 2, the Commission explained why it had ruled out the explicit inclusion of

[63] See document A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 260, para. 224.

[64] Ibid., p. 312, para. 99.

[65] Harvard Law School, op. cit., pp. 21-22.

[66] See *Yearbook ... 1989*, vol. II (Part Two), pp. 14 and 48.

international organizations within the scope of the draft articles, as defined in article 1. The commentary contained the following qualification, however:

> ... the fact that the articles deal only with couriers and bags of States does not preclude the possibility of substantial similarities between the legal regime of couriers and bags of international organizations, particularly those of a universal or broad regional character, and the legal regime of couriers and bags of States. ...[67]

111. Opinions were divided during the discussion of that question in the Commission[68] and in the Sixth Committee of the General Assembly.[69] Some of the written comments and observations reflected support for the restriction of the scope of the draft articles to the couriers and bags of States; but a large number of comments and observations reflected support for the inclusion of the couriers and bags of international organizations within the scope of the draft.

112. After listing a series of considerations, and in accordance with the comprehensive and uniform criterion on which the draft articles were based, the Special Rapporteur, Mr. Yankov, suggested in his eighth report that a new paragraph 2 should be inserted in article 1, to read as follows:

Article 1. Scope of the present articles

...

2. The present articles apply also to the couriers and bags employed for the official communications of an international organization with States or with other international organizations.[70]

113. After lengthy discussion, the Commission decided not to include the proposed new paragraph. Some argued in favour of its inclusion, others against. In this particular instance, as was pointed out in the Commission, the repeated insistence by some members on differentiating between States and international organizations was inopportune. International organizations are established by States and use diplomatic couriers and diplomatic bags, as we have seen, without any serious objection ever having been raised. Both the General Convention and the Convention on the Privileges and Immunities of the Specialized Agencies, as well as many other international instruments (headquarters agreements, technical assistance agreements and so forth) contain similar specific provisions on this subject.[71]

114. Here there appears to be a slight contradiction between the decision taken by the Commission, and approved by the Sixth Committee, to adopt a comprehensive and uniform criterion as a basis for the draft articles (harmonization of diplomatic law established in the various Vienna Conventions) and the exclusion from these rules of international organizations, which are covered by such law in accordance with existing instruments.

115. However, since opinions were divided, the Commission opted for confining the scope of the draft articles to couriers and bags of States "in order not to jeopardize the acceptability of the draft articles", but at the same time it believed it was appropriate for States to be given the choice to extend, if they so wished, the application of the draft articles to couriers and bags of, at least, international organizations of a universal character. Accordingly, it prepared and approved draft Optional Protocol Two on the Status of the Courier and the Bag of International Organizations of a Universal Character, which states, in article I:

Article I

The articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:

(*a*) with its missions and offices, wherever situated, and for the official communications of those missions and offices with each other;

(*b*) with other international organizations of a universal character.[72]

116. According to the two studies prepared by the Secretariat on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities,[73] although the United Nations has used couriers, the dispatch of communications in bags has been much more frequent. In either case, the privileges and immunities of the United Nations have been observed. A few incidents have occurred, however, when government officials, usually minor officials, acting in error or in ignorance of international regulations, have opened United Nations bags.

117. Writing to the legal adviser of a United Nations subsidiary organ after an incident in which customs authorities had opened a sealed pouch that was being carried in a United Nations vehicle, the Legal Counsel of the United Nations summarized the legal position as follows:

> As a general rule, the diplomatic bag is inviolable; it may not be subject to customs inspection or any other form of interference. Should the receiving State, on suspicion that a diplomatic bag contains improper objects, open it for inspection but its suspicion prove to be unfounded, the sending State would be within its right to complain of a violation of international law. On the other hand, if improper objects are found in the bag, it would be the sending State that is guilty of abuse of privilege and no complaint from it may lie. This, I believe, sums up the general rule as practised by States.[74]

118. In 1962, in agreeing to the establishment of a pouch service between United Nations Headquarters and its capital, a Member State sought to impose the condition that, in case of doubt, the Government might open the pouch in the presence of a United Nations official, on the pretext that it had not signed the General Convention. The United Nations found the condition unaccept-

[67] Ibid., p. 15, para. (1) of the commentary.

[68] See *Yearbook... 1988*, vol. II (Part One), p. 125, document A/CN.4/409 and Add.1-5; and *Yearbook... 1989*, vol. II (Part One), p. 75, document A/CN.4/420.

[69] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly" (A/CN.4/L.431), paras. 324-326.

[70] See *Yearbook... 1988*, vol. II (Part One), p. 172, document A/CN.4/417, para. 60.

[71] See the summary of the discussion on this question at the fortieth session of the Commission in *Yearbook... 1988*, vol. II (Part Two), pp. 76-77, paras. 306-309.

[72] For the text of the draft protocol and the commentary thereto, see *Yearbook... 1989*, vol. II (Part Two), pp. 48-49.

[73] See footnotes 13 and 18 above.

[74] See document A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 260, para. 225.

able and pointed out that, under the technical assistance agreement which the Member State had concluded earlier, the State had agreed to apply the said Convention in respect of technical assistance operations for which the pouch service was required. The Government withdrew the restriction and granted the United Nations the right to use the diplomatic bag unconditionally.[75]

119. In the case of the regional commissions of the United Nations, some of the relevant agreements—the Agreement between the United Nations and Chile relating to ECLA (art. III, sect. 6), the Agreement between the United Nations and Thailand relating to ECAFE (art. V, sect. 13 (*b*)) and the Agreement between the United Nations and Ethiopia relating to ECA (art. III, sect. 6)—expressly provide that the correspondence which may be sent by courier or in (sealed) diplomatic bags includes "publications, documents, still and moving pictures, films and sound recordings".

120. Again according to the information transmitted by the specialized agencies, the majority of them do not use codes or dispatch correspondence by courier or in bags. Those that do so state that they have not experienced any problem in securing appropriate recognition of their rights in this regard.[76]

(d) *Diplomatic couriers*

121. As has been said, this means of communication is infrequently used by the United Nations and the specialized agencies. However, it should be pointed out that, in the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier prepared by the Commission, an effort has been made to fill the gaps that exist in the conventions in the field of diplomatic law drawn up under United Nations auspices in respect of the definition of "diplomatic courier" and "diplomatic bag" and the status and, more particularly, the privileges and immunities of the diplomatic courier. As noted above (para. 115), these rules do not cover international organizations; their extension to such organizations is purely optional and effected by accession to draft Optional Protocol Two to those articles.

(e) *Postal services*

122. It has been suggested that international organizations could become more independent, and in fact there is currently a trend in this direction as far as postal services are concerned, the idea being that the organization itself should operate its own postal services, independently of the State in which its headquarters is situated. Thus far, States, for obvious reasons, have been reluctant to accept this situation, in particular for security reasons. At present, only the United Nations has its own postal administration, separate from that of the United States of America, at its New York Headquarters. None of the specialized agencies or IAEA has such a service.

123. The United Nations Postal Administration was established by a General Assembly decision of 1 January 1951, in accordance with General Assembly resolution 232 (III). The United Nations has entered into special agreements with the United States and with Switzerland regarding the operation of postal facilities in United Nations premises situated in those countries. By and large, these agreements have worked smoothly.

124. After the Agreement with the United States had been signed, it proved necessary to examine the exact division of functions between the United States Post Office Department and the United Nations Postal Administration with particular reference to the sale and cancellation of stamps for philatelic purposes. After discussions with the United States Post Office Department, one of the provisions of the Agreement was amended.[77]

125. Under the Agreement with Switzerland the United Nations agreed to use exclusively Swiss postage stamps for the statutory franking of postal dispatches sent by the Geneva Office; the stamps were imprinted with a surcharge designating them as the official stamps of the said office. The 1949 Agreement was abrogated by the Postal Agreement of 11 December 1968, which was similar to the Postal Agreement concluded with the United States in 1951. The 1968 Agreement establishes a Palais des Nations post office at Geneva, to be operated by the Swiss Postal, Telephone and Telegraph Department. The United Nations is authorized to issue, at its own expense, all the postal items (postage stamps in denominations expressed in Swiss francs, postcards and airletters) necessary for the operation of the postal service, which are the only ones that may be sold at this post office. The Agreement also authorizes the establishment by the United Nations of a special service for philatelic purposes.

126. The United Nations has also made special postal arrangements in respect of mail sent to or by United Nations peace-keeping forces. The exchange of letters constituting an agreement concerning the status of UNEF in Egypt contains such a provision (para. 31). The Agreement concluded with Lebanon by an exchange of letters concerning the UNEF postal services provides for the establishment of a UNEF base post office at Beirut.

127. Similar provisions are contained in the Agreement relating to the legal status, facilities, privileges and immunities of the United Nations in the Congo (para. 35) and in the exchange of letters between Cyprus and the United Nations constituting an agreement concerning the status of the United Nations Peace-keeping Force in Cyprus (para. 31).

128. As noted above, none of the specialized agencies or IAEA possesses postal services like those of the United Nations. Nevertheless, the Agreement between Switzerland and ILO and the Agreement between Switzerland and WHO provide for the issue of special stamps (*timbres de service*) by the Swiss federal authorities for those organizations, within the limits authorized by the

[75] Ibid., para. 226.

[76] Ibid., p. 312, para. 99; and document A/CN.4/L.383 and Add.1-3 (see footnote 18 above), p. 197, paras. 116-117.

[77] The amendment consisted of the deletion of the words "in response to orders received by mail" at the end of the first sentence of paragraph (ii) of section 3 of the Agreement (United Nations, *Treaty Series*, vol. 149, p. 414).

UPU conventions. Stamps have also been issued for the other specialized agencies with headquarters in Switzerland.

(f) *Telecommunications; broadcasting services*

129. The use of radiocommunication by international organizations creates the same problems as its use by diplomatic missions. These problems derive from reluctance on the part of States, prompted mainly by security considerations, and from the original allocation of frequencies in application of the International Telecommunication Convention of Atlantic City. Accordingly, the Vienna Convention on Diplomatic Relations establishes a limitation by providing, in article 27, paragraph 1, that "the mission may install and use a wireless transmitter only with the consent of the receiving State".

130. If international organizations are treated in the same way as diplomatic missions in this regard, the limitation applies also to them. The problem arose at the time of the League of Nations in relation to the establishment of "Radio-Nations" and was solved by the conclusion of the Agreement of 21 May 1930 between the Swiss Government and the League of Nations concerning the establishment and operation of a wireless station in the neighbourhood of Geneva.[78]

131. Neither the General Convention, in article III, section 9, nor the Convention on the Privileges and Immunities of the Specialized Agencies, in article IV, sections 11 and 12, contains a specific reference to the subject. However, the Agreement concluded with the United States of America regarding the Headquarters of the United Nations regulates the matter in some detail in article II, section 4. According to these provisions the United Nations may establish and operate in the headquarters district

(1) its own short-wave sending and receiving radio broadcasting facilities, including emergency link equipment, which may be used on the same frequencies (within the tolerances prescribed for the broadcasting service by applicable United States regulations) for radiotelegraph, radioteletype, radiotelephone, radiotelephoto, and similar services.

The same section contains a series of technical provisions and provisions concerning related facilities.

132. Similar provisions may be found in other agreements concluded by the United Nations, such as the arrangement with Switzerland in 1946, the Agreement with Thailand relating to ECAFE, which also provides for the operation of telecommunications circuits and of radio services, and the Agreement with Ethiopia relating to ECA.

133. In addition to the provisions contained in general host agreements, the United Nations has made arrangements, usually on the basis of an exchange of letters, for the operation of United Nations radio stations in a number of countries.[79] In 1955, an *aide-mémoire* was prepared by the Office of Legal Affairs setting out the essential legal points which needed to be considered before telecommunication operations or negotiations could be undertaken in any given country.[80]

134. The *aide-mémoire* referred to article 26 of the International Telecommunication Convention adopted at Buenos Aires, article XVI of the Agreement between the United Nations and ITU annexed thereto, and General Assembly resolutions 240 (III) and 460 (V) whereby the Assembly approved the establishment and operation of the United Nations telecommunications system. In particular, it contained model provisions for inclusion in agreements concerning United Nations administrative centres, which have since been reproduced in a number of such instruments.[81]

135. As we have seen, ITU has resolutely opposed the establishment of a telecommunications network for the specialized agencies. The United Nations had requested that traffic of the specialized agencies should be carried on its network. The Plenipotentiary Conference of ITU held at Buenos Aires in 1952 declared, in resolution No. 26, that in normal circumstances the United Nations telecommunication network should not be used to carry the traffic of the specialized agencies "in competition with existing commercial telecommunication networks".[82] ITU confirmed that position at the Montreux Conference in 1965 in resolution No. 25.[83]

136. However, some communications of the specialized agencies concerning matters of interest to the United Nations are considered as communications of the United Nations and, as such, are carried by the United Nations network. In 1971, traffic originating in Geneva and consisting of communications of specialized agencies with regard to matters concerning the United Nations accounted, in terms of the number of words, for more than double the traffic of the United Nations proper.[84]

137. The effect of the restriction referred to above is less noticeable following the signing on 3 August 1972 of a contract regarding the establishment of a telex link between New York and Geneva. This link, which uses submarine cables and overland lines, replaces the previous system between the two cities and is available for use by the specialized agencies according to the conditions laid down in ITU resolution No. 26.

138. The tendency among international organizations towards trying to secure greater independence for their communications contrasts with the attitude of States, which are anxious to guarantee their own security. The two sides are constantly vying with one another. On the one hand, the internal development of international organizations prompts them increasingly to try to highlight their international character, their own personality

[78] See M. O. Hudson, ed., *International Legislation*, vol. V, 1929-1931 (Washington, D.C., 1936), pp. 494 *et seq.*, Nos. 257 and 257a.

[79] See "United Nations telecommunication system" in *Everyman's United Nations*, 8th ed., (Sales No. E.67.I.5), pp. 482-483.

[80] See document A/CN.4/L.118 and Add.1 and 2 (footnote 13 above), p. 262, para. 234.

[81] Ibid., pp. 262-264, paras. 234-238.

[82] ITU, *International Telecommunication Convention, Buenos Aires, 1952*, pp. 155-156.

[83] See ITU, *International Telecommunication Convention, Montreux, 1965*, pp. 204-205.

[84] See Duffar, op. cit., p. 224.

as distinct from that of their member States and, as a result, to show that they are not answerable to States nor dependent upon their services. States, for their part, cannot remain indifferent to the prospect of seeing international organizations replace them in the exercise of functions that traditionally have been within their exclusive competence. Both theory and current practice seek to strike a balance between the two trends, whereby the fundamental interests of both parties concerned would be recognized.

139. At first glance, international organizations would seem to have the advantage over States in so far as official communications are concerned. Article 27 of the Vienna Convention on Diplomatic Relations, which, as already noted, applies also to international organizations, states in paragraph 1 that "the receiving State shall permit and protect free communication on the part of the mission for all official purposes." Thus, so long as the State is informed of the official nature of the communications, such communications are protected. This, of course, does not present any major problem; all that is needed is some simple external identifying marks. The difficulty had arisen over what was to be understood by "official purposes". Uncertainty in this matter was dispelled after the adoption of the Vienna Convention on Diplomatic Relations, which, in defining the expression "official correspondence", emphasizes once again the functional criterion. Indeed, article 27 provides, in paragraph 2:

> 2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

140. This provision, which applies to diplomatic missions, applies with all the more reason to international organizations. The functional requirement alone defines the extent of the official nature of the correspondence. All communications of international organizations are considered official in so far as the international organizations themselves confer this character upon them.

141. So far, only the United Nations has felt the need to have its own means of communication, because the nature of its functions places upon it a far-reaching and highly delicate global responsibility. Obviously, in times of serious crisis the United Nations would need to be sure that it would not be cut off as a result of an interruption in public communications systems. It is also obvious that, although this is desirable in the case of the United Nations, it does not appear to be equally desirable for each and every international organization.

142. Once they are covered by the diplomatic regime, which permits them to secure the inviolability of all their communications since they are all considered official and consequently inviolable without distinction whatsoever, like those of diplomatic missions, it would seem logical that international organizations should seek to establish their own communications and telecommunications networks so as to be totally free of control by and dependence on States.

143. Such a situation, naturally, must give rise to alarm on the part of a State that is acting as host to an international organization. The State feels that if it cannot control and monitor the means of communication, the latter may be used by interests contrary to its own. That would seem to be what motivates States to seek ways of preserving and guaranteeing their security.

144. In this regard, the system established by the Vienna Convention on Diplomatic Relations does not really meet the security requirements of States and is therefore not considered entirely satisfactory. As we know, this is the regime that also applies to international organizations. Some States apply what they consider a customary rule and open diplomatic bags, to the detriment of the principle of inviolability, whenever they feel that the external appearance of the bag gives rise to suspicion concerning its contents.[85] The Vienna Convention on Consular Relations embodies such a rule, but only in connection with consular bags. Article 35 of this Convention provides, in paragraph 3:

> 3. ... if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this Article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

145. On the other hand, the Vienna Convention on Diplomatic Relations embodies the principle of absolute inviolability of communications. It does not provide for any exceptions to this principle. Not only does the receiving State have the obligation to protect the freedom of diplomatic communications but it is also required, in all cases, to refrain from opening, intercepting or trying to decipher them.[86]

146. The Commission did not consider it appropriate, in the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the final text of which it adopted at its forty-first session, in 1989,[87] to close the loopholes in the Vienna Convention in this area. After extensive discussions, it decided to provide, in article 28 of the draft, for an exception to the principle, but only in the case of the consular bag. Article 28, which the Commission considered the key provision on the draft articles, reproduces in paragraph 2 the wording of article 35, paragraph 3, of the Vienna Convention on Consular Relations.

147. The Commission explains its position in this regard in the commentary to article 28 by stating that

> ... while the protection of the diplomatic bag is a fundamental principle for the normal functioning of official commnications between States, the implementation of this principle should not provide an opportunity for abuse which may affect the legitimate interests of the receiving or transit States.[88]

It then adds, with regard to non-discrimination and reciprocity:

> ... nothing precluded States from introducing by agreement, in their mutual relations, other practices regarding the diplomatic bag. In particular, they could agree to submit the consular bag to the diplomatic bag regime or vice versa.[89]

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[85] See Cahier, op. cit., p. 214.

[86] Ibid., p. 213.

[87] See *Yearbook... 1989*, vol. II (Part Two), pp. 14 *et seq.*

[88] Ibid., p. 43, para. (8) of the commentary.

[89] Ibid., p. 44, para. (10) of the commentary.

148. With regard to international organizations, the latter solution has, in fact, been adopted. A series of instruments provide for the treaty approach in guaranteeing the security of the State, either through a specific agreement on communications or through an agreement on security in general.

149. An example of an agreement on communications is the Convention on the Privileges and Immunities of the Specialized Agencies, which states in article IV, section 12, third paragraph:

> Nothing in this section shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between a State party to this Convention and a specialized agency.

It is interesting to note that the corresponding provision of the General Convention, namely article III, section 10, contains no reference to the possible adoption of security precautions.

150. Most specialized agencies, and IAEA, have not formally adopted security precautions as envisaged in article IV, section 12, of the Convention on the Privileges and Immunities of the Specialized Agencies. In accordance with airport security regulations, however, FAO pouches arriving from certain points have been subject to X-ray examination.

151. A number of WHO agreements are subject to the condition that they shall not derogate or abridge the right of the host Government to take the precautions necessary to protect the security of the State. State authorities are none the less obliged, whenever they deem it necessary to adopt measures for the protection of security, to approach WHO as rapidly as circumstances allow in order to determine by mutual agreement the appropriate measures to be taken. Likewise, WHO is required to collaborate with the authorities of the host countries to avoid prejudice to security because of WHO activities.[90]

152. The Agreement regarding the headquarters of ICAO concluded with Canada provides, in article IX, section 40, that nothing in the Agreement shall be construed as in any way diminishing, abridging, or weakening the right of the Canadian authorities to safeguard the security of Canada, provided the Organization shall be immediately informed in the event that the Canadian Government shall find it necessary to take any action against any person enumerated in the Agreement.

153. An example from the second category, i.e. instruments referring to security in general texts and not solely with respect to communications, is the Agreement between Switzerland and ILO, article 25 of which reads as follows:

> *Article 25. Security of Switzerland*
>
> 1. Nothing in the present Agreement shall affect the right of the Swiss Federal Council to take the precautions necessary for the security of Switzerland.
>
> 2. If it considers it necessary to apply the first paragraph of this Article the Swiss Federal Council shall approach the International Labour Organisation as rapidly as circumstances allow in order to determine by mutual agreement the measures necessary to protect the interests of the International Labour Organisation.
>
> 3. The International Labour Organisation shall collaborate with the Swiss authorities to avoid any prejudice to the security of Switzerland resulting from its activity.

154. Similar provisions are to be found in the Agreement between Switzerland and WHO (art. 25), the Agreement between WMO and Switzerland (art. 24), the Agreement between IAEA and Austria (art. XVIII, sect. 47) and the Agreement between Argentina and the Pan American Sanitary Bureau (art. 14).

155. More recently, there has been a tendency to change the mechanism for the adoption of restrictive measures. The trend is to replace the treaty regime of mutual agreement between organizations and States with the granting to each member State of the power to take any precautionary measures in the interest of its security—in other words, to adopt unilateral measures.

D. Draft articles 13 to 17

156. In accordance with the above, the Special Rapporteur proposes the following wording for part IV of the draft articles, relating to publications and communications facilities granted to international organizations:

PART IV

PUBLICATIONS AND COMMUNICATIONS FACILITIES

Article 13

International organizations shall enjoy in the territory of each State party (to this Convention)* the free circulation and distribution of their publications and public information material necessary for their activities, including films, photographs, printed matter and recordings prepared as part of the public information programme of an organization and exported or imported for display or retransmission, as well as books, periodicals and other printed matter.

Article 14

International organizations shall enjoy, in the territory of each State party (to this Convention)* in respect of such organizations, for their official communications, treatment not less favourable than that accorded by the Government of such State to any other Government, including the latter's diplomatic missions, in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone, telefax and other communications, and press rates for information to the press, cinema, radio and television. However, the international organization may install and use a wireless transmitter only with the consent of the host State.

[90] See document A/CN.4/L.383 and Add.1-3 (footnote 18 above), p. 197, paras. 118-119.

Article 15

1. The official correspondence and other official communications of an international organization shall be inviolable.

2. Official correspondence and official communications mean all correspondence and communications relating to an organization and its functions.

Article 16

International organizations shall have the right to use codes and to dispatch and receive their official communications by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags under the provisions of the multilateral conventions in force governing matters relating to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

Article 17

None of the above provisions shall affect the right of each State party (to this Convention)* to adopt the necessary precautions and appropriate measures in the interest of its security.

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* The words "to this Convention" have been placed in brackets in order not to prejudge the final form of the draft articles.

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Sixth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur

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United Nations

Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946)	United Nations, *Treaty Series*, vol. 1, p. 15.
United Nations and Switzerland: Interim Arrangement on Privileges and Immunities of the United Nations (Bern, 11 June 1946)	Ibid., p. 163.
United Nations and Chile: Agreement regulating conditions for the operation, in Chile, of the headquarters of the United Nations Economic Commission for Latin America (Santiago, 16 February 1953)	Ibid., vol. 314, p. 59.
United Nations and Thailand: Agreement relating to the headquarters of the Economic Commission for Asia and the Far East in Thailand (Geneva, 26 May 1954)	Ibid., vol. 260, p. 35.

Specialized agencies and IAEA

Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	Ibid., vol. 33, p. 261.
Switzerland and ILO: Agreement concerning the legal status of the International Labour Organisation in Switzerland, and Arrangement for the execution of the Agreement (Geneva, 11 March 1946)	Ibid., vol. 15, p. 377.
Switzerland and WHO: Agreement concerning the legal status of the World Health Organization, and Arrangement for the execution of the said Agreement (Geneva, 17 July 1948)	Ibid., vol. 26, p. 331.
Italy and FAO: Agreement regarding the headquarters of the Food and Agriculture Organization of the United Nations (Washington, [D.C.], 31 October 1950)	*Legislative Texts*, vol. II, p. 187.
ICAO and Canada: Agreement regarding the headquarters of the International Civil Aviation Organization (Montreal, 14 April 1951)	United Nations, *Treaty Series*, vol. 96, p. 155.
Chile and FAO: Agreement regarding the Latin American Regional Office of the Food and Agriculture Organization of the United Nations (14 June 1952)	*Legislative Texts*, vol. II, p. 206.
Egypt and FAO: Agreement regarding the Near East Regional Office of the Food and Agriculture Organization of the United Nations (17 August 1952)	Ibid., p. 212.
UNESCO and France: Agreement regarding the headquarters of the United Nations Educational, Scientific and Cultural Organization and the privileges and immunities of the Organization on French Territory (Paris, 2 July 1954)	United Nations, *Treaty Series*, vol. 357, p. 3.

	Source
ILO and Mexico: Agreement regarding the establishment of a Field Office at Mexico City and the privileges and immunities necessary for its operation (Mexico City, 5 January 1955)	Ibid., vol. 208, p. 225.
Thailand and FAO: Agreement regarding the Far East Regional Office of the Food and Agriculture Organization of the United Nations (entered into force on 6 February 1957)	Ibid., p. 220.
IAEA and Austria: Agreement regarding the headquarters of the International Atomic Energy Agency (Vienna, 11 December 1957)	Ibid., vol. 339, p. 111.
OTHER INTERGOVERNMENTAL ORGANIZATIONS	
Agreement on the Privileges and Immunities of the Organization of American States (15 May 1949)	OAS, *Law and Treaty Series*, No. 31 (Washington, D.C.); *Legislative Texts*, vol. II, p. 377.
General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949) and Protocol thereto (Strasbourg, 6 November 1952)	United Nations, *Treaty Series*, vol. 250, p. 13 and p. 33.
Protocol on the Privileges and Immunities of the European Coal and Steel Community (Paris, 18 April 1951)	Ibid., vol. 261, p. 238.

I. Introduction

1. At its forty-second session, the Commission considered the fourth report of the Special Rapporteur on "Relations between States and international organizations (second part of the topic)"[1] at its 2176th to 2180th meetings. After discussing draft articles 1-11 as contained in the report, the Commission decided, at its 2180th meeting, to refer them to the Drafting Committee.

2. With one exception, the members of the Commission who spoke in the debate[2] broadly supported the path charted for the topic in his fourth report and agreed that the Commission should pursue its study and consideration of the topic in conformity with the outline approved by the Commission and endorsed by the General Assembly.[3]

3. In accordance with the mandate entrusted to the Commission by the General Assembly, a mandate which it has reaffirmed year by year in its resolutions on the Commission's report, and in conformity with General Assembly resolution 45/41, paragraph 2, adopted on 28 November 1990, the Commission is required to continue its work on this topic.

4. During the deliberations of the Sixth Committee of the General Assembly on the Commission's report on the work of its forty-second session (see A/CN.4/L.456, paras. 410-417), most of the representatives who referred to this topic expressed satisfaction at the progress achieved on it and at the fact that 11 draft articles had been referred to the Drafting Committee.

5. The sixth report of the Special Rapporteur now before the Commission follows the outline within which the sense, thrust, and substance of the topic were established. This outline was adopted by the Commission in its report on the work of its thirty-ninth session submitted to the General Assembly at its forty-second session.[4]

[1] *Yearbook... 1989*, vol. II (Part One), p. 153, document A/CN.4/424.

[2] See *Yearbook... 1990*, vol. I, 2176th to 2180th meetings.

[3] Ibid., vol. II (Part Two), paras. 424-427.

[4] See *Yearbook... 1987*, vol. II (Part Two), paras. 216-219. The outline submitted by the Special Rapporteur read as follows:

"I. Privileges and immunities of the organization:

(Continued on next page.)

II. Fiscal immunities and exemptions from customs duties

6. In the present report, first, the fiscal immunities of international organizations, and second, their exemptions from customs duties will be studied separately.

A. Fiscal immunities

7. Legal doctrine has, in general, held that all the various immunities constitute, in substance, no more than a derivation from fiscal immunity, which would thus appear to be the origin in relation to all other immunities. In accordance with this view, fiscal immunity, an extension of immunity of property, in reality constitutes the principle for every immunity. In this form it can be found in Roman law and in Merovingian law, in France.[5]

8. The reciprocal fiscal immunity which States grant each other in their mutual relations is in fact the counterpart of equality. Under the principle of sovereignty and equality between States, a State cannot be viewed as being subject to the tax-levying authority of another State. This has been established both by custom in international law and by practice in international relations; it has been confirmed by bilateral and multilateral agreements, or even by unilateral decisions of States, at least as regards property intended for State purposes.

9. Bishop cites article XIX of the Treaty of Friendship concluded on 8 December 1923 between the United States of America and Germany. This article states: "Land and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, State, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited".[6]

10. The tax exemption granted to international intergovernmental organizations would also appear to be justified by this same principle of equality between member States. A State may not levy taxes on other States through an international organization, and the host State must not derive unjustified fiscal benefit from the presence of an international organization on its territory.

11. The coercive character of taxation explains why an international organization, as an entity independent of the member States of which it is composed, must also avoid the fiscal coercion entailed by taxation. A principle admitted by many legislations in public law holds that the State does not pay taxes to itself, which logically leads to tax exemption.

12. Some writers maintain that the justification for the exemption granted to international organizations must be dissociated from the concept of "organizations of States" and that this justification is based on the aims of public service. According to this view, whereas during the early years of an international organization the personality of States may clearly be seen to manifest itself in its functioning, this personality gradually tends to become diluted as the organization consolidates itself. Since it is in principle non-profit-making, the activity of a public service is in many national legislations not subject to the tax levied on companies. A budget granted to a public service is used exclusively for the discharge of its mission. Any levy through direct taxation would accordingly be tantamount to distorting the use made of the funds received.[7]

13. As regards States, the expenses of a diplomatic mission, by virtue of being incurred by the sending State, may not be subject to the control of the receiving State and, hence, to any type of fiscal levy imposed by the latter.

14. Generally speaking, diplomatic law does not refer to exemption from direct taxation and a mission's exemption from taxation is defined not on the basis of the somewhat vague concept of direct taxes, but in relation to the mission's immovable property.

(Footnote 4 continued.)

A. Non-fiscal privileges and immunities:
  (*a*) immunity from legal process;
  (*b*) inviolability of premises and exercise of control by the organization over those premises;
  (*c*) immunity of property and assets from search and from any other form of interference;
  (*d*) inviolability of archives and documents;
  (*e*) privileges and immunities in respect of communication facilities (use of codes and dispatch of correspondence by courier or in diplomatic bags, etc.);

B. Financial and fiscal privileges:
  (*a*) exemption from taxes;
  (*b*) exemption from customs duties;
  (*c*) exemption from currency controls;
  (*d*) bank deposits.

"II. Privileges and immunities of officials:

A. Non-fiscal:
  (*a*) immunity in respect of official acts;
  (*b*) immunity from national service obligations;
  (*c*) immunity from immigration restrictions and registration of aliens;
  (*d*) diplomatic privileges and immunities of executives and other senior officials; and
  (*e*) repatriation facilities in times of international crisis;

B. Financial and fiscal:
  (*a*) exemption from taxation of salaries and emoluments;
  (*b*) exemption from customs duties.

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

[5] See J. Duffar, *Contribution à l'étude des privilèges et immunités des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 1982), p. 267.

[6] W. W. Bishop, "Immunity from taxation of foreign State-owned property", AJIL (Washington, D.C.), 1952, p. 251 (cited by Duffar, op. cit., p. 268).

[7] See, *inter alia*, Duffar, op. cit., p. 269.

15. Traditionally, the immovable property of a diplomatic mission, owned by the foreign State, enjoys exemption from any property tax, and from taxes levied at the time of purchase of that property.[8]

16. The Institute of International Law, in its resolution of 1929 (New York session) on diplomatic immunities, established in article 19 that:

> The premises of the mission should be exempt from all dues and taxes save where the premises were not the property of the agent or of the State which the latter represented.[9]

17. Article 23 of the Vienna Convention on Diplomatic Relations confirms and amplifies the practice of States, in stipulating that:

> 1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
>
> 2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Similar provisions are to be found in the Vienna Convention on Consular Relations (art. 32) and the Vienna Convention on the Representation of States in their Relations with International Organizations (art. 24).

18. In accordance with the Conventions cited, exemption applies both when the State is the owner and when it is only the lessee of the premises of the mission. In other words, now the mission is exempted even when it is merely the lessee, in which case it may lawfully be stipulated that taxes will be defrayed by the lessee, in other words, the mission.[10] In addition, the mission is exempt from payment of the transfer taxes which private individuals are required to pay in property transactions.

19. Clearly, the exemption of property, in relation to direct taxes, constitutes the most important of the exemptions granted to diplomatic missions.[11]

20. As we have seen, article 23 of the Vienna Convention on Diplomatic Relations exempts the sending State and the head of the mission from "all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased". The Commission, in its commentary on this provision in the draft articles on diplomatic intercourse and immunities, stated that:

> The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable.[12]

This reasoning may also be applied to international intergovernmental organizations.

21. As far as the international organizations are concerned, the Convention on the Privileges and Immunities of the United Nations[13] (art. II, sect. 7) and the Convention on the Privileges and Immunities of the Specialized Agencies (art. III, sect. 9) enable the international organizations to which they apply to benefit from much broader exemption, since they refer to all direct taxes.

22. Article III, section 9 (*a*), of the Convention on the Privileges and Immunities of the Specialized Agencies establishes that:

> The specialized agencies, their assets, income and other property shall be:
>
> (*a*) Exempt from all direct taxes; it is understood, however, that the specialized agencies will not claim exemption from taxes which are, in fact, no more than charges for public utility services . . .

23. Similar drafting is to be found in the General Convention (art. II, sect. 7); the General Agreement on Privileges and Immunities of the Council of Europe (art. 7 (*a*)); and the Agreement on Privileges and Immunities of OAS (art. 5 (*a*)), supplemented by the Bilateral Agreement between the Council of OAS and the Government of the United States of America,[14] by which OAS will avail itself of the provisions contained in the International Organizations Immunities Act.[15]

24. All the legal instruments we have mentioned speak of exemption from any direct taxation, with the proviso, however, that no exemption may be claimed from taxes which are, in fact, charges for public services or public utility services.

25. Moreover, in an important series of bilateral agreements concluded between international organizations and a number of States, the international organizations are, in general, exempted from all direct taxes. The agreements include the following: Switzerland and ILO (art.10); ILO and Mexico (art. 4 (*a*)); ICAO and Canada (art. II, sect. 6 (*a*)); Italy and FAO (art. VIII, sect. 19 (*a*)); Chile and FAO (art. VI, sect. 13 (*a*)); Egypt and FAO (art. V, sect. 13 (*a*)); Thailand and FAO (art. VIII, sect. 15 (*a*)); France and UNESCO (art. 15); Switzerland and WHO (art. 10).

26. States usually establish a distinction between direct taxes, from which international organizations are exempted, and indirect taxes or charges included in the prices of movable and immovable property, on which a rebate or refund may not be required from member States except in the case of large or substantial pur-

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[8] See P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), pp. 278 *et seq.*

[9] See *Annuaire de l'Institut de droit international*, vol. II (Paris, Pedone, 1929), p. 311. The resolution is reproduced in Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 186-187. This is also the sense of article 18 of the Havana Convention regarding Diplomatic Officers.

[10] See the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session and commentaries thereto (*Yearbook . . . 1958*, vol. II, p. 89 *et seq.*, document A/3859, in particular p. 96).

[11] See "Practice followed by Member States in exempting diplomatic missions from real estate taxes", Note by the Secretariat (document A/AC.154/WG.1/L.2 and L.2/Add.2 and Add.4 of 16 April and 11 June 1974 and 5 February 1975, respectively).

[12] See para. (2) of the commentary to article 21 (footnote 10 above).

[13] Hereinafter the "General Convention".

[14] See *Legislative Texts*, vol. II, p. 381.

[15] Public Law 291, *United States Code, 1988 Edition*, vol. 9, title 22, sect. 288.

chases, where it is possible to take appropriate administrative measures. This restriction on the principle of exemption is reasonable and justified. Such taxes and charges are usually incorporated in the price paid and are collected by the State through a third party, the trader, and not from the organization as such.

27. The terms "large purchases" or "substantial purchases" are somewhat imprecise and may give rise to various interpretations. However, in view of the difficulties involved in making the refund, from the administrative viewpoint they enable Governments to require organizations to justify their requests for a refund. In any case, a rebate must be granted on any charge on transfers of property acquired by an international organization for its official activities.

28. Obviously, in some cases it may be difficult to define what should be considered an official activity of an international organization. The European Committee on Legal Cooperation has proposed that an official activity should be considered as one relating to the achievement of the aims of the international organization.[16] Such a definition makes it possible to exclude certain secondary activities by an international organization, such as the operation of a restaurant, a bar or any other commercial establishment. The Swiss Government, for instance, exempts international organizations from taxes only on buildings of which they are the owner and which are occupied by their services.

29. Clearly, in a case where an international organization engages in a commercial activity, the granting of tax privileges does not apply.

30. The definition of direct taxation is not identical in all national legislations. It varies from one country to another. There is no uniform criterion in that regard. That is why the Secretary-General of the United Nations, in an exchange of notes with a Member State, maintained that:

> The characterization given to a tax in a particular municipal law system cannot be controlling in the application of the provisions of the Convention on the Privileges and Immunities of the United Nations which must be interpreted uniformly in respect of all Member States. Otherwise there would be inequality of treatment between Members.[17]

31. The distinction between direct taxes and other taxes, however, does not in practice appear to give rise to major difficulties, as the European Committee on Legal Cooperation noted in its aforementioned explanatory report on privileges and immunities, "except in a few cases which had to be judged on their individual merits."[18]

32. The question also gave rise to a memorandum prepared in 1953 by the Office of Legal Affairs setting forth the grounds for the immunity of the United Nations from real property tax in respect of its ownership and occupation of the Headquarters District.[19]

33. The reasoning of the Office of Legal Affairs was based primarily on Article 105 of the Charter of the United Nations, a multilateral treaty entered into by the United States with other nations which, in the words of article 6, clause 2, of the United States Constitution "is the supreme Law of the Land . . . anything in the Constitution or Laws of any State to the contrary notwithstanding". The Office of Legal Affairs reached the conclusion that "The United Nations Charter, as part of the supreme law of the land, confers upon the United Nations the immunities necessary for the fulfilment of its purposes, without the requirement of any State legislation; that these immunities include exemption from real property taxes; and that the tax exemption became operative from the effective date of the Charter, without regard to the taxable status date under ordinary local practice".[20]

34. Few controversies appear to have arisen concerning the immunity of the specialized agencies and IAEA from direct taxes, and when such controversies have arisen, they have normally been resolved satisfactorily.[21]

35. As provided for in the Convention on the Privileges and Immunities of the Specialized Agencies, the latter pay "charges for public utility services". Questions have arisen regarding the interpretation of that term. In most of these cases, a satisfactory agreement has been reached and the organization concerned has obtained immunity.[22]

36. From a study prepared by the Secretariat submitted to the Commission at its nineteenth session it would appear that the Legal Counsel of the United Nations has on several occasions had to negotiate with the competent State authorities on the interpretation of the rules of exemption, eventually reaching a satisfactory solution in the great majority of cases.[23]

37. With regard to taxes on United Nations financial assets, a study prepared by the Secretariat submitted to the Commission at its thirty-seventh session indicates, for example, that the Legal Counsel of the United Nations wrote, on 11 July 1977, to the Permanent Representative of the United States to the United Nations about the recognition on the part of the competent United States authorities of the exemption of the United Nations, *inter alia* under the General Convention, from the stock transfer tax levied in one of the States of the

[16] See Council of Europe, *Privileges and Immunities of International Organisations*, Resolution (69) 29 adopted by the Committee of Ministers on 26 September 1969 and explanatory report (Strasbourg, 1970), p. 31, para. 61.

[17] See *Yearbook . . . 1967*, vol. II, p. 243, document A/CN.4/L.118 and Add.1 and 2, para. 152, and similarly a memorandum from the United Nations Legal Counsel to the Field Operations Service, Office of General Services, United Nations, *Juridical Yearbook 1972* (Sales No. E.74.V.1), pp. 158-159.

[18] See *Privileges and Immunities of International Organisations* . . . (footnote 16 above), p. 31, para. 60.

[19] *Yearbook . . . 1967*, vol. II (see footnote 17 above), pp. 245-246, para. 167.

[20] Ibid.

[21] See *Yearbook . . . 1985*, vol. II (Part One), *Addendum*, pp. 191-192, document A/CN.4/L.383 and Add.1-3; and *Yearbook . . . 1967*, vol. II (footnote 17 above), p. 306.

[22] See *Yearbook . . . 1985*, vol. II (Part One), *Addendum* (footnote 21 above).

[23] *Yearbook . . . 1967*, vol. II (footnote 17 above), pp. 241-248, paras. 143-174.

Union in relevant transfers executed on behalf of all United Nations assets, in particular the United Nations Joint Staff Pension Fund. In his letter, the Legal Counsel concluded that:

It is the position of the United Nations that the practice of the State concerned must conform to the international obligations of your country and that the stock transfer tax law must be interpreted in that light.

Subsequently, the United States Mission to the United Nations informed the Legal Counsel that, following a study of the matter by the New York State Commission on Taxation and Finance, a ruling had been made to the effect that the United Nations Joint Staff Pension Fund was exempt from the New York stock transfer tax.[24]

38. The report of the Committee of the San Francisco Conference responsible for the drafting of Article 105 of the Charter of the United Nations pointed out that "if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise".[25]

39. The Agreement signed between the United Nations and Switzerland contains the following clause in article II, section 5:

The United Nations, its assets, income and other property shall be:

(*a*) Exempt from all direct and indirect taxes whether federal, cantonal or communal. It is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(*b*) Exempt from the *droit de timbre* on coupons instituted by the Swiss Federal Law of 25 June 1921, and from the *impôt anticipé* introduced by the Federal Council decree, 1 September 1943, and supplemented by the Federal Council decree of 31 October 1944. The exemption shall be effected by the repayment to the United Nations of the amount of tax levied on its assets.

40. The position maintained by the United Nations Office of Legal Affairs, reflected in the study prepared by the Secretariat (see para. 36 above), is that, in view of the fact that the General Convention was drawn up for uniform application in all Member States of the United Nations, the meaning to be given to the term "direct taxes" cannot depend on the particular meaning given to that expression by the fiscal laws of a particular State. Thus, whilst the terms "direct" and "indirect" taxes are interpreted differently in the various national legal systems of Member States, according to the tax system or administration adopted, the meaning to be given to those terms in relation to the application of the General Convention must be found by reference to the nature of that instrument and to the incidence of the tax in question, that is to say, according to the party upon whom the burden of payment directly falls. Moreover, in interpreting the Convention, the United Nations and its Members must be guided by the overlying principles of the Charter, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. In accordance with that provision, no Member State can hinder the working of the Organization or take any measure which might increase its financial or other burdens; this opinion was expressed at the United Nations Conference on International Organization. Accordingly, under article II of the Convention the Organization is relieved of the burden of all direct taxes, and is to be granted the remission or return of indirect taxes where the amount is important enough to make this administratively possible.[26]

41. The Convention on the Privileges and Immunities of the Specialized Agencies establishes the same principle. Apparently, in practice, no major difficulties have occurred in respect of its implementation.[27]

42. Some headquarters agreements refer specifically to exemption from taxation on buildings of which the international organization is the owner and which are occupied by its services. Unquestionably, the most detailed of these agreements is that signed by Italy and FAO, which exonerates the organization from any form of direct taxation, particularly the tax on movable property (*imposta sui redditi di ricchezza mobile*), the land income tax (*imposta sui redditi dei terreni*), the tax on income from buildings (*imposta sui redditi dei fabbricati*), the capital levy (*imposta sul patrimonio*) and all local surtaxes (*sovra imposte locali*) (art. VIII, sect. 19 (*a*)).

43. Some national legislations make a distinction between charges and taxes. A tax, economically speaking, is the payment devolving upon each citizen to cover the expenditure of the State and, administratively, its imposition is an official act.

44. In contrast, a charge is a payment for a service rendered. In the first place it is the cost of a service for which payment has to be made. In some cases the charge for the service must be made by semi-administrative measures, but such a procedure does not change the nature of the charge. That is why the various provisions contained in the General Convention (art. II, sect. 7) and the Convention on the Privileges and Immunities of the Specialized Agencies (art. III, sect. 9 (*a*)), in establishing exemption from direct or indirect taxes make a specific reservation, however, in respect of the charges for "public utility services" or "general utility services", which any international organization availing itself of such services is required to pay.

45. Similar provisions are found in the General Agreement on Privileges and Immunities of the Council of Europe (art. 7 (*a*)); in the Vienna Conventions on Diplomatic Relations (arts. 23 and 34), on Consular Relations (arts. 32 and 49 (*a*)), Special Missions (art. 24), and the Representation of States in their Relations with International Organizations of a Universal Character (art. 24).

46. In some national legislations, this distinction between a tax and a charge, established long ago by doctrine, has been complicated by the emergence of further divisions and classifications. With respect to international organizations, the Switzerland-League of Nations *Modus Vivendi* of 1926, in article VIII, established the

[24] See *Yearbook... 1985*, vol. II (Part One), *Addendum* (footnote 21 above), pp. 163-164, paras. 26-27.

[25] See *Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. XIII, p. 705.

[26] *Yearbook... 1967*, vol. II (see footnote 17 above), p. 241, para. 145.

[27] Ibid., p. 306, para. 54.

criteria for determining the meaning to be given to a charge. That article states:

Charges are understood to mean—irrespective of the term used in the relevant regulations—solely those taxes relating to a special and specific service performed by the administration for the person who is paying, as well as those taxes that are paid to defray expenditures particularly necessitated by an act of a taxpayer.[28]

47. We may conclude from the above that international intergovernmental organizations should, and do enjoy, in the same way as States and the diplomatic missions that represent them, the fiscal immunities indispensable to the effective performance of their official functions.

B. Exemptions from customs duties

48. In order to perform their official functions effectively, intergovernmental international organizations must, as we have seen, enjoy the greatest possible independence in relation to the States of which they are composed. This independence must not be impeded in any way. Accordingly, the principle of the free movement of the articles and capital of international organizations appears to have been accepted and constitutes one of the basic elements for preserving and guaranteeing their independence.

49. It therefore appears logical that all legal texts, whether they be bilateral agreements, multilateral conventions or unilateral decisions, and the practice of States in this matter should establish the principle of the freedom of movement of the articles, publications and capital of international organizations.

50. As an intergovernmental international organization is the creature of the States of which it is composed and they are equal as between each other, these States must place themselves on an equal footing *vis-à-vis* the organization of which they are members. It would not be acceptable for a State to derive unjustified fiscal benefit from the funds placed at the disposal of an international organization.

51. Article II, section 7, of the General Convention stipulates that:

The United Nations, its assets, income and other property shall be:

...

(*b*) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country.

52. Similar provisions are contained in the Convention on the Privileges and Immunities of the Specialized Agencies (art. III, sect. 9 (*b*)); the General Agreement on the Privileges and Immunities of the Council of Europe (art. 7 (*b*)), and the Additional Protocol thereto (art. 4); the agreement between Switzerland and the United Nations (art. II, sect. 5 (*c*)); the agreement between the United Nations and Chile (art. IV, sect. 10 (*b*)); the agreement between the United Nations and Thailand (art. IV, sect. 8 (*b*)); the arrangement for the execution of the agreement between Switzerland and ILO (art. 1); the agreement between ICAO and Canada (art. II, sect. 6 (*b*)); and the agreement between Italy and FAO (art. VIII, sect. 19 (*c*)).

53. Many of these agreements establish the same privileges for the publications of the international organizations concerned, as explained previously in the fifth report.[29]

54. However, although the principle of the free movement of the articles of international organizations is fundamental and necessary for the fulfilment of the purposes for which they have been established, States naturally have the right to protect themselves against abuse or any erroneous interpretation which may distort its true aim.

55. Even though most of the agreements cited do not include express provisions concerning control by the State, there are differences in their wording which impose certain limitations on application of the principle of exemption. Thus, for example, in the agreement between Italy and FAO, it is stipulated that the maximum number of vehicles that FAO may import will be 12 (art. VIII, sect. 19 (*d*)). On the other hand, the agreement between IAEA and Austria establishes no limitation with regard to this question (art. VIII, sect. 22 (*e*)). Other agreements are even broader and list a number of undetermined articles for which exemption is granted. Thus, article III of the agreement between UNRWA and Egypt provides that the "goods, stores, produce and equipment, including petroleum products" shall be exempt.[30]

56. It is thus necessary to strike a balance between the two principles: that of the free movement of the articles which international organizations import or export for their official use, and the right of the State to protect its interests and security. In the agreement between UNRWA and Egypt it is stipulated that:

(2) Subject to measures connected with security and public order the aforementioned goods, stores, produce and equipment will be exempted from customs examination and inspection. This exemption can be withdrawn if the customs authorities find out that it is being abused.[31]

57. Before the adoption of the Vienna Convention on Diplomatic Relations, the regime applied to the international organizations in this area was, in most cases, similar to that applied to diplomatic missions. Thus, for example, in accordance with the agreement concluded with the United States, OAS benefits from the same customs privileges as those granted to foreign Governments, under the terms of the International Organizations Immunities Act. Title I, section 2 (*d*), of this Act stipulates:

Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.[32]

[28] See *Legislative Texts*, vol. II, p. 135.

[29] See document A/CN.4/438, paras. 48-65, reproduced in the present volume.

[30] United Nations, *Treaty Series*, vol. 121, p. 107.

[31] Ibid.

[32] See footnotes 14 and 15 above.

58. When ILO had to move to Canada as a result of the Second World War, the Canadian Under-Secretary of State for External Affairs informed ILO in an official note, that "as regards matters of customs and customs duties, the position of the International Labour Office in Canada is analogous to that of a foreign legation".[33]

59. However, since the adoption of the Vienna Convention on Diplomatic Relations, the situation has changed, there having been a shift in favour of the international organizations. The customs privileges granted to these organizations appear to be broader than those granted to diplomatic missions. Article 36, paragraph 1, of the Vienna Convention establishes a limitation on exemption, stipulating that:

> 1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:
>
> (*a*) Articles for the official use of the mission;
>
> ...

60. A similar limitation is established in the Vienna Conventions on Consular Relations (art. 50) and on the Representation of States in their Relations with International Organizations of a Universal Character (art. 35).

61. Furthermore, States may, under the principle of reciprocity, impose conditions on the application, and restrict the scope, of the privilege granted. According to Cahier, the Commission also refers to the possibility open to States to restrict the exemption granted to diplomatic missions.[34]

62. This type of restriction is not to be found in the relevant texts concerning customs exemptions for international organizations. The prevailing view is that the free movement of articles belonging to international organizations must not be obstructed by levying import or export customs duties or by measures of an economic character or by administrative measures for the prohibition or restriction of imports or exports—measures that would run counter to the principle of the equality of States and of the freedom of action of international organizations.

63. The total exemption regime which is applied to international organizations is, however, accompanied by certain procedural rules which, although not intended to establish absolute control on the part of the State, enable it at least to be aware of the imports made by international organizations and hence foresee or minimize possible abuses. Many States require both diplomatic missions and international organizations to make a written application for exemption "in accordance with diplomatic privileges", indicating, *inter alia*, the nature, value, weight, quantity, and origin of the items involved, together with a declaration issued by the head of the mission or director or secretary-general of the international organization that the goods or articles concerned are intended for official use.

64. Some States require, in addition, a customs declaration to be presented at the time of import. All the same, notwithstanding these formalities which are of little consequence in practice, the privilege does exempt the international organizations from the obligation to request an authorization, licence or visa or to abide by quantitative limitations or quotas.

65. This very broad exemption in both fiscal and customs matters is nevertheless subject, under all the conventions and agreements that have been mentioned, to a very clear limitation by the formula "for official use". In other words, the articles imported duty-free in accordance with the privileges granted to international organizations cannot be used other than to meet the needs of the international organization for the conduct of activities intended to achieve the purposes for which it was established. All this follows logically from the system, since otherwise the principle of equality of all before the general customs regime would be violated.

66. It will be readily appreciated that difficulties can arise in practice because, while the relevant legal instruments employ the expression "official use", they do not define it. Nevertheless, no unduly complex problems appear to have arisen in formulating a definition, despite the existence of sensitive sectors such as food products, alcohol, tobacco and petroleum products. States, which are jealous of their fiscal and customs prerogatives, have a tendency to place strict limits on the functional needs of international organizations in these sectors.

67. Canada, by an Order-in-Council dated 4 April 1952, defined the expression "official use" as follows:

> "Official use" means use to advance the objects of the United Nations and not enuring to the financial benefit of the importer or any other individual.[35]

68. In an opinion handed down in 1946 on the subject of the duty-free import of alcoholic beverages intended for official receptions of the United Nations, the Attorney-General of the State of New York referred to Public Law 291 which, as we have already indicated (see para. 23 above), equates the privileges of international organizations with those of foreign Governments. The Attorney-General stated that:

> Restricting this ruling to imports by the United Nations itself, to be used only for purposes of its own official hospitality, it is my opinion that the State Liquor Authority should recognize the rights conferred by Public Law 291 of the United States Congress, and permit the delivery of such liquor to the United Nations, upon request by the United Nations specifying the amount and nature of the shipment.[36]

69. The Office of Legal Affairs of the United Nations gave an opinion on the same question in 1959 in connection with the right of directors of United Nations information centres to import alcoholic beverages duty-free.

> Imports of liquor for official receptions should, by the terms of section 7 (*b*) of the Convention on the Privileges and Immunities of the United Nations, be exempt from customs duties. This applies also to gasoline, whenever it is "for official use".[37]

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[33] See *International Labour Office, Official Bulletin*, vol. XXV, 1 April 1944, p. 78.

[34] Op. cit., p. 192.

[35] *Legislative Texts*, vol. I, p. 14.

[36] *Yearbook ... 1967*, vol. II (see footnote 17 above), p. 249, para. 178.

[37] Ibid., para. 179.

70. Both the General Convention (art. II, sect. 7 (*b*)) and the Convention on the Privileges and Immunities of the Specialized Agencies (art. III, sect. 9 (*b*)) expressly provide that:

> It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country.

71. It is quite obvious that if any article imported under exemption is sold, it ceases to be "for official use" by the organization, which must therefore pay customs duty in proportion to the residual value of the article and in accordance with the legal provisions and regulations of the State into which it was imported, or in accordance with the modalities agreed between that State and the organization. In the event of sale of the article to another international organization equally entitled to privileges, the requirement to pay customs duty does not, of course, apply.

72. Some legal instruments refer not only to sales but also to gifts such as, for example, the Protocol on the Privileges and Immunities of the European Coal and Steel Community, which refers to any disposal whether or not in return for payment (art. 4 (*b*)).

73. The United Nations Legal Counsel, in an opinion given to the Legal Adviser of a United Nations subsidiary organ in 1964, specified the conditions which must govern the sale of articles imported duty-free, as follows:

> While conditions for sale must be agreed with the host country, it was not intended that such conditions should be unilaterally and arbitrarily established but that they should be negotiated with the purpose of protecting the legitimate interests of both parties, that is, to ensure the host country against the abuse of import privileges and to ensure the United Nations and its staff effective use of such privileges for the purposes that they were intended.[38]

74. International organizations thus enjoy customs exemption for articles imported or exported for their official use. The exemption does not apply to charges for storage, cartage or similar services. Moreover, the State into whose territory the articles are imported duty-free by the international organization has the right to impose conditions regarding the disposal, whether or not in return for payment, of these articles in its territory. It is likewise entitled to exercise a measure of control over such imports and exports for the purpose of preventing abuse or interpretations which may adversely affect the application of the principle of free movement of the articles of international organizations and of protecting its interests and its security.

[38] Ibid., p. 251, para. 189.

III. Draft articles 18 to 22

75. In accordance with the observations in the present report, the following draft articles are proposed as part V of the draft articles, on the fiscal immunities and exemptions from customs duties of intergovernmental international organizations of a universal character.

PART V

FISCAL IMMUNITIES AND EXEMPTIONS FROM CUSTOMS DUTIES

Article 18

International organizations, their assets, income and other property intended for their official activities shall be exempt from all direct taxes; it is understood, however, that international organizations will not claim exemptions from taxes which are, in fact, no more than payment for public utility services.

Article 19

1. International organizations shall be exempt from all national, regional or municipal dues and taxes on the premises of the organization, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the international organization.

Article 20

International organizations, their assets, income and other property shall, in accordance with the laws and regulations promulgated by the host State, be exempt from:

(*a*) All kinds of customs duties, taxes and related charges, other than charges for storage, cartage and similar services, as well as from import and export prohibitions and restrictions with respect to articles imported or exported by international organizations for their official use; it is understood, however, that articles imported under such exemption may not be disposed of, whether or not in return for payment, in the country into which they have been imported, except under conditions agreed with the Government of that country;

(*b*) Customs duties and prohibitions and restrictions with respect to the import and export of their publications intended for official use.

Article 21

1. International organizations shall not, in principle, claim exemption from consumer taxes or sales

taxes on movable and immovable property that are incorporated in the price to be paid.

2. Notwithstanding the provisions of the foregoing paragraph, when international organizations make, for their official use, large purchases of goods on which such duties and taxes have been, or may be, imposed, States parties (to the present Convention)* shall, wherever possible, adopt the necessary administrative provisions for the remission or refund of the amount corresponding to such duties or taxes.

Article 22

For the purposes of the foregoing articles, the terms "official activity" or "official use" shall mean those relating to the accomplishment of the purposes of the international organization.

* References to the "Convention" have been placed in brackets in order not to prejudge the final form of the draft articles.

CHECK-LIST OF DOCUMENTS OF THE FORTY-THIRD SESSION

Document	*Title*	*Observations and references*
A/CN.4/434	Provisional agenda	Mimeographed. For agenda as adopted see *Yearbook... 1991*, vol. II (Part Two), chap. I, para. 7.
A/CN.4/435 [and Corr.1] and Add.1 [and Corr.1]*	Ninth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in the present volume.
A/CN.4/436 [and Corr.1, 2 and 3]	Seventh report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	*Idem.*
A/CN.4/437 [and Corr.1]	Seventh report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	*Idem.*
A/CN.4/438 [and Corr.1]	Fifth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	*Idem.*
A/CN.4/439	Sixth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	*Idem.*
A/CN.4/440 and Add.1	Third report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	*Idem.*
A/CN.4/L.456	Topical summary, prepared by the secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fifth session of the General Assembly	Mimeographed.
A/CN.4/L.457	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 23	See *Yearbook... 1991*, vol. I, summary records of the 2218th meeting (paras. 23 *et seq.*), 2219th meeting (paras. 15 *et seq.*), 2220th meeting (para. 59), 2221st meeting (paras. 9-60).
A/CN.4/L.458 [and Corr.1] and Add.1	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: Parts I, II and VI of the draft articles; articles 2, 10 and 26-33	*Idem*, summary records of the 2228th meeting (para. 67), 2229th meeting (paras. 12 *et seq.*), 2230th meeting (paras. 6 *et seq.*).
A/CN.4/L.459 [and Corr.1] and Add.1	Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee: Parts One and Two; articles 1-26	*Idem*, summary records of the 2236th meeting (paras. 14 *et seq.*), 2237th meeting (paras. 34 *et seq.*), 2239th meeting (paras. 2 *et seq.*), 2240th meeting (paras. 2 *et seq.*), 2241st meeting (paras. 26-58).
A/CN.4/L.460	[Symbol not used]	

* The corrigenda to A/CN.4/435 and to A/CN.4/435/Add.1 were combined in a single document.

Document	*Title*	*Observations and references*
A/CN.4/L.461	Draft report of the International Law Commission on the work of its forty-third session: chapter I (Organization of the session)	Mimeographed. For the adopted text see *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10). The final text appears in *Yearbook... 1991*, vol. II (Part Two).
A/CN.4/L.462 and Add.1 [and Add.1/Corr.2 and 3], 2 [and Add.2/Corr.1], and 3 [and Add.3/Corr.1]	*Idem*: chapter II (Jurisdictional immunities of States and their property)	*Idem.*
A/CN.4/L.463 [and Corr.1], and Add.1, 2, 3 and 4	*Idem*: chapter III (The law of the non-navigational uses of international watercourses)	*Idem.*
A/CN.4/L.464 and Add.1, 2, 3 and 4	*Idem*: chapter IV (Draft Code of Crimes against the Peace and Security of Mankind)	*Idem.*
A/CN.4/L.465	*Idem*: chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	*Idem.*
A/CN.4/L.466	*Idem*: chapter VI (Relations between States and international organizations (second part of the topic))	*Idem.*
A/CN.4/L.467	*Idem*: chapter VII (State responsibility)	*Idem.*
A/CN.4/L.468 [and Corr.1]	*Idem*: chapter VIII (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/SR.2205-A/CN.4/SR.2252	Provisional summary records of the 2205th to 2252nd meetings	Mimeographed. The final text appears in *Yearbook... 1991*, vol. I.

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