

YEARBOOK
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1993

Volume II
Part One

Documents of the forty-fifth session

UNITED NATIONS



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NOTE

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

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1991*).

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-fifth 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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CONTENTS

	<i>Page</i>
Abbreviations.....	iv
Note concerning quotations	v
State responsibility (agenda item 2)	
<i>Document A/CN.4/453 and Add.1-3.</i> Fifth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur.....	1
Draft Code of Crimes against the Peace and Security of Mankind (agenda item 3)	
<i>Document A/CN.4/448 and Add.1.</i> Comments and observations received from Governments.....	59
<i>Document A/CN.4/449.</i> Eleventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	111
<i>Document A/CN.4/452 and Add.1-3.</i> Comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction.....	125
The law of the non-navigational uses of international watercourses (agenda item 4)	
<i>Document A/CN.4/447 and Add.1-3.</i> The law of the non-navigational uses of international watercourses. Comments and observations received from Governments.....	145
<i>Document A/CN.4/451.</i> First report on the law of the non-navigational uses of international watercourses, by Mr. Robert Rosenstock, Special Rapporteur	179
International liability for injurious consequences arising out of acts not prohibited by international law (agenda item 5)	
<i>Document A/CN.4/450.</i> Ninth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur.....	187
Programme, procedures and working methods of the Commission, and its documentation (agenda item 6)	
<i>Document A/CN.4/454.</i> Outlines prepared by members of the Commission on selected topics of international law	203
Check-list of documents of the forty-fifth session.....	251

ABBREVIATIONS

CSCE	Conference on Security and Cooperation in Europe
ECA	Economic Commission for Africa
ECE	Economic Commission for Europe
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
LON	League of Nations
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

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* *

AFDI	<i>Annuaire français de droit international</i> (Paris)
AJIL	<i>American Journal of International Law</i> (Washington, D.C.)
BFSP	<i>British and Foreign State Papers</i> (London)
BYBIL	<i>British Year Book of International Law</i> (Oxford)
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
<i>P.C.I.J. Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)

<i>Recueil des Cours . . .</i>	<i>Collected Courses of The Hague Academy of International Law</i>
RGDIP	<i>Revue générale de droit international public</i> (Paris)
United Nations, <i>Historical survey . . .</i>	United Nations, <i>Historical survey of the question of international criminal jurisdiction</i> , memorandum by the Secretary-General (Sales No. 1949.V.8)
United Nations, <i>Legislative Texts . . .</i>	United Nations Legislative Texts, <i>Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation</i> (Sales No. 63.V.4)

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NOTE CONCERNING QUOTATIONS

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

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

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/453 and Add.1-3*

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

[Original: English]
[12 and 28 May and 8 and 24 June 1993]

CONTENTS

	<i>Page</i>	
<i>Note</i>		3
Works cited in the present report		3
	<i>Paragraphs</i>	
INTRODUCTION	1-2	7
<i>Chapter</i>		
I. PART 3 OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY: DISPUTE SETTLEMENT PROCEDURES.....	3-108	7
A. The draft articles on dispute settlement discussed in the Commission at its thirty-sixth and thirty-seventh sessions and in the Sixth Committee at the fortieth and forty-first sessions of the General Assembly.....	4-28	8
1. Mr. Riphagen's proposals.....	4-9	8
2. The debates in the Commission and in the Sixth Committee.....	10-26	8
(a) The general problem.....	11-13	8
(b) Relationship between the proposed procedures and any dispute settlement arrangements in force between the parties.....	14	9
(c) Nature of the settlement procedures.....	15-23	9
(d) Provisions of the draft to which the procedures envisaged should apply.....	24	11
(e) The question of reservations.....	25-26	12
3. Conclusion.....	27-28	12
B. Dispute settlement in part 3 of the draft.....	29-42	12
1. The problematic features of unilateral reactions.....	29-31	12
2. The 1992 debates on countermeasures in the Commission and in the Sixth Committee.....	32-38	13
3. The 1984 and 1985 debates on the subject.....	39-40	15
4. Conclusion.....	41-42	15
C. Dispute settlement provisions as an element of the draft on State responsibility.....	43-61	15
1. An adequate dispute settlement system as an indispensable complement to a regime governing unilateral reactions.....	43-51	15
2. Further reasons for including an effective dispute settlement system in the draft.....	52-61	17
D. Recommended solutions.....	62-85	19
1. Introduction.....	62-69	19
2. The proposed three-step dispute settlement system.....	70-78	20
(a) The first step: conciliation.....	71-72	20
(b) The second step: arbitration.....	73-74	21
(c) The third step: judicial settlement.....	75-78	21
3. Main features of the proposed solution: third-party settlement procedures as a remedy for the negative effects of the present inevitable system of unilateral reaction.....	79-85	21

* Incorporating A/CN.4/453/Add.1/Corr. 1-3.

Chapter

E.	The Commission's approach to dispute settlement.....	86-105	22
1.	The practice of the Commission concerning the inclusion of arbitration clauses in its drafts.....	86-88	22
2.	Recent developments regarding dispute settlement procedures as evidence of a new trend.....	89-95	24
3.	Part 3 of the draft on State responsibility as a matter of progressive development of the law of dispute settlement	96-105	26
F.	Draft articles and annex.....	106-108	28
II.	THE CONSEQUENCES OF SO-CALLED INTERNATIONAL CRIMES OF STATES (ARTICLE 19 OF PART I OF THE DRAFT ARTICLES)	109-269	30
A.	Problems raised by the "special regime" of crimes in the Commission's work on State responsibility, as identified by the Commission, by the Sixth Committee and in the literature.....	112-166	31
1.	Introduction	112-115	31
2.	The "special" consequences of crimes in the work of the Commission.....	116-139	31
(a)	The first references to the question	116-118	31
(b)	The commentary to article 19	119	32
(c)	The debate on draft article 19.....	120-122	32
(d)	The commentary to articles 30 and 34.....	123-126	33
(e)	Recapitulation	127	33
(f)	The 1984 and 1985 proposals	128-134	34
(g)	The Commission's debate on the 1984 and 1985 proposals.....	135-138	35
(h)	Recapitulation of the Commission's positions	139	36
3.	Reactions of States in the Sixth Committee	140-147	37
(a)	The problem of criminal liability.....	140-142	37
(b)	The "substantive" consequences of crimes.....	143	37
(c)	<i>Faculté</i> of reaction	144	37
(d)	The role of the "organized international community"	145-146	38
(e)	Recapitulation of Sixth Committee positions	147	38
4.	Scholarly views.....	148-166	38
(a)	Introduction.....	148	38
(b)	The wrongdoer State/victim State relationship.....	149-153	39
(c)	The wrongdoer State /"non-directly" injured State relationship.....	154-158	40
(d)	The role of the "organized international community"	159-166	41
B.	Problematic aspects of a possible "special regime" of responsibility for crimes	167-249	43
1.	Introduction	167-170	43
2.	Substantive consequences.....	171-187	43
3.	Instrumental consequences: measures involving the use of force.....	188-196	45
4.	The problem of the <i>faculté</i> , of reaction: "subjective-institutional" aspects	197-225	46
5.	Measures not involving force: The problem of attenuating the limits on resort to countermeasures	226-240	51
6.	The problem of an "obligation to react" on the part of injured States.....	241-249	53
C.	International criminal liability of States, individuals or both?	250-269	54

NOTE

Multilateral conventions cited in the present report

- | | <i>Sources</i> |
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Introduction

1. The present report consists of two chapters, the first of which addresses the subject matter of part 3 of the draft articles on State responsibility (Implementation) while the second deals with the consequences of so-called international crimes of States under article 19 of part 1 of the draft articles.¹ Chapter I also contains the text of proposed draft articles and an annex on the settlement of disputes. For the reasons indicated at the beginning of that chapter, chapter II does not contain any draft articles.

2. Although the subject matters of chapters I and II are discussed separately, it will be shown that the extent to which dispute settlement procedures are available and the chances of dealing effectively with the consequences of crimes are more closely inter-related than may appear at first sight.

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

CHAPTER I

Part 3 of the draft articles on State responsibility: Dispute settlement procedures

3. Section A of this chapter contains a summary of the proposals made by the previous Special Rapporteur, Mr. Willem Riphagen, in 1985 and 1986 relating to the settlement of disputes, including draft articles 3 to 5 of part 3,² and of the debates in the Commission and in the Sixth Committee thereon.³ Section B analyses the features of countermeasures as an indispensable means of implementation of State responsibility, on the basis of the important debates on the subject held in the Commission and in the Sixth Committee from 1984 to 1986⁴ and in

1991⁵ and 1992.⁶ Section C sets forth the consequences to be drawn from the nature of countermeasures and the statements on the subject made in the course of the debates for the purposes of the choices that the Commission is called upon to make with regard to the dispute settlement provisions of part 3 of the draft. Section D describes the solutions recommended in the light of the positive impact they could have on the regime of countermeasures and the proper implementation of the law of State responsibility in general. Section E discusses the Commission's practice with regard to the dispute settlement provisions to be embodied in its draft in the light of the requirements of the progressive development of the law in the area of State responsibility. Section F contains the proposed draft articles of part 3 and the annex thereto.

² For his general comments on the proposed part 3, see his sixth report (*Yearbook . . . 1985*, vol. II (Part One), pp. 15-19, document A/CN.4/389); for texts of draft articles 1 to 5 and the annex of part 3, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86. The annex is also reproduced in footnote 167 below.

³ For summaries of the Commission's discussions, see *Yearbook . . . 1985*, vol. II (Part Two), paras. 108-163 and *Yearbook . . . 1986*, vol. II (Part Two), paras. 40-65. For detailed comments, see *Yearbook . . . 1985*, vol. I, 1890th-1902nd meetings and *Yearbook . . . 1986*, vol. I, 1952nd-1956th meetings. For summaries of the discussions in the Sixth Committee, see topical summaries (A/CN.4/L.389), sect. G and C, respectively.

⁴ For summaries of the Commission's discussions in 1984, see *Yearbook . . . 1984*, vol. II (Part Two), paras. 344-380. For detailed comments, see *Yearbook . . . 1984*, vol. I, 1858th, 1860th-1861st and 1865th-1867th meetings. For a summary of the discussions in the Sixth Committee, see the relevant topical summary (A/CN.4/L.369), sect. D. For 1985 and 1986, see footnote 2 above.

⁵ For summaries of the Commission's discussions, see *Yearbook . . . 1991*, vol. II (Part Two), paras. 302-322. For detailed comments, see *Yearbook . . . 1991*, vol. I, 2238th meeting. For a summary of the discussions in the Sixth Committee, see the relevant topical summary (A/CN.4/L.456), sect. E.

⁶ For summaries of the Commission's discussions, see *Yearbook . . . 1992*, vol. II (Part Two), paras. 105-276. For detailed comments, see *Yearbook . . . 1992*, vol. I, 2265th-2267th, 2273rd-2280th, 2283rd, and 2289th meetings. For a summary of the discussions in the Sixth Committee, see "Topical summary . . . of the discussions . . . on the report of the Commission during the forty-sixth session of the General Assembly" (A/CN.4/L.469, sect. F).

A. The draft articles on dispute settlement discussed in the Commission at its thirty-sixth and thirty-seventh sessions and in the Sixth Committee at the fortieth and forty-first sessions of the General Assembly

1. MR. RIPHAGEN'S PROPOSALS

4. The dispute settlement provisions proposed by the former Special Rapporteur⁷ were designed to come into operation at the phase where, in the words of his draft article 3 of part 3, objection had been raised against measures taken or intended to be taken under the articles of part 2 providing for the right of an allegedly injured State to resort to countermeasures (namely his draft articles 8 and 9 of part 2⁸).

5. Under paragraph 1 of Mr. Riphagen's proposed draft article 3,

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

Under paragraph 2, however,

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

In case no solution could be reached on the basis of the procedures referred to in article 3, three kinds of procedures were envisaged under article 4 (a), (b) and (c).

6. Article 4 (a) provided that disputes concerning the interpretation or application of the provision of part 2 prohibiting countermeasures consisting in the violation of an obligation deriving from a "peremptory norm of general international law" (art. 12)⁹ could be submitted unilaterally by any one of the parties to ICJ for a decision.

7. Article 4 (b) provided for the same possibility in relation to disputes concerning the "additional rights and obligations" envisaged as consequences of international crimes of States by the relevant provision of part 2 (art. 14).

8. Article 4 (c) dealt with the more general category of disputes concerning the application or interpretation of the provisions of part 2 relating to the regime of countermeasures (arts. 9-13). As regards these disputes, either party was entitled under article 4 (c) to resort to a conciliation procedure—provided for in an annex to the articles—by submitting a request to that effect to the Secretary-General of the United Nations.

9. Since, for the reasons indicated on many occasions, the time is not yet ripe to make definitive suggestions to the Commission relating to what Riphagen in his article 4 (b) calls "additional rights and obligations" attaching to the internationally wrongful acts contemplated in

article 19 of part 1 of the draft articles, for the time being, this report will not concern itself with the provision of article 4 (b).

2. THE DEBATES IN THE COMMISSION AND IN THE SIXTH COMMITTEE

10. The comments of the members of the Commission and those made in the Sixth Committee on the proposals referred to above may be classified under five headings according to whether they relate to:

(a) The general, preliminary problem of whether dispute settlement provisions should be included in the draft;

(b) The relationship between the dispute settlement procedures to be provided for in the draft and any dispute settlement arrangements in force between the parties;

(c) The nature of the settlement procedures according to:

(i) the stage of implementation of the responsibility relationship at which the said procedures should come into play;

(ii) the extent to which resort thereto should be compulsory;

(iii) the binding or non-binding nature of their outcome;

(d) The provisions of the draft (substantive or instrumental) to which the envisaged procedures should apply;

(e) The question of reservations.

(a) *The general problem*

11. To the general preliminary question of whether dispute settlement provisions should be included in the draft, some members gave an affirmative answer.¹⁰

12. Some members pointed out that a convention on State responsibility would be incomplete and ineffective without a compulsory procedure for the settlement of certain disputes.¹¹ Others thought that the absence of a compulsory dispute settlement procedure in the convention would be unacceptable to Governments.¹² One way or another, a careful balance would clearly have to be struck between the necessity

... on the one hand, to prevent nullification or diminution of the purpose and effectiveness of the future convention through lack of effective procedures for dispute settlement, and, on the other hand, to avoid reducing the acceptability of the future convention by making the dispute settlement regime too rigid.¹³

¹⁰ Mr. McCaffrey (*Yearbook* . . . 1985, vol. I, 1892nd meeting); Mr. Al-Qaysi (*ibid.*, 1899th meeting); Mr. Yankov (*ibid.*); and Mr. El Rasheed Mohamed Ahmed (*ibid.*, 1900th meeting).

¹¹ Mr. Calero Rodrigues (*ibid.*, 1892nd meeting); Mr. Huang (*ibid.*, 1894th meeting); and Mr. Mahiou (*ibid.*, 1897th meeting).

¹² Sir Ian Sinclair (*ibid.*, 1895th meeting). Mr. Arango-Ruiz (*ibid.*, 1900th meeting, para. 24), observed that some States would support a draft without a compulsory dispute settlement procedure, while others "would be reluctant to accept any codification or progressive development of the law in such a sensitive area without an adequate system of implementation and peaceful settlement". He, therefore, held that the Special Rapporteur should draft articles based on section B of his sixth report.

¹³ Mr. Huang (*ibid.*, 1894th meeting, para. 84). Similarly, Mr. Calero Rodrigues (*ibid.*, 1892nd meeting, para. 46).

⁷ See footnote 2 above.

⁸ For text of articles 6 to 16, see *Yearbook* . . . 1985, vol. II (Part Two), pp. 20-21, footnote 66.

⁹ *Ibid.*

Others affirmed, on the contrary, that the former Special Rapporteur's proposals with respect to part 3 would inevitably provoke disagreement within the Commission and observed that in the case of the Vienna Convention on the Law of Treaties, the Commission had left the delicate matter of the inclusion of a dispute settlement procedure to the plenipotentiary conference.¹⁴

13. During the corresponding debate in the Sixth Committee, Brazil characterized the drafting of part 3 as a delicate task and only reluctantly agreed that a part 3 would be necessary.¹⁵ Cyprus,¹⁶ the Federal Republic of Germany,¹⁷ Greece,¹⁸ Jamaica,¹⁹ Kenya,²⁰ New Zealand,²¹ Nigeria,²² Somalia,²³ Spain²⁴ and Tunisia²⁵ supported the incorporation of mandatory dispute settlement procedures. Australia,²⁶ China,²⁷ Ethiopia²⁸ and Morocco²⁹ held that caution should be exercised when drafting part 3 in view of the reluctance of States to submit to compulsory third-party settlement procedures.

(b) *Relationship between the proposed procedures and any dispute settlement arrangements in force between the parties*

14. With regard to the relationship between the dispute settlement procedures to be provided for in the draft and any dispute settlement arrangements in force between the parties (art. 3, para. 2 of Riphagen's draft), one member emphasized that article 3 should make it clear that priority was to be given to procedures in force between parties to a dispute.³⁰ Some other members thought that the provision in paragraph 2 of article 3 should also qualify article 4.³¹

¹⁴ Mr. Reuter (ibid., 1891st meeting).

¹⁵ *Official Records of the General Assembly, Fortieth Session, Sixth Committee, 23rd meeting, para. 80.*

¹⁶ Ibid., 24th meeting, para. 13.

¹⁷ Ibid., 24th meeting, paras. 31 and 32.

¹⁸ Ibid., 25th meeting, paras. 39-40.

¹⁹ Ibid., 26th meeting, paras. 36 and 37.

²⁰ Ibid., 27th meeting, para. 16.

²¹ Ibid., 31st meeting, para. 80.

²² Ibid., 32nd meeting, para. 70.

²³ Ibid., 33rd meeting, para. 6.

²⁴ Ibid., 35th meeting, para. 45.

²⁵ Ibid., 36th meeting, para. 15.

²⁶ Ibid., 27th meeting, para. 57.

²⁷ Ibid., 30th meeting, para. 79.

²⁸ Ibid., 31st meeting, para. 24.

²⁹ Ibid., 36th meeting, para. 27.

³⁰ Mr. Ogiso (*Yearbook . . . 1986*, vol. I, 1954th meeting).

³¹ Sir Ian Sinclair (ibid., 1953rd meeting). According to him, in other words, the clause of article 3, paragraph 2 (which preserves the dispute settlement rights and obligations in force between the parties), should apply not only to the provision of article 3, paragraph 1 (means of settlement indicated in Article 33 of the Charter), but also to the rights and obligations provided for under article 4 (a), (b) and (c). Mr. Lacleta Muñoz (ibid., 1954th meeting) stressed that "Nothing should be allowed to prevent disputes from being unilaterally submitted to ICJ" as provided for in article 4 (a) and (b).

A similar view was expressed by Riphagen in his sixth report (*Yearbook . . . 1985*, vol. II (Part One)), (see footnote 2 above), paras. 16-18, considering that provisions of part 2 also have such a residual character. This opinion was shared, in particular, by Sir Ian Sinclair (ibid., vol. I, 1895th meeting).

(c) *Nature of the settlement procedures*

15. A distinction needs to be drawn between various aspects of the nature of the settlement procedures that have been addressed by members of the Commission.

16. One concerns the stage at which the envisaged settlement procedures relating to the implementation of the responsibility relationship should come into play.³² According to one member, the scope of the reference in draft article 3 to the application of the optional procedures provided for in Article 33 of the Charter of the United Nations should have been wider;³³ it could encompass for instance articles 10 to 13 of part 2 of the draft³⁴ or the whole of part 3.³⁵ Some other members held furthermore that reference should also have been made to article 8 of part 2,³⁶ or even to articles 6 and 7 thereof.³⁷

17. Another aspect concerns the extent to which resort to the procedures envisaged should be compulsory. Riphagen, in both his sixth and seventh reports, had expressed the intention to seek inspiration from the relevant provisions on settlement procedures contained in other conventions.³⁸ Some members welcomed this suggestion.³⁹ The approach taken in his sixth report was widely approved,⁴⁰ although a few members stressed that States could be reluctant to include a compulsory dispute settlement procedure in part 3 of the draft.⁴¹ Some members, on the other hand, were utterly opposed to the introduction of a compulsory procedure for the settlement of

³² McCaffrey considered this issue was of fundamental importance with respect to the question of the interrelationship between the various parts of the draft articles (*Yearbook . . . 1986*, vol. I, 1953rd meeting).

³³ Mr. Yankov (ibid., 1954th meeting).

³⁴ Mr. Jagota (ibid., 1955th meeting).

³⁵ Mr. Koroma (ibid.).

³⁶ Mr. Reuter (ibid., 1953rd meeting); Mr. Ogiso (ibid., 1954th meeting); Mr. Yankov (ibid.); Mr. Jagota (ibid., 1955th meeting); and Mr. Razafindralambo (ibid., 1956th meeting).

³⁷ Mr. Ogiso (ibid., 1954th meeting); and Mr. Yankov (ibid.).

³⁸ These views are developed particularly in Mr. Riphagen's sixth report dealing with the content, forms and degrees of international responsibility (part 2 of the draft articles); and "implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*Yearbook . . . 1985*, vol. II (Part One), p. 3, document A/CN.4/389), paras. 9-11 and 13. An explicit reference to the relevant provisions of the 1969 Vienna Convention on the Law of Treaties (arts. 65-66) is contained in the commentaries to articles 3 and 4 in his seventh report (*Yearbook . . . 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1), pp. 4-5.

³⁹ Mr. Huang (*Yearbook . . . 1985*, vol. I, 1894th meeting, para. 8); Mr. Koroma (ibid., 1900th meeting, para. 49); and Mr. Jagota (ibid., 1901st meeting, para. 19) agreed that use should be made of existing codification instruments. According to Mr. Huang, however, "no particular model should be adopted to the exclusion of others". Other members indicated more directly that the Special Rapporteur was correct to proceed on the basis of an analogy with the Vienna Convention on the Law of Treaties, for instance Mr. Sucharitkul (ibid., 1890th meeting); Mr. Calero Rodrigues (ibid., 1892nd meeting); and Mr. Razafindralambo (ibid., 1898th meeting).

⁴⁰ Mr. Reuter (ibid., 1891st meeting); Mr. Calero Rodrigues (ibid., 1892nd meeting); Mr. Sinclair (ibid., 1895th meeting); Mr. Barboza (ibid., 1897th meeting); Mr. Mahiou (ibid.); and Mr. Lacleta Muñoz (ibid., 1899th meeting).

⁴¹ Mr. Calero Rodrigues (ibid., 1892nd meeting); Mr. Huang (ibid., 1894th meeting); Mr. Mahiou (ibid., 1897th meeting); and Mr. Arangio-Ruiz (ibid., 1900th meeting).

disputes.⁴² It should in any case be stressed that, in view of the reluctance of States to be bound by third-party settlement procedures, the mere reference in article 3, paragraph 1, of part 3 of the draft to Article 33 of the Charter of the United Nations was welcomed by various members of the Commission.⁴³ With regard to the "substance" of the mechanism proposed by the former Special Rapporteur, one member of the Commission considered his proposals with respect to ordinary internationally wrongful acts to be broadly acceptable.⁴⁴

18. During the debate in the Sixth Committee, States also expressed their position on the matter. Some⁴⁵ sup-

⁴² Mr. Flitan (*ibid.*, 1893rd meeting); Mr. Balanda (*ibid.*, 1894th meeting); and Mr. Njenga (*ibid.*, 1896th meeting). Mr. Flitan expressed concern that such an approach would jeopardize the future convention and felt that in view of the importance of the draft articles to the international community it would be wiser to display moderation with regard to the implementation of international responsibility. Mr. Balanda held that although a roof to the project in the form of a dispute settlement procedure would be necessary, ad hoc arrangements were probably better since "States were more and more mistrustful of compulsory jurisdiction as such, so that rather than suggest too binding a mechanism, it would be better to suggest a flexible system that would encourage the States parties to the dispute to come together in order to seek a solution".

⁴³ Including Mr. Calero Rodrigues (*Yearbook . . . 1986*, vol. I, 1953rd meeting); Sir Ian Sinclair (*ibid.*); Mr. Sucharitkul (*ibid.*, 1954th meeting); Mr. Huang (*ibid.*); Mr. Francis (*ibid.*, 1955th meeting); and Mr. Jacovides (*ibid.*). Mr. Sucharitkul pointed out that the means of peaceful settlement enumerated in Article 33 of the Charter were not limitative and that use could also be made of "good offices". Mr. Huang thought that, in conformity with State practice, direct negotiations should be emphasized; Mr. Arangio-Ruiz (*ibid.*, 1966th meeting), held that it was possible to state in article 3 or in the commentary thereto which of the means of settlement provided in Article 33 were considered to be the most appropriate.

⁴⁴ Mr. McCaffrey (*ibid.*, 1953rd meeting). Mr. Tomuschat (*ibid.*, 1955th meeting), on the other hand, observed that the possibility unilaterally to set in motion the compulsory conciliation procedure would result in a metamorphosis in international law; the question was whether it would be acceptable to States. He and Mr. Malek agreed that it was important not to lose sight of what could reasonably be achieved. Mr. Malek (*ibid.*, 1952nd meeting) added that the many inquiry and conciliation structures set up outside the framework of the United Nations were rarely used as States preferred to submit their disputes to the principal organs of global or regional organizations so as to be able to win public support for their case. In his sixth report, Mr. Riphagen had expressed the view that the alleged injured State "cannot force the alleged author State to submit to a dispute settlement procedure concerning the alleged breach, which may or may not be agreed between them . . . only the alleged author State should be empowered to set into motion the procedure of dispute settlement to be provided for in part 3 of the draft articles" (*Yearbook . . . 1985*, vol. II (Part One)) (see footnote 2 above), para. 20). This is contrary to the approach reflected in article 42 and articles 65 and 66 of the Vienna Convention on the Law of Treaties pursuant to which both parties to the dispute may set in motion the dispute settlement procedure provided for in the Convention. Mr. Calero Rodrigues (*ibid.*, vol. I, 1892nd meeting) specifically approved of the approach taken by the Special Rapporteur, which placed the author State in the position of having to take the initiative of applying the compulsory conciliation procedure. With regard to the same aspect, Mr. Tomuschat (*ibid.*, 1955th meeting) held that, insofar as such a restrictive interpretation was possible of article 4 (a) and (b), an unwarranted imbalance would result (because of the fact that only the alleged author State could file an application with the Court) which could moreover, "place ICJ in a very embarrassing situation".

⁴⁵ Including Austria (*Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 33rd meeting, para. 55); Cyprus (*ibid.*, 32nd meeting, para. 16); the Federal Republic of Germany (*ibid.*, 24th meeting, para. 13); Greece (*ibid.*, 25th meeting, paras. 39-40); Jamaica (*ibid.*, 24th meeting, para. 32); Kenya (*ibid.*, 36th meeting, para. 15); Nigeria (*ibid.*, 26th meeting, paras. 36-37); Spain (*ibid.*, 32nd meeting, para. 70); Somalia (*ibid.*, 35th meeting, para. 45); and Tunisia (*ibid.*, 33rd meeting, para. 6).

ported the inclusion of mandatory dispute settlement procedures—particularly with regard to the sensitive aspects of the draft which could hardly be left to the judgement of Member States themselves—even though the question was asked whether such systems would best serve the interests of the international community.⁴⁶ Other States were more reserved. They insisted that caution should be exercised in the drafting of part 3 in view of the reluctance of States to submit to compulsory third-party settlement procedures.⁴⁷ In the opinion of many other States, the general orientation and the provisions of article 4 in particular were unacceptable as they did not respect the principle of freedom of choice concerning the means of dispute settlement.⁴⁸

19. Another subject of discussion in the Commission has been whether the outcome of the dispute settlement procedures should be binding or non-binding. The proposal to give limited compulsory jurisdiction to ICJ to determine whether there was a rule of *jus cogens* applicable to the breach (article 4 (a)) or whether an international crime had been committed (article 4 (b))⁴⁹ provoked a variety of reactions in the Commission. Some members supported the compulsory jurisdiction of ICJ as provided in article 4 (a) and (b).⁵⁰ It was argued in this

⁴⁶ German Democratic Republic (*ibid.*, 25th meeting, para. 21); Hungary (*ibid.*, 30th meeting, paras. 21-22); and Jamaica (*ibid.*, 24th meeting, para. 32) held that settlement procedures should not be limited to those which were compulsory but that room should be made for negotiated settlement, for instance.

⁴⁷ This opinion was shared by Australia (*ibid.*, 31st meeting, para. 24); China (*ibid.*, 30th meeting, para. 79); Ethiopia (*ibid.*, 27th meeting, para. 57); and Morocco (*ibid.*, 36th meeting, para. 27). During the debates relating to the proposals worked out in Mr. Riphagen's seventh report (see footnote 39 above), Morocco (*Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 36th meeting, para. 31) and New Zealand (*ibid.*, 44th meeting, para. 52) agreed with compulsory conciliation.

⁴⁸ Hungary (*ibid.*, 34th meeting, para. 34) pointed out that many States had neither ratified the Vienna Convention on the Law of Treaties, nor accepted the optional clause of Article 36, paragraph 2, of the Court's Statute. See also Bahrain (*ibid.*, 38th meeting, para. 66); Bulgaria (*ibid.*, paras. 87-89); China (*ibid.*, 39th meeting, para. 28); Czechoslovakia (*ibid.*, 34th meeting, para. 47); Ethiopia (*ibid.*, 38th meeting, para. 22); France (*ibid.*, 41st meeting, para. 43); the German Democratic Republic (*ibid.*, 36th meeting, paras. 37, 40 and 41); Israel (*ibid.*, 41st meeting, para. 9); Kuwait (*ibid.*, 43rd meeting, para. 34); Morocco (*ibid.*, 38th meeting, para. 31); Romania (*ibid.*, 36th meeting, para. 73); the Ukrainian Soviet Socialist Republic (*ibid.*, 37th meeting, para. 60); and Venezuela (*ibid.*, 43rd meeting, para. 16). Iraq held that compulsory conciliation was not always an effective means (*ibid.*, 34th meeting, para. 60).

⁴⁹ The approach taken by Mr. Riphagen (*Yearbook . . . 1986*, vol. I, 1952nd and 1956th meetings) resembles the suggestion made by Mr. McCaffrey (*ibid.*, 1953rd meeting) who, while not convinced of the merit of compulsory jurisdiction of the Court said that he would prefer it to be "limited to determining whether a rule of *jus cogens* or an international crime was involved in a dispute". Mr. Tomuschat (*ibid.*, 1955th meeting, para. 28) noted that the comparison made with the Vienna Convention on the Law of Treaties was not completely justified as the scope of the Court's jurisdiction in the matter of State responsibility would be wider than under the Vienna Convention and would encompass disputes relating to *jus cogens* or international crimes in their entirety and with all the legal implications. Mr. Koroma (*ibid.*) favoured referral of all cases involving an alleged international crime or breach of a rule of *jus cogens* to ICJ.

⁵⁰ Mr. Arangio-Ruiz (*ibid.*, 1952nd and 1955th meetings, para. 12); Mr. Calero Rodrigues (*ibid.*, 1953rd meeting); Mr. Lacleta Muñoz (*ibid.*, 1954th meeting); Mr. Tomuschat (*ibid.*, 1955th meeting); Mr. Koroma (*ibid.*); Mr. Francis (*ibid.*); and Mr. Jacovides (*ibid.*).

connection that as a result of the changes in its composition, the Court had shed its conservative image and had become more acceptable to a larger number of States.⁵¹

20. One member considered that giving jurisdiction to ICJ was obviously the ideal solution,⁵² while another favoured compulsory jurisdiction with respect to article 4 (a) only.⁵³ Some members thought that

... the fact that compulsory dispute settlement machinery applicable to the interpretation and application of the draft articles in parts 1 and 2 would inevitably cover a very wide area should not deter the Commission from attempting to devise such machinery.⁵⁴

A few members preferred not to refer to the rules of *jus cogens* at all, but agreed that, if article 4 (a) was retained, the decision on the content of *jus cogens* was indeed to be made by ICJ.⁵⁵ Others considered that the proposal in article 4 (a) was a good one, but at variance with practice in view of the limited number of States that had accepted the optional clause under Article 36, paragraph 2, of the ICJ Statute.⁵⁶

21. As regards the submission of disputes concerning the application or interpretation of provisions relating to *jus cogens* and international crimes, some members wondered why article 4, unlike the corresponding provisions of the Vienna Convention on the Law of Treaties on which it was based, did not contemplate the possibility of submitting such disputes to arbitration by common consent.⁵⁷ This question was viewed as calling for clarification for two reasons: it was noted, first, that although the Vienna Convention allowed for resort to arbitration, the reference to the compulsory jurisdiction of ICJ had apparently so far prevented many developing countries from ratifying that Convention.⁵⁸ Secondly, although article 3, paragraph 1, of part 3 referred to Article 33 of the Charter (which covers judicial settlement), article 4 provided for the jurisdiction of ICJ and made no mention of arbitration.⁵⁹ One member, on the other hand, felt that the Special Rapporteur had rightly refrained from envisaging the possibility of arbitration in article 4 (a) and (b)⁶⁰ inasmuch as, from the perspective of jurisprudential development, "adjudication by ICJ would produce a more consistent development".⁶¹ Mr. Riphagen explained that while, with respect to *jus cogens*, international crimes and the application of the Charter, the rules of part 3 were not residual, the compulsory jurisdiction of ICJ was limited.⁶² He then

said, rather confusingly, that under article 3, paragraph 1, parties were of course free to submit the dispute to arbitration.⁶³

22. In the Sixth Committee, many States⁶⁴ had supported the compulsory jurisdiction of ICJ with respect to disputes regarding *jus cogens* and international crimes. For other disputes, they favoured a reference to the flexible enumeration of means of settlement contained in Article 33 of the Charter and, in addition, compulsory conciliation. Italy held that article 4 (a) and (b) should provide for the possibility of arbitration,⁶⁵ while Cyprus would have preferred all disputes falling within article 4 to be settled through a dispute settlement system entailing a binding decision by ICJ or by an international criminal court.⁶⁶

23. Another technical aspect on which Commission members raised doubts concerns the period of 12 months provided for in article 4, which some⁶⁷ considered to be too long.

(d) *Provisions of the draft to which the procedures envisaged should apply*

24. Another issue was to identify the provisions (substantive or instrumental) of the draft the application or interpretation of which should be governed by the procedures envisaged. Some members⁶⁸ during the debate on the sixth report expressed concern at Mr. Riphagen's statement that the establishment of a separate system for the settlement of disputes

... would amount to the creation of a multilateral compulsory dispute-settlement procedure relating to all (primary) obligations, present and future, under international law, of States becoming parties to the future convention on State responsibility.⁶⁹

⁵¹ Mr. Arangio-Ruiz (ibid., 1952nd meeting).

⁵² Mr. Thiam (ibid., 1956th meeting).

⁵³ Mr. Sucharitkul (ibid., 1954th meeting).

⁵⁴ Sir Ian Sinclair (*Yearbook* . . . 1985, vol. I, 1895th meeting). Along the same lines, Mr. Jacovides (*Yearbook* . . . 1986, vol. I, 1955th meeting).

⁵⁵ Mr. Ogiso (ibid., 1954th meeting).

⁵⁶ Mr. Huang (ibid.); and Mr. Díaz-González (ibid.). Similarly, but in respect of article 4 as a whole, Mr. Malek (ibid., 1952nd meeting).

⁵⁷ Mr. Malek (ibid.); Mr. Ogiso (ibid., 1954th meeting); Mr. Razafindralambo (ibid., 1956th meeting); and Mr. Yankov (ibid., 1959th meeting).

⁵⁸ Mr. Razafindralambo (ibid., 1956th meeting).

⁵⁹ Ibid.

⁶⁰ Mr. Francis (ibid., 1955th meeting).

⁶¹ Ibid. See also Mr. Riphagen (ibid., 1956th meeting).

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Including Argentina (*Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 40th meeting, para. 27); Brazil (ibid., 34th meeting, para. 11); Canada (ibid., 40th meeting, para. 39); Chile (ibid., 43rd meeting, para. 62); Denmark (ibid., 36th meeting, para. 66); the Federal Republic of Germany (ibid., para. 57); Greece (ibid., 42nd meeting, para. 36); Ireland (ibid., 32nd meeting, paras. 8-9); Italy (ibid., para. 21); Madagascar (ibid., 30th meeting, paras. 41-42); Sierra Leone (ibid., 27th meeting, para. 90); and the Sudan (ibid., 40th meeting, para. 41).

⁶⁵ Ibid., 32nd meeting, para. 21.

⁶⁶ Ibid., 37th meeting, para. 11.

⁶⁷ Including Mr. Flitan (*Yearbook* . . . 1986, vol. I, 1952nd meeting, para. 20) and Mr. McCaffrey (ibid., 1953rd meeting). Some, including, Mr. Ogiso (ibid., 1954th meeting) and Mr. Roukounas (ibid., 1956th meeting), considered that the determination of that period depended on the type of settlement mechanism used. Mr. Flitan (ibid., 1952nd meeting) stressed the necessity of a provision covering cases of special urgency and some members proposed to replace the words "twelve months" by "reasonable period of time", in particular Mr. Jagota (ibid., 1955th meeting) and Mr. Balanda (ibid.).

⁶⁸ Mr. Calero Rodrigues (*Yearbook* . . . 1985, vol. I, 1892nd meeting).

⁶⁹ Ibid., vol. II (Part One) (see footnote 2 above), para. 8.

Other members were of the view that the application of part 3 of the draft as it now stood appeared to be limited to part 2, instead of covering part 1 as well.⁷⁰

(e) *The question of reservations*

25. As regards draft article 5, some members commented on the admissibility of reservations relating to part 3 of the draft.⁷¹ While one member considered the provision of draft article 5 excluding reservations to be acceptable, except in relation to the application of draft article 4 (c) to disputes concerning countermeasures where the right allegedly infringed by such countermeasures arises solely from a treaty concluded before the entry into force of the convention, other members⁷² found that the rule of non-retroactivity in draft article 5 was unduly restrictive.⁷³ Still others⁷⁴ were not convinced of the usefulness of draft article 5 and felt it preferable to keep the matter entirely open.

26. In the course of the debate in the Sixth Committee, most States⁷⁵ advocated a more flexible approach to the

⁷⁰ Including Sir Ian Sinclair (*Yearbook . . . 1986*, vol. I, 1952nd meeting; *ibid.*, 1953rd meeting); Mr. Arangio-Ruiz (*ibid.*, 1952nd meeting); Mr. McCaffrey (*ibid.*, 1953rd meeting); and Mr. Thiam (*ibid.*, 1956th meeting). Mr. Razafindralambo (*ibid.*), thought it logical to infer that the three parts formed a coherent whole. He nevertheless indicated that he would appreciate a clearer reference in part 3 to part 1. The Special Rapporteur (*ibid.*, 1952nd meeting) made it clear that the three parts of the draft were interdependent. He further stated (*ibid.*, 1956th meeting) that "in any attempt to apply the provisions of part 2, it was impossible to get away from the application of the provisions of part 1".

⁷¹ Sir Ian Sinclair (*Yearbook . . . 1985*, vol. I, 1895th meeting) held that the Special Rapporteur should, in working out the details, include "some kind of temporal limitation to exclude disputes relating to acts or facts which might have occurred prior to the proposed convention's entry into force".

⁷² Including Mr. Sucharitkul (*Yearbook . . . 1986*, vol. I, 1954th meeting) and Mr. Lacleta Muñoz (*ibid.*). Although Mr. Reuter and Mr. Ogiso viewed article 5 as acceptable in general and Mr. Jacovides was also inclined to accept it, they all noted—as did others—that the crucial question of reservations could in accordance with tradition be dealt with in a future diplomatic conference. On this point, see Mr. Reuter (*ibid.*, 1953rd meeting); Mr. Lacleta Muñoz (*ibid.*, 1954th meeting); Mr. Ogiso (*ibid.*); Mr. Yankov (*ibid.*); Mr. Tomuschat (*ibid.*, 1955th meeting); Mr. Jacovides (*ibid.*); and Mr. Razafindralambo (*ibid.*, 1956th meeting). While Mr. Malek agreed with Mr. Yankov that the possibility of reservations to part 3 would make the convention a lot more acceptable to States, he disagreed with Mr. Yankov's inclination to accept reservations to the future convention. He observed in particular (*ibid.*, 1952nd meeting) that, as of June 1985, the Vienna Convention on the Law of Treaties had only been ratified by 46 States, 10 of which had formulated reservations or objections to the dispute settlement procedure. For Mr. Yankov (*ibid.*, 1954th meeting, paras. 39-41), acceptance of reservations to the future convention was in conformity with the Vienna Convention as well as with articles 297-298 of the Convention on the Law of the Sea concerning limitations on and exceptions to compulsory procedures entailing binding decisions.

⁷³ Including Mr. Tomuschat (*ibid.*, 1955th meeting). Mr. Jagota (*ibid.*), who proposed to provide simply that reservations would be allowed in case of disputes arising after the entry into force of the future convention. It is not entirely clear, however, whether this approach would be less restrictive.

⁷⁴ Including Mr. Calero Rodrigues (*ibid.*, 1953rd meeting) and Mr. Francis (*ibid.*, 1955th meeting).

⁷⁵ Including China (*Official Records of the General Assembly, Forty-first Session, Sixth Committee*, 39th meeting, para. 28). Austria held that States could not be prevented from making reservations with respect to article 4 (a) and (b) (*ibid.*, para. 24).

question of reservations. For one State,⁷⁶ article 5 was acceptable, while for others, the question ought to be left to the future diplomatic conference.⁷⁷

3. CONCLUSION

27. On the whole, during the discussions in 1985 and 1986 the Commission seemed to be satisfied with the general dispute settlement system resulting from the provisions of the relevant draft articles proposed by Mr. Riphagen for part 3, notably the combined effect of article 3, paragraph 1, and article 4 (c) as proposed in 1986; and, of course, article 3, paragraph 2.

28. It is felt that the Commission should carefully reconsider the whole matter. It should do so particularly in the light of the need to mitigate the negative effects of countermeasures denounced in the third⁷⁸ and fourth⁷⁹ reports and articulately stressed in the Sixth Committee debate of 1992 (paras. 30-35 below). A number of elements, including the better prospects for dispute settlement opened up by recent—and not so recent—developments and attitudes, seem to indicate that a more elaborate solution is both necessary and possible. Serious consideration should also be given to the desirability of a body such as the Commission seizing the opportunity to make a significant contribution, in accordance with the letter and spirit of General Assembly resolution 44/23 on the United Nations Decade of International Law, to the progressive development of a vital area of international law that hitherto does not appear to have received adequate attention in the codification process.

B. Dispute settlement in part 3 of the draft

1. THE PROBLEMATIC FEATURES OF UNILATERAL REACTIONS

29. The inclusion in part 3 of the draft of elaborate dispute settlement procedures is highly advisable in view of the nature of the measures envisaged in part 2 of the draft articles as remedies (*facultés*) open to an injured State. As noted in the previous reports (see, for example, paras. 2-6 of the third report),⁸⁰ countermeasures are the most difficult and controversial aspect of the whole regime of State responsibility. In addition to the fact that every State in principle considers itself entitled to be the judge of its own rights, subject only to the possibility of agreed negotiated or third-party settlement, the consequence of the need to ensure compliance with legal obligations in an inter-State system lacking any organic structure is to introduce the further potentially arbitrary element represented by the injured State's *faculté*, to resort to unilateral measures which are tantamount to actual, if lawful, non-compliance with one or more of its obligations towards the alleged wrongdoer. It is because of this very serious

⁷⁶ Cyprus (*ibid.*, 37th meeting, para. 10).

⁷⁷ Ethiopia (*ibid.*, 38th meeting, para. 23).

⁷⁸ *Yearbook . . . 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1.

⁷⁹ *Yearbook . . . 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3.

⁸⁰ See footnote 78 above.

drawback, further aggravated by the fact that not all States are equally able to adjust to such a rudimentary system, that any recognition of this *faculté*, in the draft—as may be warranted by long-standing custom—must be accompanied by as many stringent conditions and limitations as are compatible with the effectiveness of the reaction to an internationally wrongful act.

30. It is obvious, however, that whatever conditions and restrictions are imposed on the practice of countermeasures, such measures will always, by their very nature, suffer from a basic flaw, namely that the assessment, on the one hand, of the right that has been infringed and, on the other hand, of the legality of the reaction—a reaction which in turn can provoke a further unilateral reaction (the so-called counter-reprisals) from the alleged wrongdoer—is unilateral. Being potentially flawed in all circumstances, even where the States involved enjoy comparable power or means, the remedy of countermeasures may lead to intolerably unjust results when applied between States of unequal strength or means. It is essentially because of those negative effects that doubts arise as to the desirability of providing for a legal regime of countermeasures within the framework of a codification project. While there may be sufficient evidence that the practice of countermeasures, whatever its limits, is recognized under customary international law, no responsible “legislator” can avoid the temptation either expressly to rule out the practice of countermeasures as illegal (as a matter of progressive development) or at least to keep silent on that practice so as not explicitly to legitimize it.

31. Considerations such as those were obviously at the root of the strong reservations to which the inclusion in the draft of a legal regime of countermeasures has given rise, first at the Commission’s forty-fourth session and later—more pointedly—in the Sixth Committee of the General Assembly at its forty-seventh session. As one of the representatives to the Sixth Committee remarked,

Several members of the Commission . . . were not convinced that countermeasures were an appropriate means of coercing a State alleged to have committed an internationally wrongful act to go to dispute settlement or to acknowledge its wrong and make amends.⁸¹

The reservations expressed in both bodies in 1992 were significantly more forceful (especially in the Sixth Committee) than those that had been formulated in the Commission debates of 1984,⁸² 1985⁸³ and 1986⁸⁴ and in the corresponding debates in the Sixth Committee⁸⁵ on Riphagen’s proposed draft articles on countermeasures. Some of the statements made in the course of the Sixth Committee debates are worth recalling.⁸⁶

⁸¹ *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 27th meeting, para. 1.

⁸² See footnote 4 above.

⁸³ See footnote 3 above.

⁸⁴ *Ibid.*

⁸⁵ *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 33rd-47th meetings; *ibid.*, *Fortieth Session, Sixth Committee*, 23rd-35th meetings; and *ibid.*, *Forty-first Session, Sixth Committee*, 27th-34th and 36th-44th meetings. See also footnotes 3 and 4 above.

⁸⁶ It is also worth noting that the latter reservations had themselves been more articulate than those made in the late 1970s when countermeasures were included among the circumstances excluding wrongfulness (art. 30 of part 1) (see footnote 81 above).

2. THE 1992 DEBATES ON COUNTERMEASURES IN THE COMMISSION AND IN THE SIXTH COMMITTEE

32. Some States observed, in the first place, that in the absence of a mechanism for the impartial and rapid determination of the existence of an internationally wrongful act, the injured State had to be granted an exclusive right to determine the existence of a wrongful act—which opened the door to unilateral acts, many of which would be based on subjective decisions, and to abuses with serious consequences for the peace and happiness of peoples. The remark was also made that leaving it to the victim State to assess the gravity of the prejudice and to determine if all available settlement procedures had been exhausted meant that neither the impartiality nor the lawfulness of the decisions to be taken could be guaranteed.⁸⁷ It was further noted in this connection that the notion that the injured party should take the law into its own hands represented a lower stage in the evolution of legal techniques and implied an admission that the international legal order was inadequate. Concern was also expressed that the concept of countermeasures seemed antithetical to fundamental principles of international law.⁸⁸

33. A number of representatives—echoing the identical concerns expressed in the third⁸⁹ and fourth⁹⁰ reports—stressed that, States being unequal in size, wealth and strength, a regime of countermeasures, far from affording equal protection to all States, would place powerful or rich countries at an advantage in the exercise of reprisals against the wrongdoing States and would lead to abuse of the weaker States. This fear, it was stated, was rooted in

For example, concerns and doubts were expressed with regard to countermeasures in the course of the debate on Mr. Ago’s eighth report (*Yearbook . . . 1979*, vol. II, Part One, p. 3, document A/CN.4/318 and Add.1-4). These related mainly to the prohibition of armed reprisals (Njenga, *ibid.*, vol. I, 1544th meeting); the necessity of distinguishing unilateral reactions from sanctions imposed by international institutions (Mr. Francis, *ibid.*, 1545th meeting); and the necessity to avoid abuse by strong States to the detriment of the weak (Mr. Tabibi, *ibid.*, paras. 11-12). As confirmed by the relevant topical summary (A/CN.4/L.311), very few doubts were expressed in the course of the debate in the Sixth Committee of the General Assembly at its thirty-fourth session on article 30 with regard to the legitimacy of unilateral reactions accompanied by precise limitations and conditions. This was surely due, in part, to the fact that the regime of countermeasures was only to be dealt with at a later stage within the framework of part 3 of the draft. The debate obviously became richer in 1984-1986, following the submission of Riphagen’s draft articles 8-10 of part 2. In the Commission, the question was raised whether resort to countermeasures would be lawful in the absence of a previous objective determination of the existence of an internationally wrongful act. The answer was that the draft articles, as proposed, provided that, unless a possibility existed of prior resort to dispute settlement mechanisms already in existence between the parties, there would necessarily have to be a “provisional” unilateral determination on the part of the injured State and that adequate consideration of the problem of dispute settlement would be taken up at a later stage within the framework of part 3 (*Yearbook . . . 1984*, vol. II (Part Two), p. 103, paras. 365-366). Much more significant were the 1984 and 1985 debates in the Sixth Committee. See paras. 37 et seq. below.

⁸⁷ Belarus (*Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 27th meeting, paras. 80 and 83); Cuba (*ibid.*, 29th meeting, para. 60); Romania (*ibid.*, para. 24); and Russian Federation (*ibid.*, 28th meeting, para. 106).

⁸⁸ Brazil (*ibid.*, 25th meeting, para. 39). In a similar vein, Sri Lanka (*ibid.*, 27th meeting, para. 6).

⁸⁹ See footnote 79 above.

⁹⁰ See footnote 80 above.

history as well as in the more recent experience of developing countries, for which countermeasures were frequently synonymous with aggression, intervention and gunboat diplomacy. Against this background the question was asked whether an attempt at codification of the subject might not tend to legitimize countermeasures as an instrument par excellence of the hegemonic activities of certain Powers.⁹¹

34. The desirability of including in the draft a legal regime of countermeasures was further questioned on the ground that, far from constituting a remedy intended to encourage the wrongdoing State to return to the path of legality, countermeasures were likely merely to inflame relations between the parties to the conflict, thereby rendering them even more intransigent.⁹² This remark echoes in part Mr. Riphagen's concern that resort to countermeasures on the part of an allegedly injured State might result in an escalation of countermeasures.

35. The view was also expressed that any legal regime of countermeasures would inevitably involve intricate qualifications and limitations, and that further complexities would arise in defining the circumstances in which countermeasures would be permissible should more than one State consider itself to have been injured. In such cases, the question of who the injured States were, the extent of their entitlement to resort to countermeasures and the proportionality of the countermeasures, viewed not only individually but also collectively, would be difficult to answer with precision.⁹³ It was added, in the same context, that the issue of countermeasures that would not be permissible under any circumstances came perilously close to touching upon some of the fundamental provisions of the Charter of the United Nations set forth, for example, in Article 2, paragraph 4, and Articles 51, 41 and 42.⁹⁴

36. From a very different angle, the desirability of providing for a legal regime of countermeasures seems to have been put in question by the remark that countermeasures, which in some respects constitute means of enforcement, do not fall "precisely within the scope of the question of State responsibility even if they are linked to it".⁹⁵ Concern was expressed from the same source that, by broadening the subject, the Commission might be tempted to raise problems regarding the interpretation of specific treaties which should remain outside the scope of its study and find itself addressing particularly sensitive issues going beyond the limits which it had set itself, by dealing with primary rules—in particular the defini-

tion of the areas in which countermeasures should be prohibited.⁹⁶

37. It is worth stressing in particular that a few representatives said that they found it difficult to endorse the notion that the way to deal with the consequences of a wrongful act was to commit another wrongful act, particularly as cases of non-observance by States of their international obligations were, for the most part, not deliberate, but due to genuine oversights, misunderstandings or differences of opinion. Furthermore, it was observed, countermeasures were not the only means of enforcing international law where an obligation under international public law had been breached and the margin for lawful resort thereto had been narrowed by the emergence of more suitable methods and procedures tailored to the special needs of certain groups of States.⁹⁷ There was no elaboration, however, as to the nature of the "tailor-made procedures" or of the small groups of States involved in any really effective settlement arrangements.

38. Despite the reported perplexities, most representatives in the Sixth Committee seem to have concurred with the majority of the Commission that countermeasures had a place in any legal regime of State responsibility.⁹⁸ Unilateral measures were recognized to be a reflection of the imperfect structure of international society, which had not yet succeeded in establishing an effective centralized system of law enforcement,⁹⁹ with the result that counter-

⁹⁶ *Ibid.*

⁹⁷ Uruguay (*ibid.*, para. 20). Among such methods and procedures, some representatives singled out those relating to the peaceful settlement of disputes. One representative observed in this connection that it might be possible to expand existing dispute settlement procedures to include additional and innovative ones so as to ensure that a State believed to be in breach of an international obligation did not evade settlement of the differences which had arisen (Sri Lanka, *ibid.*, para. 3); see also Russian Federation (*ibid.*, 28th meeting, para. 106) and Switzerland (*ibid.*, 25th meeting, para. 92). In this connection, reference was made to existing conventions in the environmental and other fields which included provisions on the monitoring of the fulfilment of treaty obligations by States parties. The concept of interim measures of protection might also be developed to ensure that a State was in a position to preserve its interests against the consequences of a wrongful act by another State until such time as the differences that had arisen were resolved (Sri Lanka, 27th meeting, para. 7). Attention was also drawn to the possibilities for effective bilateral or multilateral diplomatic protests, as well as for measures of retortion not amounting to a breach of an international obligation, which, it was stated, were not inconsiderable and, if resorted to, were likely to prove effective (France, *ibid.*, 26th meeting, para. 7). Emphasis was furthermore placed on the opportunities offered by collective mechanisms for the prevention and redress of internationally wrongful acts. One representative said in this connection that at a time when processes of disintegration were impeding the harmonious development of the international community, it was important to refrain from granting a legally superior standing to reprisals which were unilaterally decided upon and to establish instead a common legal standard which would serve as a framework for the collective action undertaken by the community of nations on the basis of the Charter of the United Nations and other universally recognized instruments, with a view to preventing and eliminating the consequences of internationally wrongful acts (Russian Federation, *ibid.*, 28th meeting, para. 107).

⁹⁸ See the statements of Belarus (*ibid.*, 27th meeting, para. 81); Brazil (*ibid.*, 25th meeting, para. 39); Islamic Republic of Iran (*ibid.*, para. 62); and Spain (*ibid.*, 26th meeting, para. 74).

⁹⁹ See the statements of Azerbaijan (*ibid.*, 27th meeting, para. 33); Belarus (*ibid.*, para. 80); Czechoslovakia (*ibid.*, 25th meeting, para. 44); Denmark on behalf of the Nordic countries (*ibid.*, para. 32); Ecuador (*ibid.*, 30th meeting, para. 49); Egypt (*ibid.*, para. 30); Islamic Republic of Iran (*ibid.*, 25th meeting, para. 62); Italy (*ibid.*, 29th meeting, para. 47); and Poland (*ibid.*, 28th meeting, para. 78).

⁹¹ Along the same lines, Algeria (*ibid.*, 29th meeting, para. 70); Brazil (*ibid.*, 25th meeting, para. 39); China (*ibid.*, 29th meeting, para. 58); Indonesia (*ibid.*, 28th meeting, para. 65); Morocco (*ibid.*, 25th meeting, para. 85); and Sri Lanka (*ibid.*, 27th meeting, para. 6). This concern does not seem to be significantly diminished by the consideration put forward by Spain (*ibid.*, 26th meeting, para. 74) "that while powerful and developed States are undeniably in a better position than weak States to adopt countermeasures, it had to be borne in mind that countermeasures could also be applied between States of comparable strength".

⁹² Islamic Republic of Iran (*ibid.*, 25th meeting, para. 61) and Switzerland (*ibid.*, 25th meeting, para. 93).

⁹³ Sri Lanka (*ibid.*, 27th meeting, para. 4).

⁹⁴ Sri Lanka (*ibid.*).

⁹⁵ France (*ibid.*, 26th meeting, para. 5).

measures to confront internationally wrongful acts would continue to be needed for a long time to come.¹⁰⁰ Hence the necessity, stressed by almost all speakers in the Sixth Committee, of carefully studying the conditions and limitations to be placed on the scope of unilateral enforcement action.¹⁰¹

3. THE 1984 AND 1985 DEBATES ON THE SUBJECT

39. Although less articulate than those of 1992, the comments put forward in the Sixth Committee in 1984 and 1985 at the thirty-ninth and fortieth sessions of the General Assembly should not be overlooked. According to the topical summary of 1984 (A/CN.4/L.382),

Some representatives expressed the view that the subject of reprisals should be approached with great caution and maximum safeguards because of abuses that had occurred. The view was expressed that reprisals should not be dealt with in the articles. Application of the provisions of draft article 9 could create serious uncertainty in international relations. There was a need, it was said, to consider its replacement by peaceful means of settlement. The view was expressed that *third-party compulsory settlement of disputes was essential for the application of the provisions of draft article 9.** The provisions of draft article 9 might, otherwise, lead to intolerable situations* involving uses of reprisal which had, hitherto, been inadmissible. (Para. 520.)

[. . .]

It seemed to one representative that some clarification was required in draft article 10 which seemed to imply that reprisals should be viewed as an extreme measure of coercion applicable *only after all international procedures for peaceful settlement of disputes available to the injured State had been exhausted.** It seemed necessary to clarify whether draft article 10 would be applicable to situations whose urgency made use of peaceful settlement procedures impracticable; and as to how draft article 10 would be applicable when a State alleged to have committed an internationally wrongful act did not consider the act wrongful and denied the existence of a dispute. (Para. 526.)

...

The question was raised by one representative as to why paragraph 2 (b) of draft article 10 referred, exceptionally, to a "State alleged to have committed the internationally wrongful act". He wondered whether the divergence in terminology was intentional, and noted that *compulsory third-party settlement of disputes seemed essential to implementation of the draft articles.** (Para. 529.)

40. A very careful treatment of the whole matter—countermeasures and dispute settlement—was again urged by representatives in the Sixth Committee in 1985.¹⁰² The views expressed may be summarized as fol-

¹⁰⁰ See the statements of Austria (ibid., 26th meeting, para. 47); China (ibid., 25th meeting, para. 24); Ecuador (ibid., 30th meeting, para. 49); Hungary (ibid., 28th meeting, para. 100); Islamic Republic of Iran (ibid., 25th meeting, para. 62); Italy (ibid., 27th meeting, para. 47); Japan (ibid., 26th meeting, para. 31); Jordan (ibid., 28th meeting, para. 41); Spain (ibid., 26th meeting, para. 75); and Thailand (ibid., 27th meeting, para. 26).

¹⁰¹ With a few differences of emphasis, this view was universally shared, except by those who believed (as noted in para. 34 above) that the regime of countermeasures was not to be considered as part of the topic of State responsibility. See, for instance, the statements of Algeria (ibid., 29th meeting, paras. 70-71); Austria (ibid., 26th meeting, para. 47); Bahrain (ibid., para. 19); Belarus (ibid., 27th meeting, para. 80); Brazil (ibid., 25th meeting, para. 39); China (ibid., 27th meeting, para. 24); Cyprus (ibid., 21st meeting, paras. 81 and 89-90); Denmark on behalf of the Nordic countries (ibid., 25th meeting, para. 32); Egypt (ibid., 30th meeting, para. 30); India (ibid., 25th meeting, paras. 72-73 and 76); Italy (ibid., 29th meeting, para. 47); Japan (ibid., 26th meeting, paras. 31-32); Jordan (ibid., 28th meeting, para. 41); Pakistan (ibid., 29th meeting, para. 62); Slovenia (ibid., 26th meeting, para. 37); Spain (ibid., paras. 75 and 76); Switzerland (ibid., 25th meeting, para. 93); Thailand (ibid., 27th meeting, paras. 27-28); Tunisia (ibid., 30th meeting, para. 45); United States of America (ibid., 27th meeting, para. 37); and Venezuela (ibid., para. 89).

¹⁰² See footnote 3 above.

lows: (a) the legitimization of countermeasures might lead to abuse and injustice; (b) a rigid, strict regime should be envisaged for unilateral countermeasures (with only a few speakers contending that such measures should be ruled out altogether); (c) dispute settlement procedures would significantly contribute to reducing the risk of abuse and injustice (with a few speakers going so far as to suggest that such procedures should be an alternative to unilateral reactions). At the same time concern was expressed that an obligation of prior exhaustion of dispute settlement procedures might unjustly paralyse the allegedly injured State to the advantage of the alleged wrongdoing State. On the whole, the 1984 and 1985 debates of the Sixth Committee clearly reveal doubts with regard to the legitimization of countermeasures. Those doubts are, however, far less pronounced and systematic and less widely shared.

4. CONCLUSION

41. Reverting to the 1992 debates, account should be taken of the differences which manifested themselves on the question of whether the legal regime of countermeasures should be viewed as a matter of mere codification or of progressive development.¹⁰³ Those differences had less to do with substance than with the angle from which the matter was approached. From the viewpoint of the general principle of the past and present admissibility of unilateral reactions, there seemed to be no doubt that countermeasures were firmly grounded in customary international law. From the viewpoint of the regulation of unilateral reactions, the area was rightly viewed as also requiring progressive development. In the words of one representative,

It was not possible to rest content with a . . . systematization of the existing rules . . . for fear of *perpetuating a discredited order.** On the contrary, [one] must depart from . . . precedents and *embark more resolutely on the road to renewal, while working for the progressive development of international law with a view to limiting recourse to countermeasures.**¹⁰⁴

42. The Sixth Committee thus seems to have recognized that:

(a) At least in the long run, countermeasures should be replaced by means more consonant with an adequate rule of law;

(b) Resort to countermeasures should be limited; and

(c) Most important, the safeguards against abuse of unilateral reactions should be strengthened.

C. Dispute settlement provisions as an element of the draft on State responsibility

1. AN ADEQUATE DISPUTE SETTLEMENT SYSTEM AS AN INDISPENSABLE COMPLEMENT TO A REGIME GOVERNING UNILATERAL REACTIONS

43. The negative effects of countermeasures, which members of the Commission and representatives in the

¹⁰³ Denmark on behalf of the Nordic countries (ibid., 25th meeting, para. 32).

¹⁰⁴ Islamic Republic of Iran (ibid., para. 63). Along the same lines, Chile (ibid., 24th meeting, para. 42); China (ibid., 25th meeting, para. 23); Czechoslovakia (ibid., para. 45); Sri Lanka (ibid., 27th meeting, para. 1); and Thailand (ibid., para. 29).

Sixth Committee were almost unanimous in denouncing are not only very real but extremely serious. They are serious enough to justify, to some extent, the attitude of those—be they Government officials or scholars—who suggest that countermeasures should have no place in a codification exercise, even for the purpose of subjecting them to conditions and limitations.¹⁰⁵ It must be realized, however, that there is not a single flaw among those denounced which could not be corrected by providing for an adequate dispute settlement system.

44. It is indeed perfectly true that countermeasures are not an “appropriate means of coercing a State . . . to go to dispute settlement or to acknowledge its wrong and make amends”.¹⁰⁶ Countermeasures are, however, one of the means, and the only way to overcome their drawbacks is precisely to persuade Governments to agree to go to dispute settlement, more specifically to submit to one or more forms of third-party settlement, either as a substitute for countermeasures or, at least, as a method of evaluating the admissibility and the lawfulness of any unilateral measures to which resort is had.

45. Similar considerations apply to the other negative effects of countermeasures (paras. 32-37 above). The in-

¹⁰⁵ This understandable attitude has a precedent in the history of the Commission itself. In the 1960s, when the Commission discussed the draft articles on the law of treaties, the question arose whether the rule *inadimplenti non est adimplendum* should extend or not to the violation, by way of reaction to the breach of a given treaty, to treaties other than the infringed treaty itself (the matter is dealt with, *inter alia*, by Forlati Picchio, *La sanzione nel diritto internazionale*, Padua, 1974, pp. 81-85 et seq.). At that time the issue was whether the measures of suspension to be envisaged in what was to become article 60 of the Vienna Convention should be extended by the Convention (beyond the strict rule *inadimplenti non est adimplendum*) to the rules of other treaties or to rules of customary international law. The view that rightly or wrongly prevailed in the Commission was that the draft on the law of treaties should not envisage any suspension (by way of unilateral reaction) either of other treaties or of customary law. This conclusion, however, was not based on any denial of the *faculté* of a State to react to a treaty violation by not complying with an obligation deriving from a different treaty or from a rule of customary law—a *faculté* the existence of which no one seemed to contest under general international law. If the view prevailed that the draft on the law of treaties should confine itself to the hypothesis of a reaction consisting in a violation of the same treaty (if not of the same rule), it was because of the reluctance of the Commission to touch upon the *faculté* of reprisals or countermeasures—a right which the Commission preferred not to address in the article concerned.

As the then Special Rapporteur, Sir Humphrey Waldock, indicated in his second report on the law of treaties (*Yearbook . . . 1963*, vol. II, p. 26, document A/CN.4/156 and Add.1-3), concerning what was then article 20 (Termination or suspension of a treaty following upon its breach):

“Paragraph 3 sets out the rights of the innocent party in case of a material breach of a bilateral treaty. These are to abrogate the whole treaty or suspend its whole operation or, alternatively, to terminate or suspend the operation only of the provision which has been broken by the defaulting party. The latter right, like the former, is an application of the principle *inadimplenti non est adimplendum*, endorsed by Judge Anzilotti in the *Diversion of Water from the River Meuse* case. Admittedly, it may also be put upon the basis of a right to take non-forcible reprisals and upon that basis it is arguable that the innocent party may suspend the operation not necessarily of the provision which has been broken but of some other provision of special concern to the defaulting party. The terms of paragraph 2 are not intended to exclude whatever other rights may accrue to the innocent party by way of reprisal; but it is thought better not to introduce the law of reprisals, as such, into the present article.” (*Ibid.*, p. 76, para. 14 of the commentary.)

¹⁰⁶ See footnote 81 above.

clusion in the draft of an adequate and reasonably effective dispute settlement system would decisively help minimize or eliminate:

(a) The major drawback represented by the fact that a regime of unilateral reaction by the injured State would place “powerful or rich countries at an advantage” to the detriment of weaker States (para. 33 above);

(b) The danger that countermeasures may inflame relations between the parties, thereby rendering them more intransigent (para. 34 above).

More effective availability of third-party settlement procedures, to the extent that it proved feasible, could not but reduce the imbalance deriving from the factual inequalities among States and provide the parties with an opportunity to “cool off”.

46. There is no doubt that adequate dispute settlement procedures would also contribute decisively to making the practice of countermeasures—which admittedly reflected “a lower stage in the evolution of legal techniques and implied an admission that the international legal order was inadequate” (para. 32 above)—more compatible (or less incompatible) with the rule of law in inter-State relations. If objection was raised to resort by one party to countermeasures, it would open the way to a third-party settlement procedure which would have a deterrent effect on both reaction- and counter-reaction-prone States. This would, if not guarantee, at least strengthen the primacy of the rule of law.

47. It also goes without saying that more effective availability of third-party settlement procedures would render largely moot the question of whether countermeasures would in practice be a sufficiently well-understood and clear procedure to be endorsed as an accepted coercive legal procedure, considering that they are subject to intricate qualifications and limitations (para. 33 above). Issues that States either unilaterally or bilaterally proved unable to elucidate by themselves would be settled by conciliators and arbitrators.

48. The need to strengthen existing dispute settlement procedures in connection with the regime of countermeasures was stressed by many speakers in the course of the 1992 debate on the Commission’s report in the Sixth Committee.¹⁰⁷ Only a small minority expressed the view that the draft should not deal with dispute settlement.¹⁰⁸

49. The debates in the Commission and in the Sixth Committee on draft article 12, paragraph 1 (a), as proposed in the fourth report,¹⁰⁹ confirmed that greater availability of adequate settlement procedures would be an essential means of minimizing the negative effects of unilateral measures. Most members and representatives

¹⁰⁷ See especially the statements of Belarus (*Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 27th meeting, para. 80); Denmark on behalf of the Nordic countries (*ibid.*, 25th meeting, paras. 32 and 33); Egypt (*ibid.*, 30th meeting, para. 31); Japan (*ibid.*, 26th meeting, para. 31); Jordan (*ibid.*, 28th meeting, para. 42); Russian Federation (*ibid.*, 28th meeting, para. 106); Slovenia (*ibid.*, 26th meeting, para. 38); Sri Lanka (*ibid.*, 27th meeting, para. 7); and Switzerland (*ibid.*, 25th meeting, para. 92).

¹⁰⁸ Italy (*ibid.*, 29th meeting, para. 46) and the United States of America (*ibid.*, 27th meeting, para. 37).

¹⁰⁹ For text, see *Yearbook . . . 1992*, vol. II (Part Two), p. 27, footnote 61.

expressed themselves in favour of that provision. Particularly noteworthy were the positive reactions of Chile, the Islamic Republic of Iran, Poland, Switzerland and Venezuela. The representatives who took the opposite view were concerned either by the requirement to exhaust *all* settlement procedures—some of which, like negotiation, could be protracted, dragging on for years, during which it would be unfair to oblige the injured State to refrain from taking countermeasures—or by the multiplicity of existing procedures, as listed, for example, in Article 33 of the Charter of the United Nations. In the absence of any indication of an order of priority this process too could go on for years.

50. It should be noted, however, that it is precisely the dangers mentioned in paragraph 49 above that would be the corollary of inadequate dispute settlement obligations. Draft article 12, paragraph 1 (a), would indeed be very likely to have objectionable effects on account of the abuses to which the principle of “freedom of choice” under Article 33 of the Charter opens the door. But it is precisely in order to avoid this pitfall that effective third-party settlement procedures should be envisaged in part 3 of the draft. The acceptance of such procedures—with the possibility of unilateral resort to a third party by the alleged wrongdoing State following the adoption of countermeasures by the allegedly injured State—would leave no latitude to take advantage of the loose “free choice” principle and would make it difficult for a recalcitrant wrongdoing State to escape its obligations by resorting to protracted inconclusive negotiations or other time-consuming procedures. This solution, referred to in section D below (especially paras. 64 et seq.), would also meet the concern expressed in the Sixth Committee by a number of representatives (including those of Austria, Belarus, Jordan and Morocco) that the exhaustion of settlement procedures should be a “parallel” obligation rather than a condition that has to be met *before* resorting to countermeasures. As will be shown in section D, this is precisely one of the features of the proposed solution. Once this solution was accepted in part 3, draft article 12, paragraph 1 (a), of part 2 would have to be amended accordingly.

51. It follows that an essential element of the regulation of countermeasures is precisely the inclusion of a set of effective dispute settlement provisions in part 3, as was pointed out during the debate at the previous session.¹¹⁰ The rules on the conditions and limitations by which resort to countermeasures is governed are clearly intended to confirm the lawfulness of unilateral reaction, while circumscribing that *faculté*, within bounds that are both acceptable and indispensable. One of the limitations under draft article 12, paragraph 1 (a), as proposed in the fourth report is precisely the condition of the prior exhaustion of dispute settlement procedures “available” to the parties under instruments other than the draft itself. The function of part 3 should precisely be to ensure that adequate dispute settlement procedures are fully “available”, at a stage which will be determined more clearly later (see section D below, especially paras. 62 and 75-77), even where such procedures are unavailable, or not fully available, under any dispute settlement arrangement in force between the parties. A sufficient degree of availability of

dispute settlement procedures would adequately balance the inclusion in the draft of a legal regime of unilateral measures. It would supplement the mere regulation of resort to such measures either by providing a more reliable and effective alternative to the use of countermeasures or by acting as a deterrent to the abuse of countermeasures.

2. FURTHER REASONS FOR INCLUDING AN EFFECTIVE DISPUTE SETTLEMENT SYSTEM IN THE DRAFT

52. Effective dispute settlement provisions would be helpful in many respects.

53. First, they would serve the interest of justice by reducing the risk of resort to unjustified or otherwise unlawful countermeasures on the part of allegedly injured States. Such a result would of course disappoint the minority of representatives who understandably (but perhaps too “conservatively”) object to the idea of codifying the law of countermeasures, not because they question the legitimacy of unilateral measures but because they are reluctant to see limits and conditions imposed on the *faculté* of States to resort to reprisals. The inclusion of dispute settlement provisions, far from going in the direction of that minority, would, on the contrary, in the fairest way possible, meet the concerns of the great majority of Commission members and representatives in the Sixth Committee. As already recalled, the reference here is to those who questioned, if not the legitimacy of countermeasures under existing international law, at least the desirability of devising, by way of codification and progressive development of the law, a legal regime of countermeasures which, however strict, could be seen as perpetuating methods incompatible with justice and the sovereign equality of States. Reference is also made principally to all those who denounced the negative effects of a regime of unilateral measures and called for them to be minimized in a manner more compatible with the rule of law in the inter-State system. As noted at the Commission’s forty-fourth session, in response to such objections, strict regulation of countermeasures is in any case essential to the implementation of international law, but the inclusion in the draft of an effective system of dispute settlement would provide an equally indispensable way of correcting the inevitable shortcomings of an implementation system which is bound to rely for some time to come upon unilateral reactions to the breach of international obligations.

54. Secondly, an effective dispute settlement system, as well as reducing friction and conflicts between allegedly injured and alleged wrongdoing States, could not but bring about more balanced and equitable settlements between the parties involved. Solutions reached through conciliation, fact-finding, arbitration or judicial settlement would, in all likelihood, on the whole be more just—or less unjust—than those reached by mere resort to unilateral coercive measures.

55. Thirdly, the improvements that an effective system of dispute settlement would bring about for both potential victims and potential wrongdoers should not be overlooked.¹¹¹

¹¹¹ It is not so unrealistic to hope that the adoption of effective third-party settlement procedures could lead to conciliation or arbitration gradually replacing the unilateral reprisals which remain the rule whenever issues of State responsibility are not settled by an early agreement.

¹¹⁰ See Arangio-Ruiz (*Yearbook* . . . 1992, vol. I, 2267th and 2283rd meetings).

56. As a potential victim of breaches of the law, any law-abiding State has an interest in finding in the draft on international responsibility, in parallel with, and as a complement to, the rules on its *faculté*, to resort to countermeasures, dispute settlement provisions that would at least reduce the need to rely exclusively—as an *ultima ratio*—upon its own capacity to resort to effective unilateral reaction, a course of action which, even if available, may well prove to be costly and of uncertain efficacy.¹¹²

57. As a potential wrongdoer, any State should in turn welcome the presence in the draft of dispute settlement provisions that would allow it better to defend itself before an effective third-party forum—by challenging the admissibility or the legality of a countermeasure directed against it—rather than being forced to accept the unilateral determination and action of one or more allegedly injured States and being reduced to its own, possibly limited, capacity to react.

58. Both as a potential victim and as a potential wrongdoer, any law-abiding State should also consider that, armed reprisals having been rightly outlawed, the measures that are still permissible are mainly economic in nature. Considering the current high degree of economic interdependence of States and of peoples, the adoption of any economic countermeasure is likely to have adverse repercussions not just on the wrongdoing State's economy—and on its people—but also on the economy and the people of the injured State itself. As a result, an injured State will often find it hard to respond adequately to the infringement of one of its rights by resorting to an economic measure, to which there may be no alternative. Situations of that kind might become extremely serious for an injured State that is in a difficult economic situation. The possibility has in fact been noted in the literature that economic dependence—which is not necessarily limited to unequal parties—may become a “deterrent” to the adoption of measures against internationally wrongful acts.¹¹³ An effective settlement system seems to be the only reasonable remedy, not just in the interest of States but, first and foremost, that of their peoples.¹¹⁴

59. The above considerations should be viewed as all the more cogent given that the nature of the procedures to

¹¹² See paragraph 58 below.

¹¹³ See, for example, Hofmann, “Zur Unterscheidung Verbrechen und Delikt im Bereich der Staatenverantwortlichkeit”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 45 (1985), p. 229:

There is no question that the danger of abuse is implicit in the right to unilaterally take non-violent reprisals which, according to this, attaches to every State; however, that danger is already much reduced by the strict requirements imposed by general international law with respect to the admissibility and type of reprisals. Moreover, the risk of rash reprisals is also likely to be diminished by the fact that reprisals will mainly take the form of the breaking off or restriction of trade relations and as such will also entail loss for the State that takes them.

¹¹⁴ It is worth recalling in this respect that, in the course of the 1978 Montreux CSCE Meeting on Dispute Settlement, one of the main arguments advanced by certain delegations against proposals on third-party settlement procedures (as distinguished from the most rudimentary forms of consultation) between CSCE participating States, was that only the Governments “of the people” were properly qualified to determine and protect the interests of their respective peoples. “Neutral” or third-party arbitrators or conciliators, even if chosen by the litigating Governments, could not be trusted. Nowadays, CSCE Governments seem to be more judicious.

be adopted, namely conciliation, fact-finding and arbitration—with judicial settlement as a last resort for special problems (paras. 69-71 below)—would be such that both parties to the dispute would participate in the designation of the members of the “third-party” body. It follows that the third party would unquestionably be less partial than the other State which is a party to the dispute.

60. It is likely that an effective dispute settlement system would also have the following beneficial effects:

(a) In the case of a plurality of injured States it would:

(i) reduce the difficulties inherent in that plurality and in the possible diversity and irreconcilability of the substantive claims of the various injured States;

(ii) make it less difficult to muster and possibly coordinate a collective response (by way of countermeasures or otherwise) on the part of various States equally or unequally affected by the breach, notably in case of violation of international obligations in the area of human rights and environmental protection;

(b) In the case of a plurality of wrongdoing States, it would reduce the inherent difficulties of determining each State's liability;

(c) Finally, in the case of breaches consisting of the violation of a multilateral treaty, it would make it less difficult to harmonize the interests, attitudes and conduct of the various States parties to the treaty.

Points (a), (b) and (c) will be discussed in further detail at a later stage.

61. What is equally important, is that an effective dispute settlement system would in the future be likely to reduce, where the most serious breaches are concerned (whether they are called “crimes” or just “grave delicts”), the need to rely exclusively for the establishment of the wrongdoing State's liability on options which do not seem to be entirely in conformity with the exigencies of progressive development of the law in this sensitive area. One option seems to be reliance on the action of a few, generally Western, States able and willing to react to the breach of the supposedly *erga omnes* rule: a reaction which though it is “concerted” and may be justified, is no less unilateral and “uncontrolled” for all that. The other option is represented by political bodies. The action of these bodies has so far proved to be not only indispensable but basically beneficial and, in any case, more “controlled”, thanks to the existence of a worldwide or regional constituent instrument. However, when political bodies are not paralysed for lack of the required majority, they are likely to be unduly influenced by power politics; and, as they have to respond to any situation, they may be led to extend their action beyond the scope of the mandate entrusted to them. The strengthening of third-party settlement procedures in the area of State responsibility would relieve political organs of that part of the burden which is more appropriately dealt with by judicial bodies. This matter will be dealt with later in the framework of the discussion of the consequences of international “crimes” of States as contemplated in draft article 19 of part I (see chap. II below).

D. Recommended solutions

1. INTRODUCTION

62. For the compelling reasons set forth in the preceding sections, the Commission should take a step forward from the solutions it has envisaged so far. In order to mitigate the negative effects of unilateral countermeasures adequately, as discussed in section C, it would be totally insufficient merely to provide that in the event that resort to a countermeasure gives rise to an objection, the matter would be referred to a conciliation commission. Although a pronouncement by such a body could certainly be helpful in bringing about an agreed settlement of the dispute between an allegedly injured and an alleged wrongdoing State, the non-binding character of the outcome of conciliation renders such a procedure inadequate for the purpose of remedying the negative effects of unilateral countermeasures. The addition of more advanced third-party procedures to the solution contained in draft article 4 (c) as submitted by Mr. Riphagen—leaving aside for the time being subparagraphs (a) and (b) of that article—would be a decided improvement.

63. A preliminary point to be considered, however, is the different ways in which settlement procedures (and related obligations of contracting parties) should come into play for the purposes of implementation of a State responsibility convention. The reference here is mainly to the way in which settlement obligations are presently contemplated in article 12, paragraph 1 (a), as proposed in the fourth report, on the one hand, and the way those obligations should be envisaged within part 3 and possibly in article 12, paragraph 1 (a), itself, on the other hand. Reference is made in particular to the various ways in which settlement obligations could affect the injured State's *faculté* to resort to countermeasures.

64. In requiring the injured State to refrain from resorting to countermeasures prior to the exhaustion of "available" settlement procedures, draft article 12, paragraph 1 (a), refers only to such settlement procedures as the parties may resort to under international rules *other* than those directly provided for in a State responsibility convention. Indeed, article 12, paragraph 1 (a), does not impose upon the injured State any *given* settlement procedure as a condition for resort to countermeasures. It merely requires the exhaustion of such procedures as are "available" to the injured State based on legal obligations pre-dating the dispute or agreed to thereafter. Everything depends, therefore, on what the situation is or may become between an allegedly injured State and an alleged wrongdoing State with regard to the means of dispute settlement.

65. It is evident that the settlement procedures in question range from the most rudimentary forms of negotiation/consultation (possibly assisted by good offices or mediation) to conciliation, arbitration, judicial settlement, regional arrangements, and procedures under Chapter VI of the Charter of the United Nations. Clearly the multiplicity of means listed in Article 33 of the Charter, combined with the "freedom of choice" rule, would make it very difficult to determine which means of settlement—particularly *effective* means—are available *in concreto* to any injured State vis-à-vis any wrongdoing State at a given time and with regard to the infringement of specific

primary or secondary obligations. To get a clearer picture, it is necessary, of course, to move away from multilateral systems or treaties into the more specific bilateral instruments—dispute settlement treaties and arbitration clauses—in force between given States. Even here, however, there are many varying degrees of "availability". The treaties or treaty clauses establishing settlement obligations differ very considerably (*ratione personae*, *ratione materiae* and *ratione temporis*) according to whether they contemplate procedures that may be set in motion by unilateral initiative (the maximum option in terms of "availability") or procedures which would instead require the conclusion of a special agreement (*compromis*) in each specific case once the dispute has arisen. To assess "availability" in the latter case is far from simple, even with regard to a given pair of injured/wrongdoing States. Much would also depend upon the *inclination* of each State to resort to conciliation, arbitration or judicial settlement, once a specific dispute has arisen, if no prior provision has been made for automatic unilateral initiative. Considering the variables involved (*ratione personae*, *ratione materiae* and *ratione temporis*), only a highly gifted mathematician—if not a magician—would be willing to try to determine with any approximation the degree of "availability" of settlement procedures between any conceivable pair of States at any given time.

66. In other words, in laying down the indispensable "exhaustion requirement", of draft article 12, paragraph 1 (a), it only refers to means of settlement and does not directly prescribe such means. This precludes the possibility of using that article to determine how the "exhaustion requirement" should be met by a State, as a potential injured State, in its relationships with other States, as potential wrongdoing States. Only in each specific case is it possible to determine whether any effective settlement procedures are or were "available" which would bar the injured State under a provision such as draft article 12, paragraph 1 (a), from resorting to a countermeasure. Even the kind of countermeasure in question may have an important bearing on the issue. Thus, only in each particular case, by taking into account the multilateral or bilateral instruments in force and the actual "inclination" of the alleged wrongdoing State—not to mention the allegedly injured State itself—is it possible to determine whether the latter State has complied with the "exhaustion requirement".¹¹⁵ A rather clear-cut situation would be one in which the injured State can avail itself of a jurisdictional link providing for the possibility of a unilateral application to ICJ. In such a case, it should be relatively easy to see that the injured State could not lawfully resort to countermeasures unless it had obtained from the Court either an order of interim measures or a judgment on the merits, with which the wrongdoing State has failed to comply. Even then, however, exceptions would have to be allowed if an urgent measure of protection was essential

¹¹⁵ All that can be said in general is that in most cases the first (and perhaps the only) means of settlement available is likely to be negotiation/consultation. In some cases there may be forms of conciliation or arbitration of varying degrees of sophistication, but only infrequently will implementation by unilateral initiative be possible. Only in very rare cases will compulsory judicial settlement be available under Article 36, paragraph 2, of the ICJ Statute or equivalent instruments providing for a unilateral application to the Court. Except in the infrequent or rare situations described, most cases would still involve, at least initially, a unilateral assessment of the requirements of "availability" and "exhaustion".

to save human life or suffering or to avoid otherwise irreparable damage.

67. Of course, there is a "legislative" way to reduce the variables, the freedom of choice, the consequential uncertainties and the further consequential risks that countermeasures may be abused—such abuse being especially, although not exclusively, to the detriment of the weak and to the advantage of the powerful. The way to attain this objective would be to replace provisions which merely refer to dispute settlement obligations deriving from sources *other* than a State responsibility convention, as in the case of article 12, paragraph 1 (a), by provisions *directly* setting forth the obligation to exhaust *given* procedures as a condition for resort to countermeasures.¹¹⁶ The more sophisticated the procedures adopted by the Commission, the more substantial the progressive development in the area of both State responsibility and dispute settlement will be. The injured State's "right" to make a unilateral assessment and its *faculté* to resort to countermeasures would be reduced in direct proportion to the degree of effectiveness of the procedures expressly provided for in a State responsibility convention.

68. The solution suggested in the preceding paragraph certainly represents the most realistic approach to attaining as far as possible the goal of the *theoretically ideal solution*. This would obviously involve introducing into the draft articles—either in part 3 or in part 2 itself—a structured system of third-party settlement procedures which, failing agreement, would ultimately lead to a binding third-party pronouncement. *At the same time* draft article 12, paragraph 1 (a) of part 2 would need to be amended so as to *make the lawfulness of any resort to countermeasures conditional upon the existence of such a binding third-party pronouncement*—except in the case of the interim measures of protection or cautionary measures envisaged in paragraph 2 of that draft article. Within such a system, countermeasures in the sense of draft article 11¹¹⁷ could be lawfully resorted to by State A against State B, for the exclusive or almost exclusive purpose of coercing a supposedly recalcitrant State B into complying with an arbitral award or an ICJ judgment which found State B to be in breach of one or more of its primary or secondary obligations towards State A. Although, even then, in the absence of adequate institutional arrangements, countermeasures would still be the main instrument for ensuring compliance, resort to countermeasures would only *follow* a binding third-party pronouncement. Justice and equality would surely be better safeguarded. If the Commission so desired, the necessary draft articles to make such a breakthrough in the development of international law possible could readily be submitted.¹¹⁸

69. In preparing the present report, it had been felt that the solution considered in the preceding paragraph might not find favour with the majority of the Commission. While not excluding any step of progressive development

in that direction, if the Commission were inclined to accept it, a solution had been envisaged that was less bold, although bolder than the one proposed in 1986.¹¹⁹ The proposed solution, as explained in subsection D.2 below, is:

(a) To leave draft article 12, paragraph 1 (a), as it stands, namely as a provision referring to settlement obligations *not creating them*;

(b) To strengthen the proposed non-binding conciliation procedure in part 3 as submitted by the previous Special Rapporteur in 1986, by adding arbitration and judicial settlement procedures without directly affecting the prerogative of the injured State to take countermeasures. This prerogative would be affected, as explained in paragraph 86 below, only "in the mind", so to speak, of the injured State, in the sense that that State would *know* that resort to a countermeasure exposes it to the risk of third-party verification of the lawfulness of its reaction.

However, any step that members of the Commission might suggest in the direction of the more advanced kinds of solutions envisaged in the two previous paragraphs would be welcome.

2. THE PROPOSED THREE-STEP DISPUTE SETTLEMENT SYSTEM

70. The solution recommended for the consideration of the Commission consists of a binding third-party dispute settlement procedure which would come into play only after a countermeasure had been resorted to, allegedly in conformity with draft articles 11 and 12 of part 2, and a dispute arose with regard to its justification and legality. The following is a description of the three-step dispute settlement system resulting from the six draft articles proposed for part 3 and the annex thereto.¹²⁰

(a) *The first step: conciliation*

71. The first step should be a conciliation procedure similar to that envisaged in the 1986 proposal. Either party in the responsibility relationship, or alleged relationship, would be entitled to resort to such a procedure following the adoption of a countermeasure on the part of an allegedly injured State and in the presence of two primary and two secondary conditions. The primary conditions are that (a) a countermeasure has been resorted to by an allegedly injured State and (b) that a dispute has arisen following a protest or other reaction on the part of the alleged wrongdoing State. The secondary conditions are that the dispute is neither settled within four months from the date when the countermeasure was put into effect, nor submitted within the same period to a binding third-party settlement procedure.¹²¹

72. The conciliation commission would be set up on the unilateral initiative of either party in conformity with the provisions of an annex, similar in part to the one proposed in 1986 by Riphagen.¹²² In addition to the usual role of

¹¹⁶ For example, an obligation could be placed upon the allegedly injured State to propose a binding or non-binding third-party settlement procedure and also to submit its claim to the third party once the alleged wrongdoing State has agreed to such a procedure.

¹¹⁷ See footnote 109 above.

¹¹⁸ Very regrettably, the conditions for such a development are unlikely to occur either during the current United Nations Decade of International Law or at any time in the foreseeable future.

¹¹⁹ See Mr. Riphagen's seventh report (footnote 38 above).

¹²⁰ For the texts of the draft articles, see section F.

¹²¹ Binding third-party settlement procedures would include an arbitral tribunal or ICJ.

¹²² See his seventh report (footnote 38 above), p. 3, and footnote 167 below.

conciliation commissions, and without prejudice to the merely recommendatory nature of any final report to be issued, the conciliation commission would, in particular, perform the following tasks, on the basis of draft article 2 of part 3 (see section F, paragraph 106 below):

- (a) Determine, including, when necessary, by fact-finding *in loco*, any question of fact or law which may be of relevance under any of the provisions of the draft articles on State responsibility;
- (b) Order the suspension of any countermeasures resorted to by either party;
- (c) Order interim measures of protection.

(b) *The second step: arbitration*

73. Arbitration is to be envisaged in certain circumstances, according to draft article 3, namely, either:

- (a) In the case where the setting up or the functioning of the conciliation commission within three months from either party's application for conciliation has been prevented by any obstacle; or
- (b) In the case where, following the commission's report, no settlement has been reached between the parties within four months from the final report of the conciliation commission.

74. The arbitral tribunal would be appointed in conformity with the provisions of the annex. It would be called upon to decide, with binding effect, issues of fact or law which may be of relevance under any of the provisions of the draft articles on State responsibility within either ten months of the date of its establishment or six months of the date of completion of the parties' written and oral submissions. The tribunal should be empowered a fortiori to exercise the functions expressly attributed to the conciliation commission under draft article 4 (see paragraph 72 above).

(c) *The third step: judicial settlement*

75. Subject to any further possibilities to be considered in connection with the regime of wrongful acts defined as so-called international crimes of States in article 19 of part 1, judicial settlement should only be envisaged as a last resort in specific cases under draft article 5. Two of these cases would be:

- (a) The failure, for whatever reason, to meet the obligation to set up the arbitral tribunal, unless the dispute is settled by other means within six months of such failure;
- (b) The failure of the arbitral tribunal to meet the obligation to issue an award within the prescribed time limit of either ten or six months.

In such cases, either party could unilaterally submit the matter to ICJ.

76. The competence of ICJ should also be envisaged in the case of an *excès de pouvoir* or the violation of a fundamental principle of arbitral procedure by the arbitral tribunal. Under article 6 either party would be entitled to refer such cases to ICJ by unilateral application.

77. Like the arbitral tribunal, ICJ should also be empowered, with regard to the case, to exercise any of the functions envisaged for the conciliation commission in

paragraph 72 above, which, although not necessarily contemplated therein, are not incompatible with the Court's Statute.

78. The time limits suggested at each of the three steps, as described above, are merely tentative.

3. MAIN FEATURES OF THE PROPOSED SOLUTION: THIRD-PARTY SETTLEMENT PROCEDURES AS A REMEDY FOR THE NEGATIVE EFFECTS OF THE PRESENT INEVITABLE SYSTEM OF UNILATERAL REACTION

79. The proposed system for dispute settlement is characterized by three essential features.

80. The main feature of the system is that, failing an agreed settlement at any stage, it would lead to a binding settlement of the dispute without significantly hindering the parties' freedom of choice with regard to other possible settlement procedures. Indeed, two limitations are placed on their choice of settlement procedures. The first is that a unilateral application for conciliation under the conditions set forth in paragraph 71 above may be made if the dispute which has arisen following resort to a countermeasure is not settled or has not been submitted to a binding third-party procedure within four months from the date when the countermeasure was put into effect. This deadline may be shorter than, and in that sense contrast with, any longer time limit which is envisaged in an agreement or arrangement in force between the parties. It is felt, however, that the presence in the draft articles of a stricter rule, that is to say, one providing for a shorter deadline for the dispute to be settled or submitted to a third-party procedure, represents a reasonable, and hence acceptable, limitation of the otherwise excessively broad "free choice" rule of Article 33 of the Charter.¹²³

81. A second limitation on the parties' freedom of choice would reside, of course, in the very fact of envisaging a specific conciliation procedure, namely one which may be initiated in conformity with draft article 1 of part 3 and the annex thereto, as proposed. This may not necessarily be in conformity with any standing or ad hoc arrangement between the parties. Under any such arrangement, either party may be entitled, for example, to resort to a conciliation commission of a different kind, set up in a different way or endowed with different powers. Here again, the feeling is that the rule proposed for part 3 of the draft articles should prevail over any less stringent rule which may be in force between the parties. This would better ensure the effective implementation of the articles on State responsibility.

82. The second essential feature of the proposed solution, and surely the most important in assessing its feasibility, is the fact that the settlement procedures to be included in the draft articles would not be such as directly to curtail to any significant extent the injured State's faculté, to resort to countermeasures against a State which it believes to be in breach of one of its rights. The lawfulness of resort to countermeasures continues to depend, of course, on such basic conditions as the existence of an internationally wrongful act, the attribution of the act to a

¹²³ A discrepancy of this kind may occur, for example, between the provision being proposed and the conciliation procedure provided for in the Vienna Convention on the Law of Treaties.

given State and the other conditions and limitations laid down in draft articles 11 to 14 of part 2. The evaluation as to the existence of the necessary conditions and the conformity of a proposed countermeasure with the conditions and limitations set forth in draft articles 11 to 14 would in principle remain a prerogative to be exercised unilaterally by the injured State itself, albeit at its own risk and subject to any agreement to the contrary in force between the parties. The inclusion of the proposed three-step binding third-party settlement provisions as part 3 of the draft articles would not directly affect the prerogative or *faculté*, exercised by the injured State when it decides to resort to countermeasures. The proposed settlement procedures would simply be activated once the injured State has made its determination. The purpose of the procedures would be to settle, in the timely and effective fashion described above, any differences between the parties in the responsibility relationship, including of course any questions of fact or law which may be relevant under any of the articles on State responsibility.

83. The latter point should be stressed to avoid any possible misunderstanding. The “triggering mechanism” (*mécanisme déclencheur*) of the settlement obligations to which the parties would be subject under the proposed part 3 is neither an alleged breach of a primary or secondary rule of customary or treaty law nor the dispute that may arise when the alleged breach is contested. It is only the dispute arising when resort to a countermeasure on the part of an allegedly injured State—or possibly resort to a counter-reprisal from the opposite side—is contested that triggers the dispute settlement system. In the first instance, the evaluation of the existence of such a dispute, and consequently of the conditions triggering the procedures, will of course be made by the conciliation commission.

84. There is no need to expand on the obvious difference between the “triggering mechanism” represented by a dispute in the current proposal, on the one hand, and that represented by an “objection” in the 1986 proposal, on the other hand. The “dispute” is believed to provide a less problematic and, in a sense, more objective datum that has been widely and authoritatively explored in the theory and practice of international law. It will be readily apparent that the recommended system presents an advantage over the 1986 proposal. Resort to a third-party procedure by an alleged wrongdoing State which is the target of a countermeasure would not follow simply from an objection to an intended and notified countermeasure. The third-party procedure could only be set in motion once the actual countermeasure had been put into effect. “Conservatives” should be satisfied that, while certainly more advanced and more effective in curbing abuses of countermeasures, the proposed solution would in its operation be more respectful of the customary practices they seem so anxious to preserve.

85. Another noteworthy feature would be the role to be played by the proposed dispute settlement mechanism within the framework of the State responsibility relationship. Although, as explained above, this mechanism would not directly preclude resort to countermeasures by an injured State at its own risk, the availability of the system should have a sobering effect on an injured State’s decision to resort to countermeasures. However, it would

not be the kind of system for suspending unilateral action (*dispositif de freinage de l’action unilatérale*) that is found in other Commission drafts.¹²⁴ Under the draft articles on the law of the non-navigational uses of international watercourses, for example, the implementation of a project on the part of a State may have to be suspended while a given consultation and/or conciliation procedure is pursued.¹²⁵ Within the framework of the proposed dispute settlement system for the draft articles on State responsibility, the countermeasure would not be suspended at all, except by an order of a third-party body after the initiation of a settlement procedure. The only disincentive for resort to a countermeasure that the proposed system would bring about would operate in the mind, so to speak, of the injured or allegedly injured State, whose authorities would, it is hoped, be induced to exercise greater circumspection in weighing the conditions and limitations of a possible countermeasure.

E. The Commission’s approach to dispute settlement

1. THE PRACTICE OF THE COMMISSION CONCERNING THE INCLUSION OF ARBITRATION CLAUSES IN ITS DRAFTS

86. The Commission has not contributed very significantly to the development of the law of dispute settlement. With a few exceptions, the great majority of the codification drafts produced so far by the Commission contain imperfect arbitration clauses providing, at best, for binding recourse to non-binding conciliation—in addition to negotiation and a general reference to Article 33 of the Charter. Stricter, more advanced commitments, which are usually relegated to an annex or a protocol, together with conciliation provisions, are made subject to the separate acceptance or reservation of the contracting States.¹²⁶

87. The most significant exception seems to be the Commission’s draft articles on the law of treaties.¹²⁷ The

¹²⁴ Cf. Sir Humphrey Waldock, second report (see footnote 105 above).

¹²⁵ *Yearbook . . . 1991*, vol. II (Part Two), p. 68, art. 17.

¹²⁶ It has also been noted that in only two cases have the arbitration clauses in question provided the basis for the competence of ICJ and in no case have they led to any arbitral procedure (see Coussirat-Coustère, “Le règlement des différends dans l’oeuvre de la Commission du droit international: vers une codification progressive?” *Perspectives du droit international et européen, Recueil d’études à la mémoire de Gilbert Apollis*, 1992, pp. 29-46).

¹²⁷ Article 66 of the Vienna Convention on the Law of Treaties, provides not only for compulsory resort to judicial settlement before ICJ for any dispute concerning the application or the interpretation of articles 53 or 64 that is not settled by a commonly accepted arbitration, but also compulsory resort to a conciliation procedure. Although the implementation of the latter procedure is laid down in an annex, judicial settlement and conciliation are both clearly envisaged in article 66 as an integral, non-optional, automatically operative part of the Convention’s procedural system which has to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. The area of controversy covered by article 66 is, however, a rather narrow one. On the interesting history of this provision see, *inter alia*, Kearney, and Dalton, “The treaty on treaties”, *AJIL*, 1970, pp. 545-555; Dupuy, “Codification et règlement des différends: les débats de Vienne sur les procédures de règlement”, *AFDI*, 1969, pp. 70-91; Deleau, “Les positions françaises à la Conférence de Vienne sur le droit des traités”, *ibid.*, pp. 20-23; Nahlik, “La Conférence de Vienne sur le droit des traités: une vue d’ensemble”, *ibid.*, pp. 42 et seq.

other exceptions are the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character¹²⁸ and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.¹²⁹ Mention should also be made of the draft articles on the law of the non-navigational uses of international watercourses¹³⁰ and of the draft articles on the jurisdictional immunities of States and their property.¹³¹ Although in those two cases, the Special Rapporteurs suggested a more progressive line,¹³² they were not followed by the Commission, whose attitude towards dispute settlement provisions remains very guarded.¹³³

88. The Commission's general reluctance to consider bolder provisions in the area of dispute settlement in previous drafts seems to have been largely based on the following factors:

¹²⁸ Article 84 provides as follows:

"If a dispute between two or more States parties arises out of the application or interpretation of the present Convention, consultations between them shall be held upon the request of any of them. At the request of any of the parties to the dispute, the Organization or the conference shall be invited to join in the consultations."

Article 85, paragraph 1, provides as follows:

"If the dispute is not disposed of as a result of the consultations referred to in article 84 within one month from the date of their inception, any State participating in the consultations may bring the dispute before a conciliation commission constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations."

¹²⁹ Articles 65-66 of this Convention are very similar to articles 65-66 of the Vienna Convention on the Law of Treaties. The main original feature of the dispute settlement system of the former is the advisory opinion procedure contemplated in article 66, para. 2 (b) and (e).

¹³⁰ The procedures which were envisaged by the successive Special Rapporteurs were a combination of negotiation, fact-finding and conciliation at the request of one of the parties. Failing conciliation, provision was made for non-compulsory resort to arbitration or judicial settlement: see Schwebel's third report (*Yearbook* . . . 1982, vol. II (Part One), p. 65, document A/CN.4/348), paras. 472-498; and Evensen's first report (*Yearbook* . . . 1983, vol. II (Part One), p. 155, document A/CN.4/367), paras. 200-231.

¹³¹ Sucharitkul, eighth report (*Yearbook* . . . 1986, vol. II (Part One), pp. 32 et seq., document A/CN.4/396), paras. 43-48. In addition to negotiation, consultation and agreed arbitration or judicial settlement, the Special Rapporteur envisaged the possibility of a unilateral request for a conciliation procedure (arts. 29-33). Draft article 31 contained an optional clause under which any signatory State could declare its acceptance of the compulsory jurisdiction of ICJ for any dispute not settled under the means indicated in articles 29-30.

¹³² Another example of this trend, although unconnected with the Commission, is the United Nations Convention on the Law of the Sea, part XV of which sets up an elaborate non-optional third-party settlement system. See especially Richardson, "Dispute settlement under the Convention on the Law of the Sea: a flexible and comprehensive extension of the rule of law to ocean space"; *Contemporary Issues in International Law, Essays in Honour of L. B. Sohn*, 1984, pp. 149 et seq. and Jacovides, "Peaceful settlement of disputes in ocean conflicts: does UNCLOS III point the way?", *ibid.* Oda expressed a not very optimistic view in his article entitled "Some reflections on the dispute settlement clauses in the United Nations Convention on the Law of the Sea", *Essay in International Law in Honour of Judge Manfred Lachs*. See also *A Handbook on the New Law of the Sea*, R. J. Dupuy and D. Vignes, eds. (Académie de droit international de La Haye, Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster), vol. 1 (1991), pp. 777 et seq. and vol. 2 (1991), pp. 1333 et seq.

¹³³ See especially Coussirat-Coustère, *loc. cit.*

(a) The view of numerous members of the Commission that Governments would not accept any substantial obligations in the area of dispute settlement;

(b) A restrictive understanding of the Commission's task in the sense that the mandate to undertake the codification of a topic does not extend beyond the drafting of the substantive rules relating to the subject, and thus any dispute settlement provisions are to be considered at the diplomatic conference or, at most, during the very last stage of the drafting, in the form of an annex;¹³⁴

(c) The view that in any case the rules on dispute settlement really belong to a different, and in a sense separate, area of law, namely the law of procedure, which should be dealt with separately on its particular merits;

(d) The view that the addition of ad hoc dispute settlement rules to a draft would complicate the substantive issues and reduce the chances of the results of the codification process receiving the approval of a sufficient number of Governments;

(e) The limited success of the Commission's efforts from 1949 to 1958 on the topic of arbitral procedure;¹³⁵

(f) The concern, with specific reference to State responsibility, that the inclusion in the draft of advanced dispute settlement obligations, notably compulsory and binding third-party settlement procedures, would affect the violation of virtually any primary international obligation, regardless of the subject matter. This, it is suggested, would make the adoption of a draft on State responsibility more difficult.

¹³⁴ A typical example is the request that the Commission has repeatedly addressed to the General Assembly in recent years for authorization to study and prepare a draft statute for an international court of criminal jurisdiction, in connection with the draft Code of Crimes against the Peace and Security of Mankind. Although it was obvious, as stated repeatedly by a few members, that an international criminal court would be an essential element for the proper implementation of the Code, this has been taken up rather reluctantly, as evidenced by paragraph 6 of General Assembly resolution 47/33 of 1992, and far too late.

¹³⁵ While the Commission had recommended, in 1953, that a convention should be concluded on the basis of its draft articles on the subject (*Yearbook* . . . 1953, p. 208, para. 57), the General Assembly first invited the Commission, on the basis of comments from Governments, to reconsider the draft and report again (resolution 989 (X), para. 2). When the Commission recommended that the resulting Model Rules on Arbitral Procedure should be adopted, together with its report, by resolution (*Yearbook* . . . 1958, vol. II, p. 83, document A/3859, chap. II, para. 22), the Assembly declined to take the recommended action. It merely took note of the Commission's report and brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use to the extent appropriate in drawing up arbitration commitments (resolution 1262 (XIII), para. 3). According to Rosenne ("The International Law Commission", *British Year Book of International Law*, vol. 36, pp. 150-151), there were three reasons for this outcome, namely (a) the boldness of the Commission's approach in basing the draft on a concept of judicial instead of diplomatic arbitration; (b) a feeling that the draft relied too heavily on progressive development, and (c) the fact that the political climate of the United Nations was not ready for a further extension of the judicial settlement of disputes in place of diplomacy. It is impossible to grasp, however, the meaning of the expression "diplomatic arbitration".

2. RECENT DEVELOPMENTS REGARDING DISPUTE SETTLEMENT PROCEDURES AS EVIDENCE OF A NEW TREND

89. The Commission should not be discouraged by any of these general or specific factors. Without doubt, States are generally reluctant to accept advanced dispute settlement commitments, particularly with regard to binding third-party procedures.¹³⁶ The history of the law of dispute settlement records a considerable number of failures, notably the failure to establish a real permanent court in 1907 and the failure to achieve a general compulsory jurisdiction for legal disputes, as considered during the drafting of the Statute of PCIJ in 1919-1920. The implementation of the settlement provisions of the Covenant of the League of Nations, namely Articles 12 to 15 thereof, and of the General Act for the Pacific Settlement of International Disputes, adopted in 1928 and revised in 1949, were marked by only a few successes.

90. The adoption of the Charter of the United Nations, Chapter VI of which is mainly concerned with political (and "dangerous") disputes, did not represent any significant progress in the area of settlement procedures for legal disputes. While the roles of the Security Council and of the General Assembly remain political in nature even for legal disputes,¹³⁷ the main procedures for the settlement of such disputes (arbitration, judicial settlement and fact-finding) appear to be buried, so to speak, under the "free choice" principle in Article 33. There have been no improvements in this situation, despite the efforts of some delegations during the drafting of the relevant parts of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations¹³⁸ in

¹³⁶ See especially Franck, *The Structure of Impartiality: Examining the Riddle of One Law in a Fragmented World*, pp. 46 et seq. and *passim*; and Lee, "A case for facilitation in the settlement of disputes", *German Yearbook of International Law*, vol. 34 (1991).

¹³⁷ See, for example, Bowett, "Contemporary developments in legal techniques in the settlement of disputes", *Collected Courses* . . . 1983- II, vol. 180.

¹³⁸ General Assembly resolution 2625 (XXV). See mainly the proposal submitted by Dahomey, Italy, Japan, Madagascar and the Netherlands, the third paragraph of which states as follows:

"3. In order to ensure the more effective application of the foregoing principle:

"(a) Legal disputes should as a general rule be referred by the parties to the International Court of Justice, and in particular States should endeavour to accept the jurisdiction of the International Court of Justice pursuant to Article 36, paragraph 2, of the Statute of the Court.

"(b) General multilateral agreements, concluded under the auspices of the United Nations, should provide that disputes relating to the interpretation or application of the agreement, and which the parties have not been able to settle by negotiation, or any other peaceful means, may be referred on the application of any party to the International Court of Justice or to an arbitral tribunal, the members of which are appointed by the parties, or, failing such appointment, by an appropriate organ of the United Nations.

"(c) Members of the United Nations and United Nations organs should continue their efforts in the field of codification and progressive development of international law with a view to strengthening the legal basis of the judicial settlement of disputes.

"(d) The competent organs of the United Nations should avail themselves more fully of the powers and functions conferred upon them by the Charter in the field of peaceful settlement, with a view to ensuring that all disputes are settled by peaceful means in such a manner that not only international peace and security but also justice is preserved." (*Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18 (A/8018)*, pp. 59-60).

which peaceful settlement was very poorly dealt with,¹³⁹ and Principle V of the Final Act of the Conference on Security and Cooperation in Europe,¹⁴⁰ a particular disappointment in the light of the articulate and highly meritorious proposal submitted to that Conference by the Government of Switzerland.¹⁴¹

91. In recent years, there have been a number of encouraging developments, some of which were noted in the third¹⁴² and fourth reports.¹⁴³ The Manila Declaration on the Peaceful Settlement of International Disputes¹⁴⁴ represents a significant general policy development. Despite the fact that it takes the form of a resolution and that its provisions have a programmatic rather than an operative

¹³⁹ For example, with regard to General Assembly resolution 2625 (XXV), see the paper submitted by the representative of Italy to the 1970 session of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States. In his opinion, the declaration that was being drafted was seriously weakened by the total disregard of the Committee's majority for the institutional aspects of the principles. In a document reproduced in the Committee's report to the General Assembly (*ibid.*, p. 55) he stressed that:

"Among the seven Principles, some may be, or appear to be, *merely normative* in character, while the content of other principles is obviously *normative and organizational* at the same time. In any case, the organizational element could not be overlooked in the last quarter of our century without seriously prejudicing the impact of the normative content of the principles and perhaps their very existence.

[. . .]

" . . . it would be dangerous to overlook the essential organizational aspects of the prohibition of the threat or use of force, of the principle of non-intervention, or of the principle of the peaceful settlement of international disputes.* Not only the effective realization and general impact of these principles but their very existence and development depend in a high degree upon the procedure, instruments and machineries through which the rules stemming from those principles and inspired thereby are applied or enforced in inter-State relations."

As regards, more specifically, the settlement of disputes, the same representative stated that he had frequently indicated the serious difficulties which, in his opinion, were inherent in the current wording of that principle (see, for example, *Official Records of the General Assembly, Twenty-first Session, Sixth Committee*, 939th meeting, para. 10 and *ibid.*, *Twenty-fourth Session, Sixth Committee*, 1162nd meeting, para. 45). As recorded in the above-mentioned report of the Special Committee, he maintained that:

" . . . the existing formulation 'reduces, in wording as well as concepts, the impact of Chapter VI of the Charter' and 'simply disregards whole articles or paragraphs of Chapter VI, not to mention the Statute of the International Court of Justice' and other international instruments" (*ibid.*, *Twenty-fifth Session, Supplement No. 18 (A/8018)*, p. 59),

and he again drew the attention of the Committee to the proposal Italy had submitted together with Dahomey, Japan, Madagascar and the Netherlands (see footnote 138 above), adding that, failing acceptance of that proposal,

"[w]ere the draft Declaration to maintain such a gap, serious damage might result in the progressive development of the law of peaceful settlement" (*ibid.* p. 60).

¹⁴⁰ Signed at Helsinki on 1 August 1975.

¹⁴¹ See, in particular, Bindschedler, in "La Conférence sur la sécurité en Europe et le règlement pacifique des différends". For the Swiss proposal, see Caflisch in "La pratique suisse en matière de droit international public 1972", *Annuaire suisse de droit international*, vol. XXIX (1973), especially pp. 373-377.

¹⁴² *Yearbook* . . . 1991, vol. II (Part One) (see footnote 78 above), paras. 52-62.

¹⁴³ *Yearbook* . . . 1992, vol. II (Part One) (see footnote 79 above), paras. 35-40.

¹⁴⁴ General Assembly resolution 37/10, annex.

function, that document contains two elements that the Commission should not overlook in the present context. The first is the recommendation contained in section I, paragraph 9, to the effect that States should

... consider concluding agreements for the peaceful settlement of disputes among them

and, more specifically,

... should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation and application thereof.

Although this provision may appear obvious to the ordinary person, it represents a considerable development if it is considered that nothing of the kind is to be found in either the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations¹⁴⁵ or Principle V of the Helsinki Final Act of the Conference on Security and Cooperation in Europe.¹⁴⁶ The second equally significant element is the related provision contained in section I, paragraph 11, which states that

States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes.

It was high time that an international body denounced, at least by implication, the almost total ineffectiveness of the numerous arbitration, conciliation and/or judicial settlement treaties, the texts of which are compiled, together with a few less ineffectual instruments, in three well-known volumes.¹⁴⁷ Further significant elements are to be found in section II, paragraph 5 (b), of the Manila Declaration, according to which it is desirable that States:

(i) Consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;

(ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;

(iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice.

This paragraph also provides that

Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.

Again, no such wording is to be found in the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations or in the Final Act of the Conference on Security and Cooperation in Europe.

92. A similar trend emerges from the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security

and on the Role of the United Nations in this Field¹⁴⁸ and the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security.¹⁴⁹

93. A recent noteworthy development is the new Convention on Conciliation and Arbitration prepared by the Conference on Security and Cooperation in Europe. Even more remarkable are the practical steps that a number of Eastern European States have been taking in order radically to reverse their formerly less than progressive policies in this area.¹⁵⁰ Reference is made, in particular, to the acceptance by the former Soviet Union of the jurisdiction of ICJ with regard to a number of international human rights instruments and the acceptance by the former Czechoslovakia and by Hungary of the judicial and conciliation procedures envisaged in article 66 of the Vienna Convention on the Law of Treaties. The increasingly favourable attitude towards providing for dispute settlement by ICJ is another important sign of a new trend. Developments such as these indicate that the factor described in paragraph 88 (a) above should not be overemphasized.

94. The factors set forth in paragraphs 88 (b), (c) and (d) above are highly questionable. As regards the factor mentioned in paragraph 86 (b), the Commission should remember that it has been entrusted by the General Assembly with the technical task of preparing the legal materials necessary for the implementation of Article 13, paragraph 1 (a) of the Charter. Once the parent body has made its political choice by entrusting the Commission with the preparation of a draft, it is for the Commission to decide *ad referendum*, on the basis of its technical expertise, the exact scope of the task to be performed in order properly to serve the United Nations and its membership. In the case of the preparation of a draft statute for an international criminal court referred to above,¹⁵¹ the Commission's hesitation as to its competence resulted not only in unfortunate delays but also in a highly regrettable waste of resources. The Organization had to address itself to Member States for expertise that should otherwise have come from the Commission. Furthermore, it was necessary to resort to an ad hoc formula—hardly a commendable solution in the area of criminal law.

95. With regard to the factors listed in paragraphs 88 (c) and (d), there is nothing in the distinction between substance and procedure that would require that they be dealt with separately in all circumstances either in national or international law. As regards international law, in fact the opposite seems to be true. The general dispute settlement instruments, whether bilateral or multilateral, as noted above, have not proved to be very effective. They are interesting materials for study and for teaching the various mechanisms and procedures, and combinations thereof, for settling disputes, but they are not the most frequently used in practice by litigating States. The same must be said of the Commission's technically praiseworthy Model Rules on Arbitral Procedure which are nothing more than a model for States to use once they have decid-

¹⁴⁵ See footnote 139 above.

¹⁴⁶ See footnote 140 above.

¹⁴⁷ Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes; Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948* (United Nations publication, Sales No. 1949.V.3); and *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes, 1949-1962* (United Nations publication, Sales No. 66.V.5).

¹⁴⁸ General Assembly resolution 43/51, annex.

¹⁴⁹ General Assembly resolution 46/59, annex.

¹⁵⁰ See footnote 114 above.

¹⁵¹ See footnote 134 above.

ed to resort to arbitration. The more useful dispute settlement mechanisms are those commonly referred to by lawyers as "arbitration clauses", namely the settlement clauses attached to specific international treaties (including an increasing number of multilateral treaties), which provide means of settlement for any dispute arising out of the application or interpretation of the treaty. These are precisely the kind of settlement mechanisms which the General Assembly in the Manila Declaration¹⁵² encouraged States to adopt and which are sometimes, and should be more frequently, embodied in the draft codification conventions that it is the Commission's task to recommend, through its parent body, to the community of States.

3. PART 3 OF THE DRAFT ON STATE RESPONSIBILITY AS A MATTER OF PROGRESSIVE DEVELOPMENT OF THE LAW OF DISPUTE SETTLEMENT

96. Coming now to the reluctance of States as regards this specific topic (see para. 88 (*f*) above), the inclusion of dispute settlement provisions is considered to be particularly appropriate for the draft on State responsibility. Unlike most codification conventions, the draft is already to include a number of important articles on other than substantive matters, for instance, the articles presented at the forty-fourth session¹⁵³ on the conditions and limitations on lawful resort to countermeasures as a reaction against an internationally wrongful act and the uncooperative attitude of the wrongdoing State, which are presently before the Drafting Committee. *Mutatis mutandis*, these provisions are instrumental in nature and perform the same kind of function as is intended for the rules providing for dispute settlement procedures in part 3. Thus, the presence in the draft of a part 3 including specific dispute settlement articles seems to be perfectly consistent with the nature of some of the key provisions of part 2 of the draft articles.

97. It is true, of course, as noted *inter plurimos* by Mr. Riphagen, that the inclusion of dispute settlement provisions in a draft concerning the consequences of the infringement of international obligations would cover a wide range of matters by providing that States would be duty-bound to submit to binding third-party procedures, the initiation of which would depend on a unilateral decision of either party. This is not, however, as insurmountable an obstacle as it may seem at first sight. Two main considerations should be kept in mind.

98. First of all, the disputes that would be covered by this procedure are as follows:

(a) Legal disputes involving the interpretation or application of any of the articles on State responsibility: a very broad but not unlimited area;

(b) Legal disputes, as described in (a) above, arising as a consequence of countermeasures or counter-reprisals resorted to by parties in an international responsibility relationship.

¹⁵² See footnote 144 above.

¹⁵³ Articles 11-14. For texts, see *Yearbook* . . . 1992, vol. II (Part Two), pp. 25 et seq., footnotes 56, 61, 67 and 69.

99. Secondly, and most important, the draft on State responsibility already implies—since the draft articles proposed at the forty-fourth session have been referred to the Drafting Committee¹⁵⁴—that any State as a prospective wrongdoer may be subject to unilateral initiatives which are certainly less palatable than the unilateral initiation of a third-party conciliation, arbitration or judicial settlement procedure. Even assuming that States, in the midst of the United Nations Decade of International Law, would view third-party settlement obligations as an intolerable burden, the Commission should at least invite them to consider further whether allowing a general prerogative (*faculté*) of resort to countermeasures without an adequate check would not be even more intolerable.

100. There is yet another general reason for the Commission to include more advanced dispute settlement provisions in the draft on State responsibility. The Commission's hesitation in proposing more decisive steps towards a third-party dispute settlement system, irrespective of the possible reluctance of States to accept it, is no doubt understandable in view of the broad scope of the draft. However, this very factor should serve as an encouragement to the Commission seriously to consider including such a system in the current draft, for two good reasons. First of all, the Commission would thus bring an essential *correctif* to the most unpalatable features of countermeasures, that being the only equitable and effective way to ensure that an injured State, however powerful, complies with all the conditions and limitations which the draft places on its *faculté* of unilateral reaction. Secondly, the inclusion of an effective dispute settlement system in the draft would necessarily enhance the observance of any rule of international law, including any past or future codification convention.

101. Experience shows that the documents on dispute settlement most commonly referred to, such as Chapter VI of the Charter of the United Nations, the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations¹⁵⁵ or even the Manila Declaration,¹⁵⁶ as well as the Charter of OAS,¹⁵⁷ the Pact of Bogotá¹⁵⁸ and the Charter of the Organization of African Unity and the Protocol thereto,¹⁵⁹ are too vague to provide any effective protection against infringements of international obligations. There is therefore not much point in undertaking any further efforts towards progressive development of dispute settlement procedures of a general character in the light of the numerous ineffective general dispute settlement treaties. It would be more appropriate in the context of the draft on State responsibility to engage in a substantial progressive development of dispute settlement procedures by providing for a more effective arbitration clause. It would indeed be very difficult to imagine a better opportunity to take a step forward in the form of a positive development in the

¹⁵⁴ *Ibid.*, para. 119.

¹⁵⁵ See footnote 138 above.

¹⁵⁶ See footnote 144 above.

¹⁵⁷ Signed at Bogotá 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).

¹⁵⁸ American Treaty on Pacific Settlement (*ibid.*, vol. 30, p. 55).

¹⁵⁹ *Ibid.*, vol. 479, p. 39.

law of dispute settlement than the occasion offered by the adoption of a draft convention which, while regulating the present system of unilateral reaction, and thus expressly sanctioning a practice of customary law involving many negative aspects, would at the same time set in place adequate controls over the *faculté* of resort to countermeasures—a *faculté*, which would otherwise inevitably expose the weak and vulnerable, namely the great majority of the members of the inter-State system, to the risks deriving from the factual inequalities of States.

102. In short, the draft on State responsibility provides an excellent opportunity for the United Nations to make a significant contribution to the development of the law of dispute settlement. It is submitted, with respect, that it would be a grave error for the Commission to miss such an opportunity. It is further hoped that an improvement in the area of dispute settlement procedures will considerably enhance the prospects for real progress in terms of the implementation of article 19 of part 1 of the draft articles.

103. The inclination therefore is to believe that the Commission should reverse its tendency to interpret its competence narrowly with respect to dispute settlement procedures and to overemphasize the reluctance on the part of Governments to accept more advanced dispute settlement commitments. It is opined that the Commission should consider the matter in as innovative a spirit as possible and address it with full confidence in its technical skills and expertise. In this connection, the attention of Governments should be drawn to the advantages a well-conceived set of draft articles for part 3 would bring to the development of the rule of law in the inter-State system.

104. Of course, the effort of the Commission with regard to dispute settlement must go beyond its codification function, which is generally understood to consist in

... the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.¹⁶⁰

The task to be performed is instead one of progressive development, as envisaged in Article 13, paragraph 1 (a), of the Charter and in articles 1 and 15 to 24 of the Commission's statute. In accordance with the relevant provision of the statute, this task entails

... the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.¹⁶¹

Certainly, progressive development, originally distinguished from strict codification in the statute (and in the *travaux préparatoires*), was rightly considered by the Commission to be just one of the two inseparable aspects of codification in a broad sense. But the "early abandonment"¹⁶² of the distinction and the notion that the two aspects of the Commission's task are merged, so to speak, in the concept of codification *lato sensu* do not mean the Commission's role in the area of progressive development is diminished. On the contrary, this role is far more important than the mere "formulation and systematization" of existing rules.¹⁶³ The "early abandonment" of the

distinction between the two functions was merely prompted by the fact that, in many areas, it is difficult—and furthermore not essential—to distinguish between these two aspects of the Commission's work. Moreover, while certain areas call for only strict codification in a narrow sense, that is to say enhancing the certainty of the law by detailing it and writing it down, other areas of international relations call for the drafting of new rules by way of progressive development. It is clear that dispute settlement is precisely one of the latter areas in which it is imperative for the Commission to carry out that creative work with the necessary determination.¹⁶⁴

105. In submitting to the General Assembly the result of its effort, the Commission should not hesitate to call the attention of Member States to the indisputable fact that

The failure of the international community to develop a third-party law-making [i.e., for our purposes, adjudication] comparable to that of the national community may well prove to be the fatal error of our civilization.¹⁶⁵

The proposals contained here are far less ambitious and do not even attempt to fill such a gap. They do not suggest the establishment of machinery for the creation of new law. They only advocate the establishment of the machinery that is strictly essential to correct those aspects of the existing system of unilateral countermeasures that cause the greatest concern, simply by applying existing law. International lawyers, in particular, should play a more active role in promoting such a development. They cannot escape that responsibility by resorting to the outdated argument that Governments will not accept more adequate settlement commitments. Let Governments take responsibility for accepting or rejecting them.¹⁶⁶

"codification [in a narrow sense], is, or should be a *scientific* task . . . of ascertaining and declaring the law which already exists, and which is binding on States whether they approve its content in every detail or not. It is true that it must necessarily involve the correction of the small inconsistencies in the existing rules . . . and the filling of lacunae . . . , and the distinction between legislation and codification [in a narrow sense] can, therefore, not be a strictly scientific one. Nonetheless the distinction is correct in a broad sense; the main purpose of codification [in a narrow sense] is not to find rules which are acceptable to the parties, which is inevitably the first consideration in a convention, but to state what the rules already are".

The most significant part of the Commission's task is therefore progressive development. The pre-eminence of the development of the law seems to be recognized also by Jennings. "The progressive development of international law and its codification", *British Year Book of International Law*, vol. 24.

¹⁶⁴ On the role of the Commission with regard to progressive development, especially from the viewpoint of the exigencies of the "third world", see "The International Law Commission: The Need for a New Direction" (United Nations Institute for Training and Research, *Policy and Efficacy Studies No. 1*, 1981); and Franck and El Baradei, in "The codification and progressive development of international law: a UNITAR study on the role and use of the ILC", *AJIL*, vol. 76 (1982).

¹⁶⁵ Franck (see note 136 above). The author's reflections on the bloodshed caused by the wars of the twentieth century apply with equal force to the negative consequences of the practice of any kind of unilateral coercive measures.

¹⁶⁶ It is perhaps appropriate to recall that the most vigorous (and justified) criticisms of countermeasures referred to in the preceding sections of the present report came from those who participated in the debate in the Sixth Committee at the forty-seventh session of the General Assembly in 1992. Their voice is particularly authoritative, first because of their political role as Government representatives and secondly on account of their expertise in international law. Those representatives expressed the views of Governments, the very same entities that drafted and adopted the Manila Declaration, and to whom it is addressed. It must be stressed that the negative effects of countermeasures that they denounced are additional arguments in favour of implementing the Manila Declaration.

¹⁶⁰ Article 15 of the statute of the International Law Commission.

¹⁶¹ *Ibid.*

¹⁶² Sinclair, *The International Law Commission: Hersch Lauterpacht Memorial Lectures*, p. 46 and *passim*.

¹⁶³ It might be possible to agree with Briery's view, as quoted by Briggs (*The International Law Commission*, pp. 131-132), that

F. Draft articles and annex

106. The Special Rapporteur hereby proposes the following draft articles of part 3 and of the annex thereto:

PART 3

Article 1. Conciliation

If a dispute, which has arisen following the adoption by the allegedly injured State of any countermeasures against the alleged lawbreaking State, has not been settled by one of the means referred to in article 12, paragraph 1 (a), or has not been submitted to a binding third-party settlement procedure within [four] [six] months from the date when the measures have been put into effect, either party [to the dispute] is entitled to submit it to a conciliation commission in conformity with the procedure indicated in the annex to the present articles.

Article 2. Task of the Conciliation Commission

1. In performing the task of bringing the parties to an agreed settlement, the Conciliation Commission shall:

(a) examine any question of fact or law which may be relevant for the settlement of the dispute under any part of the present articles;

(b) where appropriate, order, with binding effect:

(i) the cessation of any measures taken by either party against the other;

(ii) any provisional measures of protection it deems necessary;

(c) resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

2. Failing conciliation of the dispute, the Commission shall submit to the parties a report containing its evaluation of the dispute and its settlement recommendations.

Article 3. Arbitration

Failing the establishment of the Conciliation Commission provided for in article 1 or failing an agreed settlement within six months following the report of the Conciliation Commission, either party is entitled to submit the dispute for decision, without special agreement, to an arbitral tribunal to be constituted in conformity with the provisions of the annex to the present articles.

Article 4. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be of relevance under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the annex to the present articles and shall submit its decision to the parties within [six] [ten] [twelve] months from the date of [completion of the

parties' written and oral pleadings and submissions] [its appointment].

2. The Arbitral Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

Article 5. Judicial settlement

The dispute may be submitted to the International Court of Justice for decision:

(a) by either party:

(i) in case of failure for whatever reason to set up the Arbitral Tribunal provided for in article 4, if the dispute is not settled by negotiation within six months of such failure;

(ii) in case of failure of the said Arbitral Tribunal to issue an award within the time-limit set forth in article 4;

(b) by the party against which any measures have been taken in violation of an arbitral decision.

Article 6. Excès de pouvoir or violation of fundamental principles of arbitral procedure

Either party is entitled to submit to the International Court of Justice any decision of the Arbitral Tribunal tainted with *excès de pouvoir* or departing from fundamental principles of arbitral procedure.

Annex

*Article 1. Composition of the Conciliation Commission*¹⁶⁷

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective

¹⁶⁷ The provisions of the draft annex proposed by Mr. Riphagen corresponding to articles 1 and 2 above read as follows:

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

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

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

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

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

nationals. The three other commissioners shall be appointed by agreement from among the nationals of third States. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

If the appointment of the commissioners to be designated jointly is not made within the period for making the necessary appointments, the appointment shall be entrusted to a third State chosen by agreement between the parties, or on request of the parties, to the President of the General Assembly of the United Nations, or, if the latter is not in session, to the last President.

If no agreement is reached on either of these procedures, each party shall designate a different State, and the appointment shall be made in concert by the States thus chosen.

If, within a period of three months, the two States have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

In the absence of agreement to the contrary between the parties, the Commission shall meet at the seat of the United Nations or at some other place selected by its President.

The Conciliation Commission may in all circumstances request the Secretary-General of the United Nations to afford it his assistance.

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

"The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties to the dispute shall be appointed within 60 days following the date on which the Secretary-General receives the request.

"The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

"If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

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

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

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

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to inquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of the Hague Convention for the Pacific Settlement of International Disputes of 1907.

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all members are present.

Article 2. Task of the Conciliation Commission

1. The tasks of the Conciliation Commission shall be to elucidate the question in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of the proceedings, the Commission shall draw up a *procès-verbal* stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the *procès-verbal* of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.

4. The Commission's *procès-verbal* shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

Article 3. Composition of the Arbitral Tribunal

1. The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member,

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

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

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

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

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

who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third States. They must be of different nationalities and must not be habitually resident in the territory nor in the service of the parties.

2. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third State, chosen by agreement between the parties, shall be requested to make the necessary appointments.

3. If no agreement is reached on this point, each party shall designate a different State, and the appointments shall be made in concert by the States thus chosen.

4. If, within a period of three months, the two States so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a national of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

5. Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

6. The parties shall draw up a special agreement determining the subject of the dispute and the details of the procedure.

7. In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of the Hague Convention of 1907 for the Pacific Settlement of International Disputes shall apply so far as is necessary.

8. Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by either party.

9. If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply, subject to the present articles, the rules in regard to the substance of the dispute enumerated in article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.

107. The content of the articles and the annex are explained in paragraphs 62 to 85 above.

108. Further articles may be required to complete part 3 of the draft in order to deal with whatever procedures may be contemplated with respect to the instrumental (procedural) consequences of those internationally wrongful acts qualified as "crimes" under article 19 of part 1 as adopted on first reading.

CHAPTER II

The consequences of so-called international crimes of States (article 19 of part 1 of the draft articles)

PRELIMINARY REMARKS

109. While recognizing that the consequences of the wrongful acts qualified as crimes of States under article 19 of part 1 of the draft articles¹⁶⁸ are no longer the *terra incognita* they certainly were at the outset, it is still not possible to reach any conclusions on any of the difficult aspects of the matter. This applies to the determination both of the existing legal situation and of the possible lines of progressive development of the law. The best service that can be rendered to the Commission, for the time being, is to try to identify and explore issues for further discussion. Only on the basis of the guidance offered by an adequate and significant debate in the Commission and in the Sixth Committee will it be possible, after further thought, to submit for the next session tentative suggestions and, possibly, draft provisions.

110. Reference is made, of course, to the determination of the consequences, *de lege lata* or *de lege ferenda*, of the wrongful acts in question, for which a merely terminological distinction has been made since 1976 between international crimes and other internationally unlawful acts (delicts). Although the specific matter of the distinct consequences of "crimes" has been addressed in the Commission and in the Sixth Committee not infrequently since 1976, notably within the framework of the debate on Mr. Riphagen's draft articles 14 and 15 of part 2 and draft article 4 (b) of part 3, it was not dealt with conclusively by either body. The Commission in particular has not gone beyond the mere referral of those draft articles to the Drafting Committee, which did not act upon them. Despite the valuable proposals and debates of 1985 and 1986, the legal consequences of international "crimes" of States have been dealt with mainly in the remarkable, albeit not very conspicuous, literature on the subject. When article 19 of part 1 was adopted those consequences were deliberately, though perhaps not prudently, left aside, to be taken up later.

¹⁶⁸ See footnote 1 above.

111. In view of its indicated purpose, the present chapter first contains, in section A, a review of the opinions which have been expressed so far on the consequences of international "crimes" of States in the Commission, in the Sixth Committee and in the literature. Section B is devoted to a tentative identification of the main substantive and procedural issues which confront the Commission in determining the consequences of such wrongful acts from the viewpoint of both *lex lata* and *lex ferenda*. By way of conclusion, section C contains equally tentative considerations on the merits of the theoretically conceivable alternative solutions to the issues identified which appear to be most important for the Commission to consider. It goes without saying that even the list of issues is anything but exhaustive. Any additions that members of the Commission or of the Sixth Committee may wish to make in order to provide further guidance would be most welcome.

A. Problems raised by the "special regime" of crimes in the Commission's work on State responsibility, as identified by the Commission, by the Sixth Committee and in the literature

1. INTRODUCTION

112. At its twenty-eighth session in 1976, the Commission, welcoming the proposals of the then Special Rapporteur, Mr. Roberto Ago, adopted on first reading a provision—article 19 of part 1¹⁶⁹ of the draft—intended to single out from among internationally wrongful acts a "special" class of breaches referred to as "international crimes".

113. The reasons and practical considerations that led the Special Rapporteur and the Commission to draw a distinction between "crimes" and simple "delicts" are amply illustrated in the documents relating to the work of that session of the Commission, and the reader is therefore simply referred to them.¹⁷⁰ In any event, it should be pointed out that what the Commission meant by "crimes", as the term is used in article 19, were those acts which the "international community as a whole" considers to be serious breaches of obligations essential for the protection of fundamental interests of that community. The Commission went on to provide a non-exhaustive list of examples of wrongful acts which, under international law as it stood in 1976, would constitute "crimes" within the meaning indicated: aggression, as a serious breach of an obligation of essential importance for the maintenance of international peace and security (para. 3 (a)); the establishment or maintenance by force of colonial domination as a serious breach of an obligation of essential importance for safeguarding the right of self-determination of peoples (para. 3 (b)); slavery, genocide and apartheid, as serious breaches on a widespread scale of obligations of essential importance for safeguarding the human being (para. 3 (c)); and massive pollution of the atmosphere or

the seas, as a serious breach of an obligation of essential importance for the safeguarding and preservation of the human environment (para. 3 (d)).

114. As pointed out by the Commission from the outset, the distinction between "delicts" and "crimes" would have not only a descriptive but also, and especially, a normative value. This distinction, in other words, was included in the draft because it involved a differentiation of "regimes of responsibility". Responsibility for "crimes" would entail legal consequences different (at least in part) from, and more severe than, those entailed by responsibility for "delicts".¹⁷¹

115. In the pages which follow an attempt will be made to analyse: (a) how this "special" regime of "responsibility for crimes" was gradually constructed by the Commission during the course of its work; (b) the reactions of the Sixth Committee of the General Assembly to the views put forward in the Commission; and (c) the views of scholars concerning the content to be given to any provisions of the draft relating to the consequences of international crimes of States.

2. THE "SPECIAL" CONSEQUENCES OF CRIMES IN THE WORK OF THE COMMISSION

(a) *The first references to the question*

116. The idea of differentiating between regimes of responsibility according to the type of wrongful act committed came up very early in the Commission's work. Its chief protagonist was Mr. Roberto Ago, who, as far back as the debates at the twenty-first session in 1969, insisted on the need to take into account the difference between two classes of wrongful acts. In a first class he included less serious breaches, which would give rise primarily to the obligation of the responsible State to make reparation *lato sensu*, and only in certain cases—such as the failure to perform that obligation—to the applicability of "sanctions" against that State. In the second class he placed the more serious breaches, with regard to which the threat of "sanctions" would be admissible from the outset—a threat, however, which in such cases would be independent of the outcome of the contentious procedure on reparation.¹⁷² The proposal was favourably received by the Commission and a number of members even contributed to its more precise formulation. Mr. Ushakov, for example, in addition to warning that the admissibility of "sanctions" of a military nature could be spoken of only in the case of wrongful acts that violated or threatened international peace and security, stressed above all, the aspect of the *faculté* of reaction to the wrongful act, noting that in the case of violations of fundamental interests of the international community, such *faculté* would also concern subjects other than the "principal victim" of the wrongful act.¹⁷³ With regard to this latter point, other members of the Commission took a positive attitude, observing, however, that States "not especially affected" by the violation

¹⁶⁹ See *Yearbook . . . 1976*, vol. II (Part Two), p. 95.

¹⁷⁰ See Mr. Ago's fifth report (*ibid.*, (Part One), p. 3, document A/CN.4/291 and Add.1-2, paras. 79-154), and the Commission's commentary to article 19 (*ibid.*, (Part Two), pp. 96-122). For a very valuable analysis of the notion of crime and its consequences as discussed and developed by the Commission, see Spinedi, "International crimes of State: The legislative history".

¹⁷¹ See, in this connection, the Commission's commentary to article 19 (*Yearbook . . . 1976*, vol. II (Part Two), pp. 116-118), especially paragraphs 51-54.

¹⁷² *Yearbook . . . 1969*, vol. I, 1036th meeting, paras. 15-26, and *Yearbook . . . 1970*, vol. I, 1074th meeting.

¹⁷³ *Yearbook . . . 1969*, vol. I, 1012th meeting.

would be entitled to react not *ut singuli* but *ut universi*, or in other words, in implementation of a decision taken collectively by authorities [*sic*] representing "the international community as a whole".¹⁷⁴

117. As may be seen, right from the start, two lines began to take shape along which the theme of responsibility for particularly serious wrongful acts was to develop: (a) the "substance" of the consequences, which would be more severe than for other breaches; and (b) the kind of reaction, which, in the case of wrongful acts affecting fundamental interests of the international community, might be described as, "diffuse", or downright universal.

118. On the basis of the positive responses obtained in the preliminary debate, the Special Rapporteur formally proposed to set apart in the draft articles a category of more serious wrongful acts—which could be qualified as "crimes"—to which a "special" regime of responsibility would attach.¹⁷⁵ This proposal met with the approval of the vast majority of Commission members;¹⁷⁶ so much so that in 1976, following the discussion of Mr. Ago's fifth report (devoted precisely to the differentiation between wrongful acts according to the subject matter of the obligation breached and the notion of "international crime" of the State),¹⁷⁷ draft article 19 was adopted on first reading.¹⁷⁸

(b) *The commentary to article 19*

119. The Commission's commentary to article 19,¹⁷⁹ in line with Mr. Ago's fifth report, deals primarily with the grounds for the division of internationally wrongful acts into two distinct conceptual categories ("delicts" and "crimes"), leaving the problem of the special consequences of the latter to part 2 of the draft. However, traces can also be found in that commentary of at least three general indications regarding the "special" regime of responsibility which characterizes "crimes" according to the Commission:

(a) First of all, it is affirmed that the distinction between different regimes of responsibility is one that is currently in force in general international law. The effort to be made by the Commission must therefore consist in the

codification of *lex lata* rather than in an elaboration *de lege ferenda*;¹⁸⁰

(b) In the second place, even though several different hypotheses—such as aggression, colonial domination or massive pollution—have been included in the same provision by way of example, that does not mean that they all entail the same consequences: rather, the regime of "aggravated" responsibility would vary according to the crime;¹⁸¹

(c) Thirdly, the Commission forewarned that the codification of the regime of responsibility could not in any way derogate from the provisions of the Charter concerning

... certain acts which it particularly sets out to prevent and punish. (...) In so far as certain provisions of the Charter are now an integral part of general international law on the subject with which the Commission is concerned, they will be logically and faithfully reflected in its work. Otherwise, precisely because of their "special" nature and also because of the provisions of Article 103, the provisions of the Charter would always prevail over those of a general codification convention.¹⁸²

(c) *The debate on draft article 19*

120. Further elements concerning the substance of the "special" consequences of crimes can be inferred from the debate that took place among the members of the Commission on Mr. Ago's fifth report.

121. For example, the Special Rapporteur stated that, in his opinion, in the case of a crime, the State which was the victim of the breach might, in addition to demanding reparation *lato sensu*, also apply "sanctions" against the wrongdoing State. This would imply resorting to reprisals not only functionally related to the performance of the primary obligation breached or to reparation, but also to a merely "afflictive aim", although the latter might involve the use of force only in specific cases.¹⁸³ Other members of the Commission, too, referred to the possibility of applying "sanctions" (in addition, obviously, to claiming reparation) in the case of crimes, though they did not clarify what exactly they meant by "sanctions".¹⁸⁴ In this connection, the sole point on which there was broad agreement seems to have been that only in the case of aggression, and hence by way of self-defence, would unilaterally decided armed measures be deemed admissible.¹⁸⁵ It must be borne in mind, however, that even earlier, in the

¹⁷⁴ Mr. Sette Câmara (*Yearbook* . . . 1970, 1075th meeting, vol. I); Mr. Yasseen (*ibid.*, 1076th meeting); Mr. Ustor (*ibid.*, 1079th meeting); Mr. Ago (*ibid.*, 1074th meeting). See also *Yearbook* . . . 1970, vol. II, p. 177, document A/CN.4/233, paras. 22-25.

¹⁷⁵ *Yearbook* . . . 1973, vol. II, p. 172, para. 51.

¹⁷⁶ The only voice decidedly against was that of Mr. Reuter (*ibid.*, vol. I, 1202nd meeting, paras. 34-37).

¹⁷⁷ *Yearbook* . . . 1976, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2, especially paras. 79-155.

¹⁷⁸ *ibid.*, vol. II (Part Two), pp. 95-122. Reservations concerning the article were expressed only by Mr. Kearney, Mr. Tsuruoka and Mr. Reuter (*Yearbook* . . . 1976, vol. I, 1362nd meeting, paras. 23-24 and 1363rd meeting, paras. 33-37; 1375th meeting, paras. 1-4, and 1402nd meeting, paras. 61-64, respectively). However, as Spinedi observes, "They did not dispute the fact that contemporary international law attached, to certain particularly serious wrongful acts, different consequences from those arising from all other wrongful acts. They only doubted the usefulness of dealing with these special responsibility rules in the draft articles the Commission was engaged in drafting". (*loc. cit.*, p. 22).

¹⁷⁹ *Yearbook* . . . 1976, vol. II (Part Two), pp. 96-122.

¹⁸⁰ *ibid.*, para. (54) of the commentary on article 19.

¹⁸¹ *ibid.*, para. (53). In this connection it should be noted, however, that the Commission saw fit to refine the Special Rapporteur's proposal, which made a distinction between breaches of obligations essential to the maintenance of international peace and security and other crimes, with only the former entailing "extreme measures of coercion and sanctions" (*ibid.*, vol. II (Part One) (see footnote 177 above), para. 150).

¹⁸² *ibid.*, vol. II (Part Two), commentary to article 19, para. (55).

¹⁸³ *ibid.*, (Part One) (see footnote 170 above), paras. 80 et seq. In this connection, however, see the position expressed by Mr. Ago in his third report (*Yearbook* . . . 1971, vol. II (Part One), p. 199 et seq., document A/CN.4/246 and Add.1-3), paras. 32 et seq.

¹⁸⁴ Mr. Bedjaoui (*Yearbook* . . . 1976, vol. I, 1362nd meeting); Mr. Yasseen (*ibid.*, 1372nd meeting); Mr. Hambro (*ibid.*); Mr. Sette Câmara (*ibid.*, 1373rd meeting); Mr. Martínez Moreno (*ibid.*); Mr. Ramangasoavina (*ibid.*, 1374th meeting); Mr. Bilge (*ibid.*, 1376th meeting); and Mr. Castañeda (*ibid.*, 1402nd meeting).

¹⁸⁵ Significant remarks were made on this point by Mr. Kearney (*ibid.*, 1374th meeting) and Mr. Castañeda (*ibid.*, 1402nd meeting).

commentary to article 1 of part 1, the Commission as a whole had expressed itself as follows on the meaning to be attributed to the term "sanctions":

The term "sanction" is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation.¹⁸⁶

122. As to the extent of the right to react (with measures not involving armed force), some members viewed it as broad enough, in the case of crimes, to permit the adoption of measures by each and every State, even in the absence of any decision by an international body,¹⁸⁷ while others maintained that collective or generalized measures, even not involving the use of armed force, were allowable only if previously authorized and supervised by a competent international organ, and more specifically, by the Security Council.¹⁸⁸ It should also be pointed out that many members of the Commission did not hesitate to consider some of the measures provided by the Charter of the United Nations as being precisely among the most typical "widespread and multilateral" sanctions that might be imposed in the case of crimes: either "social" measures like expulsion of Members of the United Nations or suspension of their rights and privileges, or, in the case of aggression, measures under Chapter VII.¹⁸⁹

(d) *The commentary to articles 30 and 34*

123. On the two main aspects of the "special" regime of "responsibility for crimes" (greater severity of consequences and diffusion of the *faculté* of reaction), the Commission also expressed itself on the occasion of the adoption on first reading of draft articles 30 and 34 respectively, concerning "countermeasures" and "self-defence" as circumstances excluding wrongfulness.

124. In the commentary to article 30, it is affirmed, for example, that countermeasures may be meant not only to "secure performance", but also to "inflict punishment".¹⁹⁰ In response to certain wrongful acts or in the presence of certain circumstances—which the commentary, however, does not specify—the countermeasure would not merely have the function of obtaining cessation or reparation *lato sensu*. It might also have an independent purpose and might therefore be adopted at the same time that claims

¹⁸⁶ *Yearbook* . . . 1973, vol. II, p. 175, para. (5) of the commentary to article 1.

¹⁸⁷ Mr. Ushakov (*Yearbook* . . . 1969, vol. I, 1012th meeting, para. 38); Mr. Ago (*Yearbook* . . . 1976, vol. I, 1363rd meeting); Mr. Quentin-Baxter (*ibid.*, 1375th meeting); Mr. Bedjaoui (*ibid.*); and Mr. Castañeda (*ibid.*, 1402nd meeting).

¹⁸⁸ Thus, explicitly, Mr. Sette Câmara (*Yearbook* . . . 1976, vol. I, 1373rd meeting), and, implicitly, Mr. Kearney, who contrasted such unilateral action with the system established in the Charter to safeguard international peace and security (*ibid.*, 1374th meeting).

¹⁸⁹ Mr. Ago (*ibid.*, 1371st, 1372nd and 1376th meetings); Mr. Yasseen (*ibid.*, 1372nd meeting); Mr. Sette Câmara (*ibid.*, 1373rd meeting); Mr. Vallat (*ibid.*); Mr. Martínez Moreno (*ibid.*); Mr. Raman-gasoavina (1374th meeting); Mr. Kearney (*ibid.*); Mr. Tsuruoka (*ibid.*, 1375th meeting); Mr. Rossides (*ibid.*); Mr. Ustor (*ibid.*); Mr. El-Erian (*ibid.*, 1376th meeting); and Mr. Bilge (*ibid.*). Only Mr. Reuter and Mr. Castañeda expressed doubts as to the correctness of considering measures under Chapter VII as forms of international responsibility (*ibid.*, 1402nd meeting).

¹⁹⁰ *Yearbook* . . . 1979, vol. II (Part Two), p. 116, para. (3) of the commentary.

were put forward for cessation or reparation, or even after the close of the contentious proceedings on reparation. Concerning the substance of the countermeasures, the point was made that, outside the case of self-defence, no wrongful act could warrant resort to unilateral measures involving the use of armed force.

125. In paragraph (22) of the same commentary it is further pointed out that by virtue of a decision of a competent international body condemning a serious breach of a fundamental obligation, resort to countermeasures would be possible also on the part of "non-directly" injured States. There could also be a derogation from such general rules or principles as prior demand for reparation, proportionality and prohibition of armed reprisals. Nothing is said, however, of the possibility of countermeasures adopted by "indirectly" injured States *ut singuli*.

126. With regard to draft article 34, some members of the Commission observed that resort to measures involving armed force by way of self-defence might be justified not only in the event of an armed attack, but also in response to other wrongful acts consisting in breaches less serious than the unlawful use of force.¹⁹¹ As has been pointed out,¹⁹² this would suggest that the idea was largely shared within the Commission that a certain type of wrongful act (aggression and, according to the less "restrictive" opinions, any serious breach of the prohibition against the use of force) might entail a consequence (resort to armed force by way of self-defence) distinct from, and graver than the consequences common to other internationally wrongful acts.

(e) *Recapitulation*

127. The inferences that may be drawn from the work of the Commission on part 1 of the draft may be summarized as follows:

(a) According to the Commission, general international law already provides for a different regime of responsibility for the kind of wrongful acts indicated in draft article 19;

(b) Such a regime is not always the same, but varies according to the crime, though it is distinguished from the regime of delicts by certain general characteristics;

(c) Among crimes, only armed aggression (or, according to some, serious violation of the prohibition of the threat or use of force) justifies unilateral armed reactions by way of individual or collective self-defence, as provided for under general international law and recognized in Article 51 of the Charter of the United Nations;

(d) A crime justifies the adoption of countermeasures (even for purposes other than purely securing execution or reparation, though this is not explicitly indicated as a distinctive feature of "responsibility for crimes" alone) not only on the part of the State, if any, primarily injured by the breach, but also of any other State in any way injured by the wrongful act;

¹⁹¹ Mr. Reuter (*Yearbook* . . . 1980, vol. I, 1620th meeting); Mr. Díaz González (1627th meeting, pp. 220-221); Mr. Pinto (*ibid.*); and Mr. Tabibi (*ibid.*, 1628th meeting).

¹⁹² Spinedi, *loc. cit.*, pp. 42 et seq., especially p. 43.

(e) While there is no unanimity concerning the possibility for “non-directly” injured States to react *ut singuli* to a crime by means of unilateral measures, there does seem to be agreement within the Commission that the reaction of such States may be very severe (in derogation, for example, from the principles of prior demand for reparation, proportionality and the prohibition on armed countermeasures) if it follows a decision of a collective body competent to deal with the situation created by the crime;

(f) The measures originating in a “collective source” that might be adopted as sanctions against a crime, as distinct from a delict, include, according to the majority of the Commission, the suspension of membership in the United Nations or expulsion of Members from the Organization under Articles 5 and 6 of the Charter, as well as such measures as the Security Council may determine under Chapter VII.

(f) *The 1984 and 1985 proposals*

128. In his reports on part 2 of the draft, Mr. Riphagen expresses views which, in many respects, are in line with the conclusions just summarized, especially for the proposition that

... the international crimes listed (as possible examples) in paragraph 3 of the draft article [19] cannot each entail the same new legal relationships.¹⁹³

While recognizing that different crimes have different consequences, Mr. Riphagen still tries to ascertain the “elements of special legal consequences common to all international crimes”¹⁹⁴ and generally distinguish the regime of crimes from that of delicts.

129. As regards the obligations of the wrongdoing State (which may roughly be identified with the “substantive” consequences, to use the current terminology), Mr. Riphagen does not appear to consider the regime of “responsibility for crimes” as differing from that of delicts. The obligations to put an end to the breach, to provide *restitutio in integrum* or compensation and to provide appropriate guarantees against repetition fall, according to Riphagen, on the author State, as a result of the commission of any internationally wrongful act, whether “delict” or “crime”.¹⁹⁵ Other members of the Commission, moreover, seem to have been in agreement with this view.¹⁹⁶

130. As regards the “instrumental” consequences for the “directly” injured State, however, only in the case of aggression do they differ from those generally stemming from “ordinary” wrongful acts, according to Mr. Riphagen. In that case, in addition to the fact that resort to armed force in self-defence is justifiable, the countermeasures that might be adopted by the injured

State are in fact limited only by the principle of proportionality and respect for *jus cogens*, “subject to the application of the United Nations machinery for the maintenance of international peace and security”,¹⁹⁷ of course. In the case of crimes other than aggression, however, the regime of countermeasures that might be adopted by the injured State does not differ, according to Mr. Riphagen, from the regime of any other internationally wrongful act.¹⁹⁸ As for the other members of the Commission, they agreed that an armed reaction by the “directly” injured State was admissible only by way of self-defence in the event of aggression.¹⁹⁹ They do not seem, however, to have taken any kind of stand on the difference between the regime of countermeasures available to such a State in the case of other crimes and the regime of countermeasures in the case of delicts.

131. Particular attention was paid by Mr. Riphagen to the features of “responsibility for crimes” from the standpoint of the “non-directly” injured States. In keeping with the position taken by the Commission during work on part 1 of the draft, Mr. Riphagen affirms in particular that every crime gives rise to responsibility *erga omnes*, that is to say, with respect to all States other than the author of the wrongful act.²⁰⁰ However, the position of this plurality of States in the responsibility relationship would not be the same as that of a State which is the “principal victim” of a crime: according to Mr. Riphagen, the legal situation of “non-directly” injured States would include (a) the right to demand cessation, reparation and guarantees against repetition; (b) the obligation not to help the author of the breach to maintain the situation created by the crime; (c) the right to engage in behaviour, *vis-à-vis* the author of the crime, which would otherwise be prohibited or in breach of the principle of non-intervention in internal affairs, it being understood, however, that this right would not be unconditional and would only last until the competent United Nations organ takes a decision regarding sanctions against the crime; and (d) the obligation to carry out the measures decided by United Nations bodies as sanctions against the crime, bodies being the competent “authority” for dealing with the consequences of a crime, even if it does not involve a threat to international peace or security.²⁰¹

132. The regime just described would undergo a change—in the direction of greater severity—in the presence of a crime of aggression. In this case, every State (other than the author of the wrongful act) has the same rights as the “principal victim” of the crime. In particular, force could be resorted to by way of individual or collective self-defence. What is more, the reference to the United Nations system would be more precise: every State would in fact be obliged to carry out such “sanc-

¹⁹³ Preliminary report (*Yearbook*... 1980, vol. II (Part One), p. 129, document A/CN.4/330), para. 98 *in fine*.

¹⁹⁴ Fourth report (*Yearbook*... 1983, vol. II (Part One), p. 11, document A/CN.4/366 and Add.1), para. 58.

¹⁹⁵ Preliminary report (*Yearbook*... 1980, vol. II (Part One) (see footnote 193 above)), paras. 30-40; and second report (*Yearbook*... 1981, vol. II (Part One), p. 79, document A/CN.4/344, paras. 99-104).

¹⁹⁶ As Spinedi notes, “in considering the special forms of responsibility for international crimes, [the members of the Commission] do not refer to the new obligations of the State author of the wrongful act” (*loc. cit.*, p. 93).

¹⁹⁷ Fourth report (*Yearbook*... 1983, vol. II (Part One) (see footnote 194 above)), para. 55.

¹⁹⁸ *Ibid.*, paras. 53-54.

¹⁹⁹ According to Spinedi, “this is apparent from the fact that it was only in connection with the consequences of aggression that ILC members discussed, in 1982 and 1983, if they had to deal with self-defence in the draft articles” (*loc. cit.*, p. 94, note 312).

²⁰⁰ Fourth report (*Yearbook*... 1983, vol. II (Part One) (see footnote 194 above)), para. 59.

²⁰¹ *Ibid.*

tions" as may be decided by the Security Council on the basis of Chapter VII of the Charter.²⁰²

133. It must be added, however, that the position of Mr. Riphagen on the legal status of the regime he describes, or of any other regime of "responsibility for crimes" differs considerably from that adopted by the Commission in its commentary to article 19. According to him, the regime described, except for the special consequences of aggression, would not correspond to the present state of international law (*lex lata*). Its adoption would be a matter of progressive development.²⁰³

134. Mr. Riphagen embodied his proposals in draft articles 5 (e), 14 and 15, presented to the Commission in 1984.²⁰⁴ Those provisions read as follows:

Article 5

For the purposes of the present articles, "injured State" means: [...]

(e) if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

Article 14

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every State:

(a) not to recognize as legal the situation created by such crime; and

(b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

(c) to join the other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present

article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

Article 15

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.²⁰⁵

(g) *The Commission's debate on the 1984 and 1985 proposals*

135. Although they were referred to the Drafting Committee, Mr. Riphagen's proposals had not been the subject of a particularly thorough debate. From the general tone of members' comments, it is apparent, in particular, that though those proposals may well have been considered a good starting point for the drafting of the regime of crimes, they were still in need of major modification and greater elaboration.²⁰⁶ Regarding some points, however, a few more specific indications can perhaps be deduced.

136. For example, an objection shared by a number of members was that Mr. Riphagen's proposal did not sufficiently differentiate between the position of "non-directly" injured States and that of the State that was the "principal victim" of the breach. If, in the case of a crime, every State automatically had the same rights as those enjoyed by a State "directly" injured by a mere delict (as art.14, para. 1, seems to imply), then, in the case of a crime, every State would be entitled not only to receive pecuniary compensation, but even to adopt the same countermeasures as the "directly" injured State. This, to a number of members, appeared pernicious as far as a just, peaceful and orderly conduct of international relations was concerned.²⁰⁷ To this objection, Mr. Riphagen replied that the "active" situation of a State "not directly" injured by a crime would depend on the type of injury actually sustained. For example, pecuniary compensation might be claimed only if the State in question had actually been materially damaged by the international crime.²⁰⁸ The same would apply to countermeasures, in the sense that a

State which is considered to be an injured State only by virtue of article 5, subparagraph (e), enjoys this status as a member of the international community as a whole and should exercise its new rights and

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ He had initially presented a very similar provision in draft article 6 as contained in his third report (*Yearbook . . . 1982*, vol. II (Part One), p. 48, document A/CN.4/354 and Add. 1-2, para. 150). The article, which appears on p. 48 of the report, read as follows:

"Article 6

"1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every State:

"(a) not to recognize as legal the situation created by such act; and

"(b) not to render aid or assistance to the author State in maintaining the situation created by such act; and

"(c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b).

"2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

"3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail."

²⁰⁵ *Yearbook . . . 1984*, vol. II (Part One), p. 1, document A/CN.4/380, sect. II.

²⁰⁶ See the statements made by Mr. Malek (*Yearbook . . . 1982*, vol. I, 1732nd meeting), Sir Ian Sinclair (ibid., 1733rd meeting); Mr. Ni (ibid.), Mr. Jagota (ibid.); Mr. Barboza (ibid.); Mr. Laclea Muñoz (ibid.); and Mr. Razafindralambo (ibid.). Mr. Riphagen had admitted, moreover, that it had not been his intention to include in his provisions an exhaustive list of the consequences of crimes, but only to furnish a basis for further drafting by the Commission. The "minimal" and "open" character of the regime outlined by Mr. Riphagen is clearly reflected in the text of draft article 14, paragraph 1, where it is provided that any further "special" consequence of a crime might in any event be established by the international community as a whole.

²⁰⁷ See in this connection the statements made by Sir Ian Sinclair (*Yearbook . . . 1984*, vol. I, 1865th meeting); Mr. Quentin-Baxter (ibid.); and Mr. McCaffrey (ibid., 1866th meeting).

²⁰⁸ Ibid., 1867th meeting.

perform its new obligations within the framework of the organized community of States.²⁰⁹

Therefore, in the absence of, and prior to, any collective decision taken “within the framework of the organized community of States”, a State injured only within the meaning of article 5, subparagraph (e), could resort *ut singuli*, according to Mr. Riphagen, solely to the measures of non-recognition and solidarity provided for in article 14, paragraph 2.²¹⁰

137. A further observation is in order here. Without any objections on the part of other members of the Commission and in fact in line with the opinion that had been expressed by some of them,²¹¹ Mr. Riphagen tended to eliminate from the concept of international responsibility, and especially from the aims legitimately pursuable through countermeasures, any punitive aspect, or, if preferred, any aspect other than those relating to the performance of the obligation breached and the reparation for damage.²¹² This would apply even in the case of crimes, at least as far as the countermeasures that might be adopted by States *ut singuli* were concerned.²¹³ However, Mr. Riphagen does not explicitly dismiss the punitive aspect in respect of possible “sanctions” imposed pursuant to collective decisions taken by competent international bodies.

138. A final remark may be made with regard to the role to be assigned to the procedures and measures already provided for in the Charter of the United Nations. The prevailing opinion among Commission members seems to favour explicitly including in the regime which is to govern crimes the application of those measures that are admissible or actually imposed under the Charter, based on the specific features of the case: essentially measures of self-defence in the case of aggression and the procedures for the maintenance of international peace and security provided for in the Charter.²¹⁴

²⁰⁹ Sixth report (*Yearbook* . . . 1985, vol. II (Part One)) see footnote 2 above, of the commentary to article 14, para. 10.

²¹⁰ *Ibid.*, paragraph (6). This position of Mr. Riphagen had already appeared quite clearly in his third report (*Yearbook* . . . 1982, vol. II (Part One)) (see footnote 204 above), paras. 95-96 and 136-143. In this connection, see also Spinedi, *loc. cit.*, p. 124).

²¹¹ Mr. Reuter (*Yearbook* . . . 1976, vol. I, 1402nd meeting, *Yearbook* . . . 1981, vol. I, 1666th meeting and *Yearbook* . . . 1982, vol. I, 1731st meeting) and Mr. Schwebel (*Yearbook* . . . 1980, vol. I, 1601st meeting).

²¹² Second report (*Yearbook* . . . 1981, vol. II (Part One)) (see footnote 195 above), para. 35. See also Mr. Riphagen's statement at the 1759th meeting of the Commission (*Yearbook* . . . 1983, vol. I).

²¹³ Third report (*Yearbook* . . . 1982, vol. II (Part One)) (see footnote 204 above), para. 140.

²¹⁴ See the statements by Mr. Evensen (*Yearbook* . . . 1982, vol. I, 1733rd meeting, para. 17); Mr. Ushakov (*ibid.*, 1736th meeting, para. 33; 1737th meeting, paras. 25-26); Mr. Yankov (*ibid.*, para. 12); Mr. Flitan (*Yearbook* . . . 1983, vol. I, 1773rd meeting); Mr. Al-Qaysi (*ibid.*, 1775th meeting et seq.); Mr. Balanda (*ibid.*, 1776th meeting); Mr. Jagota (*ibid.*, 1777th meeting); Mr. Koroma (*ibid.*); Mr. Barboza (*ibid.*); and Mr. McCaffrey (*ibid.*). Doubts regarding the legal correctness and the political appropriateness of referring to the machinery provided by the Charter for the maintenance of international peace and security were expressed by Mr. Reuter (*Yearbook* . . . 1984, vol. I, 1861st meeting) and Mr. Malek (*ibid.*, 1866th meeting).

(h) Recapitulation of the Commission's positions

139. At this point an attempt will be made to recapitulate the conclusions on which the Commission seems to have reached some measure of agreement with regard to the “special” regime of international crimes of States, following its work on part 1 of the draft and its consideration of Mr. Riphagen's proposals:

(a) From the position taken expressly by the Special Rapporteur, to which other members of the Commission did not object, it seems to emerge that the task would be not so much to codify the possible (and confused) *lex lata* on the subject as to specify, by way of progressive development, the agreed minimum threshold at which it would be appropriate to increase the severity of the consequences of crimes as compared with those of delicts;

(b) Such a minimum is not to be found in the legal situation of the State that is the “principal victim” of the breach (if there is one): the rights and *facultés* of such a State are no different—except quantitatively in relation to the seriousness of the injury—from those it would enjoy as principally injured party in respect of any internationally wrongful act;

(c) The legal situation of “indirectly” injured States, considered from the viewpoint of their reaction *ut singuli*, does take on a “special character”, however. Unlike the situation of States “indirectly” injured by a delict, the situation of States “indirectly” injured by a crime would be characterized by a necessary minimum threshold. That threshold would no doubt involve the obligations of “non-recognition” and “non-collaboration” with the author of the “crime”, as indicated by Mr. Riphagen; but in view of the widespread dissatisfaction within the Commission at the perfunctoriness of this indication, it would presumably involve some other obligations as well. There also seems to be agreement that the legal involvement of the States in question should not go so far as to justify the unilateral adoption by one or more of them of punitive measures against the author of the wrongful act;

(d) The restrictions on the possibility of individual States *ut singuli* imposing sanctions against a crime would be narrowed in the event of a collective decision by an authority representative of “the international community as a whole”. In that case any “non-directly” injured State might be authorized or even obliged to adopt, *vis-à-vis* the wrongdoer, the measures decided upon by the “organized international community”—such measures possibly being more severe than would otherwise be permitted;

(e) A hypothetical case—and one considered to be of central importance by the majority of the Commission—in which the phenomenon referred to in (d) above may well occur—would be that of measures decided collectively by the competent organs of the United Nations on the occasion of breaches calling for the operation of specific procedures provided for in the Charter;

(f) A departure from this “minimum” general regime would be made in the case of aggression, the only crime that justifies a unilateral armed reaction by way of collective self-defence on the part of any State other than the aggressor. This crime also authorizes any State to resort to non-armed countermeasures which are less strictly circumscribed (substantially or procedurally) than those

attaching to other wrongful acts. The only restrictions applicable would be proportionality and the prohibition on breaches of *jus cogens* obligations. All these measures (self-defence and "aggravated" countermeasures) would be subject to the procedures prescribed in Chapter VII of the Charter for the maintenance of international peace and security.

3. REACTIONS OF STATES IN THE SIXTH COMMITTEE

(a) *The problem of criminal liability*

140. Turning to the reactions in the Sixth Committee at the time of the adoption of article 19 of part I of the draft, the majority of States, especially those of the "socialist countries" and the "developing world", agreed with the Commission's choice. Only a few Western States, including Australia,²¹⁵ France,²¹⁶ Greece,²¹⁷ Portugal,²¹⁸ Sweden²¹⁹ and the United States of America²²⁰ were decidedly opposed. The recurrent criticism in their positions related essentially to the risk of "criminalization" of State behaviour, which they felt to be inherent in the distinction proposed by the Commission. According to them, at that stage there was no parallel in international law to the forms of responsibility for which provision was made by the criminal law of States. There was not at present a generally accepted international body at the inter-State level which could be considered sufficiently representative and impartial to be entrusted with the function of deciding upon punitive sanctions. Furthermore, "criminalizing" State behaviour would mean raising the possibility of collective criminal liability to the level of a rule of law—a development which would be incompatible with juridical civilization. The Commission's draft ought to have dealt solely with the aspects of State responsibility relating to reparation and not with sanctions. Sanctions, if any, would have to be decided at the political level, not in connection with the determination of responsibility for international wrongful acts.²²¹

141. Opposition to punitive measures, understood as measures corresponding to the forms of criminal responsibility provided for in national legal systems, was also expressed by another, mostly European, group of States. While accepting in principle the distinction proposed, those States reserved their opinion for the time when the

²¹⁵ *Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 27th meeting, paras. 17-20, and subsequently ibid., Thirty-eighth session, Sixth Committee, 50th meeting, paras. 53-55.*

²¹⁶ *Ibid., Thirty-first Session, Sixth Committee, 26th meeting, para. 4, and subsequently ibid., Thirty-eighth session, Sixth Committee, 41st meeting, para. 26.*

²¹⁷ *Ibid., Thirty-first Session, Sixth Committee, 23rd meeting, paras. 11-12.*

²¹⁸ *Ibid.*, para. 17.

²¹⁹ The position of Sweden is to be found primarily in a written commentary on the Commission's draft (*Yearbook . . . 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add. 1-4, p. 77).

²²⁰ *Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 17th meeting, paras. 8-12; ibid., Thirty-third Session, 40th meeting, para. 2, and subsequently ibid., Thirty-eighth Session, Sixth Committee, 47th meeting, para. 67.*

²²¹ The latter observation was made only by Greece (see footnote 217 above).

Commission would define the consequences of crimes.²²² It must be stressed, however, that such reservations were made by States which nevertheless came out in favour of a "special" regime of "responsibility for crimes". For those States, the consequences of crimes should in no way include forms of criminal or punitive responsibility which, in addition to being contrary to the principle of the sovereign equality of international persons, would favour the imperialistic claims of States capable of imposing "punitive sanctions".²²³

142. To conclude on this point, it should be noted that quite a few of the States that had initially opposed or seriously questioned the idea of "responsibility for crimes", when commenting on the proposals subsequently advanced by Mr. Riphagen, displayed a less hostile attitude towards the possibility of identifying a "special" regime for the consequences of particularly serious wrongful acts. This was presumably due to the mild, non-punitive character of those proposals.²²⁴

(b) *The "substantive" consequences of crimes*

143. Moving away from the debate on the admissibility of "criminal" responsibility of States, not much was said in the Sixth Committee about the "special features" characterizing, *de lege lata* or *de lege ferenda*, the regime covering the kind of wrongful acts contemplated in article 19.²²⁵

(c) *Faculté of reaction*

144. As regards the *faculté* of reaction, only two States had doubts that the commission of a crime or, in any

²²² Austria (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 20th meeting, para. 2 and ibid., Thirty-eighth Session, Sixth Committee, 41st meeting, para. 41*); Denmark (*ibid., Thirty-first Session, Sixth Committee, 19th meeting, para. 5*); Federal Republic of Germany (*ibid., 24th meeting, para. 73; and Yearbook . . . 1981*, vol. II (Part One) (see footnote 219 above), p. 75); Japan (*ibid., 21st meeting, para. 8*); and Spain (*ibid., Thirty-eighth Session, 54th meeting, para. 35*).

²²³ Bulgaria (*ibid., 52nd meeting, para. 57*); German Democratic Republic (*ibid., Thirty-fifth Session, Sixth Committee, 49th meeting, para. 15 and ibid., Thirty-eighth Session, 36th meeting, para. 67*); Hungary (*ibid., 53rd meeting, para. 22*); Poland (*ibid., para. 33*); Ukrainian Soviet Socialist Republic (*ibid., 50th meeting, para. 24*); and Union of Soviet Socialist Republics (*ibid., 53rd meeting, para. 43*).

²²⁴ See, for example, the position taken by Greece (*ibid., Thirty-seventh Session, Sixth Committee, 40th meeting, para. 47*); Japan (*ibid., 46th meeting, para. 19*); Australia (*ibid., 48th meeting, para. 9*); Sweden (*ibid., 41st meeting, para. 12*); and the United States of America (*ibid., 52nd meeting, paras. 22-23*).

²²⁵ It may be useful, however, to recall the stands taken on this point by Bulgaria, the Federal Republic of Germany and the United States of America. The opinion of the first, for example, was that in the case of a crime, the injured State might immediately adopt countermeasures without awaiting the negative outcome of a prior demand for reparation (*ibid., Thirty-sixth Session, Sixth Committee, 51st meeting, para. 6*). According to the Federal Republic of Germany, however, it would be necessary, even in the case of a crime, to exhaust the available means of peaceful settlement before legitimately resorting to any unilateral measure (*ibid., Thirty-eighth Session, Sixth Committee, 39th meeting, para. 7*). As for the United States (which, it should be recalled, was opposed to the distinction), it suggested that if provision was indeed necessary in the draft, by way of progressive development, for "special" consequences in the case of particularly serious wrongful acts, then mention should have been made of the obligation of the responsible State to pay "exemplary" or "punitive" damages (*ibid., Thirty-first Session, Sixth Committee, 17th meeting, para. 12*).

event, of a serious breach of rules designed to safeguard the interests of the international community as a whole, generated an *erga omnes* responsibility. Few, however, took a stand on the question whether such responsibility implied that any State, even if only “indirectly” injured, could resort unilaterally to countermeasures.²²⁶ No significant comments were made on Riphagen’s proposal regarding the “minimal” obligations of general law (“non-recognition” and “solidarity”) that would be incumbent on all States other than the wrongdoing State in case of an international crime.²²⁷ However, widespread dissatisfaction was expressed, as it was also in the Sixth Committee, with the idea of reducing the “specificity” of crimes to such “minimal” obligations without properly developing the regime of the obligations of the wrongdoing State and the rights of the “directly” injured State.

(d) *The role of the “organized international community”*

145. Still on the subject of the *faculté* of reaction, a number of States did not hesitate to espouse the position of the Commission that a typical consequence of a crime should be the adoption of measures by all States *ut universi*, namely within the framework of the “organized international community”. This position rested, as noted, on the obvious underlying reference to cases calling for the application of measures provided for in the Charter of the United Nations, in particular those of Chapter VII. Some States, however, deemed that mentioning such measures in the draft would be inappropriate. This was either because their application was already governed by the Charter and, what is more, from a perspective different from that of the consequences of wrongful acts,²²⁸ or because of the risk of broadening the power of United Nations bodies, notably of the Security Council, to impose sanctions beyond the limits laid down for them by the Charter. That was considered to be a very serious risk, especially in view of the fact that the United Nations bodies involved would be the political organs, which constitutionally are unsuited to making an impartial juridical assessment of the cases concerned.²²⁹

146. Finally, widespread agreement was discernible in the Sixth Committee to consider both individual and collective self-defence in response to aggression as the “special” consequence of a wrongful act that would permit unilateral resort to armed force, even by “non-directly” injured States. Some delegations, however, had doubts as to the appropriateness of regulating such a case in the

draft, inasmuch as it was already governed by the Charter of the United Nations.²³⁰

(e) *Recapitulation of Sixth Committee positions*

147. The scanty guidelines emerging from the Sixth Committee debates may be summarized as follows:

(a) There seems to be a broad consensus that responsibility for serious breaches of obligations of fundamental importance to the international community should somehow be distinguished from the consequences of any “ordinary” internationally wrongful act. A considerable part of the international community, however, evinces a certain hesitation when it comes to using the notion of “responsibility for crime” to characterize such a regime;

(b) There is also broad agreement that any “special” regime of crimes should be devoid of any punitive connotation, in the sense that not even in the case of crime should punitive measures be left to the unilateral discretion of the injured parties, especially not to “non-directly” injured States;

(c) There is a vague tendency, however, to consider the “specificity” of the consequences of crimes as deriving not so much from the existence of the general obligations of “non-recognition” and “solidarity” incumbent upon all States, as from a greater severity of the “substantive” obligations of the wrongdoing State and of the “instrumental” rights of the State (if any) “directly” injured by the breach.

(d) The conviction is prevalent that, in the case of crimes, *erga omnes* responsibility amounts essentially to the possibility for the “organized international community” to authorize or even oblige any State, by virtue of decisions taken by “competent” organs, to adopt “sanctions”—even severe ones—against the wrongdoer. Examples are the procedures and measures to address certain situations laid down by the Charter of the United Nations. There is however no unanimity among the members of the Sixth Committee regarding the appropriateness of explicitly referring to such procedures or measures in the draft;

(e) Aggression is distinguished from all the other crimes. It is deemed to be the only wrongful act that would permit a unilateral armed reaction by way of self-defence on the part of “non-directly” injured States as well as on the part of the victim State or States.

4. SCHOLARLY VIEWS

(a) *Introduction*

148. While the Commission’s proposals concerning the regime of crimes have not reached an advanced stage of drafting, they have elicited comments from numerous scholars. In this subsection an attempt will be made to present the doctrinal trends relating to the present state of international law with regard to the “special” conse-

²²⁶ Some expressed a favourable opinion, though in somewhat general terms: Federal Republic of Germany (*Yearbook . . . 1981*, vol. II (Part One) (see footnote 219 above), p. 75); Indonesia (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 30th meeting, para. 33) and Sri Lanka (*ibid.*, 31st meeting, para. 15).

²²⁷ Only Algeria and Romania (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 35 and *ibid.*, 49th meeting, para. 9 respectively) were decidedly in favour, though they tended to stress the need to develop and specify the scope of such obligations.

²²⁸ France (*ibid.*, *Thirty-first Session, Sixth Committee*, 26th meeting, para. 5); and Greece (*ibid.*, 23rd meeting, paras. 11-12).

²²⁹ Australia (*ibid.*, 27th meeting, para. 20); Japan (*ibid.*, 21st meeting, para. 8); and Spain (*Yearbook . . . 1982*, vol. II (Part One), p. 15, document A/CN.4/351 and Add.1-3, especially p. 17).

²³⁰ Australia (*Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 50th meeting, para. 42); Federal Republic of Germany (*ibid.*, 39th meeting, para. 3); and the United States of America (*ibid.*, 41st meeting, para. 4).

quences of crimes and the possible lines along which it may develop in the future.²³¹ The first subject will be the relationship between the State which is the "principal victim" of the crime and the wrongdoing State to see whether, according to scholars, it differs from the relationship between an injured State and a wrongdoing State in the case of an "ordinary" wrongful act.

(b) *The wrongdoer State/victim State relationship*

149. Not many writers consider the "specificity" of the regime of crimes to be manifest in such a relationship. Among those who express any views on this point, only a few deal with the "substantive" obligations incumbent on the wrongdoing State vis-à-vis the "directly" injured State. As has been seen, this aspect has not been given much attention in the work of the Commission either. As regards reparation *lato sensu*, one writer stresses, for example, that in the case of a crime, unlike that of a delict, no derogation should be admissible from the obligation of restitution in kind insofar as "inalienable" interests covered by cogent rules are involved (between injured State and wrongdoer).²³² Another writer stresses that, in the case of a crime, even after making reparation, the wrongdoing State would still be subject to the obligation to provide the necessary guarantees against repetition.²³³

150. With regard to the "instrumental" consequences, scholars are divided concerning the conditions of lawful resort to countermeasures by the "directly" injured State. Whereas, according to some writers, even in the case of crimes the right of the injured State to resort to countermeasures arises only after unsuccessful demands for cessation/reparation have been made and the available means of settlement have been tried,²³⁴ others believe that the injured State may immediately resort²³⁵ to at least those countermeasures which appear to be reasonably necessary to bring about the cessation of wrongful conduct that is in progress.²³⁶

²³¹ The following analysis relates to the observations of scholars regarding the manner in which the consequences of crimes should be dealt with in the Commission's draft. It does not, however, cover the literature on specific crimes, such as aggression, genocide or apartheid, or the typical and possibly "special" consequences of such crimes that may be inferred from State practice or that of international organizations, or from the related instruments.

²³² Graefrath, "International crimes—a specific regime of international responsibility of States and its legal consequences", especially p. 165. On Graefrath's point, it should be emphasized that the prohibition against "substituting" by covenant a pecuniary compensation for *restitutio* when this would jeopardize legally inalienable interests has already been stressed by the present writer even with regard to consequences of "delicts"; indeed, the possibility that failure to make *restitutio* might violate such interests may occur even in consequence of wrongful acts *minoris generis* as compared with a crime. The only question to be resolved might then be that of the exception of excessive onerousness as set forth in draft article 7, para. 1 (c), of part 2 (see *Yearbook* . . . 1989, vol. II (Part Two), pp. 72-73, para. 230).

²³³ Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, pp. 530-531.

²³⁴ Dupuy, "Implications of the institutionalization of international crimes of States", especially p. 180; Carella, *La responsabilità dello Stato per crimini internazionali*, pp. 134 and 143.

²³⁵ Lattanzi, op. cit., p. 530; Hofmann, loc. cit., pp. 221-222.

²³⁶ Graefrath, loc. cit., p. 165.

151. A broader agreement exists with respect to the limits to the exercise of countermeasures on the part of the injured State. Most commentators are of the opinion that the proportionality limitation²³⁷ and/or the *jus cogens* limitation²³⁸ apply also in the case of crimes.

152. A broad consensus also exists on the function of the countermeasures taken by the injured State. Indeed, while no one questions that they might be adopted to bring about cessation of "criminal" conduct or, by way of an *extrema ratio*, to guarantee reparation *lato sensu*, nearly all rule out the possibility of their being used for purely punitive purposes.²³⁹

153. Lastly, it is hardly necessary to recall that the vast majority of writers consider the crime of aggression as an exception to the general regime, at least to the extent that the "directly" injured State is entitled to adopt measures involving the use of force by way of self-defence.²⁴⁰ It must be noted, however, that a significant number of writers even extend the legitimacy of the use of force by the "victim of a breach" to cases of reaction to the coercive imposition of colonial domination (or "alien domination"), namely in favour of the people under such domination.²⁴¹

²³⁷ Carella, op. cit., pp. 143-144; Hailbronner, "Sanctions and third parties and the concept of international public order", especially p. 4; Dinstein, "The *erga omnes* applicability of human rights", especially p. 19; Graefrath and Mohr, "Legal consequences of an act of aggression: the case of the Iraqi invasion and occupation of Kuwait", especially pp. 133-136. Lattanzi, according to whom, in the case of reaction to crimes, the question of proportionality cannot arise (op. cit., p. 531), takes the opposite view.

²³⁸ Dinstein, loc. cit., especially pp. 19-20; Graefrath and Mohr, loc. cit., especially p. 136; Oellers-Frahm, "Comment: The *erga omnes* applicability of human rights", especially p. 36; de Hoogh, "The relationship between *jus cogens*, obligations *erga omnes* and international crimes: peremptory norms in perspective", especially p. 201. See also Cardona Lloréns, "La responsabilidad internacional por violación grave de obligaciones esenciales por la salvaguardia de intereses fundamentales de la comunidad internacional (el 'crimen internacional')", p. 326.

²³⁹ The positions taken, among others, by Cardona Lloréns, loc. cit., pp. 325-332; Graefrath, loc. cit., and Dupuy, loc. cit., p. 180, are very clear in this respect. A quite different opinion is expressed by Spinedi ("Contribution à l'étude de la distinction entre crimes et délits internationaux", especially pp. 35-42), according to whom countermeasures/reprisals are always recognized in international law as having a function that is primarily punitive, i.e. does not conform strictly to an executive-reparatory function; and this can obviously not fail to apply to the measures that might be taken by a State against which an international crime had been perpetrated.

²⁴⁰ For the bibliography on this "special" consequence of aggression and on the various ways in which it is interpreted, see third report (*Yearbook* . . . 1991, vol. II (Part One) (footnote 78 above)), para. 9, footnote 7, and paras. 97-102; and fourth report (*Yearbook* . . . 1992, vol. II (Part One) (footnote 79 above)), paras. 58-69.

²⁴¹ The literature on the subject is abundant. See, *inter alia*, Higgins, *The Development of International Law through the Political Order of the United Nations*, pp. 103 et seq.; Cassese, "Political self-determination. Old concepts and new developments"; Ronzitti, *Le guerre di liberazione nazionale e il diritto internazionale*, pp. 98 et seq.; Ben Salah, "Autodétermination des peuples: les deux niveaux"; and White, "Self-determination: time for a re-assessment", especially p. 151. Reference should also be made to the *travaux préparatoires* of 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 138 above), and to the commentaries on the relevant part of that Declaration.

(c) *The wrongdoer State/"non-directly" injured State relationship*

154. Turning to the relationship between the author of a crime (an *erga omnes* violation by definition), on the one hand, and the "non-directly" injured States—*ut singuli*—on the other hand, the writers who have dealt with the matter, like the Commission, unanimously hold the view that the "special" aspect which most distinguishes the consequences of crimes from "ordinary" wrongful acts lies primarily in the regime governing this relationship.

155. With regard to the "substantive" consequences, no appreciable objections are found in the literature to the idea that, in the case of crimes, any State other than the State author of the wrongful act would be entitled to claim cessation and reparation *lato sensu*.²⁴² This right seems to exist even in the absence of any prior intervention by international bodies which are to some degree representative.

156. The positions of writers on the *faculté* of "non-directly" injured States to resort unilaterally to countermeasures are more varied. According to some, this right or *faculté* may be considered to be admissible *de lege lata* in general international law and indeed it constitutes the most certain of the distinctive features of the regime of international crimes of States.²⁴³ Others take a more cautious approach, stressing that the *faculté* of States in general and of each State *ut singuli* does not arise automatically from the commission of a crime. It only comes about either subsidiarily, so to speak, that is to say where there is no possibility of intervention by the "organized international community" or where that "community" remains out of the picture owing to an impasse in its decision-making mechanisms,²⁴⁴ or by way of "solidarity" with the principal victim of the crime (if there is one), which would have to have made a prior request for the help of other States.²⁴⁵ Some writers, especially Italians, are of the opinion that unilateral countermeasures by any State "not directly" injured are admissible with regard to certain wrongful acts, but not with regard to the entire category of breaches contemplated in article 19 of part I of the Commission's draft. According to these writers, the only countermeasures admissible *de lege lata* in the situation under discussion would be collective self-defence against aggression and unarmed intervention in favour of peoples whose aspirations to independence are forcibly

repressed by "alien domination".²⁴⁶ A number of writers consider, on the contrary, that "blanket" resort to unilateral countermeasures is inadmissible (or should be prohibited) even in response to an international crime, save in the case of aggression. Otherwise there would be a risk of justifying any and all abuses and arriving at a situation of anarchy and *bellum omnium contra omnes*.²⁴⁷ The sole exception to this prohibition would be precisely the case of aggression, in reaction to which not only the use of force by way of self-defence, but also particularly severe and immediate unilateral measures on the part of all States, would be admissible.²⁴⁸

157. The writers who accept resort to unilateral countermeasures on the part of any "non-directly" injured State do not go much beyond that generality. They do not make any more significant contributions regarding the legal regime that might govern such countermeasures (possibly a different regime of countermeasures from the one that may be adopted for a mere delict).²⁴⁹ The only point on which the majority of the writers in question insist is that it would not be lawful for "non-directly" injured States to pursue punitive aims through such measures, that is to say aims other than the cessation of the wrongful act or reparation *lato sensu*.²⁵⁰

158. Moving from the area of rights/*facultés* to that of the possible obligations under general international law of "non-directly" injured States, a high degree of consensus seems to exist in the literature, in the sense that such obli-

²⁴⁶ Thus, for example, Cassese ("Remarks on the present legal regulation of crimes of States") and Conforti ("Il tema di responsabilità degli Stati per crimini internazionali"), especially pp. 108-110.

²⁴⁷ Marek, "Criminalizing State responsibility", especially p. 481; Graefrath, loc. cit., p. 167; Dupuy, loc. cit., pp. 177-179, and "Observations sur le 'crime international de l'État'", RGDIP (1980), especially pp. 483-484; Jiménez de Aréchaga, loc. cit.; Elias, "Introduction to the debate", especially p. 193; Elagab, *The Legality of Non-forcible Counter-Measures in International Law*, p. 59; Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", especially p. 280; and Ten Napel, "The concept of international crimes of States: walking the line between progressive development and disintegration of the international legal order", especially pp. 165-166.

²⁴⁸ In this connection see, for example, Hofmann, loc. cit., especially p. 229, and Graefrath, loc. cit., especially p. 166, where the reference is "to the sequestration or confiscation of property of the aggressor or its nationals situated abroad, the suspension of all bilateral treaties with the aggressor State, the punishment of its leaders for the crime against peace".

²⁴⁹ With regard to what are referred to as preconditions, Sicilianos affirms that immediate countermeasures may be adopted provided that the criminal behaviour is still in progress and there is a situation of emergency (op. cit., p. 206). As for the limits, Mohr considers that States not directly injured may react, by virtue of the proportionality/reciprocity principle, only by countermeasures proportional to the injury sustained as a result of the crime (loc. cit., p. 137). Finally, according to Lattanzi, the regime of countermeasures in question does not differ substantially from that which governs the measures that may be adopted by a State directly injured by a crime (op. cit., p. 533).

²⁵⁰ Particularly explicit in this respect are Mohr, loc. cit., especially p. 139; Dominicé, "The need to abolish the concept of punishment", pp. 257-258; Sicilianos, op. cit., pp. 52-54; Graefrath and Mohr, loc. cit., pp. 133 and 139; and, among those who deny the admissibility of the countermeasures in question altogether, Marek, loc. cit., p. 463. Less categorical positions are taken however by Spinedi, loc. cit., pp. 28 et seq. and Zemanek, "The unilateral enforcement of international obligations", especially pp. 37-38. Lattanzi (op. cit., p. 533) accepts a function that is afflictive and not only "executive-reparative" in the countermeasures of States "indirectly injured" by a crime.

²⁴² Including Graefrath, loc. cit., p. 165; Abi Saab, "The concept of 'international crimes' and its place in contemporary international law", especially p. 149; Jiménez de Aréchaga, "Crimes of States, *jus standi*, and third States", especially p. 255; and Hutchinson, "Solidarity and breaches of multilateral treaties", especially p. 197.

²⁴³ Though with a variety of nuances, this seems to be the position, for example, of Lattanzi, op. cit., p. 533; Dominicé, "Legal questions relating to the consequences of international crimes", especially p. 262; and Dinstein, loc. cit., especially p. 19.

²⁴⁴ Abi Saab, loc. cit., especially p. 150; Sinclair, "State crimes implementation problems: who reacts?", *International Crimes of State* . . . , p. 257; Spinedi, loc. cit., p. 133; Hutchinson, loc. cit., pp. 212-213; Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, p. 171 and pp. 205-206.

²⁴⁵ Cardona Llorens, loc. cit., especially p. 322; Mohr, "The ILC's distinction between 'international crimes' and 'international delicts' and its implications", especially pp. 131-132; Hofmann, loc. cit., especially pp. 226-228; Hailbronner, loc. cit. and de Hoogh, loc. cit., especially p. 213.

gations are to be considered a typical, and “special”, consequence of international crimes.²⁵¹ Reference is made in particular to the obligations of “non-recognition” and “solidarity” mentioned by Mr. Riphagen in article 14, paragraph 2, of part 2 of the draft. Of these, it is especially the obligation not to recognize as “legal” (meaning, presumably, as producing legal effects at the international level and in the respective national systems) any acts performed by the wrongdoing State in respect of the “control of the situation” created by the crime that is deemed by most writers to be a “special” consequence *de lege lata* of crimes as opposed to delicts.²⁵² It is less easy, on the contrary, to find writers who explicitly accept the conclusion that general international law actually provides for “positive obligations of solidarity” incumbent on all States “not directly” injured by a crime, requiring each such State to participate in the adoption of measures (possibly as decided by an international body) that are designed to help the “most directly” injured State or to restore legality.²⁵³

(d) *The role of the “organized international community”*

159. Finally, it is essential to take a close look at the positions taken by writers regarding the legal situation of States other than the author of the crime, considered *ut universi*. This refers to the possibility for the “organized international community” to deal with the various issues and implications of international responsibility for “crime”. Here, too, a fairly wide range of positions is to be found.

160. At one end of the spectrum are the writers who feel that competence belongs, *de lege lata*, exclusively to United Nations organs. They are obviously thinking particularly of the Security Council, the body empowered to take coercive action under Chapter VII of the Charter to implement any measures required by an international crime of a State.²⁵⁴ In the opinion of those writers, the

hypothesis of “threat to the peace” provided for in Article 39 of the Charter in fact allows for a sufficiently broad interpretation to enable the Council to cover the acts defined as “international crimes”.²⁵⁵ Clearly, once it was accepted that the “specificity” of the regime of crimes lay in the competence of the Security Council under the Charter, the obligation for every State to give effect to any “sanctions” decided by that organ would follow as a matter of course.²⁵⁶

161. Not too far from that position are those writers who, unlike the ones just mentioned, do not consider the system of Chapter VII of the Charter at present suited to the implementation of the “special” regime of responsibility for all crimes (but rather consider it applicable only to aggression and crimes constituting a breach of the peace or a threat to the peace), yet similarly wish to see provision made for such implementation by the United Nations security system. This should be achieved, in their view, by progressive development (*lex ferenda*). That system is the only one, in their opinion, that might “ensure the minimum guarantees of objectivity which ought to inspire a regime of responsibility for crime of a general character”.²⁵⁷

162. Other writers, starting from an analogous reading of Chapter VII of the Charter (from the perspective of responsibility), arrive at a different, more “restrictive”, conclusion whereby the category of crimes should be limited to those wrongful acts that constitute a breach of, or a threat to, the peace, so as to place the concept of responsibility for crime on a firmer legal footing, without at the same time improperly broadening the scope of the Charter’s security system”.²⁵⁸

163. Close to this view, but more clearly defined, is the opinion according to which competence for imposing

²⁵¹ Simma observes in fact that “the majority of observers, following the bilateralist way of thinking, would probably agree that the very idea of obligations on the part of ‘third’ States in case of a violation of international law is a remarkable innovation, not to speak of the substance of such solidarity” (“International crimes: injury and counter-measures: comments on part 2 of the ILC work on State responsibility”), especially p. 305.

²⁵² Including Cardona Lloréns, loc. cit., especially pp. 312 et seq.; Abi Saab, loc. cit., especially p. 149; and Graefrath, loc. cit., especially p. 168, who calls attention to various signs that point in this direction (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 138 above), the Definition of Aggression (General Assembly resolution 3314 (XXIX), annex), United Nations resolutions on Southern Rhodesia, the South African presence in Namibia, the creation of Bantustans by South Africa and the Israeli-occupied territories); Dupuy, loc. cit. (see footnote 234 above), especially p. 181; Jiménez de Aréchaga, loc. cit., especially pp. 255-256; Conforti, loc. cit. especially pp. 108-109, who, however, confines this “special” legal consequence solely to the hypotheses of aggression and violation of “external” self-determination; Frowein, “Collective enforcement of international obligations”, especially p. 77; Graefrath and Mohr, loc. cit., especially pp. 110 and 114.

²⁵³ See, for example, the reservations of Sicilianos, op. cit., p. 171, and Hailbronner, loc. cit., pp. 11-15, according to whom, *de lege lata*, there does not exist any obligation of “active solidarity”, but only, if anything, the obligation not to interfere with any action undertaken by the “organized international community”.

²⁵⁴ Graefrath, loc. cit., especially pp. 164-168.

²⁵⁵ Ibid., p. 164. According to Graefrath, “An international crime, being a serious violation of an international obligation essential for the protection of fundamental interests of the international community by definition is an international affair which establishes the jurisdiction of the United Nations.” (ibid.). And again: “States have authorized the Security Council to determine the existence of an international crime . . . to decide upon measures necessary to stop the continuation of the wrongful conduct and to enforce universal respect for the observance of those international obligations which are fundamental for the maintenance of international peace” (ibid., p. 167).

²⁵⁶ Ibid., p. 167.

²⁵⁷ Conforti, loc. cit., especially p. 107. Along the same lines, Jiménez de Aréchaga, loc. cit.

²⁵⁸ Starace, “La responsabilité résultant de la violation des obligations à l’égard de la communauté internationale”, *Collected Courses . . . 1976-V*, pp. 294 et seq. Along the same lines, see Quigley, “The International Law Commission’s crime-delict distinction: a toothless tiger?”, especially pp. 137 and 133 et seq. and Dupuy, “Observations sur la pratique récente des ‘sanctions’ de l’illicite”. According to the latter, it would not be appropriate, in particular, to provide in the Commission’s draft for a regime of responsibility for the crime of aggression that was different—alternative or subsidiary—from the mechanism established in Chapter VII of the Charter of the United Nations and the related competence of the Security Council, all the more so if, on the basis of such a different regime, resort to unilateral counter-measures was admissible. For Dupuy there is a fear that this substitution of action will lead to a weakening of the prestige and authority of the world organization, whose incapacity to keep the peace would thus be underlined by the unsupervised, albeit generous, actions of certain States. The very basis of the notion of crime, which aims above all at ensuring respect for obligations essential to the international commu-

“sanctions” in response to crimes, at least those involving a threat to the peace, does indeed belong to the international community as “organized” within the United Nations, and specifically to the Security Council. However, it would belong “primarily” but not “exclusively” to the United Nations. The possibility would still remain for States *ut singuli* legitimately to resort to peaceful countermeasures against the author of a crime if United Nations reaction was blocked or proved to be ineffectual.²⁵⁹ The switch to this “secondary” unilateral competence would be viewed somewhat favourably, according to some writers, if the competent organs of the United Nations—albeit “incapable” of acting—issued even a simple “verbal” condemnation of the crime, as a guarantee of the legitimacy of measures that States *ut singuli* might wish to take.²⁶⁰

164. The tendency to disengage, as far as possible, the imposition of “sanctions” against crimes from the Chapter VII security system and from an “exclusive competence” of the Security Council—often viewed as prone to immobilization²⁶¹ and “political manipulation”,²⁶² is manifest also in the suggestions of those writers who tend to favour some role for ICJ in the matter. Such a role is conceived either in the form of competence of the Court with respect to disputes relating to an international crime²⁶³ or of an *ex post facto* verification of the “legitimacy” of the threatened sanctions.²⁶⁴

165. Lastly, and in a position almost diametrically opposed to that discussed in paragraph 160 above, mention

(Footnote 258 continued.)

nity as a whole, all too often risks becoming a convenient excuse for the initiatives of States who will seek in the concept of a “*carte blanche* for public order”—a justification for actions taken in furtherance of their own foreign policy goals. After all, whatever might be the good faith of the States applying the sanctions, it will be all the easier for the States they are aimed at to oppose actions that are not under United Nations aegis. And here the question arises whether the very institutionalization of crime might not harbour the seeds of international anarchy.

²⁵⁹ Hofmann, *loc. cit.*, especially p. 226; Mohr, *loc. cit.*, especially pp. 131-132 and p. 138; Sinclair, *loc. cit.*, especially p. 257; Dominicé, “Legal questions . . .”, *loc. cit.*, especially pp. 262-263; Sicilianos, *op. cit.*, especially p. 171 and pp. 206-213.

²⁶⁰ Hutchinson, *loc. cit.*, especially p. 203; Sicilianos, *op. cit.*, p. 213; Quigley, *loc. cit.*, especially pp. 144 and 150. A “primary” but not “exclusive” competence of the United Nations is indicated also by Oellers-Frahm, according to whom it would still not be legitimate for States *ut singuli* to intervene “ancillary”, but rather for “regional organizations” such as OAS or the European Community: if even these regional bodies proved unable to decide on the application of collective “sanctions”, that would mean that, a fortiori, no agreement existed within the international community for the adoption of unilateral measures on the part of individual States either, and such measures could therefore not be deemed admissible (*loc. cit.*, especially pp. 34-35).

²⁶¹ In this regard, see for example the doubts expressed by Simma, *loc. cit.*, especially pp. 312-313.

²⁶² Including Dominicé, *loc. cit.*, especially pp. 262-263; Hutchinson, *loc. cit.*, especially pp. 210-211; and also Leben: “Les contre-mesures étatiques et les réactions à l’illicite dans la société internationale”, p. 28.

²⁶³ Torres Bernardez, “Problems and issues raised by crimes of States: An overview”, *loc. cit.*, especially pp. 278-279; and Quigley, *loc. cit.*, especially pp. 128-129.

²⁶⁴ Hutchinson, *loc. cit.*, p. 211; and Dupuy, *loc. cit.* (footnote 234 above), especially pp. 182-183, who calls for a mechanism by which the General Assembly would decide on the basis of a qualified majority whether to request the Security Council to intervene in order to apply a “sanction” in response to a crime; the Council would decide the measures to be taken, also by a qualified majority and with the

must be made of the writers for whom neither the United Nations (and in particular the Security Council) nor any other international organization has any competence, *de lege lata* and in the sphere of general law, be it exclusive or primary, to regulate the reactions of States “not directly” injured by a crime. According to this view, such States thus retain full possession *ut singuli* of the right to react, if need be, by means of countermeasures against a State that has committed a serious breach of obligations intended to safeguard the fundamental interests of the international community. It must be added, however, that the same writers usually also express the wish for the matter to be taken care of through progressive development, namely by attributing the requisite functions and powers to appropriate international institutions not necessarily identifiable with any particular organ of the United Nations.²⁶⁵

166. The literature is very scarce on the possible delimitation of the scope of the “sanctions” that the “organized international community” may apply in case of a crime. Some, for example, stress that measures decided by United Nations organs cannot in any event have a punitive function.²⁶⁶ Others are concerned at the possibility of collective measures whose implementation might ultimately be

exclusion of the right of veto; finally, to complete the whole process, a procedure for settling differences would be indispensable. Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and article XII of the International Convention on the Suppression and Punishment of the Crime of Apartheid could be taken as a basis here. However, a comparison of these two provisions shows that the first allows unilateral resort to ICJ while the second seems to maintain the requirement for a consensual approach. The writer stresses the importance of the options offered (*ibid.*, especially p. 183). Without explicitly referring to ICJ, Elias, too, stresses the appropriateness of providing “judicial channels” in the regime of responsibility to be proposed for crimes in the following terms:

“... it cannot be forgotten that a judicial solution has in practice a limited ambit in which to operate and that international judicial process remains in principle voluntary. But it is against this background that the significance emerges of the development, in contemporary international law, of procedures whereby the application of the law is entrusted to third parties and not only to the State or States immediately concerned. That development is but the vehicle for making manifestly evident the exigencies of the international community, the general concerns and interests of that collective and interdependent entity which is the international community of today” (*loc. cit.*, especially p. 193).

Simma is more sceptical when, commenting on Mr. Riphagen’s proposals, he makes the following remarks:

“... the link between Article 14 and the procedural safeguard of compulsory jurisdiction of the International Court of Justice proposed in 1986 will not stand the test of political realities. Such third-party adjudication certainly is to be welcomed, some would even say, to be regarded as an indispensable corollary of the acceptance of ‘international crimes’. But let us be realistic: the idea that a significant part of United Nations Member States would be prepared to involve the Court in the issues listed in Article 19 is simply utopian” (*loc. cit.*, especially p. 307).

Graefrath is decidedly opposed to recognizing an international court as an appropriate body to deal with crimes (*loc. cit.*, especially pp. 168-169).

²⁶⁵ Abi-Saab, *loc. cit.*, especially pp. 148-149; Hailbronner, *loc. cit.*, especially pp. 9-10; Klein, “Sanctions by international organizations and economic communities”; de Hoogh, *loc. cit.*, especially pp. 207-211; and, similarly, Simma, “Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission”, especially p. 402. To these should be added the writers who came out even more decidedly in favour of the possibility for States “not directly” injured to resort *uti singuli* to countermeasures against a State guilty of an international crime (see footnote 238 above).

prejudicial to the interests of "innocent" States, in which case provision would have to be made for an obligation of "solidarity". Provision should be made by means of compensation machinery for equitable distribution of the burden borne by States as a result of the operation of "sanctions".²⁶⁷ It is sometimes recalled that the severity of the reaction of the "organized international community" should be commensurate with the gravity of the crime—particularly so in the case of aggression.²⁶⁸

B. Problematic aspects of a possible "special regime" of responsibility for crimes

1. INTRODUCTION

167. Having summarized the main positions expressed in the Commission, in the Sixth Committee and in the relevant literature concerning the provision of regulations to govern the consequences of crimes, this section will attempt to identify the principal issues that would have to be resolved in codifying the subject. Only when the Commission has provided guidance on these issues will it be possible, on the basis of a more thorough examination of both practice and scholarship, to propose a solution for the regime of crimes for its consideration.

168. As can be seen from article 19 of part 1 and article 5, paragraph 3, of part 2 of the draft as adopted on first

²⁶⁶ Dupuy, loc. cit. (footnote 234 above), especially p. 184; Cardona Lloréns, loc. cit., especially pp. 331-333, who refers primarily, however, to the possibility of applying "sanctions" like expulsion or suspension from an international organization as a consequence of a crime.

²⁶⁷ Hailbronner, loc. cit., especially pp. 12-15; Doehring, "Die Selbstdurchsetzung völkerrechtlicher Verpflichtungen", especially p. 50; Delbrück, "International economic sanctions and third States", especially pp. 92-93 and 96-98. According to these writers, the measures in question are entirely forbidden, even if decided by the "organized international community", if they are prejudicial to "vital" or "essential" interests of "innocent" States.

²⁶⁸ Here reference is made not so much to collective measures involving the use of armed force, as provided by Chapter VII of the Charter (and more specifically Article 42), which may, by general admission, be implemented against an aggressor State, as to another particularly severe type of "sanction" (or rather, perhaps, "guarantee of non-repetition"). According to some, if understood correctly, the "organized international community" might certainly apply sanctions of this type in the case of aggression, but not always in the case of other international crimes. According to Graefrath and Mohr, for instance,

"Another specific legal consequence in case of international crimes are the possible limitations of the exercise of sovereign rights to ensure non-repetition of the crime. After the Second World War, these limitations took the form of provisions on demilitarization, establishment of demilitarized zones, prohibition of certain weapons, in particular weapons of mass destruction, and certain types of missiles. Very similar provisions, or at least the same approach, can be found in Security Council resolution 687 (1991)."

In particular, the verification procedures instituted by virtue of that resolution

"... go far beyond what has until now been applied by IAEA or what was foreseen in the draft convention against chemical weapons. The control and verification procedures are clearly part of the sanctions and the legal consequences applied by the Security Council to ensure non-repetition of the aggression.* They can be understood as a limitation on the exercise of sovereign rights and justified as a legal consequence in case of a crime of aggression*" (loc. cit., especially pp. 127-128).

reading and related commentaries,²⁶⁹ crimes consist in serious breaches of *erga omnes* obligations designed to safeguard fundamental interests of the international community as a whole. The basic problem, therefore, is to assess to what extent the breach, seriously prejudices an interest common to all States affects the complex responsibility relationship which, as explained in the previous report,²⁷⁰ arises even in the presence of "ordinary" *erga omnes* breaches.

169. A convenient approach is to distinguish an "objective" and a "subjective" viewpoint. The questions to be answered are:

(a) From the objective viewpoint, whether and in what way the severity of the breaches in question aggravates the content and reduces the limits of the substantive and instrumental consequences that characterize an "ordinary" *erga omnes* breach; and

(b) From the subjective viewpoint, whether or not the fundamental importance of the breached rule involves any changes in the otherwise unorganized and institutionally uncoordinated multilateral relations that normally arise in the presence of an ordinary breach of an *erga omnes* obligation under general law, either between the wrongdoing State and all other States or among the plurality of injured States themselves.

170. The presentation of each of the specific problems posed by the consequences of crimes will be based on these two sets of fundamental questions. Following the customary order what are termed the "substantive" consequences will be discussed first.

2. SUBSTANTIVE CONSEQUENCES

171. As far as cessation of the breach is concerned, crimes do not seem to present any special characteristics in comparison with "ordinary" wrongful acts (whether or not *erga omnes*).²⁷¹ This is understandable considering, first, that the content of the obligation of cessation cannot qualitatively assume greater or lesser gravity or otherwise be modified (objective aspect); and, secondly, that even in the case of delicts, what is involved is an obligation incumbent upon the responsible State even in the absence of any demand on the part of the injured State or States (subjective aspect).

172. Practice demonstrates that not only is a State which is perpetrating a crime obliged to cease its "criminal" conduct forthwith, but that there are a variety of manners in which one or more injured parties may demand cessation

²⁶⁹ Mr. Ago, fifth report (*Yearbook* . . . 1976, vol. II, Part One (see footnote 177 above), paras. 75-154); report of the Commission on the work of its twenty-eighth session (*ibid.*, vol. II (Part Two), pp. 95 et seq.); Mr. Riphagen, sixth report (*Yearbook* . . . 1985, vol. II (Part One) (see footnote 2 above), pp. 5-8, art. 5 and commentary thereto); report of the Commission on the work of its thirty-seventh session (*ibid.*, vol. II (Part Two), pp. 25 et seq.).

²⁷⁰ Fourth report of the Special Rapporteur (*Yearbook* . . . 1992, vol. II (Part One)) (see footnote 79 above), paras. 127-151.

²⁷¹ See Arangio-Ruiz, preliminary report of the Special Rapporteur (*Yearbook* . . . 1988, vol. II (Part One)), pp. 12 et seq., document A/CN.4/416 and Add.1, paras. 29-63; and his fourth report (*Yearbook* . . . 1992, vol. II (Part One)) (see footnote 79 above), paras. 127-151.

without the lawfulness of such demands being contested, except, of course, by the wrongdoing State.

173. By way of example, what took place in two clear-cut cases of international crimes of States, that is to say, the apartheid regime in South Africa and the invasion of Kuwait, may be recalled. Concerning the first, the demand that South Africa should put an end to its policy of systematic outrage against human rights came not only from international multilateral bodies, such as the United Nations Security Council, the General Assembly and the Economic and Social Council,²⁷² but also from States *ut singuli*.

174. The well-known applications made to ICJ by Ethiopia and Liberia against South Africa as administrator of Namibia (South West Africa) are examples. Both States called for an end to the practice of apartheid.²⁷³

175. In the case of Kuwait, virtually immediate demands for the withdrawal of Iraqi troops were lodged both by international organizations²⁷⁴ and individual States.²⁷⁵

176. The same thing happened, moreover, in respect of Israeli operations against Lebanon.²⁷⁶

177. The question of what countermeasures may be adopted, and by whom, in order to obtain cessation by a State that does not comply spontaneously with cessation demands is far less self-evident. This point, however, more properly relates to the "instrumental" aspects of responsibility discussed in subsection 3 below.

178. Moving to reparation *lato sensu*, including *restitutio*, compensation, satisfaction and guarantees of non-repetition, the matter becomes more complex. A

²⁷² Suffice it to recall the various resolutions in which these organs have called upon South Africa to put an end to apartheid, especially (but not solely) within the framework of the procedure instituted for "gross violations" of human rights by Economic and Social Council resolution 1503 (XLVIII) or, for example, Security Council resolutions 181 (1963) of 7 August 1963, 182 (1963) of 4 December 1963 and 418 (1977) of 4 November 1977.

²⁷³ Points 3 and 4 of the submissions presented by the two Applicant States on 19 May 1965 (*South West Africa (Ethiopia v. South Africa: Liberia v. South Africa)*, *Second Phase*, I.C.J. Reports 1966, p. 12).

²⁷⁴ Immediate demands for the withdrawal of Iraqi troops were made not only by the Security Council (resolution 660 (1990) of 2 August 1990), but also by the Council of the League of Arab States, which met in Cairo on 2 August 1990 (document S/21434 of 3 August 1990), and by the member States of the European Community (statement of 4 August 1990, document A/45/383-S/21444 of 6 August 1990).

²⁷⁵ Such demands were also put forth, especially, by France (French Foreign Ministry communiqué of 2 August 1990, in AFDI, vol. XXVI (1990), p. 1041) and by Switzerland (note verbale of 22 August 1990 from the Chargé d'affaires of the Permanent Observer Mission of Switzerland to the United Nations, addressed to the Secretary-General (document S/21585 of 22 August 1990)).

²⁷⁶ Demands for cessation have in fact been made both by the Security Council (especially, in resolutions 313 (1972) of 28 February 1972, 332 (1973) of 21 April 1973, 501 (1982) of 25 February 1982, 508 (1982) of 5 June 1982, 520 (1982) of 17 September 1982, 583 (1986) of 18 April 1986, 586 (1986) of 18 July 1986 and 587 (1986) of 23 September 1986) and by individual States (France, "Pratique française de droit international", AFDI, vol. XXVIII (1982), pp. 1050-1051; and the United Kingdom of Great Britain and Northern Ireland, "United Kingdom Materials of International Law", BYBIL, vol. 53, p. 534).

number of problems arise here in connection with both the objective and the subjective aspects.

179. Regarding the objective aspect, some of the forms of reparation, especially *restitutio* and satisfaction, are subject to certain limits in the case of mere delicts. It is therefore necessary to see whether, as a consequence of a crime, all or any such limits are subject to derogation and, if so, to what extent. In other words, it must be determined whether, in the case of crimes, the "substantive" obligations are more burdensome for the wrongdoing State than in the case of "ordinary" breaches.

180. A first possible derogation pertains to the excessive onerousness limitation for *restitutio*. One example that comes to mind is the great efforts South Africa has been making for some time now through its internal legal system to comply with its international obligation to eliminate the effects of the previous regime of total apartheid. Yet, the reaction of the international community is still circumspect. A number of States have decided to lift sanctions gradually and re-establish diplomatic relations only when the promised legislation is effectively passed; and they still reserve the right to assess its practical implications.

181. A second derogation might concern the prohibition of "punitive damages", of humiliating demands or of demands affecting matters generally considered to pertain to the freedom of States. There is, for example, the case of Israel, which obtained an indemnity of 3.45 billion deutsche mark from the Federal Republic of Germany by way of atonement for the Nazi persecution of Jews; the territorial amputations imposed upon Germany and Italy at the end of the Second World War, together with the elimination of any remnants of their totalitarian regimes; or, more recently, the obligations imposed on Iraq by Security Council resolution 687 (1991) of 3 April 1991, relating to the destruction of armaments and the demarcation of the borders with Kuwait.

182. A third derogation might concern demands for satisfaction or guarantees against repetition which have a major impact in an area under the domestic jurisdiction of the wrongdoing State. Examples are some of the obligations imposed upon Iraq concerning the destruction, under international control, of armaments and the institution and enforcement of no-fly zones *et similia*.

183. On the subjective side, it should be borne in mind that the substantive consequences are covered by obligations which the responsible State is required to perform only at the demand of the injured party, unlike in the case of cessation. No problem arises, obviously, with regard to the demands of the State, if any, which is the "principal victim". Indeed, if the crime was directed specifically against one or more particular States (as, for example, in the case of aggression), they would unquestionably be entitled to demand compliance with the "substantive" obligations.

184. Since, however, a crime always involves, additionally or solely, States "less directly" injured than a "principal victim", the question arises whether in the current state of international law each of those States is entitled to claim reparation *ut singuli* or whether, on the contrary, some mandatory form of coordination is required among all the injured States (to be effected, presumably, by

means of institutionalized procedures), as an expression, so to speak, of the will of the "international community" or of the "organized international community". Regarding the performance of such an obligation, international practice offers examples of demands presented by individual States (other than the "principal victim", if any, of the breach) as well as by worldwide or regional international bodies.

185. Examples are the demands for *restitutio* made by France²⁷⁷ and by the Council of Europe on the occasion of the Soviet intervention in Afghanistan;²⁷⁸ the demand for *restitutio* addressed to Portugal by the Security Council on the occasion of numerous armed raids carried out by that State against Zambia;²⁷⁹ the demand for damages addressed to South Africa by the Commission on Human Rights on behalf of Namibians who were imprisoned or missing, of their families and of the future independent Government of Namibia;²⁸⁰ the demands for compensation from Israel made in favour of Iraq by the Security Council²⁸¹ and the General Assembly²⁸² in connection with the Israeli bombing of the Osiraq nuclear power plant; the demand addressed to Iraq by the League of Arab States to compensate the State of Kuwait for the damage caused by the Iraqi invasion;²⁸³ and the demand for guarantees of non-repetition addressed by the Security Council to the Libyan Arab Jamahiriya in relation to the direct and indirect involvement of that country in terrorist activities.²⁸⁴

186. Combining the subjective with the objective aspects, the question also arises whether in the case of crimes the limits referred to above may under certain circumstances be overstepped, either by a claim lodged in any manner by any injured State *ut singuli* or only by claims preceded by some form of coordination/concerted action on the part of all the injured States. Such concerted action could perhaps be taken as evidence of the will of the "international community as a whole".

187. Once the *lex lata* on all these points has been clarified,²⁸⁵ it should be possible to assess whether and to what extent it would be appropriate to provide *correctifs*, or radical innovations, by way of progressive development.

²⁷⁷ AFDI, vol. XXIX (1983), p. 907.

²⁷⁸ BYBIL, vol. 52 (1981), p. 511.

²⁷⁹ Security Council resolution 281 (1970) of 9 June 1970.

²⁸⁰ Commission on Human Rights resolution 1987/8 (*Official Records of the Economic and Social Council, Forty-third Session, Supplement No. 5 (E/1987/18-E/1987/60)*).

²⁸¹ Security Council resolution 487 (1981) of 19 June 1981.

²⁸² General Assembly resolutions 36/27 and 41/12.

²⁸³ Resolution 5041, adopted on 31 August 1990 by the Council of the League of Arab States, at its extraordinary session.

²⁸⁴ Security Council resolution 748 (1992) of 30 November 1992 (especially para. 2).

²⁸⁵ As will be explained in connection with the "instrumental" aspects (see point 3 below), the determination of *lex lata* might indeed pose particular problems when it comes to weighing the legitimacy of intervention by international bodies in the "management" of the consequences of certain crimes of States, in the light of general and treaty law in force.

3. INSTRUMENTAL CONSEQUENCES: MEASURES INVOLVING THE USE OF FORCE

188. Turning now to what are termed the "instrumental" aspects of international liability for State crimes, namely to the measures that may be adopted in response to a crime, the discussion will begin with the most serious of those measures: those involving the use of force. The prime case is that of self-defence. This does not mean, of course, reopening the discussion on the admissibility of force as a means of self-defence—a problem on which the Commission has already expressed its views in the past.²⁸⁶ The concern here is with the legitimacy of the use of force by way of reaction to a crime, notably a crime of aggression.

189. Above all, the Commission would need to clarify the content of a number of requirements traditionally considered to be conditions of self-defence, particularly immediacy, necessity and proportionality.

190. It would also have to be made clear on what terms the right of "collective" self-defence includes resort to armed force against an "aggressor" by States other than the main target of the aggression: whether, for example, such resort is legitimate only when expressly requested by the target State, whether a presumption of that State's consent suffices, or whether, in such situations, the reaction of "third" States may follow "automatically", so to speak.

191. It would be useful for the Commission to adopt a position on this series of problems even if it preferred not to lay down express provisions but rather simply to refer to the "inherent right of individual or collective self-defence": a commentary on the meaning of such "inherent right" would in fact prevent dangerous misunderstandings.

192. However, the problem of resort to force in response to an international crime is not solely a question of self-defence against armed attack. It is also a question of the admissibility of armed measures in order to bring about the cessation of crimes other than aggression. In this case, too, the problem presents above all an objective aspect. This consists in establishing whether resort to force in order to obtain cessation is or is not admissible in circumstances other than those justifying self-defence. Were it found to be admissible, it would remain to be determined, first, whether resort to force would be subject to limits and conditions; and, secondly, whether force would be admissible in response to any and every type of crime or only to certain types.

193. Among the problems which must be considered in this context are, on the one hand, those of armed support to peoples oppressed by "alien domination" or, more generally, by regimes committing grave violations of the

²⁸⁶ See addendum to Mr. Ago's eighth report (*Yearbook . . . 1980*, vol. II (Part One), pp. 51 et seq., document A/CN.4/318/Add.5-7, paras. 82-124; the Commission's commentary to article 34 of part I of the draft articles (*Yearbook . . . 1980*, vol. II (Part Two)), pp. 52-61; the third report of the Special Rapporteur (*Yearbook . . . 1991*, vol. II (Part One)) (see footnote 78 above), paras. 97-102; and his fourth report (*Yearbook . . . 1992*, vol. II (Part One)) (see footnote 79 above), paras. 58-69.

principle of self-determination;²⁸⁷ and, on the other, armed intervention against a State responsible for large-scale violations of “fundamental” human rights or the perpetration of genocide or violent forms of “ethnic cleansing”.²⁸⁸

194. With regard to such cases, if the use of armed force is deemed to be admissible *de lege lata* or desirable *de lege ferenda*, the question arises in either case whether this would constitute the “typical” sanction in reaction to a crime (i.e. a reaction against the wrongdoing State under the law of State responsibility), or whether it would correspond to some other *ratio*. An example is the *ratio* underlying the reaction to circumstances resulting from “state of necessity” or “distress”. Such circumstances do indeed preclude wrongfulness but, unlike self-defence, they do not authorize a direct reaction against the perpetrator of a particularly serious international breach. Such instances would fall outside the scope of the specific regime of responsibility for crimes.

195. Another problematic aspect of resort to force by way of reaction to a crime—again from the objective standpoint—is the question whether armed countermeasures are admissible when they are intended not to bring about the cessation of a crime currently in progress but to obtain reparation *lato sensu* or adequate guarantees of non-repetition.

196. Reference is made, for example, to the *debellatio* of a State that started a war of aggression, to the imposition by the victorious Powers of a military occupation on its territory or to any other “sanctions” imposed by force of arms on a State required to reverse all the consequences of the crime.²⁸⁹ Are measures of that kind at present

²⁸⁷ See in this connection, General Assembly resolution 3070 (XXVIII), paras. 2 and 3, and Security Council resolution 424 (1978). See also the ICJ judgment in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, which affirms the legitimacy of armed assistance to opposition movements in the case of civil wars, though it makes no pronouncement on assistance to national liberation movements (*I.C.J. Reports 1986*, p. 108, para. 206).

²⁸⁸ It should be noted that some scholars believe that, in addition to self-defence, only humanitarian intervention would justify resort to armed force. The practice of some States seems to indicate, however, that humanitarian reasons have been adduced by the intervening State, not in isolation but in conjunction with self-defence from an armed attack. It may be useful to recall the reasons adduced by India to justify intervention in Bangladesh in 1971 (*Official Records of the Security Council, Twenty-sixth Year*, 1606th meeting, paras. 158-163). On this case see Lillich, *International Human Rights: Problems of Law, Policy, and Practice*, II, pp. 565 et seq. Another instance is the invasion of Democratic Kampuchea by Viet Nam in 1978. According to one commentator, “Viet Nam never claimed to have given military help to the rebels, nor to have intervened to re-establish human rights in Kampuchea” (Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, p. 99); see the Vietnamese statement before the Security Council in *Official Records of the Security Council, Thirty-fourth Year*, 2108th meeting, paras. 126-7 and 135-6. According to Ronzitti (*op. cit.*, pp. 102 et seq.), humanitarian reasons would not have been invoked to justify the Tanzanian intervention in Uganda in 1979. The only justification on that occasion would have been self-defence against an armed attack (*op. cit.*). For other comments on the same case see Lillich, *op. cit.*, pp. 74 et seq.

²⁸⁹ The situation of Germany at the conclusion of the Second World War may be of interest in this connection. Kelsen (“The legal status of Germany according to the Declaration of Berlin”, p. 518) states that

legitimate? If so, may they follow upon any crime, or are they permissible only by way of reaction to a certain type of crime, specifically a war of aggression?

4. THE PROBLEM OF THE *FACULTÉ* OF REACTION: SUBJECTIVE-INSTITUTIONAL ASPECTS

197. Even more important—and more difficult—are the problems arising with regard to the “subjective” aspects of the instrumental consequences of crimes involving armed force. They relate essentially to the *faculté*

to adopt armed measures, be they in response to aggression or possibly to crimes other than aggression.

198. The problem might be stated roughly in the following terms: does the admissibility of armed measures vary according to whether they are taken by one or more injured States *ut singuli* or by the community of States *ut universi*? In other words, might such measures be considered inadmissible if resorted to unilaterally by one or a small group of injured States, but legitimate if they were the expression of a “common will” of the international community (or of the “organized international community”)?

199. This is obviously a problem central to the entire regime of crimes, and not just to the regime of armed measures aimed at cessation. It arises, as already mentioned, in connection with a number of “substantive” consequences and affects all the “instrumental” consequences whenever the regime of international crimes of States possibly involves the competence of the “international community as a whole” (or of the “organized international community”).

200. Widening the analysis from the particular area of armed measures considered so far to the broader area of countermeasures in general, an attempt should now be made to identify the various facets of this “subjective-institutional” problem.

201. Practice offers more than one example of injured States dealing with the consequences of a very serious breach—especially one still in progress—not in an “unorganized” fashion (*ut singuli*) but through the intervention of an international body belonging to a “system” of which the wrongdoing State is also a member. This is especially true of the organs of the United Nations, and of the Security Council in particular, with regard to the adoption

“... the legal status of Germany is not that of ‘belligerent occupation’ in accordance with Articles 42 to 56 of the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 1907”.

However, it may be useful to define that status (see especially, in this connection, Oppenheim, *International Law: A Treatise*, vol. II, *Disputes, War and Neutrality*, pp. 602 et seq.). What is of interest for the present purposes is that the occupation of Germany was intended, among other things, to guarantee a complete change of political system as well as to preclude the possibility of German industry endangering international peace in the future.

Turning to a more recent case, the possibility of force being used to guarantee the disarmament obligations imposed upon Iraq by Security Council resolution 687 (1991) of 3 April 1991, seems to be contemplated by paragraph 33 of that resolution (which makes the ceasefire conditional on Iraqi acceptance of the terms imposed) and by paragraph 34 (which provides that the Council “remains seized of the case” and may decide “such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area”).

of measures. This report will deal only briefly with examples from a body of practice that will be examined in greater depth in the next report, when—thanks to the guidance expected from the Commission—an attempt will be made to provide answers to the problems presented here.

202. Suffice it to refer, for the present purposes, to the following cases of “organized” reaction to very serious breaches:

(a) Adoption of armed measures: Security Council resolution 221 (1966) of 9 April 1966, granting consent for the use of force by the United Kingdom to render effective the embargo against Southern Rhodesia; Security Council resolutions 665 (1990) and 678 (1990), of 25 August and 29 November 1990 respectively, whereby consent was given for the use of force against Iraq as “aggressor” vis-à-vis Kuwait;

(b) Adoption of measures not involving the use of force: Security Council resolutions 180 (1963) and 183 (1963) of 31 July and 11 December 1963, urging the implementation of an arms embargo against Portugal on account of its repressive policy towards its colonies; Security Council resolutions 232 (1966) of 16 December 1966 and 253 (1968) of 29 May 1968, establishing an economic embargo against Southern Rhodesia; Security Council resolution 418 (1977) of 4 November 1977, establishing an arms embargo against South Africa by reason of its apartheid policy; Security Council resolution 748 (1992) of 31 March 1992, imposing an arms embargo and an aerial communications blockade against the Libyan Arab Jamahiriya on account of its involvement in terrorist activities; and Security Council resolution 757 (1992) of 30 May 1992, deciding on a series of economic measures against the Federal Republic of Yugoslavia (Serbia and Montenegro).

203. From a number of quarters, precedents of the kind recalled in paragraph 202 above are invoked, as noted, in support of the notion that the competence to adopt sanctions against particularly serious internationally wrongful acts does not, and should not, lie with States *ut singuli*. It would or should rather lie—*de lege lata* and/or *de lege ferenda*—with the “organized international community” as represented by the United Nations, and specifically by the Security Council as the United Nations organ endowed with the greatest powers of action.²⁹⁰

²⁹⁰ For the relevant literature see footnotes 254-268 above. In the Commission this view was shared by Mr. Ago (*Yearbook* . . . 1976, vol. I, 1371st meeting, paras. 24-26, 1372nd meeting, paras. 40-45, 1376th meeting, paras. 29-33); Mr. Yasseen (*ibid.*, 1372nd meeting, paras. 16-19); Mr. Sette Câmara (*ibid.*, 1373rd meeting, paras. 7-10); Mr. Vallat (*ibid.*, paras. 14-16); Mr. Martínez Moreno (*ibid.*, paras. 23-35); Mr. Ramangasoavina (*ibid.*, 1374th meeting, paras. 24-26); Mr. Kearney (*ibid.*, paras. 29-39); Mr. Tsuruoka (*ibid.*, 1-4); Mr. Rosides (*ibid.*, paras. 27-34); Mr. Ustor (*ibid.*, paras. 40-44); Mr. El-Erian (*ibid.*, 1376th meeting, paras. 1-13); and Mr. Bilge (*ibid.*, paras. 14-18). See also more recent statements on this matter in the Commission (Mr. Evensen (*Yearbook* . . . 1982, vol. I, 1733rd meeting, para. 17); Mr. Ushakov (*ibid.*, 1736th meeting, paras. 33-35 and 1737th meeting, paras. 25-26); Mr. Yankov (*ibid.*, 1737th meeting, para. 12); Mr. Flitan (*Yearbook* . . . 1983, vol. I, 1773rd meeting, paras. 2 et seq.); Mr. Al-Qaysi (*ibid.*, 1775th meeting, paras. 1-6); Mr. Balanda (*ibid.*, 1775th meeting, paras. 17 et seq.); Mr. Jagota (*ibid.*, 1777th meeting, paras. 1 et seq.); Mr. Koroma (*ibid.*, paras. 19-21); Mr. Barboza (*ibid.*, para. 47); and Mr. McCaffrey (*ibid.*, 1779th meeting, para. 27).

204. A considered juridical answer to this question for purposes of codification and/or progressive development of the legal consequences of international crimes of States as defined in article 19 of part 1 would require an analysis of problems at the very apex of the international legal system. (The reference to a considered *juridical* answer is, of course, to distinguish it from the mere recording of what may have occurred so far with regard to given acts or situations.) These problems range from the nature of the international community and the inter-State system and the concept of the “organized international community” to the nature of the United Nations and the functions and powers of its organs. It is mainly because of the difficulty and great sensitivity of issues of such legal and political magnitude and the inability to solve them on the “simplistic” basis of identifying law with fact that this report deliberately refrains from presenting any proposals on the consequences of international crimes of States without guidance from the Commission. Indeed, for the moment, in this area more than in any other, the best that can be done is to identify the main issues on which the debate should focus.

205. Leaving aside for the moment the more general problems, the central issue is whether and to what extent the various functions and powers of United Nations organs in the areas of international law covered by article 19 of part 1 are (*de lege lata*) or should be (*de lege ferenda*) adapted juridically to implement the consequences of international “crimes” of States. Only after solving such a set of problems would it be possible to determine:

(a) *De lege lata*, whether and to what extent the existing functions and powers of United Nations organs (or any one of them, such as the General Assembly, Security Council, ICJ, etc.) are adequate to deal with internationally wrongful acts of the kind contemplated in article 19 of part 1, that is to say, to determine the existence, attribution and consequences of such wrongful acts;

(b) *De lege ferenda*, whether and in what sense the existing powers and functions of those organs should be adapted juridically to such specific tasks as determining the existence, attribution, and consequences of the internationally wrongful acts in question;

(c) *De lege lata* and/or *de lege ferenda*, more particularly, to what extent the above functions and powers of United Nations organs affect or should affect the *facultés*, rights or obligations of States to react to any of the internationally wrongful acts in question, in the sense of either substituting for individual reactions or legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

206. As regards the first question (para. 205 (a) above) it must be determined whether the competence of United

Doubts regarding the legal correctness and the political appropriateness of relying upon the machinery provided by the Charter for the maintenance of international peace and security were expressed by Mr. Castañeda (*Yearbook* . . . 1976, vol. I, 1402nd meeting, para. 27); Mr. Reuter (*ibid.*, para. 63 and *Yearbook* . . . 1984, vol. I, 1861st meeting, para. 9), and Mr. Malek (*ibid.*, 1866th meeting, para. 13). Among States a similar view was expressed by Japan (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee*, 21st meeting, para. 8); Australia (*ibid.*, 27th meeting, para. 20); and Spain (*Yearbook* . . . 1982, vol. II (Part One)), p. 15, document A/CN.4/351 and Add.1-3, para. 4 (a)).

Nations organs (or any one of them) to deal with the wrongful acts contemplated in article 19 of part I may be drawn from the Charter of the United Nations or any supervening rule of customary international law. It must be stressed, however, that the question is not simply whether United Nations organs have in fact taken some action (decision, recommendation or more concrete measures) with regard to State conduct of the kind indicated in article 19, paragraph 3. It is whether, *de lege lata*, any United Nations organs have, *as a matter of law* (written or unwritten), exercised the specific function of determining that such conduct occurred and that it constituted a crime on the part of one or more given States, and of determining the liability of the State(s) concerned and applying sanctions or contributing to the application thereof. Only on this basis could it be ascertained whether a legally organized reaction to international crimes of States is provided *de lege lata*, namely by the present structures of the "organized international community".

207. If the various kinds of international crimes contemplated in article 19, paragraphs 3 (a), (b), (c) and (d) are combined with the functions and powers of United Nations organs, it is difficult to answer the first question. Considering the purpose of the present subsection, only a few examples will be selected from what would otherwise be a longer list.

208. *Ratione materiae*, the General Assembly—the most representative body of the inter-State system—is surely, under the Charter, the competent organ for the promotion and protection of human rights and self-determination of peoples.²⁹¹ At the same time, the General Assembly is not endowed by the Charter with the type of powers which would enable it to produce an adequate reaction to violations of human rights and self-determination of peoples of the kind contemplated in article 19, paragraphs 3 (b), (c) and (d). In these areas the Assembly can only promote the adoption of non-binding instruments, create subsidiary bodies, and, more generally, address recommendations to States collectively or individually. At most, it can recommend to the Security Council an "intervention" on the basis of Chapter VII.

²⁹¹ Under Article 13, paragraph 1 (b), of the Charter,

"1. The General Assembly shall initiate studies and make recommendations for the purpose of:

...

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Article 55, read in connection with Article 60 of the Charter, vests in the General Assembly the major responsibility for the discharge of the functions of the Organization in the area of international economic and social cooperation,

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .".

On the leading role of the General Assembly in these matters see, *inter alia*, *Die Charta der Vereinten Nationen* (B. Simma, ed.), p. 319; Goodrich, Hambro, Simons, *Charter of the United Nations: Commentary and Documents*, pp. 453 et seq. and Guarino, *Auto-determinazione dei popoli e diritto internazionale*.

209. It would seem, therefore, that with regard, *inter alia*, to wrongful acts of the kind contemplated in article 19, paragraphs 3 (b), (c) and (d), the Assembly cannot go beyond non-binding declarations of unlawfulness and attribution and non-binding recommendations of reaction by States or by the Security Council.²⁹² For the moment, the crime contemplated in paragraph 3 (a) of article 19 is left aside: obviously this is a matter where the main competence does not lie with the General Assembly.

210. The Security Council, for its part, is competent *ratione materiae* for the maintenance of international peace and security and its powers under Chapter VII and Articles 24 and 25 of the Charter do indeed *in principle* enable it to provide, directly or indirectly—but *tendanciellement* always effectively—for an adequate reaction in the form of economic, political or military measures, first and foremost against that most serious attempt against peace which is defined in article 19, paragraph 3 (a), as the "crime" of aggression. Secondly, the Council may react by means of such measures against any other of the "crimes" envisaged in paragraphs 3 (b), (c) and (d) of article 19 which, though they may lie *ratione materiae* within the competence of the General Assembly, may come under the Council's powers whenever they fall within one of the categories covered by Article 39 of the Charter, namely when they represent a threat to the peace, breach of the peace or an act of aggression.

211. No lawyer could fail to note, however, that the Security Council has discretionary power to assess any situation involving a threat to the peace, a breach of the peace or an act of aggression, with a view to maintaining or restoring international peace and security. The Council has neither the constitutional function nor the technical means to determine, on the basis of law, the existence, attribution or consequences of any wrongful act, whether "delict" or "crime". Its discretionary competence to decide whether one of those situations exists is in principle confined to the purposes of Articles 39 et seq. of Chapter VII of the Charter. That Chapter and the other relevant Charter provisions do not seem to cover the assessment of responsibility, except for the determination of the existence and attribution of an act of aggression.

212. The above consideration, however, does not dispose entirely of the issue of the Council's competence. Although that body has not been entrusted by the drafters of the Charter with the task of determining, attributing and applying sanctions in response to the serious breaches in question, the situation at present may be different. The question may indeed be asked, in particular, whether recent practice does not demonstrate an evolution in the scope of the Council's competence, precisely with regard to the "organized reaction" to certain types of particularly serious internationally wrongful acts, since the stalemate which previously characterized its functioning was broken. Some recent Security Council resolutions do not seem to be easily justifiable on the basis of the powers expressly vested in it by the Charter. These resolutions include, in particular, resolution 687 (1991) of 3 April 1991,

²⁹² It is doubtful that any contrary inference could be drawn from such well-known episodes as the revocation of the South West Africa (Namibia) mandate or General Assembly resolution 377 (V) on "Uniting for Peace".

at least that part which imposes reparations on Iraq for "war damage" and establishes the modalities according to which they are to be assessed and paid; resolution 748 (1992) of 31 March 1992 in which the well-known requirements of Article 39 are interpreted so broadly as to allow measures to be taken against the Libyan Arab Jamahiriya for its failure, in substance, to extradite the alleged perpetrators of a terrorist act; and resolution 808 (1993) of 22 February 1993 on the establishment of an ad hoc international tribunal for the prosecution and trial of crimes committed by members of the various factions presently in conflict in the territories of the former Republic of Yugoslavia.²⁹³

213. In order to affirm that the practice in question did or does contribute to the creation or consolidation of the Council's competence in the area of State responsibility for crimes (a conclusion which would be problematic), convincing arguments need to be produced to the effect that it is a "juridically decisive" practice. It is necessary notably to prove that this practice is a law-making practice either under the Charter system (so-called United Nations law) or under general international law. It needs to be proved precisely that the practice would constitute, so to speak, either a "concrete" application of the "implied powers" doctrine to the Council's action, or the material expression of an "instant" customary rule of some degree, or a tacit agreement accepted or adopted by the members of the United Nations, which may, as such, derogate from the written provisions of the Charter. In the latter case, it should be possible, of course, to indicate and demonstrate the precise content assumed by such a rule in derogation from the Charter.

214. The only existing permanent body which, in principle, possesses the competence and technical means to determine the existence, attribution and consequences of an internationally wrongful act—including possibly a crime of State—is ICJ. It is indeed the function of the Court "to decide in accordance with international law" (Art. 38, para. 1, of the Statute); and its pronouncements—concerning, in the present case, the existence and legal consequences of an internationally wrongful act—possess "binding force . . . between the parties" to the dispute (Art. 59). These two features of the Court's function—not to mention its composition—would surely make the Court more suitable for the purpose than other United Nations organs. There are, however, two sets of major difficulties deriving, *inter alia*, from other features of the ICJ system as at present constituted.

²⁹³ Scholars have already turned their attention to the study of this recent practice of the Security Council. Mention may be made, in particular, of Cotterau, "De la responsabilité de l'Irak selon la résolution 687 du Conseil de Sécurité"; Maranh, "The implementation of disarmament and arms control obligations imposed upon Iraq by the Security Council"; Weller, "The Lockerbie case: a premature end to the 'new world order'"; Tomuschat, "The Lockerbie case before the International Court of Justice"; Reisman, "The constitutional crisis of the United Nations"; Bedjaoui, "Du contrôle de légalité des actes du Conseil de Sécurité"; Gaia, "Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial: A propos des rapports entre maintien de la paix et crimes internationaux de Etats". See also *The Future of International Law Enforcement: New Scenarios—New Law?*, *Proceedings of an International Symposium of the Kiel Institute of International Law, March 25 to 27, 1992* (Delbrück, ed.), containing a debate on writings by Reisman, Farer, Rubin and Schreuer.

215. The first set of difficulties derives from the essentially voluntary nature of any State's submission to the exercise of the Court's functions, such submission being a *direct* consequence of adherence to the Statute for only marginal purposes (such as the determination of preliminary issues). For the Court to be entitled to exercise its jurisdiction with regard to a crime, its competence would have to derive from a prior acceptance by the alleged wrongdoer of the Court's jurisdiction, in such terms as to allow one or more injured States—including probably the so-called indirectly injured States—unilaterally to summon the alleged wrongdoer before the Tribunal. This would be conditional either on the acceptance by *all* States of the so-called optional clause of Article 36, paragraph 2, of the Statute or on the injured State or States initiating the action being parties, together with the alleged wrongdoer, to otherwise subjectively limited bilateral instruments which envisage the possibility of unilateral application. The only other way to empower the Court to make a ruling would be through the ad hoc acceptance of its jurisdiction by the alleged wrongdoer itself, which is improbable.

216. A second set of difficulties (the list is confined to those that are most easily apparent) concerns the almost total absence, alongside ICJ, so to speak, of organs juridically empowered to:

(a) Investigate the facts in the presence of which the existence of an internationally wrongful act and its attribution could be preliminarily ascertained;

(b) Play the role of "public prosecutor" in bringing the case to Court; and

(c) Determine the "sanctions" and impose the implementation of the Court's supposed "penalty" (except for the Security Council's function under Article 94 of the Charter).

217. In particular, the implementation of the Court's ruling on a State's liability would escape any control, so to speak, of the Court itself. Any "sanction" other than the mere identification of the breach and its attribution would thus have to be determined and applied either by the injured party or parties or be left to the discretionary action of other United Nations bodies.

218. The final question is whether and in what sense the existing functions and powers of United Nations organs should or could be juridically adapted to such specific tasks as determining the existence, attribution and consequences of international crimes of States (see paragraph 202 (b) above). Although this is the issue on which guidance from the Commission is most anxiously awaited, a few suggestions will be made as to the possible greater involvement of the Security Council in the "organized reaction" to State crimes.

219. As everybody knows, the Security Council is an organ with a restricted membership, in which some members enjoy a privileged status for the purpose of collective action. A question that naturally arises—if it is true that the "international community as a whole" has competence to impose sanctions in response to State crimes—is whether the Security Council, as at present constituted and functioning, is truly capable of giving expression, through its deliberations, to the "will" of that community?

220. The Security Council is a political body entrusted with the essentially political function of maintaining peace. This entails a number of consequences which may be summarized as follows:

(a) The Council operates on a highly discretionary basis. It acts neither necessarily nor regularly in all situations that would seemingly call for the exercise of its competence. It operates on the contrary in a selective manner;

(b) The Council is not bound to use uniform criteria in situations which may seem to be quite similar. Consequently, crimes of the same kind and gravity may be dealt with differently or not at all;

(c) The very nature of the Council's determinations seems to exclude any duty on its part to substantiate its decisions, its action or its inaction. The discretionary and possibly arbitrary character of its choices is thus aggravated by the fact that the lack of substantiation precludes present or future verification of the legitimacy of its choices.

221. These problematic features are perhaps acceptable—although not unreservedly—as the unavoidable drawbacks of the prevention and repression of aggression and other serious breaches of the peace. In such instances, where a timely reaction is indispensable, it is possible to sacrifice, to some degree, the objective assessment of any guilt and liability to the compelling need to safeguard the peace, reduce bloodshed and destruction and maintain a minimum degree of order. This comes very close to the *vim vi repellere* function which is typical of self-defence and, for want of a better solution, it is acceptable for a political body's *vis* to be deployed without the guarantees of a judicial process, which is inevitably problematic and mainly too slow.

222. Be that as it may with regard to aggression, the propriety of over-reliance on political bodies for the implementation of liability for State crimes becomes highly questionable with regard to the other instances contemplated in article 19, paragraph 3. Wrongful acts of the kind described in paragraphs 3 (b), (c) and (d) should be handled by judicial means—at least *de lege ferenda*. The history of national criminal law shows that once the repression of criminal offences is entrusted to organs that are centralized to some degree, the action of those organs is almost invariably characterized by such features as:

(a) Submission to the rule of law, procedural as well as substantive, no ad hoc criminal law provisions or extraordinary or "special" tribunals normally being tolerated in a civilized society;

(b) Regular, continuous and systematic conduct of criminal prosecutions and trials as evidenced primarily by the mandatory nature of the action of criminal law institutions;

(c) Impartiality—or "non-selectivity"—of such action with regard to the rulings of criminal courts and also, primarily, with regard to the investigation and prosecution of any known crime.

223. For the reasons set forth above, the nature of the Security Council's action—given the relevant features and mode of action of that organ—does not seem to be such as to meet the elementary, but fundamental, require-

ments of criminal justice referred to above. Were the Commission to suggest in its draft—*de lege ferenda*—that the task of implementing the international community's "organized reaction" to crimes of States should, in the main, remain with the Security Council, it would have to devise ways and means of reducing the serious gaps represented by the factors mentioned.²⁹⁴

224. A further matter on which guidance from the Commission is desirable relates to the kind of dispute settlement provisions to be included in part 3 of the draft in order to cover controversies arising in connection with a State crime. This matter, dealt with in article 4 (b) of part 3 as proposed by Mr. Riphagen in 1985-1986,²⁹⁵ is not covered by the draft articles of part 3 (and annex thereto) proposed in paragraph 106 above. The Commission should consider the possibility of improving Mr. Riphagen's proposals.

225. A last issue (identified in paragraph 205 (c) above) is the relationship between the reaction of the "organized community" through international bodies, on the one hand, and the individual reactions of States, on the other hand. Indeed, the recognition *de lege lata* or proposed recognition *de lege ferenda* of the competence of the "organized community" to adopt measures against a "criminal" State poses the problem of harmonizing the exercise of that competence with the carrying out of those measures (be they many or few, armed or non-armed) which all or certain injured States might still be entitled to adopt unilaterally (*uti singuli* or through regional arrangements) against any given crime. Leaving aside well-known cases of aggression (and consequent self-defence), there have been more than a few cases in which both "institutionalized" measures (originating in worldwide or regional organizations) and unilateral measures have been adopted (not always in an orderly fashion) on the decision of individual States or groups of States in reaction to the same crime. Two examples will suffice: one concerns the sanctions against South Africa,²⁹⁶ and the other the measures taken against the Federal Republic of Yugoslavia (Serbia and Montenegro) on the decision of the Security Council

²⁹⁴ A number of *correctifs* to the current decision-making procedures of the Security Council, with particular reference to its role in the "organized reaction" against major breaches, are being envisaged by some of the commentators cited (but see also the less recent proposals put forward by the writers cited in footnotes 263 and 264 above. Some writers propose, for example, resort to *avis preventifs* of ICJ prior to Security Council action (Simma, *The Future of International Law Enforcement: New Scenarios—New Law?*, *Proceedings of an International Symposium of the Kiel Institute of International Law, March 25 to 27, 1992*, p. 145, and Klein, "Paralleles Tätigwerden von Sicherheitsrat und Internationalen Gerichtshof bei friedensbedrohenden Streitigkeiten", pp. 481 et seq.) A more substantial contribution by ICJ for the control of legality of the Security Council action (by broadening the Court's competence either *ratione personae* or *ratione materiae* is suggested also by Bedjaoui, loc. cit., pp. 88 et seq. Other writers instead propose a more incisive role for the General Assembly, for instance, Rezek, in a speech delivered on 2 July 1991 at the eleventh Gilberto Amado Memorial Lecture, on the theme of "International law, diplomacy and the United Nations at the end of the twentieth century" and Reisman, loc. cit. The latter proposes the setting up of an ad hoc committee of the Assembly.

²⁹⁵ See footnote 2 above.

²⁹⁶ Numerous States and international organizations adopted economic measures against that country during the 1980s in reaction to its policy of apartheid (see, for example, the measures decided by the European Community, in ILM, vol. XXIV (1985), p. 1479; those of

(resolutions 757 (1992) and 781 (1992) of 30 May and 9 October 1992, respectively) and other bodies and, individually, by some States.²⁹⁷ Such cases also raise multiple and difficult issues.

5. MEASURES NOT INVOLVING FORCE:
THE PROBLEM OF ATTENUATING THE LIMITS ON
RESORT TO COUNTERMEASURES

226. Resort to measures short of force in reaction to a crime, unlike the adoption of measures involving force, does not give rise to questions of admissibility, such questions being generally settled in the affirmative with respect to any *erga omnes* breach. Rather, the problem which arises here is the possibility of *more serious aggravation* measures being taken by way of reaction to crimes as compared to delicts. Such measures may result from the removal or the attenuation of the conditions or limitations circumscribing resort to countermeasures in reaction to ordinary wrongful acts (delicts). Reference is made here to both “substantive” and “procedural” conditions and limitations.

227. Regarding the “procedural” limits—namely the conditions of the type described or implied in articles 11 and 12 of part 2 of the draft as proposed in 1992²⁹⁸—the question arises in particular whether or not in the case of crimes resort to countermeasures is or should be admissible even in the absence of prior notification and prior to the implementation of available dispute settlement procedures. It may, indeed, be asked whether for crimes, in contrast to “ordinary” breaches, there should still be a need to fulfil such preliminary requirements, as some seem to feel.²⁹⁹ A recent case of the truly sudden adoption of measures occurred following the invasion of Kuwait by Iraq. No fewer than 15 States, in fact, adopted economic measures on their own a few days after the invasion, before any attempt was made to resolve the question through dispute settlement machinery. Those measures even preceded the adoption of measures by the Security Council itself.³⁰⁰

228. A first question here is whether the presumed “special” regime of crimes is not in reality ascribable either to the particular nature of the measures envisaged—for

Canada, France, Israel, Japan, Kenya, the Scandinavian countries, the United Kingdom of Great Britain and Northern Ireland and the United States of America, RGDIP, “Chronique...”, vol. LXXX (1986), pp. 173 et seq., and *ibid.*, vol. LXXXI (1987), pp. 587 et seq., especially pp. 916-917). The Security Council, in resolution 569 (1985) of 26 July 1985, took the opportunity to praise “Those States which have already adopted voluntary measures against the Pretoria Government”, urged them to adopt new provisions, and invited those which had not yet done so to follow their example.

²⁹⁷ Regarding the measures adopted by the London stage of the International Conference on the former Yugoslavia (26-27 August 1992), see ILM, vol. XXXI (1992), pp. 1539 et seq. Mention must be made in this connection of paragraph 4 of Security Council resolution 770 (1992) in which the Council requested States to report to the Secretary-General on measures they are taking in coordination with the United Nations to implement the resolution.

²⁹⁸ See footnote 153 above.

²⁹⁹ On this question, see paragraph (3) of the commentary to article 30 of part 1 of the draft (*Yearbook . . . 1979*, vol. II (Part Two), p. 116). See also the authors cited in footnotes 234-236 and 248-249 above).

³⁰⁰ See *The Kuwait Crisis: Sanctions and their Economic Consequences*, D. L. Bethlehem, ed. (Part One), *Cambridge International Document Series*, vol. 2, 1991, p. xxxiii.

example, “interim measures” or any other measures admissible even for mere delicts as long as they are compatible with the simultaneous or subsequent resort to amicable settlement procedures³⁰¹—or to the particular situation brought about by the breach in the particular case—for example, a state of necessity or situation of distress—that is to say, circumstances precluding lawfulness, regardless of the existence of a crime or even of a delict.

229. Secondly, if resort to countermeasures in the case of a crime was found to be subject to attenuated or minimal “procedural” conditions, it would also be necessary to determine whether this applies to any type or only to certain types of crimes: for example, those “which have a continuing character” and are still in progress or which violate principles essential to the maintenance of international peace and security.

230. As regards the “substantive” limitations, they may conceivably be attenuated with regard to the admissibility of:

- (a) Extreme measures of an economic or political nature;
- (b) Measures affecting the independence, sovereignty or domestic jurisdiction of the wrongdoer;
- (c) Measures affecting “third” States;
- (d) “Punitive” measures.

A brief illustration of these four possibilities is set out below.

231. As regards point (a), coercive measures of an economic or political nature could be one important case where attenuated limits might apply. If it is true that it is not permissible to resort to measures of economic strangulation in respect of a State that has committed a mere delict, is it equally true in respect of a State that has committed a crime, especially if it does not desist from the unlawful conduct?

232. International practice is not wanting in indications that bespeak a more severe configuration of economic measures in the case of crimes. Suffice it to recall Security Council resolutions 661 (1990), 665 (1990) and 670 (1990) of 6 and 25 August and 25 September 1990, respectively, relating to severe economic measures against Iraq, and resolutions 713 (1991), 757 (1992) and 787 (1992) of 25 September 1991, 30 May and 16 November 1992, respectively, relating to economic measures against the Federal Republic of Yugoslavia (Serbia and Montenegro).

233. With respect to point (b), another example of attenuated limits might concern the prohibition of measures affecting the independence, sovereignty or domestic jurisdiction of the wrongdoing State. Examples could be forms of direct interference in the target State’s trade relations and the submission to the jurisdiction *ratione personae* [of the injured State] of responsible officials of the target State, who would otherwise be protected by immunity.

³⁰¹ See draft article 12, para. 2 (b) and (c) (Fourth report, *Yearbook . . . 1992*, vol. II (Part One) (footnote 79 above), para. 52).

234. In the latter case, the problem would obviously be linked to that of individual responsibility for war crimes, crimes against peace and crimes against humanity. From the standpoint of this report, however, it is simply necessary to ascertain whether the prosecution of individual perpetrators by States injured by an international crime can also properly be considered a lawful form of sanction against the wrongdoing State.³⁰²

235. As regards point (c), a further possibility relates to the admissibility of measures prejudicial to the rights of States other than the wrongdoing State. As proposed in draft article 14, paragraph 1 (b) (iv),³⁰³ the legitimacy of countermeasures against a wrongdoer in the case of delicts does not extend to countermeasures involving third States. Can that limit be overstepped in reacting to a crime? It is indeed quite possible that, owing to the economic interdependence of States, the adoption of collective measures may be detrimental not only to the wrongdoing State but also to States having no connection with the commission of the crime. Can such a consideration prevent the adoption of measures? Or, does it simply, as some maintain, call for simultaneous or subsequent measures of "solidarity" vis-à-vis the affected "innocent" States?

236. The question has been raised more than once before in the Security Council: in the case of Southern Rhodesia, for example, when the United States of America recalled that the imposition of an embargo must not affect the rights of neighbouring States;³⁰⁴ and more recently, when China abstained from voting in favour of resolution 757 (1992) of 30 May 1992 (calling for an economic embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro)) because it deemed the adoption of economic measures inappropriate owing to their possible repercussions on third States.³⁰⁵ Security

³⁰² This might be a case of the exercise of jurisdiction that would otherwise be "inadmissible" with respect to an official who was the actual perpetrator of conduct that constituted (or contributed towards constituting) an international crime of State. Pointers along these lines might be found, on the one hand, in the recent jurisprudence of the United States courts (from the *Filartiga v. Pena-Irala* case (see *Federal Reporter, Second Series*, St. Paul, Minn., vol. 630, 1981, pp. 876 et seq.) though this relates to civil jurisdiction, and, on the other, in the provision of obligations—primary obligations—to punish (or extradite) individuals responsible for wrongdoing contemplated by important treaties, for instance, in article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid, and article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Regarding prosecution in the case of individual responsibility for violations of international humanitarian law, attention should also be called to Security Council resolution 808 (1993) of 22 February 1993. After recalling its previous request for cessation ("that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law"), the Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".

³⁰³ See fourth report of the Special Rapporteur (*Yearbook . . . 1992*, vol. II (Part One)) (footnote 79 above), p. 35.

³⁰⁴ The representative of the United States of America was referring in particular to Zambia (see *Official Records of the Security Council, Twenty-first Year*, 1267th meeting, para. 71).

³⁰⁵ See document S/PV.3082 of 30 May 1992, pp. 8-10.

Council resolution 253 (1968) of 29 May 1968, toughening the embargo against Southern Rhodesia, and resolution 748 (1992) of 31 March 1992, whereby the Council adopted economic measures against the Libyan Arab Jamahiriya for involvement in international terrorist activities, moreover, seem to speak in favour of some sort of protection of the interests of "innocent" States.³⁰⁶ The problem of the effects of economic sanctions on third States also arose in connection with the freezing by the United States of Iranian assets deposited with foreign branches of United States banks.³⁰⁷

237. Regarding point (d), attenuated limits are also conceivable with respect to the "functional" aspect of the measures in question. While it is true that in the case of less serious wrongdoings, any "punitive" aim plays a minor role as it is subsumed by the "substantive" content of responsibility (cessation, reparation *lato sensu*, guarantees of non-repetition), is it not possible that the measures adopted against the perpetrator of a "crime" may have more than a strictly reparatory function?—as practice seems to suggest in some cases, in particular, but not only, in the case of aggression.

238. It is hardly necessary to recall, for example, how, once the invasion of Kuwait by Iraq had been brought to an end and hostilities suspended, the United States several times threatened and actually took action against Iraq in order to make it comply with the obligations of guarantee and reparation imposed by Security Council resolution 687 (1991) of 3 April 1991. The severity of such armed measures would be difficult to understand from the mere perspective of performance of the specific obligations imposed upon Iraq or of proportionality with (presumed) non-performance.³⁰⁸ It should be borne in mind, however, that the Security Council itself had decided in resolution 687 (1991) "to remain seized of the matter", so as to be able to take such further steps as may be required for the implementation of the resolution and to ensure peace and security in the area.

239. In addition to the "objective" aspect considered so far for non-armed as well as armed measures, the "subjective" aspect, most notably the "institutional" aspect, must be addressed. The only way this problem differs from that posed by armed reactions lies perhaps in the less dangerous character of the measures involved and, consequently, in the lesser concern over the risk of abuse or of *ultra vires* actions, be it in the unilateral response of the injured States or the response of organs supposedly representing a "common will" of States or of the international community.

³⁰⁶ On Security Council resolution 748 (1992) and the Lockerbie case see, particularly, Graefrath, "Leave to the Court what Belongs to the Court: The Libyan case"; Arcari, "Le risoluzioni 731 e 738 e i poteri del Consiglio di Sicurezza in materia di mantenimento della pace", pp. 932 et seq.; Tomuschat, loc. cit.; Sciso, "Può la Corte internazionale di Giustizia rilevare l'invalidità di una decisione del Consiglio di sicurezza?"; and Bedjaoui, loc. cit., especially p. 106.

³⁰⁷ See, ILM, vol. XX, No. 2 (1981), pp. 414 et seq., pp. 769 et seq. and pp. 923 et seq.

³⁰⁸ See, for example, President Bush's statement reported in the *United States Department of State Dispatch: Bureau of Public Affairs*, vol. 2, No. 39, 30 September 1991, p. 718.

240. Without again developing this point in detail, it is recalled that such "subjective-institutional" questions with regard to non-armed measures might roughly be formulated in the following terms:

(a) First of all, does the possible attenuation of the limits on resort to "peaceful" countermeasures apply only to the "principal victim" of a crime (if any), or would it benefit all States injured in any way? Or does not (*de lege lata*) or should not (*de lege ferenda*) the entire handling of any countermeasures in the case of crimes lie rather with the "organized international community"?

(b) If such "collective" competence exists—or ought to be provided for—in respect also of measures not involving the use of armed force, would it be an "exclusive" or only a "primary" competence?

(c) In the latter hypothesis, in what manner would the "collective" competence be coordinated with the residual *faculté* of unilateral action on the part of individual injured States (or groups of injured States)?

(d) Lastly, through which "collective" or "institutional" procedures would the "common will" of States appropriately be expressed?

6. THE PROBLEM OF AN "OBLIGATION TO REACT" ON THE PART OF INJURED STATES

241. A last set of problems is that of the possible duty (as distinguished from the *faculté*) of injured States to take measures against the perpetrator of an international crime. The reference here is to the kinds of obligations singled out by Mr. Riphagen,³⁰⁹ the foremost among them being the obligation not to recognize as "legal and valid" the acts of the wrongdoing State pertaining to the commission of the breach or the follow-up thereto.

242. International practice shows that States often feel the requirement not to recognize the legal effects of situations produced by a wrongful act, especially an act of aggression. Without going too far back in time, mention may be made of the provision of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations³¹⁰ that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal", a principle subsequently reiterated by the General Assembly in the Definition of Aggression.³¹¹ The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations³¹² may also be recalled. Another example is provided by the repeated declarations of illegality both by States and international organs, concerning Israeli "governmental measures" in respect of the occupied territories and the city of Jerusalem.³¹³ Under

the heading of consequences of aggression, the statements of non-recognition of the legal effects of the annexation of Kuwait by Iraq may be recalled, in particular Security Council resolutions 661 (1990), 662 (1990) and 670 (1990) of 6 and 9 August and 25 September 1990, and the positions taken by the Organization of the Islamic Conference,³¹⁴ the League of Arab States,³¹⁵ and European Community.³¹⁶

243. Regarding breaches other than aggression, reference should be made to Security Council resolution 217 (1965) of 20 November 1965, calling upon States not to recognize the "illegal authority" of the racist settler minority in Southern Rhodesia; Security Council resolution 264 (1969) of 20 March 1969 on actions of South Africa in Namibia; and General Assembly resolution 47/20 of 23 November 1992, adopted subsequent to the attempted illegal replacement of the constitutional President of Haiti, which "[r]eaffirms as unacceptable any entity resulting from that illegal situation".

244. In addition to the duty of non-recognition, mention is also made of the less clearly delineated obligation not to help or support the wrongdoing State in maintaining the situation created by the unlawful act. International practice does show signs of the possible existence of an *opinio juris* in favour of a duty of States not to assist a wrongdoing State in enjoying or preserving any advantages resulting from acts of aggression and other major breaches.

245. Examples are Security Council resolution 269 (1969) of 12 August 1969, which "calls upon all States to refrain from all dealings with the Government of South Africa purporting to act on behalf of the Territory of Namibia"; the Council's call to all States in resolution 465 (1980) of 1 March 1980 "not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories"; and the more peremptory proclamation of the General Assembly that "international responsibility" would be incurred by "any party or parties that supplied Israel with arms or economic aid that augmented its war potential".³¹⁷ Worth noting in

Assembly resolution 35/169 E, the statement by Switzerland (Caflisch, "La pratique suisse en matière de droit international public 1980", *Annuaire suisse du droit international*, 1981, especially p. 277) and the declaration of the nine European Community member countries (*Bulletin of the European Communities*, vol. 13, No. 6, 1980, p. 10); on the occupied territories in the Golan Heights, see Security Council resolution 497 (1981) of 17 December 1981, General Assembly resolution ES-9/1, the statement of the Belgian representative to the General Assembly on behalf of the European Community (*Official Records of the General Assembly, Ninth emergency special session, Plenary meetings*, 5th Meeting, paras. 22-33), the relevant statements of the British Foreign Minister (BYBIL, 1983, vol. 53, pp. 532 et seq.), and of the Permanent Representative of France to the Security Council (*Official Records of the Security Council, Thirty-sixth Year*, 2317th meeting, paras. 88 to 92) and resolution 1990/3 of the Commission on Human Rights.

³¹⁴ Communiqué of the Nineteenth Ministerial Conference of the Organization of the Islamic Conference of 4 August 1990 (see document S/21448 of 10 August 1990).

³¹⁵ Resolution adopted by the extraordinary Arab summit held in Cairo on 10 August 1990 (see document S/21500 of 13 August 1990).

³¹⁶ Statement of 4 August 1990 on the invasion of Kuwait by Iraq, issued by the 12 member States of the European Community (see document A/45/383-S/21444 of 6 August 1990, annex); and statement of the extraordinary session held in Brussels (see document A/45/409-S/21502 of 13 August 1990, annex).

³¹⁷ General Assembly resolution 38/180 E.

³⁰⁹ See the sixth report of Mr. Riphagen (*Yearbook . . . 1985*, vol. II (Part One) (footnote 2 above)), p. 13, especially article 14 and the commentary thereto.

³¹⁰ See footnote 138 above.

³¹¹ See footnote 252 above.

³¹² General Assembly resolution 42/22, annex.

³¹³ See, on the Arab and Palestinian territories occupied in 1967, Security Council resolutions 242 (1967) and 465 (1980) of 22 November 1967 and 1 March 1980, respectively; on the status of Jerusalem, Security Council resolution 478 (1980) of 20 August 1980, General

connection with the same situation are the statements of the League of Arab States,³¹⁸ the Non-Aligned Movement³¹⁹ and of OAU.³²⁰

246. Another significant case is that of the military and financial support provided by the United States of America to South Africa in its aggression against, and occupation of, part of the territory of Angola. In addition to the individual protests on the part of Angola, Cuba and the Soviet Union,³²¹ there is also the reprobation of the General Assembly, which

affirms the view that the occupation of southern Angola by the racist regime was in large part facilitated by the policies pursued by the United States Administration in the region, especially its support for the armed criminal bandits of the União Nacional para a Independência Total de Angola and its policies of "constructive engagement" and "linkage".³²²

Recent confirmation of a possible *opinio juris* on the "duty not to assist" is to be found in the reiteration of the obligation of non-assistance to Iraq by Security Council resolution 661 (1990) of 6 August 1990 and the decision of the Government of the Czech and Slovak Federal Republic (taken on 3 August 1990, prior to the adoption of that resolution) to suspend "all supplies of military character to the Republic of Iraq". At the same time, it stopped "delivering also all other items that could be used by Iraq for military purposes".³²³

247. Attention should also be called to the increasingly pronounced trend in recent years in the European Community to suspend economic cooperation agreements in the case of serious and persistent violations of human and peoples' rights.³²⁴

248. General mention is also made of the obligations of States not to interfere with the response to a crime on the part of the "international community as a whole" and to carry out such decisions as may be adopted by that community in connection with the imposition of sanctions against a crime.

249. Two questions should not be overlooked in considering such obligations by way of codification or progressive development:

(a) First, it should be ascertained whether States adopt such behaviour in compliance with a "special" obligation to react to a crime or merely in the exercise of their *faculté* to apply countermeasures of a similar or identical nature or content against the wrongdoing State;

³¹⁸ Resolution of the Council of the League of Arab States of 11 June 1981.

³¹⁹ Communiqué transmitted to the United Nations on 16 June 1981 (document S/14544 of 16 June 1981, annex).

³²⁰ The Council of Ministers of OAU recently requested the United States of America to do everything possible to prevent the settlements of migrant Jews in the occupied Palestinian and Arab territories (resolution 1277 (LII), 3-7 July 1990).

³²¹ See document A/41/218-S/17921 of 14 March 1986 (annex) and S/17931 of 20 March 1986 (annex).

³²² General Assembly resolution 41/35 A, para. 12.

³²³ See *The Kuwait Crisis: Sanctions and their Economic Consequences* (footnote 300 above), p. 101.

³²⁴ See the Council of Europe resolution of 28 November 1991 (*Bulletin of the European Communities*, vol. 24, No. 11, p. 124). See also the resolution of the ACP-CEE Joint Assembly suspending aid and forms of cooperation vis-à-vis Haiti, and the European Parliament resolution of 22 January 1993 in which the same measure was requested with respect to Equatorial Guinea.

(b) Secondly, to the extent that such behaviour is found (or made) to be the result of an obligation, it should be clarified whether the obligation is provided for under the general law of State responsibility as a response to a State crime or is only indirectly related to the occurrence of a wrongful act. The obligation may derive, in the latter case, from "primary" rules establishing obligations of institutionalized or non-institutionalized cooperation among the States involved, obligations in the absence of which the occurrence of the crime would not lead to collective or concerted action.

C. International criminal liability of States, individuals or both?

250. Were it not for the presence of article 19 in part 1, it might be assumed that the Commission's work on international responsibility is based upon an implied dichotomy between an essentially "civil" responsibility of States, on the one hand, and a criminal responsibility of individuals, on the other. Despite the relativity of the distinction between "civil" and "criminal" responsibility,³²⁵ this would seem roughly to correspond to the scope of the draft articles on State responsibility (article 19 of part 1 excepted), on the one hand, and the draft Code of Crimes against the Peace and Security of Mankind, on the other hand. States would only incur civil liability for the breach of their obligations under the law to be codified and developed by the draft articles on State responsibility. Criminal liability would only fall on individuals under the draft Code, either by virtue of international rules directly applicable to individuals or of rules to be grafted by States onto their legal systems as a part of uniform criminal law.³²⁶ While individuals are unquestionably amenable in principle to criminal justice, States would seem to be in a different situation. Any kind of liability of States would seem to be excluded in principle (except under article 19) from punitive sanctions either simply because of their collective nature (*societas delinquere non potest*), because they are not subject to punishment, or because criminal liability would be incompatible with the majesty of a sovereign State.³²⁷ The liability of States under the draft articles on State responsibility is indeed understood by the

³²⁵ Learned and thought-provoking discussions of this relativity (in municipal and international law) are to be found in the remarkable works of Spinedi, mainly in her thorough presentation in "International Crimes of State: The Legislative History" (footnote 170 above) and more particularly in her "Contribution à l'étude de la distinction entre crimes et délits internationaux" (footnote 239 above) especially pp. 19 et seq. and 28 et seq.

³²⁶ After an initial phase of indecision as to whether States themselves could be held liable for the crimes contemplated by the draft Code of Crimes against the Peace and the Security of Mankind, the work on this draft has for some time now been based on the clear assumption that the Code will only cover crimes of individuals, albeit mainly, if not exclusively (considering the nature of the offences contemplated), those occupying positions of responsibility within the State structure.

³²⁷ The maxim *societas delinquere non potest* was evoked by a considerable number of States opposing the adoption of article 19 of part 1. For Austria,

"There could be no doubt that the Commission was suggesting a radical change in the basic concept of State responsibility by introducing the notion of 'international crime', whereas under contemporary international law that notion had been reserved exclusively for individual penal responsibility. Legal doctrine had long ago rejected the idea of collective guilt and collective punishment. It

majority of Commission members at present as being strictly confined to the obligation to make reparation, no punitive function being implied.³²⁸ Within the framework of State responsibility, draft article 19 may thus be viewed as inconsistent.³²⁹

251. It is not possible to share unconditionally either the view that States would, by nature, not be subject to criminal responsibility under present international law or the view—which only partly overlaps it—according to which international State responsibility would be confined *de lege lata* within the narrow analogy with the *responsabilité civile* (civil liability) of national law. Despite the *prima facie* exclusivity of the municipal civil law analogy, State responsibility under international law also presents analogies with municipal criminal law. But before turning to that, the first point, namely the alleged incompatibility of criminal responsibility with the general nature of the State, will first be discussed.

252. The principal cause of the alleged incompatibility is the maxim *societas delinquere non potest*. This maxim is certainly justified, to some extent in the case of juridical persons under municipal law and of the State itself as a *personne morale* of national law. It is very doubtful, however, that it is justified in the case of entities such as States as “international persons”. For entities such as these, the maxim is as untenable in theory as it is in practice. In theory, the reason why *societas delinquere non potest* resides essentially in the “collective”, abstract, legal nature of juridical persons as opposed to the physical unity of natural persons. Both as a collective entity and as an instrument of legal relations among natural persons, the juridical person—for example, a private company—is to some extent not subject to penalty, either because it cannot be the subject of physical penalties or because criminal responsibility is attached to its representatives or members. This difficulty, however, is surely not an absolute one, and there are instances of criminal liability of corporations. However, it is more difficult to conceive of the criminal responsibility of a State as a juridical person of national law. The reasons are too obvious to expand on them here.

would be unfortunate if there were a revival of that obsolete idea, as a result of establishing the international criminal liability of States” (*Official Records of the General Assembly, Thirty-first Session, Sixth Committee, 20th meeting, para. 2*).

France held that

“to establish a new type of State responsibility would be to establish a sort of collective criminal responsibility, which was contrary to the modern penal law” (*ibid.*, 26th meeting, para. 7).

According to Israel,

“to introduce the notion of an international crime for which the State would be accountable would be a retrograde step and a breach of the time-honoured maxim *impossibile est quod societas delinquat*” (*ibid.*, 28th meeting, para. 17).

A more nuanced view of the undesirability of criminalizing States was held by the United States (*ibid.*, 17th meeting, paras. 8-12); Japan (*ibid.*, 21st meeting, para. 8); Portugal (*ibid.*, 23rd meeting, para. 17); the Federal Republic of Germany (*ibid.*, 24th meeting, para. 71); and Australia (*ibid.*, 27th meeting, para. 20).

³²⁸ Somewhat contradictorily, a punitive function would have to be excluded (in the form of punitive damages or otherwise) even from such forms of reparation with the obvious character of sanctions as the various kinds of satisfaction and guarantees of non-repetition.

³²⁹ Cf. Spinedi, *loc. cit.* (footnote 230 above), especially pp. 9-19.

253. States as international persons, however, are a different matter. Although they present themselves as collective entities, they are not quite the same thing vis-à-vis international law as the *personnes morales* of municipal law. On the contrary, from the viewpoint of international law they seem to present the features of merely factual collective entities.³³⁰ This obvious truth, though concealed by the rudimentary notion of juridical persons themselves as factual collective entities, finds its most obvious manifestation in the commonly held view that international law is the law of the inter-State system and not the law of a world federal State.

254. Coming now to the second cause of alleged incompatibility, however firm the belief that the liability of States which the draft is intended to cover does not go beyond the strict area of reparation, State practice shows that the entities participating in international relations are quite capable of criminal behaviour of the most serious kind. In the words of Drost (a strong opponent, at the same time, of any ‘criminalization’ of States), “[U]ndoubtedly, the ‘criminal’ State is far more dangerous than the criminal person by reason of its collective power”.³³¹ The study of international relations—whether from the viewpoint of politics, morality or law—also shows that just as such entities may act wrongfully towards one another, so also they may not infrequently be treated as wrongdoers by their peers, the treatment being implicitly or explicitly—and often very seriously—punitive.³³² In addition to the maxim *societas delinquere non potest*, it is important not to be misled by the consideration that States under international law, unlike individuals under municipal law, are not subject to institutions such as public prosecutors and criminal courts. Of course, the persistently non-institutionalized structure of the inter-State system ordinarily confines the responsibility relationship between injured State and wrongdoing State within a bilateral, purely horizontal relationship, no part normally being played by any third party or, less still, any authority. It follows that any reaction to an internationally wrongful act remains in principle a matter of choice for the injured party, whatever the risks such a choice may entail. It is for the injured party to claim cessation, reparation and/or satisfaction and to resort to reprisals in order to pursue such ends. Liability for internationally wrongful

³³⁰ Arangio-Ruiz, “The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations”, Appendix, pp. 629 et seq., especially para. 123; “State fault and the forms and degrees of international responsibility: questions of attribution and relevance”, especially pp. 29-31; and “Le domaine réservé—L’organisation internationale et le rapport entre droit international et droit interne: Cours général de droit international public”, especially pp. 439 et seq., especially pp. 443-446.

³³¹ Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples*, vol. I, p. 294. After a strongly argued plea against any idea of criminal liability of States—a plea based essentially upon the maxim *societas delinquere non potest*—he admits however that “criminal” States are actually the target of “political” measures (which he distinguishes from legal penalties), which it is very difficult not to recognize as comprising many forms of severe punishment. Drost’s list is reproduced in paragraph 255 below, and again considered in paragraph 262 (c). But Drost is just one example among many.

³³² See Drost (*op. cit.*). Even Graefrath and Mohr, *loc. cit.*, who also oppose the possibility of inflicting punitive sanctions on States, nonetheless accept the legitimacy of measures which are severely punitive in substance.

acts would thus seem *prima facie* to fit exclusively within the civil liability, private law model of municipal law systems. However, despite this *prima facie* evaluation, it is not difficult to realize, by digging beneath the surface of the “injured State/wrongdoer State relationship”, that the content of that relationship is not purely “civil” or “reparatory”—even assuming an absolute distinction could be made with criminal responsibility. Even in the case of the most ordinary wrongful acts (other than those contemplated in article 19 of part 1), the absence of a punitive element is only apparent.

255. In the most ordinary cases of internationally wrongful conduct, the penalty is either implicit in the fact of ceasing the unlawful conduct and making reparation by restitution in kind or compensation, or visible in that typically inter-State remedy which is known as “satisfaction”. In the most serious cases, such as those calling for particularly severe economic or political reprisals or an outright military reaction, followed by a peace settlement on terms of varying severity, the punitive intent pursued and achieved by the injured States is manifest. Suffice it to refer again to Drost, who candidly singles out the various forms of “political” measures (against States), which he distinguishes from “legal penalties” (against individual leaders), as follows:

These political measures, twice collective in being collectively determined and enjoined as well as collectively borne and endured, take on all sorts of forms, ways and means: territorial transfer; military occupation; dismantling of industries; migration of inhabitants; reparation payments in money, goods or services; sequestration or confiscation of assets; armaments control; demilitarization; governmental supervision; together with many other international measures including the two general categories of economic and military sanctions . . .³³³

This writer seems not to suspect that most of the measures he lists not only include quite “civil” remedies but are all likely to affect—some of them most dramatically—the very peoples he rightly wants to spare from sanctions by confining the “legal penalties” to the leaders. For more on this point, see paragraph 266 below.

256. The fact that numerous scholars and diplomats specializing in international law prefer to conceal such obvious truths under a fig leaf by omitting any reference to a punitive connotation of international responsibility or by suggesting an explicit mention that the only function of countermeasures is to secure reparation, does not alter the hard realities of the inter-State system. It is indeed recognized by the most respected authorities that international liability presents civil *and* criminal elements, the prevalence of one or the other depending upon the objective and subjective features and circumstances of each particular case. In the most serious cases, the so-called civil element is subsumed by the criminal element, while, in the most common, minor breaches, the reverse is true. In any case, the presence of a covert or overt criminal element is not excluded by the fact that the sanction is inflicted not by an institution but by the injured party or is even self-inflicted by the wrongdoing State.³³⁴ The extension to

sovereign States of the maxim *societas delinquere non potest* is no closer to the truth in practice than it is in theory.

257. A staunch critic of the idea underlying article 19 of part 1 of the draft could of course contend—not without some justification—that if the maxim *societas delinquere non potest* is incompatible with the *present* features of sovereign States and of the inter-State system, it might well become compatible with the features which that system may, it is hoped, present in the near or more distant future. That critic could contend in particular that if States are at present not *societates* or *personnes morales* in the proper sense of the term, they would inevitably have to become *societates* or *personnes morales* in a proper sense within a *genuine*, organized legal community of mankind. States would then be no different, in essence, from the subdivisions of a decentralized federation. They would thus have become *legal* subdivisions of the legal community of mankind and, as such, be less (or not at all) subject to criminal responsibility and only subject to “civil”—merely reparatory—liability. Within such a framework, criminal liability could only be attributable to the leaders, officials, and representatives of the State, not to the State as an institution.³³⁵

258. To the extent that such a scenario may be assumed to be a valid prediction, the same staunch opponent to the idea embodied in article 19 could further contend that the right way for the Commission to proceed would be precisely to maintain the distinction alluded to in paragraph 250 above, namely the distinction between a code of crimes against the peace and security of mankind covering exclusively the criminal liability of individuals, on the one hand, and the draft articles on State responsibility envisaging a merely civil liability of States, on the other hand. According to the same “staunch opponent”, this “civil” liability of States should be codified and developed by a convention on State responsibility which would not include article 19 of part 1. According to that same opponent, this would be the way to harmonize the Commission’s current draft with the direction the progressive development of the international system will presumably take towards the “ultimate” goal—to use Lorimer’s

accepted that the same gap exists with respect to any form of international (civil) liability, and, for that matter, with respect to any other aspect of international legal relations.

³³⁵ Curiously, the very opposite seems to have been suggested by some writers. See Schwarzenberger (“The problem of an international criminal law”, *International Criminal Law*, especially pp. 35-36), according to whom

“In such a situation, an international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to these States. In reality, however, any attempt to enforce an international criminal code against either the Soviet Union or the United States would be a war under another name. Thus, proposals for a universal international criminal law fall into the category of the one-way pattern of the reorganization of the international society. With other schemes of this type they share the deficiency of taking for granted an essential condition of their realization, a *sine qua non* which cannot be easily attained: the transformation of the present system of world power politics in disguise into at least a world federation. If, and when, the swords of war are taken from their present guardians, then, and only then, will the international community be strong enough to wield the sword of universal criminal justice”.

Cf., however, Dahm, *Völkerrecht*, pp. 265-266 and pp. 270-271; and Spinedi, *loc. cit.*, especially p. 31.

³³³ Drost, *op. cit.*, pp. 296-297.

³³⁴ That the absence of an institution is not the decisive factor is also shown by the fact that in national legal systems the institution is present in the implementation not only of criminal but also of a civil liability. Were the absence of a “superior” body so decisive as to exclude any form of international criminal liability (as the proponents of the view under discussion seem to believe), it would have to be

adjective³³⁶—of establishing a more centralized (or less decentralized) organized community of mankind.

259. It seems equally evident, however, that the establishment of such a legal community is far from being just around the corner. The ideal would be the establishment of a really interindividual legal community of mankind, legally organized under appropriately representative institutions, in a sense encompassing the States themselves as equally representative legal institutions of the respective national communities. States would thus become to some degree less dissimilar, as noted in paragraph 257 above, from the subdivisions of a democratically organized federal State. But a development such as this would presuppose nothing less than the political and legal integration of all peoples into one people in a process comparable, to some degree at least, to that which took place in the United States of America with the establishment of the federal Constitution—a process which is still far from having even been started among the peoples of the 12 member States of the European Community, and one which would take many generations, if not centuries.

260. The inevitable consequence is that, for good or ill, mankind will remain, for a long time to come, in that state of non-integration which is, at the same time, the main cause and effect of what sociologists and lawyers call, in a technical sense, the inter-State system.

261. Within such a system, States seem bound to remain, whether they like it or not, under an international law which is inter-State law, not the law of the international community of mankind. Within the inter-State system and under its law—international rather than supranational—States remain essentially factual rather than juridical collective entities. As such, they still have the ability to commit unlawful acts of any kind—notably “crimes” as well as “delicts”—and remain equally subject to reactions entirely comparable *mutatis mutandis* to those faced by individuals found guilty of crimes in national societies.

262. Much has rightly been written in condemnation of “collective” responsibility.³³⁷ This is indeed a decidedly primitive, rudimentary institution. It would be difficult however to escape the following obvious facts:

(a) The inter-State system, from the standpoint of legal development, is at a stage which—though far from primitive, given that it has existed for centuries—presents rudimentary aspects which it would be dangerous to ignore;

(b) One such aspect is that, together with what may be termed “ordinary” or “civil” wrongful acts, States also commit wrongful acts which, owing to their gravity, may definitely be described as “criminal” in the normal sense of this term;

(c) Another aspect is that States respond to such grave wrongful acts, for example to aggression, with forms of reaction which even as strong an opponent of the criminal liability of States as Drost admits to be so severe and

numerous as those mentioned in paragraph 254 above. As Drost himself classifies these forms of reaction (which he calls “political” measures to distinguish them from “individual penalties”), they

... may be territorial, demographic and strategic; industrial, commercial and financial; even cultural, social and educational; last but not least technological and ideological.³³⁸

It is really hard to believe that measures of such tremendous import are not *mutatis mutandis* abundantly similar in their effects to the penalties of national criminal law.

263. In conclusion, it would seem that at least for some time, and probably a long time, to come, lawful reactions to the kind of wrongful acts contemplated in article 19 of part I of the draft should be available. The Commission should therefore provide follow-up provisions to article 19 in parts 2 and 3.

264. However, the problems to be solved, *de lege lata* or *de lege ferenda*, seem to be even more difficult than those pertaining to collective security, which have not yet been resolved satisfactorily. This is especially true of those problems related to the present structure of the so-called organized international community.

265. A number of the issues involved—*de lege lata* or *de lege ferenda*—have been summarily and tentatively evoked above; others have not. Subject to any further additions and corrections the Commission may wish to make, before closing for this year, three more issues need to be raised.

266. One crucial problem is that of distinguishing the consequences of an international State crime for the State itself—and possibly for its leaders, on the one hand, and the consequences for the people, on the other. Drost’s study represents a very useful term of comparison: that writer (a not very consistent opponent of the “criminalization” of States, as has been shown) very rightly stresses the moral and political necessity of separating the political measures against the wrongdoing State from the individual penalties against its leaders, the former measures being of such a nature as to spare (not to hit) the “innocent” population of the “criminal” State. This viewpoint merits wholehearted agreement. Considering however the kinds of measures Drost himself seems so liberally to accept (see paragraph 255 above)—measures which seem to go well beyond those contemplated in Articles 41 and 42 of the Charter of the United Nations—it is not easy to make the distinction. This is especially true of the economic and peace-settlement measures (in the case of aggression), some of which seem to hit the people directly. And there is also a further question that neither the sociologist, the lawyer, nor the moralist should ignore (although Drost seems to ignore it totally). Can it be assumed in any circumstances that the people are totally exempt from guilt—and from liability—for an act of aggression committed by an obviously despotic regime of a dictator who they enthusiastically applauded before, during and after the act?

267. The second problem is that of State fault. Should or should not the Commission reconsider that matter, which it set aside (unconvincingly) with regard to “ordinary” wrongful acts? Is it possible to deal, as “material legislators”, with the kind of breaches contemplated in article 19

³³⁶ Lorimer, *Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*, vol. II, pp. 183 et seq.

³³⁷ See, for example, Kelsen, *Pure Theory of Law*, pp. 121-122, and pp. 324 et seq.

³³⁸ Drost, *op. cit.*, pp. 296-297.

of part 1 without taking account of the importance of such a crucial element as wilful intent?

268. The last problem to which it is essential to call the Commission's attention is article 19 of part 1 itself. The seriously problematic features of this formulation will be left aside—though Mr. Ago's original version of 1976 perhaps posed less difficult problems. Those features, not the least of which is the unclear nature of the provision as compared with the "secondary" character of the other articles of the draft, could be reconsidered by the Commission on second reading.

269. Suffice it to refer, for the present purposes, to substantive questions such as the following:

(a) If there are substantial or, in any event, significant differences in the manner in which the various specific types of crime are dealt with (e.g. aggression, slavery, pollution), is it in fact appropriate to establish a dichotomy only between "crimes" on the one hand and "delicts" on the other? Would it not be preferable, for example, to distinguish aggression from other crimes? Or to make several subordinate distinctions, so as to avoid placing on the same footing specific acts that are obviously quite remote from one another and would or should entail equally different forms of responsibility?;

(b) The exemplary list of wrongful acts constituting crimes which is contained in article 19 of part 1 dates

back to 1976. Does that list still best exemplify the wrongful acts which even today the international community as a whole considers, or would do well to consider, as "crimes of States"? In other words, could not that list of examples, if indeed it is desirable to maintain such a list, be "updated"?

(c) In examining practice, it is often difficult to distinguish crimes from delicts, especially where very serious delicts are involved. Might not the reason lie partly in the manner in which the general notion of crime contained in article 19 is formulated? The wording is characterized by certain elements that perhaps make it difficult to classify a breach as belonging either to the category of crimes or to that of delicts and hence to ascertain which unlawful acts now come, or ought to be placed, under a regime of "aggravated" responsibility. Consider, for example, the element of "recognition by the international community as a whole", or that of "seriousness", both of which are left equally imprecise;

(d) If it is true that a certain gradation exists from "ordinary" violations to "international crimes", especially from the point of view of the regime of responsibility which they entail, is it in fact proper to make a clear-cut terminological distinction between "crimes" and "delicts"?

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

[Agenda item 3]

DOCUMENT A/CN.4/448 and Add.1

Comments and observations received from Governments

[Original: Arabic/English/
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[1 March and 19 May 1993]

CONTENTS

	<i>Page</i>
<i>Note</i>	60
INTRODUCTION	62
<i>Sections</i>	
I. COMMENTS AND OBSERVATIONS RECEIVED FROM MEMBER STATES	62
Australia	62
Austria	66
Belarus	68
Belgium	70
Brazil	72
Bulgaria	74
Costa Rica	75
Denmark*	81
Ecuador	81
Finland*	82
Greece	82
Iceland*	82
Netherlands	82
Nordic countries	88
Norway*	91
Paraguay	91
Poland	93
Senegal	96
Sudan	96
Sweden*	97
Turkey	97
United Kingdom of Great Britain and Northern Ireland	97
United States of America	102
Uruguay	105
II. COMMENTS AND OBSERVATIONS RECEIVED FROM A NON-MEMBER STATE.....	106
Switzerland	106

* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under Nordic countries.

NOTE

*Multilateral instruments cited in the present report***Human rights**

Source

Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, p. 137.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
American Convention on Human Rights (San José, 22 November 1969)	United Nations, <i>Treaty Series</i> , vol. 1144, p. 123
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, p. 243.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51</i> , resolution 39/46, annex.

Privileges and immunities, diplomatic relations

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 4 December 1973)	United Nations, <i>Treaty Series</i> , vol. 1035, p. 167.
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Environment and natural resources

International Convention for the Regulation of Whaling (Washington, 2 December 1946)	<i>Ibid.</i> , vol. 161, p. 72.
International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)	<i>Ibid.</i> , vol. 1125, p. 3.
Convention on International Trade in Endangered Species of Wild Flora and Fauna (Washington, 3 March 1973)	<i>Ibid.</i> , vol. 993, p. 243.
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	<i>Ibid.</i> , vol. 1108, p. 151.
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	E/ECE/1010 UNEP, <i>Multilateral treaty series on environmental protection, Reference series 3</i> , Nairobi, 1982, p. 536.
Convention on the Physical Protection of Nuclear Materials (New York and Vienna, 3 March 1980)	Doc. NPT/Conf.II/6/Add.1.
Framework Convention on Climate Change (New York, 9 May 1992)	<i>International Legal Materials</i> , Washington, D.C., vol. 31, No. 4, July 1992, p. 851.

Law applicable to armed conflict

Convention respecting the Laws and Customs of War on Land, of 18 October 1907	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd ed. (New York, Oxford University Press 1918), p. 100.
Convention concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, 18 October 1907)	<i>Ibid.</i> , p. 209.

Convention relative to the Laying of Automatic Submarine Contact Mines (The Hague, 18 October 1907)	Ibid., p. 151.
Convention concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907)	Ibid., p. 157.
Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases (Geneva, 17 June 1925)	League of Nations, <i>Treaty Series</i> , vol. XCIV (1929), No. 2138.
Geneva Conventions of 12 August 1949 for the Protection of War Victims	United Nations, <i>Treaty Series</i> , vol. 75,
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	Ibid., p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Ibid., p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva, 8 June 1977	Ibid., vol. 1125, p. 3.
International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	<i>Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49, resolution 44/34, annex.</i>

Disarmament

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (London, Moscow and Washington, 10 April 1972)	United Nations, <i>Treaty Series</i> , vol. 1015, p. 163.
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Civil aviation

Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963)	Ibid., vol. 704, p. 219.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	Ibid., vol. 860, p. 105.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	Ibid., vol. 974, p. 177.
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 24 February 1988)	ICAO, document 9518.

Terrorism

Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)	League of Nations, document C.546.M.383.1937.V.
International Convention against the Taking of Hostages (New York, 17 December 1979)	United Nations, <i>Treaty Series</i> , vol. 1316, p. 205.

Narcotics and psychotropic substances

Convention on Psychotropic Substances (Vienna, 21 February 1971)	Ibid., vol. 1019, p. 175.
Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs (New York, 8 August 1975)	Ibid., vol. 976, p. 105.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)

Doc.E/CONF.82/15 and Corr.1.

Maritime navigation

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988)

IMO, Convention No. 18, 1988.

and Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (Rome, 10 March 1988)

Ibid.

Introduction

1. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft Code of Crimes against the Peace and Security of Mankind.¹ At the same session, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations should be submitted to the Secretary-General by 1 January 1993.²

2. By paragraph 9 of resolution 46/54, and again by paragraph 12 of resolution 47/33, the General Assembly

drew the attention of Governments to the importance, for the Commission, of having their views on the draft Code and urged them to present in writing their comments and observations by 1 January 1993, as requested by the Commission.

3. Pursuant to the Commission's request, the Secretary-General addressed circular letters dated respectively 20 December 1991 and 1 December 1992 to Governments, inviting them to submit their comments and observations by 1 January 1993.

4. As of 29 March 1993, the Secretary-General had received 23 replies from Member States and one reply from a non-member State, the texts of which appear in the present document.

¹ For the text, see *Yearbook ... 1991*, vol. II (Part Two), para. 174.

² Ibid., p. 98, para. 174.

I. Comments and observations received from Member States

Australia

[Original: English]
[14 January 1993]

GENERAL COMMENTS

1. Australia congratulates the Commission on its adoption on first reading of the draft Code of Crimes against the Peace and Security of Mankind. It considers, however, that there are some difficulties with the Code as presently drafted. The comments below address both general issues of concern and specific areas which, in the opinion of Australia, require further attention by the Commission.

Limited list of crimes

2. Australia notes that the draft Code deals with a broad range of crimes against the peace and security of mankind. As currently drafted, however, it does not include a number of serious crimes such as piracy, hijacking, and crimes against internationally protected persons. The

Commission has not explained the reasons for these omissions. There should be no gaps in the Code if it is intended to deal fully with crimes against the peace and security of mankind.

Relationship between the Code and existing multilateral conventions

3. The international community has developed an increasingly substantial body of international criminal law in recent decades through the conclusion of multilateral treaties. These treaties enjoy broad support. They have evolved enforcement mechanisms which rely on national legal systems and courts, reinforced by cooperation between States parties in the extradition of alleged offenders and mutual legal assistance in preparing prosecutions.

4. Australia believes the Commission should give attention to elaborating on the relationship between the draft Code and these multilateral conventions. States parties will need to be able to reconcile their obligations under the multilateral conventions to which they are already party and the Code.

5. Australia acknowledges that this will be a difficult task. The Code overlaps with and replicates definitions of offences already dealt with under the conventions. In a number of cases the Code either omits elements of an existing crime or reduces its scope. For example, article 25 of the Code repeats only one element of article 3, paragraph 1, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter called the "1988 Narcotic Drugs Convention").

6. Jurisdictional questions will also arise in settling the relationship between the Code and the multilateral conventions. The conventions all recognize the concept of universal jurisdiction in one form or another. Will the Code affect that by overlaying an international jurisdiction based on the principle of territoriality or some other principle? The Commission will need to take this into account in considering jurisdictional issues under the Code.

Setting penalties

7. Australia notes that penalty provisions have been included in the draft Code on the basis that the principle *nulla poena sine lege* so requires. States, however, have not believed it necessary to include specific penalty provisions in the multilateral conventions referred to above. Instead, States parties have been required to establish appropriately serious penalties in their domestic law for crimes dealt with under the conventions. Australia accepts, however, that there would be a need to establish specific penalties in any cases where the exclusive jurisdiction to try crimes under the Code lay with an international criminal tribunal.

Relationship to an international criminal tribunal

8. Australia notes that the proposed establishment of an international criminal tribunal is a separate issue from the draft Code, but it is nevertheless relevant. The Commission's commentary foreshadows a strong link, to the point of determining who should institute proceedings and, in respect of such offences, the possible exclusive jurisdiction of such a tribunal. Australia considers that it is only insofar as the Code deals with major war crimes that the questions of exclusive jurisdiction might arise, but even here it is not apparent that such jurisdiction should necessarily be exclusive. Australia welcomes the request by the Sixth Committee at the forty-seventh session of the General Assembly for the Commission to consider separately the issues of the draft Code of Crimes and a draft statute for an international criminal court.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 6

9. Australia notes that article 6 of the draft Code (Obligation to try or extradite) places an obligation on a State in whose territory an alleged offender is found either to try or to extradite him or her. The obligation to "try or extradite" is to be found in many multilateral conventions dealing with crimes in international law and is of fundamental importance to the enforcement of these conventions. The need to incorporate it in the Code is unquestionable.

10. Australia believes, however, that consideration should be given to the question of whether article 6 should contain more detailed provisions governing the extradition of alleged offenders. Such provisions might deal with the grounds on which other countries could seek extradition, the process of extradition under the Code, the possibility of extradition under existing treaties or arrangements between the countries concerned, and the creation of relationships between countries to allow extradition for the purposes of crimes under the Code where no such relationships already exist.

11. In addition to the obligation to "try or extradite", Australia believes that an obligation should be imposed on States to assist each other in investigating and prosecuting crimes under the Code. Evidence pertaining to the commission of a crime could well need to be obtained from several countries. Failure to secure such evidence from one or more countries because of their lack of cooperation could seriously or even fatally weaken the prosecution of an alleged offender. An example of a mutual assistance provision is to be found in article 7 of the 1988 Narcotic Drugs Convention. That article makes comprehensive provision for mutual legal assistance between parties to the Convention. The extent of any such provision in the Code would require detailed consideration.

Article 8

12. Australia believes this article (Judicial guarantees) provides the minimum guarantees necessary to ensure that an alleged offender would receive a fair trial.

Article 9

13. Australia considers there are difficulties with article 9 (*Non bis in idem*).

14. Paragraph 1 provides for full protection against prosecution for crimes under the Code where persons have already been acquitted or convicted by an international criminal court.

15. Paragraph 2, however, provides for a more limited protection against "double jeopardy" in the case where a person has already been finally acquitted or convicted by a national court. The protection offered by paragraph 2 is made subject to exceptions contained in paragraphs 3 and 4.

16. Paragraph 3 envisages that a person can be tried both under the Code and the domestic criminal law of a State for the same course of conduct. Where a national court renders "judgement" (which could either be a conviction or acquittal) on a person under domestic criminal law, the same court pursuant to paragraph 3 would then have the jurisdiction to try that person for offences against the Code arising from the same conduct. Thus, a person acquitted under domestic criminal law could be convicted under the Code for the same course of conduct. Although such cases might not be common, they certainly would weaken the concept of "double jeopardy", which is a fundamental principle of the criminal law of many countries.

17. Paragraph 5 does seek to provide some protection for a person who has been convicted under domestic criminal law for an act and who is subsequently convicted

under the Code for the same act by requiring the court trying that person under the Code to deduct any penalty “imposed and implemented” for the previous conviction. Where, however, the penalty “imposed and implemented” under domestic criminal law is identical to the one to be imposed under the Code, a question does arise as to the utility of the second trial of that person. It may even be the case that the penalty under the Code could be less than the one imposed under domestic criminal law.

Article 14

18. Australia believes that an effort should be made to elucidate the reference to “defences under the general principles of law” in paragraph 1 of article 14. If the Code is to deal with some essential ingredients of a crime—penalties for example—then it should also deal with other necessary elements, such as defences. In systems with constitutional guarantees of due process, article 14 might well be held to be unconstitutionally vague.

19. Australia also believes consideration should be given to dividing article 14 into two articles, one dealing with defences and the other with extenuating circumstances. As noted by some members of the Commission, defences and extenuating circumstances are two different concepts best treated separately.

Article 15

20. In addition to wars of aggression, article 15 (Aggression) encompasses unjustified acts of aggression short of war. This goes beyond existing international law, which criminalizes wars of aggression only. While the international community would identify acts of aggression short of wars of aggression as illegal and hold the delictual State responsible for its illegality, it does not follow that the international community is willing to recognize that individuals in the delictual State are guilty of international crimes. Australia considers that the implications of criminalizing individual acts in these circumstances should be further considered.

21. A further difficulty arises from the reference in this article to the Security Council. According to paragraph 4 (*h*) of this article, the definition of aggression both includes “any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter” and according to paragraph 3 excludes acts which the Security Council determines not to be acts of aggression because of other relevant circumstances. The relationship between the Code and the Security Council is an exceptionally difficult problem, as the Commission notes. Under constitutional systems based on the separation of judicial power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council.

Article 16

22. Article 16 (Threat of aggression) extends criminal liability to those leaders who use threats of aggression to further their cause. Australia notes that the General Assembly resolutions which reiterate the prohibition of Article 2, paragraph 4, of the Charter of the United Nations

have not referred to the threat of force as an international crime. Australia recognizes that a threat to use force is an illegal act for which an offending State may be held responsible. However, as is the case with article 15, it is doubtful that States are willing to accept the actual criminalization of all threats of intervention/aggression.

Article 17

23. Article 17 (Intervention) applies to leaders who intervene in the internal or external affairs of another State by organizing or financing subversive or terrorist activities. While intervention is a concern of an international system committed to maintaining peace and security and premised on the sovereignty of its constituent units, it is not at present a crime under international law. Australia considers that, given the doubt as to the normative force of the non-intervention rule, particularly in respect of the low-level intervention described as criminal in article 17, and the lack of jurisprudential support for its criminalization, the inclusion of intervention in the Code requires further consideration.

Article 18

24. Article 18 (Colonial domination and other forms of alien domination) refers to the rights of peoples to self-determination as enshrined in the Charter. There is considerable debate about what this right encompasses, and it does not appear satisfactory to define the elements of a criminal offence by reference to it.

25. Australia also has difficulties with the phrase “alien domination”. According to the ILC commentary, alien domination refers to “foreign occupation or annexation”.³ This would appear to be a category of aggression rather than an offence against the right to self-determination. Further, this phrase broadens the scope of the article well beyond the colonial context to which the principle has classically been applied.

Article 19

26. While Australia has no difficulties with the substance of article 19 (Genocide), which is based entirely on the definition in article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the issue of the applicable penalty requires further attention by the Commission.

27. The penalty to be specified in article 19, paragraph 1, may well be inconsistent with article V of the Genocide Convention, which requires States parties “to provide effective penalties for persons guilty of genocide”.

Article 20

28. Australia would suggest that the wording of the draft article might be modified so as to reflect more closely the International Convention on the Suppression and Punishment of the Crime of Apartheid.

³ Article 18 was previously adopted as article 15. For the commentary, see *Yearbook . . . 1989*, vol. II (Part Two), p. 70, particularly para. (3).

29. Under paragraph 2 of this article, the policies or practices must be committed for the purpose of racial domination and oppression. This incorporates an element of intent which may be difficult to prove. The Convention states in article 1 that: "Inhumane acts resulting from the policies and practices of apartheid . . . are crimes violating the principles of international law". This disposes of the element of intent required in the draft Code and better states the position under international criminal law.

30. It is unclear whether leaders or organizers acting on their own initiative, rather than on the basis of government policies and practices, are intended to be covered by this article.

Article 21

31. Australia notes the stated intention of the Commission that only the most serious international delicts should be considered as crimes. This is consistent with the philosophical basis of international criminal law and the expressed attitude of States on the matter.

32. In particular, Australia has concerns about the lack of definition of the elements of the crimes set out in article 21 (Systematic or mass violations of human rights). It notes the view of the Commission that, as the definitions in this article are included in other international instruments, it is unnecessary to repeat them in the Code. However, not all the crimes in this article are so defined. There is, for example, no agreed definition of persecution in any international instrument.

33. Reliance on other instruments for definitions of the crimes in article 21 could also cause difficulties. For example, the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment limits the crimes to acts committed by public officials or persons acting in an official capacity. In contrast, the *chapeau* to article 21 indicates that responsibility for any of the crimes enumerated extends to any individual committing the offence.

34. Australia notes in this regard that articles 15, 19, 20, 22 and 23 include definitions of offences, despite the fact that definitions are to be found in other international instruments.

35. Article 21 is also limited in its scope in that it does not (unlike articles 15 and 16) allow for "other similar acts" (art. 15, para. 4(h)) and "any other measures" (art. 16, para. 2). Australia agrees with the observation set out in the Commission's commentary⁴ that the practice of systematic disappearances of persons deserves special mention in the context of this draft article. It is not certain that persecution on social, political, racial, religious or cultural grounds would cover the practice of systematic disappearances.

Article 22

36. Article 22 (Exceptionally serious war crimes) enumerates the various acts which shall be deemed excep-

tionally serious war crimes. Most of these are included in the various treaties and conventions that make up international humanitarian law.

37. Article 22 differs, however, from customary international law in that it creates a new category of "exceptionally serious war crimes". As under international humanitarian law war crimes are themselves exceptionally serious transgressions of the laws of war, defined as grave breaches in the various conventions and protocols, it is unclear what the words "exceptionally serious" are intended to mean. If these words are intended to refer to the same conceptual category as grave breaches under the conventions and protocols, then there are a number of inconsistencies between the grave breaches under laws of war and the specific crimes listed in article 22.

38. For example, article 50 of the First Geneva Convention (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field) and article 51 of the Second Geneva Convention (Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea), both of 12 August 1949, define grave breaches to include ". . . extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly". Neither the element of wantonness nor the absence of military necessity is necessary to characterize the crime in article 22 of the draft Code. Similarly, the conditions relating to large-scale destruction of civilian property (para. 2 (e)) and wilful attacks on property of exceptional religious, historical or cultural value (para. 2 (f)) are not consistent with the offences set out in this article.

Article 23

39. Australia notes that the wording of paragraphs 2 and 3 of draft article 23 (Recruitment, use, financing and training of mercenaries) defining mercenary is the same as that adopted by the General Assembly in article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which recognizes mercenary activity as an international offence.

40. There are, however, a number of significant differences between article 23 and existing international law for which no explanation is provided by the Commission. Article 23 is, for example, limited to acts of recruiting, using, financing or training mercenaries. It does not include acting as a mercenary, which is recognized as an offence in article 3 of the Convention against the Recruitment, Use, Financing and Training of Mercenaries.

41. A second problem raised by article 23 is the limitation of the crime to agents or representatives of a State. It should be considered whether agents or representatives of non-State entities should not also be included. If involvement in mercenary activity is to be an international crime it should be irrelevant to criminal liability whether the individual responsible is linked to a State entity or a non-State entity.

42. Another difficulty with article 23 is the restriction placed on the target of the mercenaries' activities. Under this article, unless the activities are directed against another State or are for the purpose of opposing the legiti-

⁴ *Yearbook . . . 1991*, vol. II (Part Two), p. 104, para. (10) of the commentary on article 21.

mate exercise of the right of self-determination, an offence has not been committed. It is conceivable that mercenaries could be recruited, used, financed or trained for activities against an international organization—not a State and not a self-determination movement—and those activities not be punishable under article 23.

Article 24

43. Australia has difficulties with the drafting of article 24 (International terrorism). It notes in particular that the definition does not include any reference to violence. Does this mean therefore that the offence is intended to encompass non-physical acts of terror such as propaganda? Further, it is uncertain whether the agent or representative of the State needs to be acting in an official capacity for their acts to be considered acts of international terrorism. The absence from the definition of any reference to intent or motive (cf. the Convention for the Prevention and Punishment of Terrorism) also needs explanation.

Article 25

44. Australia strongly supports international action to deal with illicit trafficking in narcotic drugs and psychotropic substances. Accordingly, it has actively participated in the negotiation of multilateral conventions which promote both national and international action against drug trafficking.

45. Australia acknowledges the concerns underlying article 25 (Illicit traffic in narcotic drugs). It believes, however, that more detailed work needs to be done on a number of issues, including the relationship of article 25 with existing conventions, in particular, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

46. The acts enumerated as constituting crimes under article 25 are inconsistent with those listed in that Convention. Article 3 thereof describes a lengthy series of acts which are to be established as offences under domestic law. Although many of these appear to have been omitted from article 25 on the ground that they are not of a sufficiently serious nature to attract international criminal sanctions, others perhaps should be included.

47. The enforcement of any article dealing with drug trafficking would depend heavily on effective provisions on extradition of alleged offenders, mutual legal assistance between States in support of their prosecution, and money laundering.

48. Consideration also needs to be given to the relationship between the jurisdiction of national legal systems to deal with drug offences and any proposed international jurisdiction under the Code.

49. It is unclear why the phrase “psychotropic substances” is used only in paragraph 3, when the whole article is intended to cover these substances.

Article 26

50. The Commission’s commentary refers to the possible inconsistency between the requirement in article 26 that the damage be caused or ordered to be caused wilful-

ly and the possibility of a conviction under paragraph 2 (d) of article 22 for employing methods not only intended to but even “likely” to or “which may be expected to” cause the damage.⁵ It was argued by some members of the Commission that the requisite *mens rea* in article 26 should be lowered so as to be consistent with article 22. This inconsistency could otherwise result in a deliberate violation, for economic gain, of some regulations on protection of the environment which caused widespread, long-term and severe damage, but did not cause that damage as the consequence of a will to do so, and did not therefore amount to criminal behaviour. Australia considers that this argument has merit and that if the violation may have been expected to cause the requisite degree of damage, then it should be treated as an international crime.

⁵ *Ibid.*, p. 107, para. (6) of the commentary on article 26.

Austria

[Original: English]
[28 January 1993]

GENERAL COMMENTS

1. First of all, Austria wishes to express its appreciation for the Commission’s work in preparing the draft Code of Crimes against the Peace and Security of Mankind. Austria has noted with satisfaction the progress achieved by the Commission on this topic, which ranks high on the international agenda. Austria has consistently supported all endeavours to establish an international criminal court. It is fully committed to all efforts that will enhance and strengthen the international legal order by ensuring that individual perpetrators of serious crimes against the peace and security of mankind will be held fully accountable.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

2. The expression “under international law” in square brackets should be moved from its present position in the draft and inserted after the words “constitute crimes”. In the Austrian view, the crimes enumerated in part two are liable to punishment *if committed with intent*, unless otherwise determined.

Article 2

3. The second sentence is not strictly necessary. The fact that the characterization of an act or omission as a crime against the peace and security of mankind is not affected by whether or not such act or omission is punishable under internal law is already to be understood from the first sentence, according to which the characterization is independent of internal law.

Article 3

4. Paragraph 1 regulates criminal responsibility without making any distinction to take account of circumstances which exclude criminal responsibility (cf. article 14). The

text of paragraph 1 should be completed as follows: "... if there are no circumstances excluding the criminal responsibility".

5. The wording of paragraph 3 does not make it sufficiently clear that under the present draft Code an attempt to commit a crime under circumstances which could objectively not lead to the actual commission of the crime would not entail criminal responsibility. Article 3 could therefore be made more specific by inserting a paragraph 4 with the following wording:

"4. Any attempt to commit a crime or participation under circumstances which could objectively not lead to the actual commission of the crime does not entail criminal responsibility."

6. Austria shares the opinion of some members of the Commission who have urged further examination to clarify for which types of crimes covered by the present draft Code the attempt to commit a crime could be considered as liable to punishment. Therefore the expression in square brackets in paragraph 3 should be retained for the time being.

Article 4

7. The motive for the commission of a crime could be taken into account as an aggravating or as an extenuating circumstance (cf. article 14).

Article 8

8. Austria finds itself in general agreement with the substance of this provision, which essentially corresponds to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. From a linguistic point of view, the introductory words "have the right to" could be dropped.

9. Austria shares the view of the Commission that the appointment of a counsel for the defence is necessary in all cases covered by the present draft Code (see para. (5) of the Commission's commentary to article 8).¹

Article 9

10. Regarding this provision, attention is drawn to the problem of a *non bis in idem* effect caused by a sentence of acquittal by the State where the crime took place in the case where the perpetrator was acting on behalf of that State. This problem seems to be dealt with in paragraph 4 (b).

11. The word "punishment" in paragraph 2 should be replaced by "penalty".

12. The considerations set forth under paragraph 3 (b) of the Commission's commentary to article 9² should find expression in the wording of paragraph 4, which thus could be completed as follows: "... and these States consider that the decision did not correspond to a proper appraisal of the act or to its seriousness".

¹ Article 8 was previously adopted as article 6. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), p. 16.

² Article 9 was previously adopted as article 7. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 69.

Article 11

13. Between the words "responsibility if" and "in the circumstances" the following words should be inserted: "he knew or should have known of the illegality of the order and if,".

Article 14

14. This article deals with two different principles: the need to take account of circumstances excluding criminal responsibility (para. 1) and extenuating circumstances (para. 2). The latter principle (as well as aggravating circumstances) comes into play by determining the extent of the penalty applicable to the perpetrator of a crime, but it has nothing to do with criminal responsibility.

15. Austria does not share the negative attitude of some members of the Commission towards taking into account grounds for exemption from punishment (e.g. plea of insanity) with regard to crimes against the peace and security of mankind.

16. Paragraph 2 should be completed by mentioning aggravating circumstances which are also to be taken into account in determining the extent of the penalty. Austria shares the view of some members of the Commission regarding the insertion of a descriptive enumeration of possible extenuating (and aggravating) circumstances.

PART TWO

17. In principle it must be pointed out that the incorporation of provisions on applicable penalties seems to be indispensable. Owing to the differing degrees of seriousness of the crimes, Austria does not share the view of some members of the Commission that it would be sufficient to limit the scope to providing one single penalty applicable to all crimes defined under the Code. Therefore the wording in square brackets which would later be expanded to include the extent of the penalty in the various articles of part two should be retained.

18. The words "on conviction thereof" in articles 15 to 26 are unnecessary and should be dropped.

Article 15

19. The binding effect of decisions of the Security Council provided for in paragraph 5 seems doubtful insofar as it may infringe upon the competence of a judicial organ to decide on the existence of a material element of a specific crime (an act of aggression).

Article 16

20. The word "would" in the expression "which would give" in paragraph 2 is unnecessary and should be dropped.

Article 17

21. The expressions in square brackets in paragraph 2 should be retained.

Article 18

22. The expression "colonial domination" should be defined specifically in an additional paragraph.

23. The words “contrary to the right of peoples to self-determination” should be replaced by the following: “thus infringing the right of peoples to self-determination”.

Article 20

24. Austria finds itself in general agreement with the substance of the provision. However, there are certain doubts as to whether the notion of apartheid should really be retained in this instrument. A more general formulation of the title may be preferable, for instance “Institutionalized racial discrimination”.

Articles 21 and 22

25. The relationship between the provisions of articles 21 and 22 (concurrent or cumulative crimes) calls for further clarification. If article 21 is only to be applicable in times of peace, this should be emphasized.

26. The expression in square brackets in article 22, paragraph 2 (a), should be retained. The fact that the enumeration is only descriptive is sufficiently emphasized by the words “in particular”.

Article 23

27. In principle it may be asked if this crime is serious enough to be included in the present draft Code. The words “in any other situation” in paragraph 3 call for further clarification.

Article 24

28. Austria proposes to revise the wording of this provision to allow for the definition of “terrorist acts”:

“1. An individual who, as an agent or representative of a State, commits or orders the commission of any of the following acts:

undertaking, organizing, assisting, financing, encouraging or tolerating terrorist activities against another State, shall be sentenced [to ...].

2. Terrorist activities are acts directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.”

Article 25

29. It remains to be seen if this crime should be included in the present draft Code. It is doubtful whether illicit traffic in narcotic drugs is a crime against the peace and security of mankind. Furthermore, the consequences linked with its inclusion in the Code (i.e. imprescriptibility) do not seem desirable from a political point of view.

Article 26

30. Since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment.

Belarus

[Original: Russian]
[28 December 1992]

GENERAL COMMENTS

1. The draft Code of Crimes against the Peace and Security of Mankind was carefully studied in the Ministry of Justice and the Ministry of Foreign Affairs of the Republic of Belarus. In general, the document drawn up by the International Law Commission is commendable. However, Belarus feels that some individual provisions require clarification and redrafting.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

2. The words “under international law” should be deleted in order to standardize the terms denoting serious violations of international law, normally referred to as crimes. At present, different concepts—“international crimes” committed by States, and “crimes under international law” committed by individuals—are used to denote actions which, objectively speaking, have an identical goal, although they are committed by different perpetrators. The deletion of the words in square brackets would serve to avoid semantic confusion.

3. It is to be hoped that in future the International Law Commission will try to make the provisions of the Code applicable to all perpetrators, including States; this will also make it possible to resolve, in principle, the question of the characterization of crimes. The objections that were raised in this connection (the fact that perpetrators are subject to different regimes from the standpoint of penalties and procedural rules) essentially relate to procedural law and need not be taken into account at the current stage of work on the substantive provisions of the Code. They should be resolved when the procedure for implementing the provisions, which will be different for different perpetrators, is considered. This procedure will obviously have to be worked out in stages, starting with the procedure in respect of the responsibility of individuals, taking into account the criterion of the participation of States, and ending with the procedure in respect of the legal responsibility of States for international crimes.

Article 3

4. This article should also provide for the responsibility of any individual who aids, abets or provides means and other services after the commission of a crime against the peace and security of mankind with a view to concealing both the crime itself, and the guilty parties. It would be advisable also to provide for the responsibility of any individual for an omission—for the failure to report such a crime to the legal authorities both at the preparation stage and once it has been committed. In all cases, it should be stipulated that the act or omission must have been deliberate.

5. Furthermore, article 3, paragraph 2, should include a special reference to the criminal nature of issuing an order to commit a crime against the peace and security of mankind.

6. In paragraph 3, the words “[as set out in arts. . . .]” should be deleted. It would be neither practicable, nor advisable, to consider every crime with a view to determining whether the characterization of attempt is applicable to it; the competent courts should have the right to decide for themselves whether this characterization is applicable to the specific content of cases before them.

Article 6

7. Bearing in mind the preliminary nature of article 6, Belarus is of the view that it should establish two possible types of jurisdiction for the implementation of the Code: universal and international.

8. A rigid comparison should be avoided in any attempt to change the existing situation as regards the machinery for universal jurisdiction. The basic component, extradition, has so many limitations—which, in any case, do not accord with the nature of crimes against the peace and security of mankind—that it is extremely difficult to implement, and at the same time allow the idea of establishing an international criminal court to demonstrate its advantages. A system of universal jurisdiction and an international criminal court are far from being mutually exclusive. Most of the drafts concerning the establishment of such a court do not afford it exclusive jurisdiction in relation to a certain group of criminal offences, but give States the option of choosing between the two mechanisms. This solution is appropriate in cases where a State did not participate in any way in the commission of a crime.

9. In the case of international crimes in which a State participated, in the great majority of cases the system of universal jurisdiction is not an alternative. If there is no external coercion, it will be totally ineffective. However, if it is applied under coercion, that will lead to a situation where national judges will deliver verdicts condemning the actions of other States.

10. Both these mechanisms therefore need to be further developed as alternative measures for the implementation of the Code. First, the provisions relating to extradition for crimes against the peace and security of mankind need to be made more specific. Unfortunately, article 6, paragraph 2, as currently formulated, does not resolve the problem of how to establish an order of priority for requests for extradition in the event that one individual has committed several such crimes, including crimes in the territory of various States. Secondly, further study should be made of the question of establishing an international criminal court which would be competent to judge crimes against the peace and security of mankind, and special consideration should be given to the criterion of the participation of States. Belarus is gratified that this point of view is shared by most States Members of the United Nations, as was demonstrated by the discussion in the Sixth Committee of the General Assembly at its forty-seventh session.

11. The formulation of article 6, paragraph 1, would be improved if it referred not to “an individual alleged to have committed a crime” but to “an individual in respect of whom there are grounds to believe that he committed a crime against the peace and security of mankind”. This would exclude any possibility of applying article 6

against an individual in the absence of information about his guilt.

Article 11

12. In article 11, the words “if, in the circumstances at the time, it was possible for him not to comply with that order” should be replaced by the words “if, in that situation, he had a genuine possibility of not carrying out the order”.

Article 14

13. In Belarus’ view, the Russian version of article 14 should refer to circumstances attenuating responsibility rather than circumstances attenuating guilt. Moreover, this article should be divided into two separate articles, since paragraphs 1 and 2 refer to different legal concepts. In the article referring to the grounds which would allow for adjustment of the penalty, these grounds should be specified and should include self-defence, state of necessity, coercion and bona fide confusion (error). The possibility of applying them to each type of crime could be left to the court to consider.

14. The question of extenuating circumstances can be considered in conjunction with the question of penalties. It would be preferable to formulate a general article on penalties for all crimes, establishing the minimum and maximum penalties and listing the extenuating circumstances. An alternative to including a scale of penalties, in the event that the provisions of the Code are applied by national courts, could be to require that the crimes should be punished in a manner commensurate with their extreme danger and gravity.

15. The list of extenuating circumstances could be indicative in nature and could include, in particular, the commission of a crime under duress, on the order of a superior; and sincere remorse or acknowledgement of guilt.

16. It is commendable that the draft Code refrains from drawing a distinction between crimes against peace, war crimes and crimes against humanity. At the same time, care should be taken at the stage of formulating substantive legal provisions to avoid distinguishing between crimes on the basis of State participation. The criterion of State participation will be of crucial importance at a later stage, when the mechanism for implementing the Code is worked out.

PART TWO

17. In the light of the above-mentioned considerations on penalties and the inclusion of article 3 (Responsibility and punishment), which provides for the responsibility and punishment of an individual, the change that was made in 1991 to the initial provisions (these are now the new first paragraphs) of the articles of part two of the draft Code, concerning the perpetrators of crimes against the peace and security of mankind, is not really appropriate. The change relates in particular to articles 15, 16, 17, 18 and 20, where the perpetrator of such crimes as aggression, the threat of aggression, intervention, apartheid, and so on, is “an individual who as leader or organizer . . .”. In the view of Belarus, this formulation restricts the category of individuals and the extent of their responsibility.

Moreover, it runs counter to the general principles of responsibility and punishment laid down in article 3 of the draft Code, which refers to the responsibility of any individual, regardless of whether or not he was a leader or organizer.

18. While welcoming the inclusion in article 15 of responsibility for the planning of aggression, the competent bodies of the Republic of Belarus consider that the list of criminal acts should also include the preparation of aggression, particularly since planning is only one of the elements of preparation.

19. With regard to the distinction made in article 15 between the functions of the Security Council and those of the judicial authorities, it should be noted that the distinction can be viewed only as a temporary measure. If the Security Council's determination as to the existence of an act of aggression is to have binding force on national courts, what is needed is not only a legal formulation of this obligation in an international treaty, but also the existence and observance of some legal procedure (for example, a requirement for the preliminary establishment of a commission of inquiry), which would guarantee the objectivity of the Council's decision. Clearly, this decision can in no way prejudice the question of the guilt of a particular individual in committing aggression.

20. If an international criminal court is established within the United Nations, the question of the delimitation of competence between it and the Security Council will require further study.

21. In Belarus' view, the word "[armed]" in article 17, paragraph 2, should be omitted since economic measures can also be categorized as intervention. At the same time, article 17 should refer to the most serious forms of intervention, and the word "seriously" should therefore be retained in the text.

22. The category of perpetrators of crimes of international terrorism as set out in article 24 should be expanded. The Code cannot disregard the scale of acts of international terrorism committed by terrorist organizations and groups which are not necessarily linked to a State, and the threat posed by such acts to the peace and security of mankind. In any event, the participation of a State cannot be a criterion for defining terrorism as a crime against the peace and security of mankind.

23. Finally, Belarus is of the opinion that during the second reading of the draft Code the International Law Commission could revert to the question of the inclusion therein, as a crime against the peace and security of mankind, of the violation of a treaty designed to safeguard international peace and security.

Belgium

[Original: French]
[1 February 1993]

1. The draft articles on the draft Code of Crimes against the Peace and Security of Mankind, as prepared by the International Law Commission, are largely acceptable. The draft is the product of particularly thorough consideration of a set of juridical concepts applicable to various situations that are often difficult to define and for which it

is hard to find a common denominator. Clearly, in theory, there are other possible options, particularly with regard to the list of crimes. However, a broad consensus can be reached on this exhaustive, balanced draft.

2. The observations set out below deal with the following points: the lacuna resulting from the fact that the draft contains no articles on an international tribunal; comments on a number of concepts relating to definition and characterization; and some remarks on a number of crimes, chiefly genocide.

I. INTERNATIONAL TRIBUNAL

3. The fact that there are no articles on the competence of an international criminal tribunal clearly constitutes a lacuna. It would have been advisable to include in the draft Code of Crimes against the Peace and Security of Mankind a chapter on the establishment of an international criminal tribunal, specifying the competence of the tribunal and procedural modalities.

4. It has been said repeatedly that crimes constituting breaches of the international order must fall within an international jurisdiction. In fact, it is essential that there should be an international jurisdiction; without one, there is no guarantee that the perpetrators of crimes against the peace and security of mankind will be punished.

5. Where national courts are called upon to pass judgement on the conduct of foreign Governments in connection with a particularly serious matter concerning the conduct of States, regardless of whether it is a Government itself or its agents that are responsible for the criminal act in question, it is likely that they will not be equal to the task. The principle of universal prosecution and punishment and extradition procedures have proved largely ineffective in this connection.

6. The competence of an international tribunal should not, a priori, preclude the competence of national courts. However, in order to ensure that the system of prosecution and punishment is as effective and well-defined as possible, the international tribunal should be given not only concurrent competence with national courts but also the competence to pass judgement on decisions of national tribunals under appeal.

7. Furthermore, recourse to the international tribunal should not be optional. A reservation with regard to competence in this respect, as provided for in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, which stipulates that the international penal tribunal shall have jurisdiction with respect to those contracting parties which have accepted its jurisdiction, cannot be regarded as admissible. In that connection, Mr. Graven indicates as follows:

However, that approach ignores the *mandatory nature* of the criminal jurisdiction. It is admissible, in some cases, to select the competent court (particularly the competent arbitral tribunal) to which to submit *disputes*; but it must not under any circumstances be possible, in the event of a criminal action or *criminal proceedings*, to avoid the criminal jurisdiction that has been established.¹

¹ "Les crimes contre l'humanité", *Recueil des Cours* . . . 1950-1, Paris, Sirey, 1951, vol. 76, pp. 427 et seq., in particular p. 520, note 3.

II. DEFINITION AND CHARACTERIZATION

8. The draft Code does not define what is meant by crimes against the peace and security of mankind, but establishes a list of the crimes concerned.

9. It is not really necessary to choose between a conceptual definition and an enumerative list of crimes, since the two approaches are complementary. It is regrettable that no conceptual definition is given, since, whatever the difficulties involved in establishing such a definition, it remains true that the list of crimes must inevitably be based on it.

10. Several criteria could be used to define what is meant by crimes against the peace and security of mankind. In its commentary, the Commission refers to crimes which affect the very foundations of human society, with the crimes being considered in the light of their seriousness and the extent of their effects. A more accurate definition could be obtained by drawing a distinction between crimes against the peace and security of mankind and ordinary crimes. That distinction would apply in the case of breaches of the international order and responsibility on the part of a State, where the latter was responsible either directly or indirectly because it tolerated the crime or failed to take the measures necessary to prevent situations constituting a breach of the international order from occurring.

11. If an article of the Code were to provide a definition of the crimes in question, the reference to international law contained in article 1 would be superfluous.

12. It is vital that a scale of penalties for each crime should be included in the draft Code.

13. The crimes in question are essentially breaches of the international order. It therefore seems unusual that the establishment of penalties should be left to the discretion of internal laws, which would result in different penalties being applied to the same offence of causing a breach of the international order.

14. The draft Code deals only with individual criminal responsibility and leaves undecided the question of the international criminal responsibility of States.

15. There ought to be an article in the Code dealing with the question of the international responsibility of States. The State as such is inevitably involved in any crime against the peace and security of mankind, either directly as the active and, in some cases, the sole agent, or indirectly because of its failure to act on its improvidence. It therefore seems unusual that State responsibility should not have been dealt with in the Code. It should also be noted that inclusion of State responsibility in the Code would make it possible to provide a sound juridical basis for the granting of compensation to the victims of crimes and other eligible parties.

16. Moreover, holding the State responsible for crimes, independently of the responsibility of the Government and agents of the State, would mean that the nation would feel some collective involvement in the act in question, thereby making it difficult for it to lay all the blame on the Government on which it has conferred political power.

17. It would appear difficult to apply the concept of defences, as provided for under draft article 14, to crimes against the peace and security of mankind.

18. The question thus arises whether it would be preferable to delete article 14. Hypothetically, a judge could invoke the general principles of criminal law, such as extenuating circumstances, when having to assess the situation in which the crime was perpetrated.

III. CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

(a) *Aggression and threat of aggression*

19. Article 15, paragraph 5, provides that any determination by the Security Council as to the existence of an act of aggression is binding on national courts. The Security Council is the United Nations organ competent to determine the existence of any act of aggression or threat to the peace (Art. 39 of the Charter of the United Nations). It therefore seems logical that a judge should be bound by those determinations, which are imposed on all States, and consequently on all State organs, including courts of law. This limitation of a judge's discretionary powers should be strictly interpreted in that the judge would be bound only to the extent that the Security Council, having had the case submitted to it, determines the existence or absence of aggression.

(b) *Intervention*

20. It is justifiable to retain armed activities as the sole form of intervention. The concept of a crime against the peace and security of mankind necessarily implies that a particularly serious act, threatening the foundations of society, is involved. In addition to the difficulty of assessing the scope of economic forms of intervention, such intervention does not appear to fit the concept of a particularly serious act. However, assuming that the Code must include forms of intervention other than armed activities, it should indicate what they are.

(c) *Genocide*

21. With regard to the groups targeted by acts of destruction, the draft Code reproduces the exhaustive list contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide: "National, ethnical, racial or religious groups". A non-exhaustive list of groups could quite easily have been produced. Reference has been made on several occasions to a non-exhaustive list, examples of which are:

(a) The statement by France at the Nürnberg trial referring to certain religious, national or racial groups;

(b) The definition of genocide in General Assembly resolution 96 (I) of 11 December 1946: "Genocide is a denial of the right of existence of entire human groups";

(c) The amendment proposed by France during the discussions in the Sixth Committee in connection with the drafting of the Genocide Convention "particularly by reason of his nationality, race, religion, or opinions".²

22. The non-exhaustive nature of the list of groups is totally justified: genocide is a concept intended to cover a variety of situations which do not necessarily fit the

² United Nations, *Historical Survey*. . . p. 145, appendix 15, art. 1 (text previously published under the symbol A/C.6/211).

mould of the few examples documented by history. Thus, in the case of the acts of genocide perpetrated in Cambodia, the target group did not have any of the characteristics included in the definition of genocide set out in article II of the Convention.

23. Those in favour of an exhaustive list of target groups have pointed out the need to avoid any vague legal definition. Such an approach could be adopted, but care must be taken to ensure that the list is in fact exhaustive. It should be noted, however, that both international and internal law rely on concepts that are not well defined; this is particularly true of the concepts of *jus cogens*, "public order" and "morals".

24. It has also been pointed out that acts of genocide which fall outside the scope of the concept of the crime of genocide as defined under the 1948 Convention, could be regarded as "systematic or mass violations of human rights". There are two objections to this approach. First, genocide differs from systematic violations in that in the case of genocide a particular group is the target. Secondly, the list of acts is not the same in the case of each of the two crimes under discussion.

25. Consequently, the definition of genocide should be reviewed. There are two possible solutions: either to adopt a non-exhaustive list of groups, or to supplement the exhaustive list with other notions such as those of political and socio-economic groups. It should be noted, in this connection, that reference was made to the concept of a political group during the discussions in the Sixth Committee with respect to the drafting of the Genocide Convention.³

26. Article 26 deals with wilful and severe damage to the environment. As noted in the relevant commentary, cases of damage by deliberate violation of regulations forbidding or restricting the use of certain substances or techniques if the express aim is not to cause damage to the environment are excluded from the scope of article 26.⁴ The commentary also indicates that article 26 conflicts with article 22, on war crimes, because under article 22 it is a crime to employ means of warfare that might be expected to cause damage, even if the purpose of employing such means is not to cause damage to the environment.⁵

27. This difference between articles 22 and 26 does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive.

³ Ibid., p. 42; see also A/C.6/SR.129, p. 7.

⁴ *Yearbook . . . 1991*, vol. II (Part Two), p. 107, para. (5) of the commentary on article 26.

⁵ Ibid.

Brazil

[Original: English]
[29 January 1993]

GENERAL COMMENTS

1. At the outset, it is worth noting that the general part of the draft should be revised. Articles 11 to 13 are in fact related to some aspects of individual responsibility and

should be placed immediately following articles 3 and 4. Article 5 should conclude this first series of principles. Furthermore, in comparing the English, French and Spanish texts of the articles of the draft Code, we noted differences between them. Brazil must emphasize the importance of the French and Spanish translations, particularly in view of the fact that Brazilian law is based on the system of civil law. In this context, it is worth recalling that the title of article 7 on the time-honoured "imprescriptibility of crimes" has been rendered in English as "Non-applicability of statutory limitations".

2. Brazil has no objection whatsoever to the structure of the draft. It is assumed, however, that besides the general principles and the part on characterization, additional sections are to be included relating not only to an international court but also to a system to execute the punishment, in which even an international correctional institution could be considered.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

3. As far as the first article is concerned, on the definition of crimes covered by the Code, it would be preferable to delete the wording in square brackets, "under international law", since any crime which is defined in an international treaty is considered a crime under international law. At the most, Brazil could agree with the suggestion put forward at the end of the commentary on this article, namely that if this wording is retained it should be inserted in the second line of the draft article, after the words "constitute crimes".¹

Articles 2 and 3

4. There appears to be a contradiction between articles 2 and 3 of the draft. In accordance with article 2, a crime against the peace and security of mankind is "an act or omission". However, article 3 refers only to an individual who commits or attempts to commit a crime (paras. 1 and 3) and to "commission of a crime" (para. 2). Article 3 does not make the distinction between act and omission, which is contemplated in article 5: "Prosecution . . . does not relieve a State of any responsibility . . . for an act or omission attributable to it".

5. Clearly, this contradiction, which also indicates the existence of a lacuna in the draft, was not overlooked by the Commission. In fact, in paragraph 2 of the commentary to article 10,² the Commission considers that the word "acts" should be interpreted as "acts or omissions", and that this interpretation "would form the subject, in due course, of a special provision explaining the meaning of the term whenever it is employed in the draft Code". Notwithstanding the formulation of this provision, the rule of article 3 should be reviewed in order to embody a provision similar, for instance, to article 13, paragraph 2, of the Brazilian Criminal Code and to other criminal codes, which states that the omission is criminally rel-

¹ *Yearbook . . . 1987*, vol. II (Part Two), p. 16 (art. 6) of the commentary on article 1.

² *Yearbook . . . 1988*, vol. II (Part Two), p. 70.

evant when a person who commits an "omission" should and could act to avoid the result.

6. It should be noted that the provision of article 3, paragraph 2, refers to at least three different acts relating to delicts which would require definition: (a) aiding, (b) abetting and (c) inciting. The fact that no fewer than two paragraphs of the commentary³ deal with this provision emphasizes the importance of undertaking an in-depth and comprehensive analysis of its content.

7. It should be noted that the Spanish text of this provision seems to differ from the French text: the first refers to *asistencia o los medios*, and the other to *une aide, une assistance ou des moyens*.

Article 6

8. Paragraph 1 should be improved since, not only for the trial but also for the extradition, the mere allegation of the commission of a crime against the peace and security of mankind would not be sufficient; supporting information must be presented.

9. The future Code should distinguish between extradition (which only applies in the case of a trial before a national court) and the handing over of an individual alleged to have committed a crime for a trial in an international court. Assuming that an international court is to be established, paragraph 3 of article 6 will disappear and the other paragraphs will need to be reworded somewhat.

Article 8

10. Article 8, subparagraphs (c) and (g), should also be improved. In fact, the right of an individual charged with a crime to communicate with the counsel of his own choosing should be extended to the counsel assigned to him (see subparagraph (e)). Nevertheless, the right to have the free assistance of an interpreter should not be limited to the hearings but should apply at all stages of the proceedings.

Article 9

11. Some provisions, such as articles 6 and 9, are linked to the question of whether or not an international criminal court is established. Article 9 is particularly puzzling. It aims at ensuring the principle of *non bis in idem* among the national and international jurisdictions. However, the Commission drafted it before having decided on the jurisdictional system to be applied (international criminal court or national courts). A complex system of exceptions was therefore established which ultimately led to negative effects, as in the drafting of other articles, like article 6. As far as paragraph 1 is concerned, it should expressly state what is pointed out in paragraph (2) of the commentary, namely "that the word 'acquitted' meant an acquittal as a result of a judgement on the merits, not as a result of a discharge of proceedings".⁴

³ *Yearbook . . . 1987*, vol. II (Part Two), pp. 98-99, paras. (3) and (4).

⁴ Article 9 was previously adopted as article 7. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 69.

Article 14

12. As far as article 14 is concerned, what is stated about the "defence and extenuating circumstances under the general principles of law" seems to be insufficient. The provisions are somewhat vague since it is difficult, based only upon "the general principles of law", to indicate which circumstances should be taken into account. As a matter of fact, the large number of such broad-ranging provisions seems to be one of the most difficult problems hampering the Commission's effort to codify. As far as the draft is concerned, criminal law, by its very nature and the values involved, requires a greater level of definition and demands more detailed regulation.

PART TWO

Concerning the provisions of part two, in which the crimes are defined, the Commission should opt for a restrictive characterization. The inclusion of crimes such as the threat of aggression (art. 16) and the recruitment, use, financing and training of mercenaries (art. 23) could be embodied in an international criminal code but not necessarily in the Code under consideration. It also seems unjustifiable to include an article on intervention (art. 17), a concept too broad to be dealt with in the context of individual responsibility. The acts identified in the article could be considered crimes, but without reference to the general concept of intervention. It is understandable that the Commission may feel tempted to enlarge the mandate entrusted to it, seeking to prepare a draft Code which goes beyond the framework of crimes against the peace and security of mankind. This could lead, however, to negative results, including imprecision and lack of technical accuracy.

14. It should also be pointed out, however, that with the exceptions of the crimes of aggression, genocide and apartheid (arts. 15, 19-20), where the definitions do not stray from those in the existing international instruments, the characterization of crimes is not sufficient. In the case of article 21, although it is entitled "Systematic or mass violations of human rights", the text could be read as implying that individual cases of murder or torture would be crimes against the peace and security of mankind. It seems necessary, therefore, to clarify the scope of the expression "in a systematic manner or on a mass scale", in order to indicate that the Code will only cover acts with an international element, whether committed with or without the toleration of the State. Likewise, there is an international element in the crime of terrorism ("as an agent or representative of a State . . . against another State") meaning that the crime described in article 24 may only be punished in accordance with the Code when it is committed or ordered by an agent or representative of a State against another State. The absence of an international element with regard to the crime described in article 25 (Illicit traffic in narcotic drugs) is not justifiable. Likewise, the crime of wilful and severe damage to the environment is also characterized without any reference to the international element.

Bulgaria

[Original: English]
[4 February 1993]

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

1. A conceptual definition is preferable in article 1 of the draft, whereby a general meaning will be rendered for the term "crime against the peace and security of mankind". This position is based on the understanding that in essence a conceptual definition defines the nature of a given type of crime, its basic characteristics and elements. It is necessary to outline precisely the method and principle which will be used to determine whether a given offence could be considered as a crime against the peace and security of mankind. Thus, on the one hand, a certain crime may formally have the characteristics of one of the criminal acts listed later in the draft, but in the concrete circumstances it may not be of sufficient gravity to qualify as a crime against the peace and security of mankind. In this way, the individual rights of the perpetrators will be better safeguarded. On the other hand, in order to observe the principle of criminal law according to which crimes and their respective punishments are determined only by law, it is necessary, as pointed out below (see paragraph 8), to set aside a special part of the Code where the particular characteristics of the crimes in question will be outlined. In this connection, a sentence should be added to the text of article 1 limiting the scope of the Code to the types of crime listed therein. Thus, the draft Code will draw on the positive aspects of the two possible approaches to the matter.

2. It is also proposed that circumstances affecting guilt should also be defined, such as participation in a group or organized type of criminal act. An argument in support of this view is that many national legal systems treat the organized or group commission of a crime as an aggravating circumstance. A criminal act committed by an individual and one committed by a group or organization, which usually has much graver consequences for the peace and security of mankind, cannot be placed on the same footing. In this connection, Bulgaria proposes that the fact that a given crime was committed by a group of people or by an organization should be considered as an aggravating circumstance in determining the type and degree of punishment for the crimes listed in this Code.

3. In line with the above, it is suggested that the definition contained in article 1 of the draft Code should be amended to read as follows:

"Article 1. Definition

"1. For the purposes of this Code a crime against the peace and security of mankind is any act or omission committed by an individual, which is in itself a serious and immediate threat to the peace and/or security of mankind or results in violation thereof.

"2. In particular the crimes defined in this Code constitute crimes against the peace and/or security of mankind."

Article 9

4. The wording of article 9, paragraphs 3 and 4, constitutes a substantial violation of the basic *non bis in idem* principle of criminal law and in this sense constitutes an abuse of human rights. In order to protect human rights, Bulgaria proposes the addition of the following wording at the end of paragraph 3: "... provided that the sanction enforced on him is apparently not corresponding to the seriousness of the crime committed". This wording should also be added at the end of paragraph 4, before subparagraphs (a) and (b).

5. Such an approach makes it possible to judge in each particular case whether the penalty imposed by a given State corresponds to the gravity of the crime committed, as well as to implement the clauses of paragraphs 3 and 4 of article 9 only in cases of blatant discrepancy.

Articles 15 et seq.

6. Articles 15 et seq. list the various types of crimes against the peace and security of mankind. In Bulgaria's view these should be grouped in a separate chapter entitled "Crimes against the peace and security of mankind", while articles 1 to 14 should be grouped in a chapter entitled "General provisions".

7. It is proposed that where the person who committed the crime has been defined as "leader or organizer" (under arts. 15, 16, 17, 18 and 20), this should be considered as an aggravating circumstance, as well as in cases where an individual has participated in the commission of a crime as part of a group or organization, in line with the arguments presented above. These qualifying circumstances should be considered when determining the type and degree of the penalty for a certain crime.

8. Article 16 should contain wording identical to that in article 17, paragraph 3, and should be reproduced as it is in article 16, too, since in both cases acts committed with the purpose of protecting the right of a nation to self-determination should not be included in the scope of the Code.

9. It is proposed in article 21 that the expression "persecution on social, political, racial, religious or cultural grounds" should be supplemented by the expression "including inhuman and degrading treatment based on such grounds".

10. During the consideration of the Draft Code of Crimes against the Peace and Security of Mankind, the members of the Bulgarian delegation should emphasize that, according to the Constitution of Bulgaria, international agreements become, from the day they take effect in our country, an integral part of our internal law. It is worth noting, however, that by the terms of decision 7 of the Constitutional Court of the Republic of Bulgaria in constitutional issue No. 6/1992, "in order for acts considered as criminal under international agreements to be included in internal law, constitutive elements of characterization and penalty for each crime must be specified in an internal law whose scope is determined by the requirements of internal law". In other words, in order for individuals who have committed crimes under the Code to be prosecuted, the various crimes defined in the Code have to be included in internal law and a penalty has to be specified for each.

Costa Rica

[Original: Spanish]
[6 January 1993]

GENERAL COMMENTS

1. The following analysis of the draft Code of Crimes against the Peace and Security of Mankind deals not only with the draft itself but also with the commentaries to each article provided by the Drafting Committee. Costa Rica considered it important to take the commentaries into account since they are meant to complement the articles and give an indication of the doctrinal trends upon which they are based. Any analysis of the draft would be incomplete if it did not take account of the authors' commentaries.

2. An attempt has been made to consider the text article by article, as far as possible, dealing with each major section or part separately. This approach has been taken in order to facilitate consideration of the report and aid comprehension of the original draft, thus clarifying objections and potential ways of overcoming problems relating to legality and constitutionality to which the original draft may give rise.

3. An attempt has also been made to provide information on major features of constitutional and criminal review practice so that the Commission may take note of and assess the precedents in question. This should help the Commission make headway on issues relating to the draft that are the subject of negotiations among various countries, including Costa Rica, which is embarking on a new constitutional interpretation of criminal law and is particularly concerned that the draft should be compatible with its Constitution.

I. GENERAL PART OF THE DRAFT

*Definition and characterization of crimes
(draft arts. 1 and 2)*

4. In Costa Rica's view, draft article 1 opts for a definition that tends to be based on the specific characteristics of crimes against the peace and security of mankind. Such a characterization takes account of a number of specific features among which the seriousness of the acts described as crimes has unanimously been accepted as a criterion.

5. There is unanimity on the "cruelty", "monstrousness" and "barbarity" that may be involved in the perpetration of punishable acts such as those dealt with in the draft. These are acts that result in victims among peoples, populations and ethnic groups. As the commentary indicates:

[...] it is this seriousness which constitutes the essential element of a crime against the peace and security of mankind—a crime characterized by its degree of horror and barbarity—and which undermines the foundations of human society.¹

6. In general, it can be agreed that the acts in question are extraordinarily serious and that account must be taken of their effect on potential victims. Above and beyond the protection of the rights of the individual, what is at issue

is the protection of juridical interests relating to a large number of individuals making up a people, ethnic group or race. The violation of these interests may involve a crime of a massive and systematic nature, as recognized by the draft, but that should not lead to the explicit conclusion that the Commission appears to be drawing, namely that "guilty intent" must always be presumed and "need not be proved", that such intent "follows objectively from the acts themselves and there is therefore no need to inquire whether the perpetrator was conscious of a criminal intent".² The Commission is accepting that there is strict liability for crimes against the peace and security of mankind, an issue thought to have been settled many years ago through criminal law based on guarantees.

7. Strict liability is no longer accepted in any liberal system of criminal law, since it requires that responsibility be established without any assessment of the individual perpetrator's intent when he committed the crime, it being sufficient for punishment of the act that he accepted the risk of a given outcome or the possibility that his act would result in the violation of a juridical interest. Most States subject to the rule of law, including Costa Rica, decided not to accept strict liability in their criminal law. They opted instead for individual responsibility based on whether the individual concerned showed wilfulness (*dolus*) or negligence (*culpa*) in committing the act in question. Under legal systems such as Costa Rica's, punishable acts are presumed to be wilful, unless otherwise stated, in which case the legislator usually describes the act as culpable. However, wilfulness is not presumed on the basis of the individual's act; it must be demonstrated in order to prove the existence of the individual element required for the decision on characterization that is one of the initial steps in the judicial examination of a criminal case.

8. The issue of wilfulness arises in the typical judicial examination. It is of enormous importance, not only because it concerns characterization itself (since wilfulness is regarded as a component of the description) but also because wilfulness must be demonstrated. It is thus necessary to establish whether in the specific case at issue an error of characterization has occurred. If there has indeed been such an error, wilfulness does not apply and (if there is a parallel description based on the concept of negligence) the act in question is punished as culpable negligence (art. 34 of the Costa Rican Penal Code). In Costa Rican criminal law, it has been established that the issue of wilfulness does not depend on the degree of culpability but on characterization and that the judge must therefore pay particular attention to the problems normally surrounding the phenomenon of intent (will and knowledge).

9. The Constitutional Court, the highest court with competence to interpret the Constitution, has established that the guarantees laid down in article 39 of the Costa Rican Constitution of 1949 prohibit strict liability in criminal matters. Any description aimed at attributing responsibility on the presumption that the perpetrator is guilty by reason of the consequences of his act, the risk it entailed, or the predictability of the outcome is therefore clearly unconstitutional in the absence of wilful intent.

¹ *Yearbook . . . 1987*, vol. II (Part Two), p. 13, paragraph 2 of the commentary on article 1.

² *Ibid.*, para. 3.

10. Costa Rica consequently believes that there could be not only legal but also constitutional incompatibility with a description of strict liability in the draft, and that, for that reason, individual responsibility should be adopted. Individual responsibility is much more coherent from the viewpoint of the Commission's goal, since it is entirely in keeping with the desire to apply the Code to individuals rather than to States.

11. Moreover, with regard to draft article 2, it is important to indicate that, although for the purposes of characterization there is no need to take account of whether or not the act in question is covered by internal law, it is necessary in drawing up legislation to pay special attention to constitutional prohibitions against criminal acts. As already indicated, in Costa Rica a particularly noteworthy prohibition of this type is the prohibition against characterizations of criminal acts that do not protect specific juridical interests and against characterizations of criminal acts for the purpose of imposing a punishment on the basis of the principle of strict liability. The Drafting Committee must pay due regard to such prohibitions. The inclusion in the draft Code of principles that constitute exceptions to guarantees laid down in national constitutions regarding criminal matters could give rise to serious problems of practical application should the Code eventually become international law.

12. Article 2 gives rise to another problem of great concern to Costa Rica, which therefore feels obliged to suggest that the second sentence, reading: "The fact that an act or omission is or is not punishable under internal law does not affect this characterization." should be redrafted. First, it should be pointed out that the words "this characterization" specifically refer to the articles on crimes against the peace and security of mankind. This gives rise to the following two possible interpretations: (a) that if there are parallel descriptions (one under internal law and another similar one under the Code of Crimes against the Peace and Security of Mankind), the description laid down under international law must be applied; or (b) that the two jurisdictions could coexist, both having full powers to investigate the case and to impose a penalty—this would necessarily mean accepting the possibility of prosecution twice for the same deed. Secondly, Costa Rica believes that the sentence should be deleted because it would necessitate clarification of potential jurisdictional problems arising as a consequence of the first problem, particularly as regards rules on statutory limitations and procedural and substantive guarantees that would lead to the application of international rules of law.

13. The problems in the first category are insoluble because the constitutions of most Latin American countries, including Costa Rica, prohibit punishment twice for the same act, which is what would happen if the appropriate penalty were applied first under internal law and then under international law. With regard to the second category of problems, there is much to be gained from not embarking on definitions of the jurisdictional principles requiring implementation of the draft; among other things, there is the difficulty that would arise in a situation where the State that arrests the alleged perpetrator is a party to the Code of Crimes but—in keeping with the principle of arrest—applies its own criminal laws and not the provisions of the Code, even though another principle (universality

or territoriality) calls for application of the rules laid down in the draft. Clearly, the Commission's aim was to avoid the latter problem, but Costa Rica believes that the current drafting would present all the disadvantages mentioned above, which can easily be avoided through the deletion of the relevant sentence.³ In Costa Rica's view their objection was justified.

II. GENERAL PRINCIPLES (ARTS. 3-14)

Article 3

14. In view of Costa Rica's conclusions on the issue of individual responsibility, it believes there is a need to include an article dealing with the principle of legality in connection with the acts under consideration, including, in particular, a definition of one of the most important related principles: the principle of culpability.

15. Paragraph 1 of article 3, which is poorly worded, should also cover responsibility on the grounds of wilfulness, negligence or preterintention. It should do so not only as a matter of general principle but also in order to dispel any idea that there might be such a thing as punishment in accordance with the principle of strict liability, which is a "sword of Damocles" hanging over the draft, threatening its potential success.

16. Paragraph 2 deals with complicity, conspiracy and incitement, all at once—a rather questionable approach. It is suggested that a separate section should be drafted on perpetration and participation, covering the most recent relevant principles. Conspiracy should be left out, since the corresponding penalty would be a punishment for ideas or decisions that took shape but did not materialize as an effective threat to a juridical interest protected under penal law. The concept of conspiracy often arises in Anglo-American law but is unknown in the law derived from continental Europe. Therefore there will be difficulties getting the Latin American countries to adopt it, owing to their highly justifiable reservations based on recent democratic achievements that are a reaction to certain de facto Governments and aim to counter any possible pretext for the punishment of individuals with different views. Latin America has had experience with dictatorial regimes which make a practice of using the terms "conspiracy" and "criminal association" in order to punish individuals with different views, thus punishing dissidents and acts directed against the regime, even though such acts constitute no more than the exercise of an individual freedom already directly curtailed through the exercise of authoritarian power.

17. With regard to the issue of the responsibility of the State and the commission of the punishable acts described under the draft Code, it must be stressed that if the principle of individual responsibility is taken as a basis it is necessary to punish State agents who have either personally or indirectly, or in complicity with other perpetrators, committed the acts described in the draft. In such a case the responsibility of States would be limited to joint and several liability for damages, in the event of offences

³ Some members of the Drafting Committee appear to have been in favour of deleting the second sentence, which they did not consider strictly necessary.

committed by State organs. Costa Rica believes that the members of the Commission are right in indicating that the potential responsibility of States as perpetrators of the acts in question would lead to a transformation of the principles underlying the punishment of the acts on account of individual responsibility. It would oblige the drafters to move closer to the type of principles relating to penal matters that are being developed for the punishment of crimes perpetrated by transnationals, whose representatives are answerable, like those of States, in accordance with a set of laws and principles to be reviewed in the light of each particular country's constitution.

18. Such specific acts as helping perpetrators escape and eliminating the instruments or proceeds of the crime should be specifically characterized as crimes and not be left to be construed merely as a form of complicity; such an approach is in keeping with the principle of legality and facilitates evidentiary tasks. Clearly, those who commit such acts with a view to helping perpetrators of crimes against humanity escape are not participating in the principal act, but they are taking part in acts of "concealment" and it is for these crimes that they must be punished.

19. On paragraph 3—which deals with attempt and contains a definition that is quite in keeping with the internal legislation of most States—Costa Rica's only comment is that it is unnecessary to specify which articles define acts constituting attempt, because the acts in question must be defined on a case-by-case basis; leeway must be left for interpretation in this area, in view of the wide range of preparatory acts and forms of commission of the acts defined in the draft as crimes.

Article 4

20. It is understandable that the Drafting Committee should believe that nothing can justify a crime against the peace and security of mankind. However, as already indicated, the principle of strict liability cannot be used if there is no requirement regarding the perpetrator's intent and knowledge, and if there is no opportunity to take account of motives that might indicate that an error of characterization or prohibition has been made in the judicial study or analysis of the matter.

21. While it is true that the judge may not take into account trivial or inadmissible motives in order to justify or attempt to lessen the responsibility for a given act, it is also true that considering and promoting the rights of the defence is one of the most modern and advanced manifestations of respect for human dignity. These rights do not arise only in a formal context but also in a practical context, where use is made of all available regular and special judicial remedies and where the accused is presumed innocent and continues to be so presumed while arguments are put forward based on a series of facts and circumstances, it being for the investigating body to refute them in order to prove culpability beyond all reasonable doubt. It is true that the juridical interests that are to be protected by the laws under consideration are very extensive, but that is no reason to ignore the fact that respect for justice begins with respect for the accused. It is therefore essential not to hinder the defence, but instead to pave the way for solutions and ensure that the penalty ultimately imposed reflects not the degree of immorality of an act but

an assessment of the crime of which an individual is guilty.

Article 5

22. Provided that the international responsibility of States is referred to in the terms used in the relevant literature under international law, Costa Rica endorses the current wording of the article. However, note should be taken of the earlier reference to the civil liability of the State, which is jointly and severally liable for damages in connection with the crimes under consideration.

Article 6

23. These extradition rules must undoubtedly be reconciled with the United Nations rules on the subject (Model Treaty on Extradition).⁴ The theories which are currently being developed with regard to international courts composed of judges of varying backgrounds and jurisprudence are of grave concern, because such a composition could affect the rights of the defence in view of the uncertainty whether rules of interpretation would be utilized to define aspects of the crime of which the individual concerned would later be accused. In this connection, it is recommended that it should be national courts which try criminal acts or extradite in accordance with a multilateral treaty on extradition which takes into account the most up-to-date systems for protecting the rights of the accused, while also offering minimum guarantees for the prosecution of crimes.

24. Special care should be taken in the formulation of global policies with regard to interpolice cooperation and the joint support of all justice systems for the handing over of prisoners, an area in which the first steps have barely been taken.

25. The issue of an international criminal court is problematic in and of itself, not only because of the possible types of jurisdiction which may be conferred on it, but also because of the need felt by all States to ensure that their nationals are afforded all the judicial guarantees already established and provided by their internal law. Costa Rica is a special case in this regard since, while the extradition of aliens is permitted, the extradition of nationals is prohibited and, in the final analysis, Costa Rica is constitutionally barred from allowing one of its nationals to be compelled to leave the country in order to be tried by a body such as the one which it is proposed to establish. However, the main problems do not stem solely from these types of principles concerning extradition, since the discussion which will always be on the agenda will have to do with the guarantees afforded to the accused, the characterization of conduct constituting a crime and the penalties imposed for criminal acts, in addition to the measures by which the internal law of each State ensures the implementation of the principle of universal justice, an aspect which would directly affect the exercise of an international court's jurisdiction.

26. Without prejudging the issue, since the characteristics of this international court have not yet been defined,

⁴ General Assembly resolution 45/116, annex.

it is possible that it could be declared unconstitutional under the Costa Rican Constitution.

Article 7

27. It is true that the issue of statutory limitations is one of policy regarding crime, and that States do not follow uniform rules in this respect. Nevertheless, it has recently been held that statutory limitation more properly refers to the State's real power to prosecute citizens, which ultimately cannot be an unlimited option. If the State fails or is unable to try an individual within a given period, this option should expire in the individual's favour. Costa Rica is, of course, aware that the monstrousness of these types of crimes would "morally" justify the non-applicability of statutory limitations; however, the contemporary legal trend is towards short statutory-limitation periods and a penal process which includes guarantees but is swift. Thus, there will probably be major negotiating problems in this area.

28. What would perhaps be most appropriate would be to establish a statutory-limitation period to be negotiated with countries on the basis of the longest such limitation periods for ordinary crimes in internal law, which currently range up to 20 years and more, a period which is more than sufficient for a timely response by the penal system. A longer period would imply that the punishment imposed, and the process which is established for its imposition, would not have any general or specific preventive effects.

Article 8

29. It is appropriate to think about the principles deriving from due process which should be applied to these types of criminal matters. The Constitutional Court of Costa Rica, in its judgement No. 1739-92, has broadly defined these principles and aspects and has incorporated all those which are mentioned in article 8. It would indeed be advisable to bear in mind that the rules for the conduct of trials remain to be defined; they could be set out in an annex to the Code, which would serve as an interpretative instrument. In the Latin American context, the American Convention on Human Rights establishes a number of judicial and penal guarantees which apply to any type of trial. In Costa Rica, even if article 8 did not exist, the Convention and the constitutional rules of due process would be applied (arts. 39 and 41 of the Costa Rican Constitution).

Article 9

30. Paragraph 1 of this article prejudices the question of the establishment of an international criminal court; however, it should be construed as referring to the national court which, in accordance with the principle of arrest or universal justice, imposes a punishment for the act committed by the individual, leaving aside not only the possible jurisdiction of the national court, but also the possible violation of the *non bis in idem* rule which could be involved, and thus the violation of the procedural rights of the accused.

31. Paragraph 2 should be eliminated, because to limit the possibility of the penalty being implemented in a manner more favourable to a person accused of this type of

offence would necessarily violate the principle of equality. A well-drafted paragraph 1, giving national courts full jurisdiction to try persons accused of such acts, would be sufficient.

32. Paragraph 3 directly violates the *non bis in idem* principle and should be deleted in order to avoid the constitutional violations which it implies.

33. Paragraph 4 recognizes the principle of arrest and universal justice, which is the basis for the operation of the current jurisdiction of States with regard to this type of offence (art. 7 of the Costa Rican Penal Code).

34. Paragraph 5 should also be eliminated, since it allows for a second conviction for the same acts which resulted in a judgement being handed down for an ordinary crime.

Article 10

35. The principle of non-retroactivity is well defined and operates in full accordance with the constitutional definitions of the subject.

Articles 11 and 12

36. It would appear that what is at issue here is the set of rules which have been dealt with in the majority of Latin American penal codes as referring to "non-culpability", although it has been agreed in recent times that they do not all refer to issues of culpability, but that questions relating to characterization and justification might be involved.

37. According to article 11, the possibility of punishment arises only where an order which is blatantly illegal or in violation of human rights has been carried out by a subordinate agent of the State. In this connection, not only military regimes (which use the chain-of-command system), but also other ordinary-law penal systems are continuing to use the chain-of-command system; accordingly, its wide use in this draft is to be recommended. The chain-of-command scheme which is outlined in the draft penal code for Spain (1992) can be used as a model.

38. One additional argument in support of the notion that chain-of-command rules should be adopted in full is the existence of article 12 on the responsibility of the superior, which implies the possible existence of errors of characterization and prohibition applicable, through interpretation, to the cases mentioned in article 11.

Article 13

39. All systems of immunity appear to be excluded by this article. However, account should be taken, as a rule of criminal procedure, of the various cases in which these types of government officials can be prosecuted, rather than leaving it as a rule in principle which, as such, could be inapplicable.

Article 14

40. If a more technical formulation of the need for judges to evaluate such circumstances is desired, it is necessary to draft a generic rule concerning those aspects which should be taken into account in apportioning

blame, as is done in article 71 of the Costa Rican Penal Code. In any case, even though this article takes many defences and extenuating circumstances into account for this purpose, while penal characterizations can take into account the existence of qualifying aspects which influence the extent of the penalty on the basis of the same indictment, thereby reducing the extent of the judge's discretion, it is a decision relating to policy on crime which needs to be evaluated.

III. SPECIAL PART OF THE DRAFT

(a) *Aspects of legality of the descriptions*

Principle of legality and characterization

41. The principle of legality, as enunciated in the universal maxim *nullum crimen, nulla poena sine praevia lege* (which follows Feuerbach's Latin construction), and as represented in the Latin American countries (art. 1 of the Penal Code of Brazil, art. 39 of the Constitution of Costa Rica, and art. 2, para. 20 (d), of the Constitution of Peru), has been espoused as a principle by various peoples at various times, and has likewise been fiercely contested by individuals and groups that assume the exercise of power to be a form of unilateral supremacy maintained by force, rather than a way of guiding a nation towards a common goal by means of participatory democracy. All the struggles on behalf of that principle of legality have sprung from the common embryo of opposition to arbitrariness in penal and correctional justice. This opposition marked the birth of what today may be termed modern liberal and democratic penal and correctional law insofar as it impresses on the State authorities the need to identify for their citizens in advance those acts that are punishable and those that are to be prohibited, the prohibition having to be justified on grounds of necessity. The acts to be prohibited are those which would pose a serious threat to organized coexistence. Such acts, however, can be punishable only if the legislature has so determined prior to their commission. Thus, accepting the principle of legality of the crime means making a very clear-cut distinction between the authority adopting the legislation and establishing the prohibition, and the judicial authority. The latter's duty is to pronounce on the question of culpability and, on that basis, to impose the penalty.

42. With the principle of legality there emerges a penal and correctional law founded on the premise that only the law can determine the existence of crimes and offences and establish the respective penalties as a counter to arbitrariness in judicial proceedings.

43. In historical terms, the evidence of such arbitrariness is to be seen primarily in the lack of limits to the exercise of functions by judges, which gave the judicial authority the power to legislate by making it the judge's duty to determine, in the final analysis, what was prohibited. Each judge thus became a *de facto* legislative authority. Note should be taken of the major risk that such a situation creates: the role of judicial interpretation is expanded from an exercise involving the identification of the framework to one involving decisions as to whether the actions of an individual should or should not be pun-

ishable, thus providing a broader and easier outlet for the judge's shortcomings, prejudices, beliefs, opinions or fears.

44. As they gain currency in a juridical regime, the principle of legality of the crime and its natural derivative—the characterization of the act to be punished—create a particular category of penal and correctional jurisprudence based on respect for the human right of every inhabitant of a State to know beforehand what prohibitions circumscribe his acts as a member of society.

45. Through this system, the legislator, who is always the temporary holder of a power that is vested in the people, as may be seen from many constitutional texts, is obliged to place in the judge's hands clearly defined models of conduct, so that in seeking to determine whether an act has the specified characteristics, he would know for certain which prohibitions the legislative authority wanted to impose. Such a legislative attitude is of paramount importance in legal systems where the legislator must start with real situations in describing models of conduct (clear models, with precise limits, avoiding unnecessary detail as far as possible), and in establishing rational prohibitions that are always related to juridical interests requiring protection in penal and correctional matters.

(b) *Legality of the crime—problems of characterization in the draft*

46. In the light of the observations made in the preceding paragraphs, it must be made clear that within a republican framework, the principle of legality of the crime cannot be viewed in isolation from what might be called its natural derivative: the characterization of the act identified as a penal or correctional matter. Without characterization as an essential corollary, the principle of legality would remain a mere postulate—and an incomplete one. Imprecise or obscure penal or correctional texts would give the judge the power to become a legislator by obliging him to identify the characteristics of the act and interpret the limits or scope of the law. On the other hand, the existence of the principle of legality suggests the existence of republican penal law, for not only is characterization of the act necessary (a clear, precise and well-defined description) but, in addition, the existence of a principle makes it possible to predict the existence of a system of punishment based on juridical interests. Costa Rica would like to stress that each and every one of the prohibitions covered by penal provisions should be established on a rational and reasonable basis: that of protecting those elements of paramount importance for co-existence in society.

47. It is essential therefore to bear in mind that the reference to *nullum crimen, nulla poena sine lege* covers much more than a mere constitutional or legislative postulate: it is a reference to the adoption of a particular attitude towards the system of punishment, meaning that the State has a legislature that is distinct and separate from the judiciary and that the legislature not only has an obligation to describe in a clear, precise and well-defined manner the acts to be prohibited, but also to prohibit only acts affecting interests that are essential to coexistence.

(c) *Violations of legality and characterization*

48. Two methods by which the postulates discussed in these comments may be violated have been dealt with systematically in the literature; however, other forms of disregard for the existence of guarantees of legality and characterization can be found in legislative and judicial practice. Before going into them, it should be pointed out that in police and other extrajudicial practice, many examples can be found of methods of violating these principles.

Criminal laws with blanks

49. Also called legislative references, this is a common legislative practice in certain countries, which consists of referring in part of the description of the act to other laws, be they penal or extra-penal, of greater, equal, or lesser force than criminal laws. It is logical to assume that where reference is made to regulations, decrees, ordinances or other provisions of lesser force than law, that amounts to a total and absolutely clear violation of the principle of legality, since the text referred to would be amended by executive rather than legislative order. This means that a penal text could be totally remodelled by the decree, regulation, ordinance or other executive provision referred to. Where reference is made to laws of equal or greater force, the problem would appear to be less serious, although from a technical and descriptive point of view, it is equally improper, since an analysis of the description would require consultation of the law or laws referred to.

50. The foregoing shows that there are, so to speak, gradations in references, which range from those in absolute violation of the postulates of legality (references to texts which can be remodelled outside the purview of the legislative authority) to those where the text referred to belongs to the same corpus of law as the text in which the reference occurs, in which case both can be analysed easily. Lastly, mention should be made of those cases in which the text refers to another legislative provision, but in such general terms that consultation of that provision becomes difficult (for example: "Anyone who, in accordance with law, illegally exercises . . .").

51. It should be noted that, in such cases, characterization requires consultation of all legislation for the purpose of identifying and incorporating the characteristic treatment and, ultimately, the prohibited act. Accordingly, texts with references or criminal laws with blanks form the boundaries beyond which correctional descriptions can be regarded as violating the dual requirements of legality and characterization (art. 15, on aggression, is undoubtedly an example of this).

Open characterizations

52. Open characterizations, which in Costa Rica's view go beyond a simple legislative device violating the requirement of characterization, to the point of becoming genuine denials of the principle of legality and clear aberrations from the standpoint of a democratic and republican law on suppression and punishment, can be termed, for a working definition, as those descriptions of an act identified as a penal or correctional matter which do not place precise or clear limits on the scope of the prohibition and, accordingly, prevent either the judge or the citi-

zen from knowing positively and unequivocally what is prohibited.

53. Such descriptions are considered to be obscure, imprecise or without clear limits where the legislator, in drafting them, uses ambiguous or polysemous terms, poor syntax in the composition of the text or an excess of elements open to interpretation, so that there are no clear indicators by which the citizen and the judge may know the extent of the prohibition. Thus, the judge finds it necessary to interpret the scope of the prohibition, thereby assuming legislative functions if there is no limit: the judicial act of determining whether an act has the specified characteristics (incorporation) becomes a typical legislative act, with the further difficulty that there will be as many legislative acts establishing prohibitions as there are people with different points of view performing judicial functions and applying open characterizations (art. 20 concerning apartheid is a case in point).

Normative elements

54. Normative elements, which are one of the causes of openness in characterizations, deserve special mention, although the question of legality remains clear: if they require interpretation, the principle of legality of the crime has been violated.

55. Although the definitions of normative elements given by the various authors may not be very obvious, the works consulted were unanimous in stating that normative elements are subject to interpretation. Mayer is the first to have used such a term, according to Jiménez de Asúa. He used it to designate the components of a penal description "... which have only a given evaluative importance . . .". Normative elements are not in the same position as the subject or modal, temporal, or other auxiliaries, which have a place and a given function in the characterization. They can be any word, with any function (subject, root, etc.) and with a value: they are value-laden terms (or they confer value on the terms used). Better still, they are terms which the legislator leaves undefined, without giving them a clear meaning and which, accordingly, will need to be evaluated by the judge. Morality, acceptable conduct, authentic instruments and many more examples are to be found in the three legislations analysed.

56. When the term which is left undefined refers to the legal order (juridical normative elements) the problem does not generally arise, since it will have been defined by the legal order itself or by custom; the meaning is unambiguous.

57. Unlike juridical elements, the so-called cultural normative elements refer to relationships, cultural patterns, social beliefs, group preferences, and so forth. This is where problems arise from the standpoint of legality/characterization. In one of the legislations studied there is a characterization which concerns anyone who engages in witchcraft, sorcery or "... any other act that is contrary to civilization and acceptable conduct" (art. 291 of the Penal Code of Costa Rica). From the above text it appears that no further explanation is needed; that is also the problem with article 24 relating to terrorism.

(d) *Juridical interests and the draft articles*

58. The characterizations given in the draft articles like the penal characterizations given in internal law, are descriptions which set forth a normative model in the form of an affirmation. This means that beyond the characterization (whether it be correctional or penal) there is always an understanding of how things ought to be. This is purely a matter of style. However, when the correctional description refers to the normative model elliptically rather than expressly, there is a danger of forgetting that such a model exists. This is dangerous because it may lead to the belief that the law is the law, pure and simple, and overlook the fact that the norm, which is what all characterizations reflect, is a rational imperative whose purpose is to protect. In other words, there is a reason for the penal norm, a rationality and reasonableness which reaches beyond the mere exposition of the norm to its essence, namely juridical interest. The purpose of any prohibition covered by a penal or correctional provision is to protect.

59. Thus, just as it is said that there is no crime unless there has been a violation or endangerment of an interest protected by the penal law, so it must be pointed out that the same applies in respect of correctional norms.

60. According to the republican approach to punishment, there is a rational basis for the prohibition of acts which are punishable by law. This prevents the legislator from prohibiting an act without understanding the need and the rationale for the prohibition. Thus the existence of juridical interests is a direct derivative of the political system which the nations in question have chosen. Accordingly, the tenet that there is no crime unless there has been a violation of, or at least a real threat to, the juridical interest which is protected by the penal law has absolute validity in such constitutional systems and is the essential basis of these comments.

61. Thus the starting point is the assumption that any correctional characterization or description demonstrates and presupposes the existence of a juridical interest, and it therefore follows that, in addition to being clear, precise and well-defined, characterizations must refer to the protection of juridical interests which are reasonable in accordance with the group's social purpose.

62. The juridical interest arises from the need for coexistence. A characterization protecting any area of life the need for which is not felt by the entire group is an unreasonable social prohibition. Although mandatory, since it is law, its existence is not justified in a State having a republican, democratic system. Accordingly, there is a complementary relationship between juridical interests that are protected by the penal law and fundamental social needs (of all), since the only acts worthy of being raised to the category of interests protected by penal norms are those individual acts which truly disturb and threaten the life of the group as a collection of human beings (in all their diversity) in pursuit of a common goal.

(e) *Fragmentary character of the prohibition*

63. It is often stated that penal law is fragmentary in character or that penal law is a discontinuous system of illegalities. This is true. However, penal law (in the strict sense, namely that of crimes proper) does not constitute

the whole of the legal system of punishment. Although there is no question as to the ontic equality between crimes and violations (it is the various police, procedural and penitentiary practices that are questionable), it is necessary to affirm that international penal law too is fragmentary in character.

64. To digress for a moment on this subject, it is not penal law or international penal law that is fragmentary but the common source from which these laws spring: penal law as a system of punishment subject to legality, norms with penalties (penal or international).

65. To speak of the fragmentary character of these laws is to refer to the idea that only those areas requiring real protection need to be covered by penal provisions, as opposed to the common practice by which Latin American penal norms regulate areas which, owing to their importance or their very substance, would fall within other branches of the law.

BRIEF SYNTHESIS OF THE PROBLEMS OF
LEGALITY INVOLVED

66. Generally speaking, the Government of Costa Rica believes that the penal characterizations of the draft articles should be reformulated and the descriptions should be made clearer; the normative elements and blank penal laws should be reduced; and the characterizations should protect specific juridical interests.

67. This redrafting is extremely important to the successful negotiation of penal characterizations. The above scholarly considerations are put forward so that the Commission may take them into account in its final drafting of the Code. In Costa Rica these considerations are already part of constitutional doctrine. Thus, if the above-mentioned problems which are such a feature of the draft were to remain, Costa Rica would be compelled to reject the draft articles.

Denmark

[See *Nordic countries*]

Ecuador

[Original: Spanish]
[7 May 1992]

1. The title of the draft Code might lead to the belief that it is simply a catalogue of crimes. It would be better to call it "Penal Code for Crimes against the Peace and Security of Mankind" or "Code of Penalties for Crimes against the Peace and Security of Mankind", as suggested by the writer Jiménez de Asúa.

Article 1

2. With a view to strengthening its content, it would be worthwhile adding a paragraph to read as follows:

"The following, *inter alia*, shall be considered criminal acts under international law: genocide, terrorism, aggression and illicit traffic in narcotic drugs."

Article 17

3. It would be better to refer to "military intervention" or "armed intervention", since there are other types of intervention, economic, for example.

Article 19

4. Paragraph 2 (d) should be clarified. As currently drafted, it is vague and could create misunderstanding and confusion between purely social birth control programmes and crimes of genocide.

Finland

[See *Nordic countries*]

Greece

[Original: French]
[3 February 1993]

1. The Government of Greece would like, first, to congratulate the Commission for having adopted the articles of the draft Code of Crimes against the Peace and Security of Mankind in first reading, and also to thank the Special Rapporteur, Mr. Doudou Thiam, for his important contribution to the preparation of the draft.

2. It views completion of the first reading of the draft articles by the Commission as a particularly positive development.

3. With regard to articles 15 to 26, the Commission has identified in these articles 12 crimes which are of a particularly serious nature and which constitute an affront to mankind. Greece supports the inclusion of all these crimes in the Code. However, it would be desirable to clarify some of the provisions, *inter alia*, those of article 22 (Exceptionally serious war crimes), paragraph 2.

4. Furthermore, it would be a good idea to include, after threat of aggression (art. 16) and aggression (art. 15) a characterization relating to unlawful occupation, annexation and succession of a State, by adopting a new provision which could read as follows:

"Deliberate failure to respect the mandatory decisions of the Security Council, designed to put an end to an act of aggression and to wipe out its unlawful consequences, is a crime against the peace."

Iceland

[See *Nordic countries*]

Netherlands

[Original: English]
[18 February 1993]

GENERAL COMMENTS

1. Part I of the present document sets out the views of the Netherlands Government concerning the legal status of the draft Code and ways of linking it to a mechanism, yet to be developed, which will enable the Code to be

enforced under the provisions of international criminal law. They then deal with the main features of such a mechanism.

2. Part II sets out the views of the Netherlands Government on individual articles of the Commission's draft Code.

3. First, however, the Netherlands wishes to comment briefly on the background to and significance of the draft. The preparation of the Code and the question of the desirability of an international criminal court have a long history. The General Assembly, in its resolution 177 (II), requested the Commission to prepare a code of crimes against the peace and security of mankind in 1947. The project was delayed, however, partly by the prolonged debate that ensued concerning the definition of aggression. The Netherlands Government applauds the fact that, notwithstanding such obstacles, the Commission was able to complete the first reading of the draft Code in 1991.

4. Although the Commission has considered both the desirability and the feasibility of establishing an international criminal court, there are no provisions on this subject in the present draft Code. However, the Commission's report includes a list of factors relevant to the matter, for which provision would need to be made.

5. The Netherlands Government made its views known on the desirability of establishing an international criminal court during the review of the report by the Sixth Committee at the forty-sixth session of the General Assembly in 1991. The Government's views on the matter are therefore set out fairly briefly in part II below, insofar as they relate to the Code.

I. DRAFT CODE OF CRIMES AGAINST THE PEACE
AND SECURITY OF MANKIND

(a) *Legal status*

6. In the opinion of the Netherlands Government, the aim of this Code is to designate certain offences as crimes against the peace and security of mankind and to set up an enforcement system (whether national or international) applying only to those offences. This requires that the offences in question should be defined as clearly as possible and be laid down by treaty. This is in any event required in connection with the principle of *nullum delictum sine lege*. This basic premise is reinforced by the fact that an international enforcement system involving the establishment of an international criminal court is under consideration.

7. For practical reasons, however, the following comments are formulated in the terms used by the Commission.

(b) *Scope of the Code*

8. The Netherlands Government notes that there are substantial discrepancies in the nature of the offences referred to in the Code. Moreover, the choice is fairly arbitrary and includes a wide range of offences. On the one hand, it includes offences which run contrary to society's sense of right and wrong and constitute mass violations of basic humanitarian principles. These are offences which

in any event are punishable under prevailing international law and for which individuals can be held liable. They include genocide, for instance, or serious war crimes. On the other hand, certain offences included in the draft Code, which are based on obscure, or in any event unspecified, criteria are mainly a reflection of the types of international crime besetting various countries at the present time. Traffic in drugs is an example.

9. In the view of the Netherlands Government, there should be a close relationship between the offences to be considered for inclusion in the Code and the anticipated enforcement system. Since the Code envisages a universally applicable international enforcement system, certain criteria should apply to the offences to be covered by the Code. Considering that States are generally reluctant to relinquish any of their powers, especially in the fields of criminal law and its enforcement, it should be assumed, for the time being at least, that it will be possible only in exceptional cases to effect any form of international enforcement.

10. In the opinion of the Netherlands Government, a universal system for the enforcement of criminal law would be possible and desirable only in respect of offences that satisfy the following criteria:

(a) Crimes that violate fundamental humanitarian principles endorsed by the world community and outrage the conscience of mankind;

(b) Crimes which by their very nature are likely to preclude the effective administration of justice at the national level, and in respect of which justice can only be properly dispensed at international level;

(c) Crimes for which an individual can be held personally responsible, regardless of whether or not he or she was acting in a public capacity.

Having regard to these criteria, the Netherlands Government is of the opinion that the Code should cover only the crimes of aggression, genocide, systematic or mass violations of human rights, and serious war crimes.

11. These crimes are in any event punishable either under the provisions of international treaties or in accordance with international customary law. The Geneva Conventions of 12 August 1949 and Additional Protocol I thereto, as well as the Convention on the Prevention and Punishment of the Crime of Genocide, may be cited in this context.

12. Nevertheless, the Netherlands Government considers it feasible that at some point in the future, once a Code and criminal court are in place, other crimes (and possibly crimes of a different nature) may, if necessary, be included in the Code. However, this could only be achieved if the present structure of national sovereign States opens up to include an international mechanism for the enforcement of criminal law.

13. For the record, the Netherlands Government emphasizes that its view that relatively few crimes should actually be included in the Code does not imply that the additional crimes specified by the Commission should not be punishable. The list advocated by the Netherlands should not be taken to mean anything other than that the crimes omitted from the proposed list do not satisfy the criteria set out above, which have been formulated

specifically with a view to producing a Code linked to an international enforcement mechanism. The crimes not included on the list, like the majority of those mentioned by the Commission, should perhaps be provided for by individual treaty and on the grounds of the *aut judicare, aut dedere* principle or the principle of universality. In cases of this nature, enforcement would ultimately take place at national level.

(c) *Linking the Code to an enforcement system*

14. The Netherlands Government considers it important that the Code should be closely linked to a system by which it can be enforced. In this connection, it observes that the development of international law based on the Code will primarily concern ways of enforcing the Code internationally, rather than making certain crimes punishable; all the offences to be included in the Code are in any event punishable under existing treaties or customary law. The main objective is therefore to develop a viable international enforcement mechanism. With this in mind, it would be advisable, for the time being at least, to limit the number of crimes included in the Code and thus minimize any breach of the national jurisdiction of States. In the light of the foregoing, the Netherlands Government is not in favour of a Code which makes provision for certain crimes but fails to create an enforcement mechanism. In this case, it would serve little purpose.

15. Finally, linking the crimes listed in the Code with a system of enforcement implies that no exemption clauses may be included. The crimes which the Netherlands Government would advocate for inclusion are already punishable under international law, while exemption clauses in respect of the enforcement mechanism would be undesirable, since they would undermine the essence of and the very reasons for adopting the draft Code.

II. ENFORCEMENT OF THE CODE

16. In its contribution to the debate on the Commission's report in the Sixth Committee at the forty-seventh session of the General Assembly in 1992, the Netherlands Government set out in detail its views¹ on the feasibility and desirability of establishing an international criminal court. The following is therefore a summary of its views on the type of international enforcement mechanism it would like to see in place. In view of the nature of this contribution and the fact that talks concerning an international criminal court are still at an early stage, the following comments do not constitute an exhaustive analysis of the problems that could be encountered in establishing a criminal court of this nature.

17. The following issues are dealt with consecutively:

(a) The competence of an international supervisory mechanism (hereinafter the "criminal court");

(b) The procedure to be followed in the event of a criminal court of this nature being established;

(c) The penalties to be imposed;

¹ *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 21st meeting, paras. 57 to 76.*

(d) The composition of the prosecuting agency and the criminal court.

(a) *Competence of the international criminal court*

(i) *Competence ratione materiae*

18. Since the object is to achieve an enforcement system in conjunction with the Code, the powers *ratione materiae* of the international criminal court should be confined to the crimes to be specified in the Code, as suggested above.

(ii) *Conferral of jurisdiction*

19. The Netherlands Government favours a system of preferential jurisdiction. This means that the international criminal court would have competence as soon as a person was suspected of committing any of the offences included in the Code. If proceedings were not instituted before the international criminal court, the national courts would acquire or regain competence to try the suspect. However, if the case were in fact to be tried before the international criminal court, the court would give judgement at first and sole instance.

20. An important question here is whether or not the court should be able to try cases in the absence of the accused. Although the Netherlands Government has not yet reached a final conclusion regarding the desirability of legal proceedings by default, it would draw attention to the disadvantages of such proceedings, since actions of this type are particularly difficult and time-consuming and may have adverse effects on public opinion.

21. The following points are relevant to the question of when, specifically, the international criminal court would be competent to take cognizance of a case. In the first place, having regard to the criteria set out in part I of the present commentary, the issue in question concerns the hearing of offences which are in any event universally punishable. Secondly, the criminal court should be competent in respect of any person guilty of any of the crimes specified in the Code, even if that person is in a country or is a national of a country which is not a party to this instrument. In addition, it is important that States subscribing to the Code should incorporate in their national legislation the principle of universality in respect of the crimes included in this instrument.

22. The Netherlands Government would be opposed to a procedure assigning to the criminal court the role of appeal court. However, this does not preclude a procedure for hearing disputes regarding the interpretation or application of the Code in cases which are brought before national courts following a decision not to institute proceedings before the international criminal court.

23. Regarding prosecution of the crime of aggression, the question arises of the relationship between the criminal court and the Security Council. The view of the Netherlands Government in this respect is that, regardless of whether or not the Security Council has debated the political question of whether a State has committed an act of aggression, the criminal court should in principle have full discretion with regard to the juridical question of whether or not an individual is guilty of that same offence. However, it is highly unusual for the Security Council to

designate an act as aggression, and when it does, such a pronouncement invariably has extremely far-reaching consequences. It should be considered therefore as virtually impossible in practice for the international criminal court to reach a different conclusion in respect of the same situation.

24. In the light of these considerations, the Netherlands Government considers it unnecessary for the Security Council to be assigned a specific procedural role in prosecuting suspected acts of aggression.

(b) *Procedure*

25. In the opinion of the Netherlands Government, a procedure should be designed which is at the very least in accordance with the principles set out in article 8 of the draft Code.

26. The establishment of a special public prosecutions department would be essential in order for cases to be tried by the court. Such a department should be able to submit applications to the court:

(a) On its own initiative, for example, if it has received information from a State;

(b) On the grounds of a resolution adopted by the General Assembly. If the General Assembly were to adopt a resolution of this nature, it should be incumbent upon the public prosecutions department to prosecute the case. The Government considers the General Assembly to be the most appropriate body in view of its wide representation and powers;

(c) On the grounds of instructions to this effect from the international criminal court. Such instructions may be given at the request of a State, should the public prosecutions department decide against prosecution (expediency principle) after receiving information supplied by that State.

(c) *Penalties*

27. Having regard to the principle of *nulla poena sine lege*, the Code should incorporate provisions concerning the penalties to be imposed for these crimes. Since the Code is solely concerned with crimes of an extremely serious nature, the Netherlands feels they should all be subject to the same penalty, either in the form of custodial sentences, measures to restrict freedom or the confiscation of assets (such as those acquired through the commission of the crime). The Netherlands Government would be opposed to the inclusion of the death penalty, which would make it impossible for many other countries to endorse the Code on the grounds of national and/or international law.

(d) *Composition of the court and prosecuting agency*

(i) *Composition of the criminal court*

28. In the view of the Netherlands Government, the criminal court should be relatively small, comprising, for example, between five and seven independent judges elected by the same procedure as members of the International Court of Justice. The criminal court should be independent of ICJ, which is in fact an entirely different type of body from the court envisaged here. However, this

need not prevent ICJ judges from being appointed to the international criminal court, nor should it preclude other forms of organizational concentration which would underline the universal character of the criminal court.

(ii) *The public prosecutions department*

29. The public prosecutions department should comprise one procurator-general appointed by the General Assembly, assisted by one or more advocates-general and a small staff. In the Commission's opinion, the role of the Secretary-General, and especially the objectivity he is required to maintain in the exercise of duties assigned to him by the Charter, would be incompatible with the function of formal head of the public prosecutions department.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

30. The Netherlands Government would prefer the phrase in square brackets, "under international law", to be deleted. It shares the view of those members of the Commission who consider the insertion unnecessary and a potential source of confusion concerning the interpretation of the article.

Article 3

31. It is advocated that in principle not only the commission of a crime referred to in the Code, but also any attempt to commit such a crime, should be punishable. This could be achieved in a uniform manner either by amending the article to specify that an attempt to commit one of the crimes included in the Code is likewise punishable, or by reformulating each of the material provisions to include the words "attempts to commit" as well as "com-mits".

32. Secondly, the term "individual" in article 3 should be more closely defined. In particular, the article should specify whether it refers only to a natural person or whether it could also refer to a legal person. The advantage of the latter is that it would cover groups of people who cannot be deemed to be either individuals or government bodies. The drawback, however, is that this wider definition could make the enforcement system considerably more difficult to operate. In its second reading of the Code, the Commission might pay closer attention to this matter, either in the text of the article or in the commentary.

33. Thirdly, the Netherlands Government is unclear about the Commission's view of the connection between the concept of "the planning of" and the word "conspires" in paragraph 2.

34. It also suggests deleting the word "abets" in paragraph 2, which it considers too loosely defined and vague to merit inclusion.

Article 4

35. The Netherlands Government considers this article redundant, as the same points are covered in article 14. A reference to the purport of the present article and the com-

mentary thereto could perhaps be made in the commentary to article 14.²

Article 6

36. The first part of the present commentary set out the views of the Netherlands Government regarding the importance of linking the Code to an enforcement mechanism. It agrees with the Commission that this article will need to be amended once a decision has been taken concerning the establishment of an international criminal court. At that stage, it will probably be possible to delete parts of the article. The Netherlands Government has two further points that need to be made in this context.

37. First, with regard to extradition, it is essential to provide sufficient guarantees that the suspect will be treated in accordance with the provisions of article 8 of the draft Code. This could be achieved either by adding a clause which explicitly prohibits extradition if the requesting State fails to provide the guarantees described in article 8, or by adding to article 6 the phrase "subject to the guarantees provided for in article 8".

38. Secondly, as article 6, paragraph 1, stands at present ("an individual alleged to have committed . . . is present"), the State concerned only has jurisdiction at such time as the person in question is present in that State. If one State requests another to extradite a person who is not—or not yet—in that State, the requested State does not—or not yet—have jurisdiction. It would only have such jurisdiction if universal jurisdiction in respect of the offences set out in the Code were enshrined in the national law of the State requesting extradition. The article should be reformulated with a view to making it more effective in practice, and/or parties to the Code should be required to establish universal jurisdiction in respect of the crimes included in the Code.

Article 7

39. The acceptability of this provision depends largely on the crimes to be included in the Code. Part 1 of the above comments points out that a limited number of crimes should be covered by the Code. The Netherlands Government feels that these are the only crimes serious enough to justify exemption from statutory limitations. It does not support the provisions of this article in respect of any other offences included in the present draft Code.

Article 8

40. The Netherlands Government attaches great importance to the guarantees provided for in this article, as it has already indicated above and in its comments on article 6.

Article 9

41. This article, like article 6, will need to be amended if an international criminal court is established. The Netherlands Government has three further comments to make regarding the formulation of article 9.

² *Yearbook . . . 1991*, vol. II (Part Two), pp. 100-101.

42. First, paragraph 3 of this article is incompatible with the principle of *non bis in idem*, since the decisive factor for the application of the rule is not the way in which a certain action is defined (in national or international law), but whether an action is punishable and whether the perpetrator has been prosecuted for it.

43. Secondly, the wording of paragraph 4 is unsatisfactory. The aim of the article is to ensure that a person who has committed a serious crime does not evade a punishment commensurate with the seriousness of the offence. At the same time, however, it has to ensure that the offender is not tried twice, in fair and proper proceedings, for the same crime, or sentenced twice to a punishment commensurate with the seriousness of the offence. The Netherlands Government feels that the present formulation fails to provide proper safeguards, especially against the latter contingency.

44. Thirdly, apart from paragraph 3 of this article, which has already been discussed, the problems relating to the rule of *non bis in idem* can only be prevented by granting exclusive competence to the envisaged international criminal court (as explained in the first part of our observations above). In any other circumstances, problems would arise in connection with this rule. The Commission will consequently need to consider this issue when working out an enforcement system.

Article 10

45. The Netherlands Government feels that the words "in accordance with international law", paragraph 2, *in fine*, should be deleted. Since the Second World War, certain offences have been codified under international law. As a result, it would prejudice the possibility of prosecuting and punishing the perpetrators of crimes which are not codified but might be considered offences according to international custom.

Article 15

46. There is an inconsistency in the wording of the first two paragraphs of this article. Paragraph 1 concerns the commission of a crime by an individual ("An individual who ... commits or orders ..."), whereas paragraph 2 refers to the actions of a State ("Aggression is the use of armed force by a State ..."). Either the article as such or the relevant commentary³ should clarify the Commission's views on the relationship between individual responsibility and the responsibility of the State.

47. To avoid any ambiguity, the words "inconsistent with the Charter" in paragraph 2 should come after the words "use of armed force" at the beginning of paragraph 2. The paragraph would then finish after the words "of another State". These terms should be defined in the commentary.

48. The first part of paragraph 3 is inappropriate in this article, since it concerns the production of evidence, not the definition of the offence. The second part of the paragraph envisages empowering a political body to determine whether a particular act constituted an offence. This

would violate the *nullum crimen sine lege* principle. This element should therefore also be deleted from the definition of the crime of aggression.

49. The *nullum crimen sine lege* principle also plays a role in the formulation of paragraph 4 (*h*). Empowering the Security Council to determine that certain acts in retrospect constituted aggression and could be prosecuted as such would violate this principle. The only alternative would be for the Security Council to stipulate in advance and in general terms what constitutes aggression.

50. Paragraph 5 could, by implication, provide that a determination by the Security Council is not binding on an (envisaged) international criminal court. This paragraph and the relevant commentary should be reviewed if an international court is indeed established.⁴ For the sake of clarity, the words "or not" should be inserted after "existence".

51. The meaning of paragraph 6 is unclear. It is questionable whether it in fact adds anything to the provisions of Article 103 of the Charter of the United Nations. The Netherlands Government recommends the deletion of this paragraph.

52. Paragraph 7 could likewise be deleted.

Article 16

53. This crime should not be incorporated in the draft Code. In several cases it would be covered by the prohibition on aggression as such, and would accordingly fall under the provisions of article 15.

Article 17

54. This article should also be omitted from the Code. One reason is that certain types of intervention are in any event covered by the prohibition of aggression and are consequently punishable under the terms of article 15. In the view of the Netherlands Government, the types of intervention not covered by article 15 are not sufficiently grave to merit inclusion in the Code. On the other hand, the definition seems too loose and ambiguous to allow for the enforcement of those provisions.

Article 18

55. For the same reasons as those given in respect of article 17, the Netherlands Government considers it undesirable to include this article in the Code.

Article 19

56. The Netherlands Government is in favour of the inclusion of genocide in the Code. Indeed, it is a crime which, more than any other, outrages society's sense of right and wrong. It is to be hoped that the Code will help to enforce the prohibition against genocide, which has already been outlawed in a separate convention.

57. A discrepancy is noted between the crime of aggression, where planning to commit the crime is an offence, and genocide, where planning the offence is not. As suggested in respect of article 3, the problem could be solved

³ Article 15 was previously adopted as article 12. For the commentary, see *Yearbook* . . . 1988, vol. II (Part Two), pp. 71 and 72.

⁴ *Ibid.*, para. 6.

by amending each of the material provisions to conform to a uniform formulation, or by adding a further provision to article 3 specifying that planning to commit any of the crimes included in the Code is in itself a crime.

Article 20

58. This provision should not be included in the Code. On the one hand, the very nature of the offence is apt to raise virtually insoluble problems concerning responsibility, prosecution, and so forth. On the other hand, it is in any event the case that apartheid would generally constitute a systematic or mass violation of human rights.

Article 21

59. The Netherlands Government is of the opinion that this crime should be included in the Code and it merits attention in its own right, irrespective of the monitoring procedures relating to such violations laid down in various regional and global human rights conventions. The latter are designed primarily to evaluate—in retrospect—a State's fulfilment of its responsibility to observe human rights, rather than—as envisaged by the Code—the criminal responsibility of an individual who violates those rights. Furthermore, many of the existing monitoring procedures have proved inadequate in the cases of human rights violations which would fall under article 21 of this Code.

60. In addition, there is a close link between this article and the crime of genocide. For the sake of consistency, therefore, violations of human rights should be included in the Code together with genocide.

61. Concerning article 21, it would be desirable to interpret the term "persecution" in the same way as it is interpreted in the Convention relating to the Status of Refugees. This is in fact a narrower interpretation than the one in the commentary to article 21.⁵ In the view of the Netherlands Government, the reference in the commentary to persecution "by government officials or by groups that exercise de facto power over a particular territory"⁶ gives the concept a far wider interpretation than the Convention does.

62. The Netherlands Government would also prefer the word "and" instead of "or" in "systematic manner or on a mass scale". Only violations which occur both systematically and on a mass scale should be included in the Code, for only in such circumstances do they constitute acts which seriously conflict with society's sense of right and wrong.

63. It is further in favour of including "in a systematic manner or on a mass scale" in the *chapeau* of the article in order to clarify the fact that it applies to all five of the violations listed. Furthermore, this would serve to establish that certain aspects of apartheid fall within the scope of this article. Consequently, paragraphs 2 (c) and (d) of article 20, which in the opinion of the Netherlands Government should be omitted from the Code, could be covered in the commentary to article 21.

64. The Netherlands Government would also like to see a clearer statement than at present, perhaps in a general article (such as article 3), of the fact that the Code concerns individuals who have committed a crime in an official capacity. This should in fact be included in the Code itself. It is not sufficient to deal with this issue in the commentary.

65. Finally, the commentary should include more references to universal human rights conventions than those already mentioned. They should not, however, be incorporated in the actual definitions of crimes.

Article 22

66. The text of this article reflects the Commission's efforts to achieve a compromise between two different approaches to this category of offence: on the one hand, it has attempted to formulate a general definition of war crimes and, on the other, to enumerate acts which it feels constitute war crimes.

67. The Netherlands Government supports the view taken by those members of the Commission who are opposed to an enumeration of acts to be deemed "exceptionally serious war crimes". In the first place, an enumeration of this type occurs nowhere else in the text and, secondly, it would also prevent any new developments in the field of warfare from being included under the provisions of the Code.

68. At the same time, it appreciates that it is extremely difficult to find a general term which is sufficiently precise but yet does not limit the scope of the article more than necessary. In this connection, the phrase "grave breaches" would not be suitable, considering that certain acts described as "grave breaches" in the Geneva Conventions and Additional Protocol I thereto are not sufficiently serious to be included in the Code, while others which are not described as "grave breaches" are eligible for inclusion. On the other hand, the Netherlands Government feels that the phrase "acts of cruelty or barbarity" is too loosely defined and allows too much scope for subjective interpretation to be suitable here.

69. It consequently suggests that paragraph 2 should refer to "serious war crimes"—omitting the qualification "exceptionally"—defined as follows:

(a) Grave breaches as described in the Geneva Conventions and Additional Protocol I to the Geneva Conventions;

(b) Other serious violations of the rules of international law applicable in armed conflicts.

Strictly speaking, category (a) is not absolutely necessary, given that the same provision is covered by category (b). Nevertheless, it should be stated explicitly for the sake of clarity. The qualification "serious" implies that not all war crimes are covered by the Code. The question as to whether a violation may be deemed "serious" will arise primarily when the expediency of prosecuting a crime is at issue.

70. The Netherlands Government agrees with the Commission that this article should also be applicable to national armed conflicts, given that serious war crimes can likewise be committed in these circumstances. It would

⁵ *Yearbook* . . . 1991, vol. II (Part Two), pp. 103-104.

⁶ *Ibid.*, p. 104, para. (9).

consequently be possible to invoke the article in response to human rights violations by insurgents. Furthermore, it would obviate the need to decide whether a conflict in a given case was national or international. The commentary to the article⁷ should specify that this application widens the scope of existing law, since war crimes are not mentioned in Additional Protocol II to the Geneva Conventions. In addition, the commentary should examine this provision in relation to article 6, paragraph 5, of Additional Protocol II, which urges the parties to the conflict to cooperate in achieving the widest possible amnesty after the cessation of hostilities.

Articles 23 to 26

71. The Netherlands Government is opposed to the inclusion of articles 23 to 26 in the Code since none of them satisfies the criteria set out in part I of the present comments.

72. The concept of "international terrorism" (art. 24), moreover, could give rise to almost insurmountable problems of definition and interpretation.

73. Traffic in narcotic drugs (art. 25) is of an entirely different order from crimes such as genocide, aggression or systematic and mass violations of human rights. The Netherlands Government would again emphasize its view that the envisaged mechanism for enforcing the Code internationally would not be the most suitable means of punishing this offence. National enforcement instruments would be more appropriate in such cases, possibly based on the principle of universality or, alternatively, on the principle of *aut judicare aut dedere*, the application of which would be established by treaty.

Nordic countries

[Original: English]
[22 December 1992]

GENERAL OBSERVATIONS

A. Considerations of principle

1. The Nordic countries are basically in favour of a Code of Crimes against the Peace and Security of Mankind. However, the present draft must be supplemented extensively, both with respect to important questions of principle, such as under what circumstances a perpetrator is not to be held accountable, and to the specific wording of the various penal provisions. Furthermore, the wording of the draft deviates from general usage in legislative drafting and consequently the Code could not be used in its present form by the courts of many countries.

B. Relationship to an international criminal court

2. One of the basic difficulties with the present Code is that its status is unclear. On the one hand, it could be a traditional convention under which each individual country undertakes to incorporate the punishable acts mentioned in the convention into its internal legislation as crimes and

stipulates an appropriate penalty or to initiate an extradition process. One argument against such a solution is, however, that most of the crimes included in the draft Code are already covered by existing conventions or are contrary to current international and domestic law.

3. On the other hand, the possibility could be envisaged of establishing an international penal code that is independent of national criminal law. Given such a point of departure, it is difficult to assess the current draft as it only touches briefly on the procedural requirements for trying a case before a court of law.

4. As the Nordic countries understand the draft, the intention is merely to criminalize various acts according to international law, but the question whether such crimes should be prosecuted by an international criminal court or a court in the country concerned, or both, remains undecided. They also interpret the draft to mean that the States that accede to the Code will not thereby undertake a legal obligation to ensure that their internal criminal legislation covers all the acts defined as crimes in the draft Code. Many judicial systems, such as those in the Nordic countries, will nonetheless require corresponding penal provisions in their internal law in order to institute a prosecution under the Code. Therefore, consideration should be given to whether States parties to the final instrument will be required to take the necessary measures, including legislation, in order to ensure its implementation.

5. There is a definite need for a court that can try certain particularly serious crimes, such as aggression, intervention and genocide, for which there is generally limited national jurisdiction because of their international character. However, the Nordic countries see less reason to establish an international criminal court to try crimes that unquestionably are of an international character, but which have been dealt with so far under the internal criminal law of the respective countries. It would be more expedient to use the Commission's draft as a basis for drawing up a code dealing with gross violations of the peace and security of mankind which could both serve as a foundation for and come under the jurisdiction of a prospective international criminal court.

C. General comments on the draft Code

6. To a certain extent, several of the articles are directly based on existing international conventions dealing with the respective crimes. In these cases, the relationship between the draft Code and the conventions in question must be clarified.

7. Another problem, particularly in the light of the high degree of precision required by criminal law, is that a number of the key articles are so vague and ambiguous that they would create more confusion than clarity. Moreover, many of the articles make use of general concepts with political overtones, which leaves them open to a variety of interpretations. This applies, for example, to the wording in article 16, "any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated". It may be difficult to determine precisely what is implied by that concept.

⁷ *Ibid.*, pp. 105-107.

8. It is evident from the above that the crimes to be included in such a code must fulfil two criteria. First of all, they should be acts that are in reality a crime against the peace and security of mankind, that is to say, they must fulfil the criterion of classification. Secondly, their nature must be such that they can be regulated by this kind of instrument, namely they must fulfil the criterion of suitability. As is pointed out in the specific comments on individual articles below, the draft Code includes a number of articles which, in the view of the Nordic countries, do not meet these two criteria. A code based on these criteria would be considerably less comprehensive than the present draft. The crimes that should be retained are primarily those outlined in articles 15 to 22, and which are committed on behalf of State authorities.

9. A further problem with the present draft is that it fails to specify the degree of accountability that must subsist. As the Nordic countries understand the draft, it is generally sufficient that an offence has actually been committed. However, in certain articles it is specified that the provision is only applicable to acts that are committed "wilfully". In other cases it is stated that special motives must be present. An example is the wording in article 20: "for the purpose of establishing". In the view of the Nordic countries, it should be set out in a separate article in part one that the Code basically only applies to acts committed wilfully. Any exceptions to this can be specified in the articles in which the intention is to strengthen or weaken the requirements as to subjective accountability.

10. Furthermore, the draft does not take account of the fact that there is a significant difference between cases in which the act has been carried out by individuals on their own initiative and those in which it is the consequence of a decision taken by the highest government bodies of the State. For example, cases in which decisions are made by a national assembly comprising several hundred members pose obvious problems. In this context reference is made to article 20, paragraph 2 (c), where "any legislative measures" may be regarded as apartheid. Is the intention here that all members of the national assembly who were instrumental in passing such a statute should be liable to a penalty? At any rate this would not be a particularly practical course of action. In such cases, the criminal responsibility would rest almost automatically with the State, in that it is the highest government bodies that act and have jurisdiction under international law to propose or pass legislation on behalf of the State. It is not indicated clearly enough whether it is individuals or the State as such that are liable. The criminal responsibility of a State raises problems of enforcement that differ fundamentally from those raised by the articles that are directed at individuals. It is the view of the Nordic countries that the Code should apply only to criminal acts committed by individuals.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

11. The following comments reflect the preliminary thinking of the Nordic countries on individual articles of the draft seen as a whole.

Article 1

12. The article appears to give a legal definition of the term "crimes against the peace and security of mankind"

and, as currently worded, can be interpreted as being antithetical. This provision should be deleted as there is no need for such a definition. Moreover, it could be confusing because certain crimes included in the draft Code can hardly be said to be of the nature described.

Article 2

13. The principles set out in the article are acceptable as regards crimes that normally do not come under national jurisdiction because they would be contrary to international law. However, the draft Code includes crimes that are generally subject to conflicting national legislation. Where this is the case the provision needs to be made less categorical.

Article 3

14. The article is a good illustration of the difficulties associated with the technique employed in the draft Code. If the aim is to establish an international criminal code, the question of determining individual accountability, criminal participation, complicity, various kinds of attempt, and so forth, must be resolved satisfactorily from the point of view of interpretation.

Article 4

15. It is not difficult to imagine motives, for example in various kinds of emergency situations, which would affect the question of criminal responsibility. According to the wording of the article, however, no importance should be attached to such considerations. Thus, the article causes considerable problems and is not acceptable in its present form.

Article 5

16. This provision must be retained in the draft Code in order to maintain the criminal responsibility of individuals and at the same time ensure that States are not relieved of responsibility for war reparations, and the like.

Article 6

17. The Nordic countries presume that a decision not to incite a perpetrator is also covered by the term "try". This is in keeping with the corresponding interpretation of similar formulations employed in other international contexts. If an international criminal court were to be established, the substance of the principle "try or extradite" will have to be further elaborated.

Article 7

18. The absence of statutory limitations may be acceptable as regards the most serious crimes, but it is much more doubtful in those cases where conflicting national criminal law may prescribe statutory limitations after a certain period of time.

Article 8

19. The article demonstrates clearly that the procedural requirements for a trial in accordance with the draft Code must be determined in connection with the formulation of

the penal provisions. The minimum standards established for legal actions, which are taken from civil rights requirements, are reasonable as far as they go but far from sufficient as rules of judicial procedure for a court of law.

Article 9

20. A number of the substantive solutions that derive from this provision can be called into question. For instance, according to paragraph 4, an individual may be tried by a national court of one State even though he has been tried by the court of another State for the same offence, if the former State has been the main victim of the crime. The Nordic countries interpret this to mean that this applies, for example, even if the person in question has already served a long prison sentence. Thus, the provision clearly conflicts with traditional principles of force of law in criminal law and should thus be worded in less categorical terms. A reasonable solution might be to provide that consideration by a national court should not prevent a crime from being tried in accordance with the Code, but that account should be taken of the sentence the convicted person is serving or is to serve in accordance with the judgement handed down by the national court.

Article 11

21. The provision establishes that the fact that an individual acted pursuant to an order of a superior does not relieve him of criminal responsibility provided that "it was possible for him not to comply with that order". The word "possible" as used in this provision must be more clearly defined. The consequences for refusing to comply with orders may vary widely, ranging from reprimands and dismissal to the death penalty. The intention cannot be that all such circumstances shall relieve the perpetrator of criminal responsibility. This problem should be dealt with explicitly in the text of the Code itself.

Article 12

22. This provision, which concerns a superior's failure to attempt to prevent a criminal act, goes further in terms of criminalizing such failure than is acceptable in the Nordic countries. In order for such responsibility to exist, it is generally required that the substantive provisions give rise to an obligation to act on the part of the person who has omitted to act. Moreover, it may be difficult to reconcile the provision with the definition of individual responsibility set out in article 3.

Article 13

23. It must be presumed that even heads of State cannot be absolved of international responsibility for their acts if these acts constitute a crime against the peace and security of mankind. This must apply even if the constitution of a particular State provides otherwise.

Article 14

24. Paragraphs 1 and 2 should be placed in separate articles, because there is a fundamental difference between circumstances that absolve a perpetrator of responsibility for an act and circumstances that have a bearing on the sentence.

25. As the article is currently worded, it gives no indication of the circumstances to be taken into account when trying a crime. Thus, any court is free to interpret the provision, which is hardly in conformity with the rule of law. In the view of the Nordic countries, it would be appropriate to determine the significance of self-defence and state of necessity. The problem of consent may also arise in various contexts.

26. Furthermore, the draft Code includes two other articles (arts. 11 and 13) that deal with grounds on which a perpetrator may be relieved of responsibility. These should be combined with article 14. One way of doing this could be to enumerate the circumstances that relieve an individual of responsibility, and those that do not. The circumstances set out in articles 11 and 13 of the current draft would then be among those that do not in any case incur accountability.

27. Another problem with the draft is that it does not include any provisions to govern cases in which a perpetrator is insane or otherwise unaccountable for his actions at the time of committing the act.

28. Paragraph 2 should also govern aggravating circumstances. Moreover, it is necessary to define and exemplify what is meant by the terms extenuating and aggravating circumstances, as the provision in its present wording is practically without substance.

Article 15

29. The provision concerning aggression fulfils both the criteria set out in section C above. It is, however, questionable whether the definition is suitable in all respects. Paragraph 3 includes a reference to the Security Council's determination of aggression. From a political point of view, the Security Council's competence in this matter is well founded. However, in a legal context it is not an acceptable approach, as the judgement of a court would then be dependent upon a political assessment.

Article 16

30. The criteria set out in section C above have, in the view of the Nordic countries, been fulfilled in this article as well. However, the provision could perhaps be limited to the "threat of violent aggression" in order to avoid charges for misdemeanours that are less serious than or fall short of genuine threats.

Article 17

31. The provision fulfils the criteria mentioned in section C, but in some respects it seems to overlap with article 24 concerning terrorism. These two articles should be considered carefully, as it might be sufficient just to retain article 17, which is the more comprehensive of the two. There are, however, weighty political arguments for explicitly prohibiting terrorism in a separate article or, alternatively, in a separate paragraph in article 17.

Article 18

32. In the opinion of the Nordic countries, this provision does not fulfil the criterion of suitability set out in section C. The wording "alien domination contrary to the right of people to self-determination" is too imprecise and

probably too comprehensive. As currently worded, the provision could, for example, apply to various forms of trade boycott as well as to situations where a donor country stipulates certain conditions in connection with development assistance. Thus, the provision is open to various interpretations and could give rise to conflicts. It must therefore be made much more precise if it is to be retained.

Article 20

33. The Nordic countries hold the view that the provision on apartheid does not fulfil the criterion of suitability. What is more, the definition of the crime is clearly covered by article 21 concerning systematic or mass violations of human rights.

Article 22

34. Although the provision concerns "exceptionally serious war crimes", not all of the acts specified herein fall within this category, though they are definitely criminal acts. This applies, for example, to "unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities" (paragraph 2 (a)).

Article 23

35. In the view of the Nordic countries, the acts covered by the provision are in themselves not serious enough to be included in a code of crimes against the peace and security of mankind, particularly given the fact that the use of such forces in armed aggression or oppression of ethnic groups, and the like, is covered by previous articles. As currently worded, the provision also covers negligent complicity in financing the services of mercenaries, and it is questionable whether such an act ought to be an offence at all.

Article 24

36. The scope of the provision is too narrow from a substantive point of view. It is difficult to understand why only cases where the terrorist is "an agent or representative of a State" should be covered. The other crimes included in the draft Code are not subject to such a limitation, provided that it is possible for individuals to contravene these provisions without acting on behalf of a State. The majority of the crimes that could conceivably fall within the scope of this article are of such a nature that they are generally covered by national criminal legislation as well as specific conventions. There is, therefore, reason to presume that, in many cases, conflicting penal provisions are to be found in national criminal law.

Article 26

37. It is important to establish some form of international legal regime which deals with the question of liability in connection with transboundary environmental damage. From a substantive point of view, however, it is clear that the article does not have the degree of precision required for a penal provision. The matter should therefore be considered further.

PENALTIES

38. The Nordic countries presumed that imprisonment would be the most appropriate penalty, as the draft Code should only include crimes that are so serious that a custodial sentence is the only conceivable form of punishment. As far as the death penalty is concerned, they have on several occasions expressed the view that it is unacceptable, even for the most serious crimes.

39. As regards assessment of sentence, a scale of penalties should be established for each individual article. Minimum sentences should probably also be prescribed in connection with a number of the penal provisions.

40. There is also a definite need for provisions concerning confiscation in addition to imprisonment. This could, for example, be quite practical in cases where cultural objects have been stolen in wartime.

CONCLUSION

41. In the view of the Nordic countries, it would be most expedient to focus on the most serious crimes against the peace and security of mankind, and thus on a relatively limited code.

Norway

[See *Nordic countries*]

Paraguay

[Original: Spanish]
[30 November 1992]

GENERAL COMMENTS

1. The draft Code of Crimes against the Peace and Security of Mankind does not define such crimes but simply enumerates them and characterizes them as crimes under international law. Unlike other international instruments, it does not draw a distinction between crimes against peace, war crimes and crimes against humanity.

2. The principal crimes it lists are aggression and the threat of aggression, intervention, colonial domination and apartheid. Another group consists of the recruitment, use, financing and training of mercenaries. A third group is made up of genocide, systematic or mass violations of human rights, exceptionally serious war crimes, illicit traffic in narcotic drugs and wilful and severe damage to the environment.

3. Many of these crimes, such as genocide, war crimes and torture, are already covered by instruments emanating from the United Nations and the Organization of American States.

4. The purpose of this draft is to supplement those norms by seeking to ensure effective protection for human rights and greater observance of the principles of non-intervention and self-determination of peoples, thereby helping to expand the legal protection of the international community.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

5. In paragraph 1 of the Spanish text, the words *podrá ser sancionado* should be replaced by the words *será sancionado*, since it involves an obligatory penalty. The same applies to paragraphs 2 and 3.

Article 7

6. Whatever views may be held regarding derogation from the principle of statutory limitations for criminal action and punishment, this article merely follows the system established with respect to such crimes in similar international instruments. Instead of declaring the non-applicability of statutory limitations, however, it should establish a longer time limit or limitation than that applicable to common-law crimes.

Article 9

7. Paragraphs 1 and 2 establish the rule of *non bis in idem*. However, paragraph 3 weakens it considerably by providing that if an individual has been punished for a crime under ordinary law, he may be tried and punished again for a crime covered by this Code. Such a provision works against the principle of *non bis in idem*, the right not to be tried more than once for the same act, which is a legal guarantee for the accused instituted for the preservation of legal safeguards.

8. The same applies to the provisions of paragraphs 4 (a) and (b). It should be acknowledged, however, that paragraph 5 would help mitigate the effects of the aforementioned paragraphs.

9. With regard to paragraph (2) *in fine* of the commentary,¹ it should be pointed out that, under Paraguayan law a discharge of proceedings has the same effect as an acquittal, although it is pronounced during pre-trial proceedings rather than during the trial.

Article 10

10. It is not advisable to limit the principle of non-retroactivity. *Nullum crimen, nulla poena sine lege* is a cardinal principle of the legal order and it is dangerous to permit exceptions to it. Paraguay believes, therefore, that paragraph 2 of this article should be deleted. Paragraph (3) of the commentary² is also unacceptable, for it seeks, without justification, to give the word *lex* a very broad meaning, encompassing not only written law but also custom and general principles of law. It would have the effect of virtually negating the principle of the legality of crimes and penalties as cited.

Article 14

11. Paragraph 1 of this article provides that

"the competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime".

¹ Article 9 was previously adopted as article 7. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 69.

² Article 10 was previously adopted as article 8. For the commentary, *ibid.*, p. 70.

Defences (justifications, grounds for inculpability and for non-imputability) are so important a matter in criminal law that to refer to "general principles of law", thereby leaving a great deal to the judge's discretion, seems inappropriate. It would be wiser, in order not to have to spell out the grounds for the defence, to refer to the laws of the State in which the crime was committed.

Article 15

12. This article states—as do the others in part two—that an individual who . . . commits one of the crimes specified in the draft Code "shall, on conviction thereof, be sentenced . . .". The phrase "on conviction thereof" is clearly redundant, for a person cannot be sentenced until he has been tried and found guilty.

13. The Commission saw fit to include the offence of total or partial annexation in the draft (paragraph 4 (a)); it is defined as the total or partial annexation of a sovereign State by another, through the use of violence or other illicit means.

Article 16

14. The rule set out in paragraph 1 is too broad and imprecise. Defining the threat of aggression in the Spanish text with the terms *proferir una amenaza* or *ordenar que sea proferida* is not precise enough with regard to the offence. There must be a reasonable probability, as evidenced through actions, that aggression will take place.

Article 17

15. Fomenting and financing armed activities is not the only form of intervention in the internal or external affairs of a State; intervention may take more subtle, covert and effective forms, such as attacks or measures of an economic nature that severely disrupt the life of a country, forcing it to accept the demands being placed upon it.

Article 19

16. The crime of genocide was already defined in the Convention on the Prevention and Punishment of the Crime of Genocide, and it remains unchanged in this instrument. If any change is to be made, paragraph 2 (e) could be expanded to cover adults as well as children.

Article 21

17. This is similar to the crime of genocide (art. 19), as can be seen by comparing the provisions of the two articles. However, this article does not mention the underlying motive for the crime of systematic or mass violations of human rights. The differences do not seem to be fundamental.

Article 22

18. There are already many international conventions on war crimes, which are referred to in the commentary to this article.³ It is legitimate to ask whether there is any need to have yet another category of crime, namely ex-

³ *Yearbook . . . 1991*, vol. II (Part Two), p. 105.

ceptionally serious war crimes, and whether the degree of seriousness is a sound criterion to use in defining an offence for which other characterizations already exist. Degree of seriousness is, however, a valid criterion to use in determining the severity of the punishment.

Article 24

19. This article covers terrorism, not as committed by individuals or private groups, but by agents or representatives of a State, cases of which exist in the international community today.

Article 26

20. Given the current gravity of ecological problems, it is appropriate that severe damage to the environment should be established as an offence under international criminal law.

Poland

[Original: English]
[29 March 1993]

GENERAL COMMENTS

Penalties

1. In the field of public international law it is very difficult to establish a uniform system of punishment which would be acceptable to all States. There are many concepts and philosophies regarding the punishment system provided in the domestic law of States. Certain penalties in force in some countries, based on a long legal and cultural tradition, are unknown in others, for example, death and physical mutilation penalties.

2. The first important question is whether a penalty should be specified for each crime against the peace and security of mankind severally or whether, since all such crimes are characterized by the same degree of extreme gravity, the same penalty should be laid down, under a general formula, for all cases, with a minimum and maximum according to whether or not there are extenuating or aggravating circumstances. Practically speaking, the second option would have a better chance of being adopted by all States. Determining a separate penalty for each crime would require very careful discussion on part one of the draft Code and probably would prevent the achievement of a satisfactory compromise in the near future.

3. Taking into account a diversity of legal systems, philosophies and traditions of criminal law of many countries, the Government of Poland supports the second option, with the term of imprisonment (life imprisonment and imprisonment for 10 to 35 years) being strictly determined by the court, according to the circumstances of the case, and, if deemed necessary by the court, supplemented by community work, total or partial confiscation of property and deprivation of some or all civil and political rights (as has been proposed by the Special Rapporteur in alternative B of the new, second version of draft article Z.¹)

¹ For text, see *Yearbook . . . 1991*, vol. II (Part Two), p. 85, footnote 281.

4. The Polish Government is therefore in favour of a single penalty with a minimum and a maximum. On the other hand, it is obvious that some crimes might be considered more serious than others—for example genocide or aggression, which could not be treated in the same way as drug trafficking. Such differences should be taken into account by the court in deciding the penalty, ranging from life imprisonment (maximum) to imprisonment for a term of 10 years (minimum).

5. The second question, regarding penalties, raises the question of the type of penalties to be applied under the Code.

6. Poland shares the opinion in respect to life imprisonment, that those who have committed “the most serious of the most serious crimes” should be separated and removed from the international and domestic community for ever in order to protect mankind and prevent the recurrence of such crimes in the future.

7. As concerns temporary imprisonment (for the term of 10 to 35 years) the view is that the individual who has been convicted for temporary imprisonment should serve his full sentence without the right to apply for early release.

8. Poland draws attention to the fact that the draft Code does not determine who or what body would be responsible for carrying out the sentence of imprisonment and, consequently, in which State those condemned should serve their sentences. This determination would be important since the severity of penal institutions and prisons differs in various countries and it is necessary to take these differences into account.

9. In the opinion of the Government of Poland, the main problem regarding supplementary (additional) penalties seems to be their “territorialization” in one country or another. The question that arises is in which State the penalty of deprivation of some or all civil and political rights would be effective and applicable. Furthermore, this particular penalty should be decided only by the domestic court of the State of which the subject of the prosecution is a national.

10. The use of community service as a supplementary penalty also gives rise to some doubts. First, this penalty ought to be decided only in cases of petty offences or misdemeanours, not crimes. Secondly, it is a question of knowing for whom such work would be done and what society or State would be the beneficiary.

11. In principle, Poland is of the view that the restoration of stolen property is a matter for the domestic law and jurisdiction of each State concerned. Furthermore, there are many well-known problems and difficulties concerning claims to property, even in domestic cases.

12. The total or partial confiscation of property as one of the optional penalties would be useful in many cases. As to the question of to whom the confiscated property would be awarded on the international level, the Polish Government supports the view that, according to the widely recognized principle of law, such part of the property as has been stolen should be restored to its rightful owner or his heirs.

13. Turning over the remaining part of the confiscated property (property which was not stolen) to humanitarian organizations or allocating it to a special United Nations fund might cause certain practical problems, particularly with regard to real estate.

Institution of criminal proceedings (submission of cases to the court)

14. Criminal proceedings in respect of crimes against the peace and security of mankind are to be instituted first and foremost, but not exclusively, by States. In the view of the Polish Government, in some cases it would be more convenient and appropriate for other entities concerned (such as international governmental and non-governmental organizations) to institute criminal proceedings rather than for States to do so, as for example in the case of environmental crimes, human rights violations or war crimes. Therefore such organizations should have the right to take action as regards the crimes described in the draft Code.

15. Poland does not share the opinion that the right to bring charges should be entrusted to a special prosecutor's office attached to the court, because it would be difficult to establish yet another international criminal body responsible for investigating and determining the grounds for prosecution.

16. The crimes of aggression and the threat of aggression as provided in the draft Code also constitute violations of international peace and security. Therefore, in these cases, the position and rights of the Security Council must be underlined and taken into account. The Security Council itself should not be competent to take any judicial measures and to institute criminal proceedings directly; to give it such competence would be neither logical nor appropriate. Furthermore, it would require amending the Charter of the United Nations. The court should be bound by a determination of the Security Council that there had been an act of aggression or threat of aggression, but if the Security Council did not act and make such a determination, the court would be fully capable of making its own decision as to the determination of a given act as one of aggression or threat of aggression. Later, the Security Council, in its activities, would not be bound by such a decision of the court.

17. This would make it possible to avoid the eventuality of blocking criminal proceedings were the Security Council unable to take a positive decision on the matter.

18. The conclusion is that either every positive decision of the Council would be binding on the court or the court, acting on the legal—not the political—level, would have to make its own decision and continue criminal proceedings regardless of the “no-decision” outcome of the Security Council's action. As mentioned by some members of the Commission during the consideration of the topic at its forty-third session, ICJ in its judgment of 27 June 1986 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*),² had not refused to consider the question whether one of the States parties to the dispute had been guilty of an act

of aggression which had not been determined by the Security Council. In this case, the Court decided, quoting the Definition of Aggression³ annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974 as expressing customary law in this respect, by 12 votes to 3, that the United States, by certain attacks on Nicaraguan territory and other acts which involved the use of force, had acted against Nicaragua in breach of its obligations under international law not to use force against another State.

Acts likely to constitute an attempt to commit a crime

19. The Government of Poland is of the view that the automatic transfer of types of offences from domestic to international law is inappropriate. There are even doubts in respect of attempt. Those doubts are much more serious with regard to types of offences such as preparation of, aiding and abetting, and incitement to commit a crime. Nevertheless, the Government of Poland is open to consider attempt as a useful and applicable concept in the following types of crimes described by the draft Code in articles 15, 17, 19, 21, 22, and 24 to 26.

20. The Government of Poland considers that the crime of the threat of aggression, in essence seems to be something like “pre-attempt at aggression”, and it would be going too far to recognize as a crime an “attempt to threaten”, whatever the threat may be.

21. In the crimes described in articles 18, 20 and 23 of the draft Code, the essential element seems to be a wrongful result of the concrete act and therefore, in the cases of absence of such result (for example, in the case when there is only the attempt to commit a crime), such an act should be carefully considered and reviewed in a different manner, maybe outside the terms of criminal responsibility.

22. Regarding part two of the draft Code as a whole, the Government of Poland is of the opinion that the order in which particular crimes appear therein does not establish the scale or degree of seriousness of those crimes and the hierarchy of gravity among them. It supports the fact that the draft does not maintain the distinction between crimes against peace, war crimes and crimes against humanity.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

23. The square brackets around the words “under international law” seem unnecessary in this context. The Code will be a treaty and crimes may only constitute international crimes in terms of international law. However, many internal systems of law recognize crimes described in the Code as crimes under domestic law. Therefore, if the bracketed words were omitted it would leave open the question of “double recognition” of such crimes as crimes under both international and domestic law.

Article 2

24. It is suggested that the words “is not punishable” should be replaced by “is not a crime” or “is not unlawful”.

² *Merits, I.C.J. Reports 1986*, pp. 14 et seq., paras. 187 to 201 and 201 to 227.

³ General Assembly resolution 3314 (XXIX), annex.

Article 3

25. The Government of Poland supports the idea that the draft Code should limit criminal responsibility for the crimes described in it solely to individuals.

26. There are three categories of individuals who might be responsible and liable to punishment under the provisions of the Code:

- (a) Leaders and organizers of crimes (arts. 15-18 and art. 20);
- (b) Agents or representatives of States (arts. 23-24);
- (c) Individuals per se (arts. 19, 21, 22 and 25-26).

The last category is the most general.

27. The Government of Poland is of the view that the adoption for the purposes of articles 23 and 24 of such personal limitation of responsibility (para. 26 (c) above) goes too far. When the individual is not an agent or representative of the State, he does not fit the definitions of the crimes described in articles 23 and 24. The question therefore arises why only the categories of individuals described should be responsible for crimes against the peace and security of mankind while the wrongfulness of the outcome and the gravity of such acts when performed by individuals who are not agents (representatives) of States are the same.

Article 5

28. This article is a well-balanced barrier against the possible interpretation of the provisions of the draft Code as relieving States of their own responsibility under international law for all wrongful activities attributable to them. The prosecution, conviction and punishment of individuals under the provisions of the Code for the crimes described therein are in no way a substitute for the State's responsibility. The essence of the State's responsibility for acts is of a different nature and exists on a different level.

Article 6

29. This article establishes the right priority of jurisdiction, recognizing the special position of the State in whose territory the crime was committed. It is important that paragraphs 1 and 2 do not prejudice the jurisdiction of the future international criminal court.

Article 7

30. The provision that no statutory limitations shall apply to crimes against the peace and security of mankind is direct evidence that these crimes are primarily crimes of international law, determined and constituted by that law.

Article 8

31. Some doubts arise regarding the expression "minimum guarantees due to all human beings with regard to the law and the facts". The Government of Poland is of the view that the maximum or the widest guarantees should be recognized rather than the "minimum". Furthermore, it is not clear what the words "guarantees with regard to the facts" mean and how they should be interpreted.

32. As concerns the expression "by law or by treaty", the Government of Poland considers that making a distinction between law and treaty suggests that a treaty is

not a law or that it is other than legal in nature. It is proposed to omit the words "or by treaty" and simply leave "by law".

Article 9

33. The *non bis in idem* principle, as mentioned in the title of this article, has been expressed in such a manner in the text that it has practically lost its fundamental sense and significance. That is why Poland considers that further intensive work is required on this article.

Article 10

34. The Government of Poland is in agreement with the manner in which the non-retroactivity principle is formulated in this article. Those crimes which existed before the entry into force of the Code might be prosecuted and punished accordingly.

Article 11

35. This article reflects experience deriving mainly from the Nürnberg trial.⁴ Generally speaking, as a principle, any kind of order does not exclude responsibility except in a situation where, in the circumstances at the time, it was possible for a subordinate not to comply with the order. Practically speaking, it may be expected that at the international criminal court many perpetrators of crimes will refer to this exception as an excellent line of defence.

36. The Polish Government is of the view that in such cases it would be difficult for the court to make a proper and objective interpretation of the expression "in the circumstances at the time, it was possible for him not to comply with that order". It is not clear what this sentence really means. There are many possible interpretations: does it only mean a threat to the personal safety of the subordinate, or does it also concern the safety of the members of his or her family and other close relatives? Poland is of the view that it would require further specification. In many particular cases, article 11 is one of the key provisions for the determination of responsibility.

Article 13

37. The provisions of this article do not recognize any kind of immunity with respect to the position or office of an individual who commits a crime, including for heads of State or Government. It is a serious but logical and reasonable limitation of the full immunity of heads of State. Their immunity cannot be such as to put them beyond the reach of criminal responsibility for crimes against the peace and security of mankind.

Article 14

38. As concerns paragraph 1, the Government of Poland would like to underline that in its opinion this paragraph includes traditional criminal law defences such as self-defence, coercion, state of necessity, *vis maior* and error—all related to the existence or non-existence of responsibility. Extenuating and maybe other kinds of circumstances, which might be considered by the Commission in second reading, determine only the degree of harshness or leniency of the penalty.

⁴ United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and Analysis (memorandum by the Secretary-General)* (Sales No. 1949.V.7).

39. Paragraph 2 should be supplemented by adding “aggravating circumstances” and also “other circumstances such as, for example, the personality of the offender, the gravity of the effects of the crime and others, as the case may be”.

Article 15

40. Paragraph 4 (*h*) is an important supplementary clause which allows the Security Council to take into account the future progress of international law concerning the definition of aggression, and particularly new forms of aggression which may appear in the future.

Article 21

41. As is determined in the title of this article, only their systematic or mass character qualifies violations of human rights as a crime against the peace and security of mankind. Such a determination clearly excludes individual and occasional violations of human rights from the definition of that crime. But there is, in the opinion of the Polish Government, some kind of inconsistency in the construction of article 21. The title provides that a necessary attribute of the crime described therein is its “systematic or mass” character but as this attribute appears only once in the detailed enumeration of the five forms (examples) of the crime, it is not clear whether murder or torture also need to be of a “systematic or mass” character in order to be recognized as crimes under article 21. It is not clear whether the essential provisions of this article should be read in conjunction with its title or not. If an act only constitutes a crime under the provisions of this article when it involves systematic or mass violations and otherwise does not come under the draft Code, then this must be expressed clearly, not only in the title but particularly in the text of the article.

Article 25

42. The expression “on a large scale” has a subjective character and without any instructions, even general in nature, as to what it means it would be difficult for the court to answer the question of what is large scale and what is not.

Article 26

43. It would be reasonable to replace the expression “long-term” by “long-term effects” because, as has been mentioned by the Commission, the expression “long-term” does not mean the period of time in which the damage occurs, but the long-term nature of its effects.

44. The observations made above in relation to the term “on a large scale” in article 25 apply in the same manner to the expressions “widespread” and “severe”, which determine the character of damage to the environment in article 26.

45. This article conflicts with article 22, which also deals with protection of the environment (para. 2 (*d*)). Under the provisions of the latter article it is also a crime when an individual employs methods or means of warfare that may be expected to cause damage, even if the purpose of using such methods has not been to cause damage to the environment, whereas article 26 is based on the concepts of intent and will (“who wilfully causes”).

Senegal

[Original: French]
[18 December 1992]

1. During the debate on this item in the Sixth Committee, the Senegalese delegation welcomed the quality of the report submitted by the Special Rapporteur of the International Law Commission, and the efforts he has been making over the past 10 years to draw up a code of crimes and a statute for an international criminal jurisdiction.¹

2. The Government of Senegal believes that the international community can no longer ignore the problems posed by the expansion of criminality to international dimensions.

3. Punishment of international crimes often involves a number of legal systems whose laws are very often incompatible. This situation creates spatial conflicts of law, making it difficult to punish crimes promptly and effectively, not to mention often creating tensions as a result of requests for extradition.

4. Accordingly, there is a pressing need for the international community to try to harmonize criminal law in order effectively to combat crime and offences of an international nature. This undertaking must be geared, as a matter of priority, to prevention, because punishment is but an imperfect means of fighting criminality.

5. For all these reasons, Senegal supports the principle of the drafting of a convention in respect of crimes against the peace and security of mankind and in respect of an international criminal jurisdiction, it being understood that such a convention would define the legal framework for international judicial cooperation, which is now more necessary than ever before in order to combat crime and delinquency in general, *inter alia*, by providing technical and financial assistance to the developing countries.

¹ See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 22nd meeting, paras. 47-52.*

Sudan

[Original: Arabic]
[26 January 1993]

1. An article should be inserted at the beginning of the draft Code of Crimes against the Peace and Security of Mankind to define those terms and expressions used in the text which require a strict legal definition in order to prevent any individual interpretations or disputes that might arise.

2. The provisions of the draft Code do not distinguish between crimes committed by a person in the territory of his own country and those committed in another country. A distinction must be drawn between these two types of crime, and it must be determined which court is competent to rule on crimes committed by nationals of a given country on foreign soil.

3. It is necessary to determine as well which court or courts are competent to rule on the crimes specified in the draft Code.

4. The failure to determine penalties for any of the crimes specified in the draft Code means the picture is not sufficiently complete to allow comment as to whether the penalties are appropriate and likely to lead to a curtailment of such crimes.

Sweden

[See *Nordic countries*]

Turkey

[Original: English]
[15 January 1993]

GENERAL COMMENTS

1. Approval of the draft Code initially as a declaration, to be converted later into a binding document, would be appropriate.
2. The fact that some of the issues entailed in the draft are covered in certain treaties and that national bodies are authorized to institute proceedings and hand down sentences on those issues may create difficulties for signatory States in harmonizing their obligations under such treaties with those under the Code.
3. The draft would be improved if penalties could be specified along with crimes. However, it would be appropriate to allow the judges to decide on penalties ranging between a minimum and a maximum, rather than stipulating specific sentences for each crime.
4. The draft should not include crimes on which complete agreement has not been reached.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 7

5. Even though the underlying idea of the article is tenable, in the case of the establishment of a future international criminal court, a statute of limitations—perhaps a relatively extensive one—should be envisaged for abuse-of-the-law cases brought against certain countries.

Article 10

6. According to this article, no one will be convicted for crimes committed prior to the entry into force of the Code. Paragraph 2 is among the basic principles of criminal law and should be made use of in the draft.

Article 15

7. After the enumeration of the acts of aggression, it is pointed out in paragraph 4 (*h*) of article 15 that the Security Council will also be able to determine, in accordance with the Charter of the United Nations, other acts that might also be considered as criminal. However, one of the basic tenets of criminal law and a safeguard for the offender is that the elements of and the penalty for the offence have to be predetermined. In the light of this principle, such a stipulation that might result in offences

being devised that were not foreseen would not be appropriate.

Article 16

8. This article of the draft cites the threat of aggression as one of the crimes against the peace and security of mankind. Paragraph 1 stipulates that the leader or organizer of the crime of threat of aggression may be punished. Paragraph 2 provides that threat of aggression entails declarations and demonstrations of force appearing to Governments as threats of aggression against their countries. This concept is also referred to in the Charter of the United Nations. However, as the Charter constitutes a treaty that commits Member States not individuals, it would be essential to clarify how personal responsibilities would emanate from such a crime. Furthermore, in cases where a crime of threat of aggression is committed by individuals, any assessment as to the elements constituting the crime, whether the person acted on behalf of his Government or not, or who actually committed the crime, may be subjective.

Article 22

9. It should be reconsidered whether the acts mentioned in paragraph 2 (*a*) of this article (acts of cruelty or barbarity directed against the life, dignity or physical or mental integrity of individuals) really fall under the heading of “exceptionally serious war crimes”.

10. Paragraph 2 (*f*) provides that wilful attacks against religious, historical and cultural values shall be considered as war crimes. It will be appropriate to expand this paragraph to include the theft, smuggling and destruction of items of religious, historical, cultural and scientific or technological value carried out in the chaotic atmosphere of times of war.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[29 January 1993]

GENERAL COMMENTS

1. The Government of the United Kingdom is concerned at the continuing lack of rigour in the preparation of the draft articles and the consequent lack of precision. Many of the proposed crimes set out in part two are vaguely defined, with the elements that are to constitute the crime far from clear. When defining any crime the need for legal precision is paramount.

2. In approaching this topic the United Kingdom has always been of the view, expressed often in the Sixth Committee, that the Commission must start with a working concept of what constitutes a crime against the peace and security of mankind. A member of the Commission has referred to the “scaffolding” of the tripartite classification of crimes against peace, war crimes and crimes against humanity, which has guided the Commission’s work.¹

¹ *Yearbook* . . . 1986, vol. I, 1961st meeting, para. 67.

Although this classification does not appear in the draft, it has served merely to subdivide a category of crimes, the outer parameters of which remain undefined. As a guide to the enumeration of specific offences the criterion of "extreme seriousness" is insufficient, being highly subjective and elastic. Strongly conflicting views within the Commission regarding the crimes to be included bear witness to the difficulties in following an enumerative approach without a working concept. If the work of the Commission is to have any success it is fundamental that there should be a rational distinction between international crimes and crimes against the peace and security of mankind. In identifying those crimes which are thought to constitute crimes against the peace and security of mankind, the Commission has quite properly drawn on the 1954 draft Code for guidance.² Less satisfactory is the reliance placed upon article 19 of the Commission's draft articles on State responsibility,³ which are not concerned with individual criminal responsibility; many of the more objectionable elements of the present draft Code may be traced to the Special Rapporteur's reliance upon that article. This applies in particular to articles 18 (Colonial domination and other forms of alien domination), 20 (Apartheid) and 26 (Wilful and severe damage to the environment). Such reliance is misplaced since it fails to acknowledge the fundamental distinction between State responsibility and individual criminal responsibility. It is only the latter with which this draft Code is concerned.

3. Several of the draft articles would have to be recast in the event that an international criminal jurisdiction is realized. It is also clear that if the Code is to function effectively it will be necessary to obtain widespread support for it. As currently drafted, the Code is unlikely to achieve such support; certainly the United Kingdom is unable to support it. Indeed, with so many of the crimes which the Commission has included in part two having already been addressed in international conventions, it is increasingly difficult to see what lacuna is being filled by the Code.

4. At the request of the General Assembly, the Commission is currently heavily committed to the task of producing a draft statute for an international criminal court. The United Kingdom has already indicated in the Sixth Committee that it shares the widespread view that work on the court should not be coupled with that on the Code. The United Kingdom believes that it would make most sense, in the development of its work programme as a whole, for the Commission to suspend all work on the Code until it has completed the drafting of a statute for a court. That would be a suitable point at which the position could be reviewed by the General Assembly.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

5. The draft adopts an enumerative approach to the definition of crimes against the peace and security of mankind. This approach, which was also that adopted in article 1 of the 1954 draft Code, is the only one which would allow the constituent elements of each offence to

be properly defined. However, the deficiencies of the working methodology of the Commission have been noted above. The rationale for the inclusion or exclusion of particular offences appears arbitrary. It is difficult to discern the reason for excluding slavery, piracy, traffic in women and children, and hijacking, which are all well established in international law, while including hitherto unknown "international crimes" such as mercenary activities and wilful and serious damage to the environment. The inclusion of the words "under international law" is neither necessary nor useful.

Article 2

6. The United Kingdom recognizes that a clarification of the relationship between international and municipal law regarding the characterization of an act or omission as a crime against the peace and security of mankind may be both desirable and necessary. However, it is not readily apparent from the terms of this article what problem it is addressing. It is hardly conceivable that acts should be punishable pursuant to an international code which are not in general of a type punishable under national criminal law. It would appear that the drafters of the article had in mind that the perpetrator of an offence under such a code may not be exonerated by virtue of the act not being criminal at the time of its commission under the law of the place in which it was committed. The reference to Principle II of the Nürnberg Principles⁴ in the commentary⁵ supports this interpretation. If this is what the Commission does intend, the article should so state.

Article 3

7. This article rightly focuses upon the criminal responsibility of individuals. However, paragraph 1 includes no requirement of intent—or *mens rea*—which is a fundamental element for serious crimes. The Convention on the Prevention and Punishment of the Crime of Genocide, for example, refers in article II to "acts committed with intent", wording which is repeated in article 19, paragraph 2, of the Code. Paragraph 1 reflects the approach of those in the Commission who considered that intent can be deduced from the "mass scale and systematic nature of a crime". This approach confuses the elements of a crime with their proof. The enormity of acts committed may raise a presumption of intent at the highest levels of command, though even there it should be permissible to introduce evidence to rebut the presumption, if such evidence exists. But the great majority of potential defendants will be those who have played only a small part in large events and in their case the state of the individual's knowledge is crucial. The point emerges clearly from a study of paragraph 2. The Code should provide either in part one, or in part two in respect of each individual crime, that intent is an essential element.

8. Paragraph 3 attributes responsibility for an attempt to commit a crime against the peace and security of mankind. It will be essential to insert a reference to the relevant articles to which this provision is intended to apply.

² Adopted by the ILC at its sixth session; the text is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8.

³ *Yearbook* . . . 1976, vol. II (Part Two), p. 70.

⁴ Principles of international law recognized in the Charter of the Nürnberg Tribunal, *Yearbook* . . . 1950, vol. II, p. 364, document A/1316, at p. 374.

⁵ *Yearbook* . . . 1987, vol. II (Part Two), p. 14, para. (1).

It would be nonsensical to speak, for example, of an attempt to commit a threat of aggression (art. 16).

Article 4

9. This provision would be more appropriately located as part of article 14 (Defences and extenuating circumstances), where it might be stated simply that motive does not constitute a defence. To the extent that motive constitutes one of the requisite elements of a crime, this can and should be included within the definition of that crime. The mischief against which this article is addressed, namely a perpetrator claiming a motive different from the one required as an element of the crime, may be adequately addressed within the compass of the definition of the crime, and is ultimately an issue of proof as to whether the required motive was present. Any other motive is irrelevant.

Article 5

10. While the principle underlying this article is accepted, the article should be worded in such a way as to limit the possibility that at least one requirement in discharging the State of its responsibility may be to hand over specified individuals to stand trial.

Article 6

11. In the absence of an international criminal court with compulsory jurisdiction the Commission has perforce addressed this article from the vantage point of indirect, municipal enforcement of the Code. To be effective, this requires (a) broad participation, not just by "victim" States; (b) a wide basis for jurisdiction; and (c) curtailment of the political offence exception. Only the second of these requirements is met by the draft articles, and the treatment of universal jurisdiction is sketchy. Whether or not the Commission is successful in drawing up a statute for an international criminal court, it will be necessary, as the commentary recognizes,⁶ to formulate more specific rules for the actual implementation of the Code. The United Kingdom assumes these will be on the lines of articles 2 to 11 of the International Convention against the Taking of Hostages, and similar conventions.

12. The obligation to prosecute or extradite contained in paragraph 1 is found in many international conventions. The commentary elaborates further upon the meaning of "try", which is intended to cover all the stages of prosecution proceedings, an elaboration which could usefully be incorporated in this article. But it would be preferable to employ the more usual formula "submit the case to its competent authorities for the purposes of prosecution". It also needs to be made clear that the States referred to in this article are only States which are parties to the convention containing the Code. The concept of universal jurisdiction is based on the notion that crimes against the peace and security of mankind affect all States wherever they are committed and irrespective of the nationality of the perpetrator or of the victims. However, paragraph 2 reflects the difficulty encountered by the Commission in allocating priorities when extradition is sought by a number of States with an interest in prosecution. For prac-

tical evidentiary purposes, the State in whose territory the crime was committed is usually given priority in existing conventions. However, effective enforcement of the Code could be undermined by according priority to the territorial State if government officials are involved or the crime results from the official policy of the State. Despite article 13, realistically, the likelihood of any provision proving workable where extradition is sought for senior government or military figures from the State in which they have carried out their official acts is remote. A further practical problem arises where extradition is sought with no real intention to prosecute. For paragraph 2, it would be preferable to have an order of priorities with the concomitant obligation on the extraditing State to ensure that the requesting State has a bona fide intention to prosecute.

Article 7

13. The suggested rule could hamper attempts at national reconciliation and the granting of amnesty for crimes. Whether and under what conditions the latter should be permitted, and the effect upon the draft articles, should be more carefully examined by the Commission. In this connection article 9 needs to be considered. If, for example, a State granted an amnesty to all government officials who had participated in the commission of a crime under the Code, article 9 would under certain conditions still permit their prosecution by another State or by an international criminal court. Whether the amnesty would be seen as a bona fide attempt at national reconciliation or a cynical measure designed to sidestep indirect enforcement of the Code would depend upon the circumstances. Clearly, the granting of amnesties could impair the efficacy of indirect enforcement under the Code, and is an issue which needs to be addressed by the Commission.

Article 8

14. This is an essential provision, one of the few to address the proper implementation of the Code. Judicial guarantees are of particular importance where the perpetrator is accused of heinous crimes of the kinds enumerated and which raise high emotion. Article 8 would be improved if the clarifications contained in paragraphs (6), (7) and (8) of the commentary⁷ were incorporated in the text of the article.

Article 9

15. This article acknowledges the interface between municipal and international law: according to this provision individuals are not immune from double culpability where ordinary crimes also constitute crimes under the Code. The United Kingdom reserves its position on this proposal which, at first sight, conflicts with the corresponding provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, to both of which it is a party. For the moment, the United Kingdom wishes only to point out that paragraph 4 goes even further and permits an individual to be tried in more than one State for a crime under the Code, although para-

⁶ Article 6 was previously adopted as article 4. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 67-68.

⁷ Article 8 was previously adopted as article 6. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 16-17.

graph 5 would operate to reduce the penalty upon a subsequent conviction. As currently drafted, there would be nothing to prevent a State in whose territory the crime was committed, or which has been the main victim of a crime, from trying and punishing an individual who has already been tried and punished in the State of which he or she is a national, in both instances for the same crime under the Code. The only safeguard is that mentioned in paragraph 5. If the mischief against which this aspect of the rule is directed is to prevent too lenient a punishment in the State of which the individual is a national, then paragraph 4 would make more sense if it rendered the jurisdiction of the national courts specified therein dependent upon a failure adequately to punish in the first instance.

Article 11

16. While agreeing with the Commission that this provision might well have been included as part of article 14,⁸ the United Kingdom accepts that the importance of the question, and its relationship to the issue raised in article 12, suggests its inclusion at this point. The wording, drawn from the 1954 draft Code, is not entirely felicitous: an individual would not be relieved of criminal responsibility if, "in the circumstances at the time, it was possible for him not to comply with an order of a superior". As presently drafted, it is far from clear when compliance with an order would operate as a defence to a crime under the Code because, in the circumstances at the time, it was not possible to disobey that order. Moreover, this wording would seem to make a large inroad into the principle in article 8 of the Charter of the Nürnberg Tribunal that superior orders are not a defence, but may be considered in mitigation of punishment.⁹ Nor is it consistent with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that superior orders "may not be invoked as a justification of torture" (art. 2, para. 3). This article needs to be re-examined, taking into account the very serious nature of the crimes considered in the Code and the general trend internationally towards the expansion of individual responsibility.

Article 13

17. It is obviously important for the effective implementation of the Code that officials, including heads of State or Government, are not relieved of criminal responsibility by virtue of their official position. However, the Commission has failed to address here, and in article 9, the possible immunity of such officials from judicial process. The Commission should consider the immunity from jurisdiction to which officials may be entitled under international law, and the relationship of this draft to existing rules on the subject.

Article 14

18. It is clearly undesirable to leave vague a provision so vital both to the conceptualization of a crime against the peace and security of mankind and to the rights of the

defendant. The more grave the crime, the less likely it is that a wide panoply of defences and extenuating circumstances will be permitted. If, as currently envisaged under article 6, it is national courts which will have jurisdiction under the Code, article 14 needs to be redrafted. National courts cannot be left to delineate defences and extenuating circumstances which will be admitted under the Code. Fairness and consistency would be entirely lost. It is symptomatic of the haste and lack of precision with which these articles have been drafted that paragraph 1 leaves open the possibility of defences to match specific crimes without any attempt at enumeration. Separate enumeration would be the better approach; although certain general defences will apply to all crimes, it is difficult to conceive of "blanket defences" which will adequately cover the circumstances of each and every crime set out in part two.

Part two

19. By far the most disappointing feature of the draft is part two and the crimes enumerated therein. As one of the members of the Commission noted, it is easy to express moral indignation but less easy to describe in abstract legal terms the primary rules and all the legal consequences of their violation.¹⁰ There are three fundamental weaknesses in the Commission's approach. First, the Commission was not guided by a concept of crimes against the peace and security of mankind in selecting crimes for inclusion in this part of the draft Code. As a consequence, the crimes listed in part two cannot be regarded as a logically defensible or coherent catalogue of crimes against the peace and security of mankind. Secondly, the articles fail to maintain the distinction between international crimes in general and crimes against the peace and security of mankind, and between crimes committed by an individual and those which may be attributable to the State. Thirdly, many of the definitions of the crimes contained in this part are derived from General Assembly resolutions and international conventions which have not in every case garnered widespread support and which, in any event, need much closer examination to ensure that the language used is appropriate to a criminal code. The comments which follow should be regarded as sample criticisms only, identifying some of the worst defects of part two as it stands.

Article 15

20. The United Kingdom has grave doubts concerning this article. It is mostly a repetition of the Definition of Aggression contained in General Assembly resolution 3314 (XXIX). The terms of that resolution were intended to assist the General Assembly and the Security Council by clarifying a key concept in the Charter of the United Nations, which had been left undefined. The United Kingdom agrees entirely with those members of the Commission who consider that a resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. It is patently insufficient for the commentary to suggest that this criticism is met by failing to men-

⁸ See paragraph 4 of the commentary in *Yearbook . . . 1991*, vol. II (Part Two), p.100.

⁹ United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and Analysis (memorandum by the Secretary-General)* (Sales No. 1949.V.7).

¹⁰ *Yearbook . . . 1985*, vol. I, 1883rd meeting, para. 3.

tion the resolution by name.¹¹ The wording of the resolution needs careful adaptation in order to prescribe clearly and specifically those acts which attract individual criminal responsibility. Paragraph 4 (*h*) offends against the principle *nullum crimen sine lege*, as well as operating with potential retrospective effect in contravention of article 10.

Article 16

21. This article is unacceptable. If there is a crime of threat of aggression (which is open to doubt), it would be more appropriate for State responsibility than individual criminal responsibility. The definition in paragraph 2 is unsatisfactory, leaving as it does the exact nature of the crime unclear, notwithstanding the Commission's attempt at an enumerative definition. The actions listed in paragraph 2 have a collective flavour inappropriate to the establishment of individual criminal responsibility. The phrase "or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" does not begin to meet the test of precision required of a criminal code.

Article 17

22. In his sixth report the Special Rapporteur posed the rhetorical question, "In view of the nuances and degrees involved, is the notion of intervention not too general and too varied in its manifestations to constitute a legal concept?"¹² "Intervention" is indeed a term of great conceptual generality, lacking the necessary precision required to define criminal conduct. The activities listed in paragraph 2 accomplish little by way of necessary clarification and narrowing of the concept. It is in any event doubtful whether intervention is a crime which should attract individual criminal responsibility. The sources relied upon by the Commission, in particular the judgment of ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*¹³ are concerned with the lawfulness or otherwise of intervention by a State in the internal or external affairs of another State. They do not deal with criminal responsibility, still less with the penal responsibility of individuals under international law. "Intervention" as a crime attracting individual criminal responsibility is not recognized in international law nor, in the opinion of the United Kingdom, should it be.

Article 18

23. Terms such as "colonial domination" and "alien domination" do not possess the requisite legal content necessary for inclusion in a code of crimes and have no foundation in international criminal law. "Colonial domination" is, in any event, an outmoded concept redolent of the political attitudes of another era. Its presence in article 19 of part I of the draft articles on State responsibility is no justification whatsoever for its presence in the Code.

¹¹ Article 15 was previously adopted as article 12. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 72-73.

¹² *Yearbook . . . 1988*, vol. II (Part One), p. 199, document A/CN.4/411, para. 22.

¹³ *Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

The United Kingdom regrets the introduction of what are little more than political slogans into a code intended as a legal instrument. Rather than employing labels which encompass both permissible and impermissible behaviour, the Commission should identify and define the acts or practices proposed to be punished. Acts committed during "colonial or alien domination" may, when further defined, fit within other provisions of the Code concerning, for example, genocide (art. 19) or systematic or mass violations of human rights (art. 21).

Article 19

24. The Commission should consider the relationship between the Code and article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which provides for the compulsory jurisdiction of ICJ in the case of disputes between contracting parties relating, *inter alia*, to the responsibility of a State for genocide.

Article 20

25. Just as the present draft is intended to update the provisions of the 1954 draft Code to take subsequent developments into account, so too should the Commission take fully into account political developments in the decade since it started work on the present draft. Discussion of apartheid in the Commission naturally focused on South Africa, though mention of that State was subsequently dropped and the draft article now applies without reference to time or place. The Commission needs fundamentally to reconsider this article in the light of changed international circumstances.

Article 21

26. Attention must plainly be paid to systematic or mass violations of human rights in any code of crimes under international law. Two requirements must be met before an act qualifies as "systematic or mass violations of human rights": the exceptional seriousness of the act and its systematic manner or mass scale. The express list of acts is welcome, but the article is incomplete and unsatisfactory. The commentary¹⁴ makes clear that definitions of the terms used, such as torture or slavery, are to be found in existing international conventions. Even assuming that national courts would be able to identify the relevant source, the definitions contained therein are not free from controversy. Indeed, as the commentary indicates, there may be doubt whether the definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be limited to the acts of officials. As currently drafted, the article contains no precise definition of criminal conduct nor any clear unifying concept.

Article 22

27. In opting for a "compromise" reconciling competing trends, the Commission risks proliferating the categories of war crimes without any attendant benefit. If the Commission were to retain this article, the United Kingdom would prefer to see a provision which accords with

¹⁴ *Yearbook . . . 1991*, vol. II (Part Two), pp. 103-104.

existing characterizations of war crimes, replacing “exceptionally serious war crimes” with “grave breaches of the Geneva Conventions”, for example.

Article 23

28. While mercenary activities may in certain circumstances be reprehensible, it is the view of the United Kingdom that they have no place in a code of crimes against the peace and security of mankind. The activities are not sufficiently widespread and grave to merit inclusion in the Code. Nor have they yet achieved the status of generally recognized international crimes. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries has yet to achieve more than a handful of adherents.

Article 24

29. The United Kingdom regrets that the Commission has, as in the 1954 draft, limited the scope of the article to State-sponsored terrorism. International terrorism is no longer confined to the acts of agents or representatives of States. In attempting to distinguish between international and “internal” terrorism, the Commission has overlooked the important category of non-State-sponsored terrorism directed at States, which properly belongs in a definition of international terrorism. The United Kingdom would therefore urge the Commission to reconsider the definition of terrorism, including the present omission of “internal” terrorism. The latter is in practice more of a problem for many States than international terrorism. It should consider also the relationship of this article with international crimes omitted from the Code, such as hijacking and hostage-taking, which might fall within the present definition of international terrorism.

Article 25

30. The 1954 draft Code omitted drug-related crimes, along with piracy, traffic in women and children, counterfeiting and interference with submarine cables. The United Kingdom would have wished for a more detailed analysis of these crimes with a view to ascertaining whether they constitute crimes against the peace and security of mankind. It is the opinion of the United Kingdom that drug trafficking, though an international crime, is a borderline case for inclusion in a code as a crime against the peace and security of mankind. It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them.

Article 26

31. The origin of this provision lies in article 19 of the Commission’s draft articles on State responsibility, where its inclusion proved controversial. It is no less so here, since there is certainly no general recognition of “widespread, long-term and severe damage to the natural environment” as being an international crime, much less a crime against the peace and security of mankind. Environmental damage may give rise to civil and criminal liability under municipal law but it would be extending interna-

tional law too far to characterize such damage as a crime against the peace and security of mankind.

CONCLUSION

32. The United Kingdom considers that the Commission could more usefully deploy its limited resources to other topics in its work programme. As indicated above, it believes that work on this topic should be suspended, at least until work has been completed on a draft statute for an international criminal court.

United States of America

[Original: English]
[1 February 1993]

GENERAL COMMENTS

1. The Government of the United States of America appreciates the opportunity to submit the following written comments and observations on the draft Code of Crimes against the Peace and Security of Mankind (draft Code), as requested under paragraph 9 of General Assembly resolution 46/54 of 9 December 1991.

2. The United States supports the development, in appropriate contexts, of individual international criminal responsibility, and is a party to most of the international conventions containing the prosecute-or-extradite requirements with respect to particular international offences. These conventions already go quite far in stipulating a number of internationally recognized offences which could be characterized as being against the peace and security of mankind, including war crimes, genocide, torture, drug offences, slavery, traffic in women and children, piracy, maritime terrorism, aircraft hijacking, aircraft sabotage, crimes involving nuclear material, crimes against officials and diplomats, and hostage-taking.

3. The United States, however, does not support the present draft Code because it is defective in many fundamental respects. Since many of the offences set forth in the draft Code are already covered by existing international conventions, much of it is either redundant or disruptive (especially where it deviates from existing statements of the law). Moreover, many of its suggestions for the development of new criminal offences are unacceptable to the United States. Throughout, the draft Code ignores basic concepts of criminal liability (for example, the state of mind necessary to be charged with a criminal violation). It also neglects concepts of due process basic to the jurisprudence of the United States and of many other countries, such as the concept that offences must be defined with precision sufficient to inform people of what acts will be considered criminal. Moreover, the Code, as drafted, does not contribute to resolving any of the technical difficulties or filling the lacunae that complicate the use of existing international conventions as a possible basis of subject-matter jurisdiction of an international criminal court. While a draft Code is by no means the only, or necessarily the best, way to solve these problems, it is noteworthy that the current effort does not do so.

4. The United States believes that the primary problem with many international crimes is not that they are undefined, but rather that they are not adequately prosecuted. This problem is particularly acute with respect to crimes committed either on behalf of, or with the tolerance of, Governments. The adoption of the Code would not solve this problem. In the view of the United States the most effective response to the problem of international crime is to strengthen cooperation among Governments in the investigation and prosecution of those committing criminal acts. The United States believes the Commission's time would be more productively spent on such measures than on continuing its efforts with respect to the draft Code.

The problem of vagueness

5. One major problem with the draft Code is its vagueness. The Code consistently fails adequately to define key terms, and frequently fails to specify precisely what actions are subject to criminal liability. It often adopts political terms that have no accepted legal definition and wraps them with a legal cloak. Because such political terms are often perhaps deliberately ambiguous, different domestic courts would inevitably disagree over the interpretation of the Code. Moreover, the ambiguously drawn offences fail to provide adequate notice concerning the type of acts that could form the basis for criminal liability. Consequently, the Code, in its present form, could run afoul of the due process protections basic to the jurisprudence of the United States and of other countries.

Failure to specify mental state necessary for the imposition of criminal liability

6. A second fundamental flaw that permeates the Code is its failure to specify the requisite knowledge or intent necessary to impose criminal liability on a potential defendant. In the United States system, criminal acts punishable by incarceration ordinarily must be committed knowingly or intentionally. The general failure of the Code to address a defendant's knowledge and intent is further compounded because the article on environmental crimes—in contrast with the other articles—specifies that the crime must be committed “wilfully”. No other article has this provision, and the significance of this discrepancy is unclear.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 15

7. The Code's definition of aggression is taken from the General Assembly's 1974 Definition of Aggression.¹ The General Assembly, however, did not adopt this definition for the purpose of imposing criminal liability, and the history of its adoption shows that it was intended only as a political guide, not as a binding definition of a crime.

Article 16

8. The Code proposes the establishment of a new international criminal offence, based only on the threat of aggression. In addition to the defect in the definition that no nation has a right to threaten another nation with an act of

aggression,² it is equally true that such threats—if not acted upon by a threatening nation—are more appropriately addressed among States rather than by a criminal action against individuals in a court of law. Far from reducing conflicts, this new offence would most likely serve to generate tensions among nations by encouraging criminal charges for statements or conduct that instead could better be addressed through constructive diplomatic dialogue.

Article 17

9. This article proposes the establishment of a new international crime called “intervention”. This new crime not only is vague, but also apparently attempts to cover acts that would not otherwise fall within the already excessively broad and vague crime of “aggression”. Moreover, although it provides an exception for acts undertaken pursuant to the “rights of peoples to self-determination”, it fails to create an exception for acts of collective self-defence, which are explicitly provided for in Article 51 of the Charter of the United Nations. As with the crime of aggression, this crime of intervention is based on a General Assembly resolution that was never intended to be the legal basis for imposing criminal liability on individual defendants.

10. The article on intervention is based on the Declaration on Principles of Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,³ which elucidated the familiar principle that States should not intervene in matters exclusively within the domestic jurisdiction of any other State. The Code's wholesale criminalization of the non-intervention principle is not only divorced from the practical relationships among nations, but is also an open invitation to criminalize disputes that should more appropriately be resolved by the careful and prudent practice of diplomacy or, when necessary, by reference to the Security Council. It may also be noted that significant disputes still exist over the precise scope of this principle: some States, for example, still argue that international concern for human rights constitutes impermissible intervention in their internal affairs.

Article 18

11. The proposed crime of colonial domination suffers from the same defects that afflict the offences previously discussed. It is vague and too broad, in that it fails to define or even describe, “colonial domination” or “alien domination contrary to the right of peoples to self-determination”. This failure is particularly grave in the present international climate, which is witnessing the emergence of smaller nations from the territory of larger ethnically diverse societies. Any attempt to criminalize conduct such as “alien domination” would most likely serve only to increase international tensions and conflicts.

Article 19

12. The crime of genocide is already defined by the Convention on the Prevention and Punishment of the

¹ Resolution 3314 (XXIX) of 14 December 1974.

² Charter of the United Nations, Article 2, paragraph 4.

³ General Assembly resolution 2625 (XXV), annex.

Crime of Genocide, to which the United States and many other States are party. United States ratification of the treaty was based on several understandings. In particular, the United States indicated that it understands that the term "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such", as used in the Convention (art. II), means the specific intent to destroy, in whole or substantial part, a national, ethnic, racial or religious group as such by the acts prohibited in the Convention. The Code's definition, in contrast, fails to establish the mental state needed for the imposition of criminal liability.

Article 20

13. The draft Code's definition of the "crime of apartheid" contains many of the same defects that are present in the "crime of colonial domination". It is so vague and broadly worded that it could be contrary to the Constitution of the United States and those of other countries.

Article 21

14. This article is too vague to impose criminal liability. The crime of "persecution on social, political, racial, religious or cultural grounds" in particular is so vague that it could mean almost anything. For example, one definition of "to persecute" is "to annoy with persistent or urgent approaches, to pester".⁴ It should not be an international crime for one political party to "annoy" or "pester" another political party, yet under the plain meaning of the draft Code that could be an international crime. This article also fails fully to consider the effect of the International Covenant on Civil and Political Rights, which spells out the specific human rights recognized by the vast majority of the international community. This article also appears to embrace common crimes, such as murder. The United States does not believe that it would be useful or even sensible to make every murder an international crime. It notes further that deportation may under many circumstances be lawful: this current formulation is thus too broad.

Article 22

15. This article seeks to punish "exceptionally serious war crimes", a term which is tautologically defined as "an exceptionally serious violation of principles and rules of international law applicable in armed conflict" consisting, *inter alia*, of "acts of inhumanity". The article is too vague and fails to consider and specifically incorporate the relevant provisions of the many international conventions dealing specifically with the law of armed conflict.⁵ For example, the vague prohibition on the "unlawful use

of weapons" does not reflect the complex realities of warfare or the international legal mechanisms established to regulate its conduct. Moreover, the United States believes it unwise to include only "exceptionally serious war crimes" and ignore other breaches of the laws of war that are also of great concern to the peace and security of mankind.

Article 23

16. This article is particularly troubling. The text does not criminalize the acts of mercenaries themselves, but criminalizes only the "recruitment, use, financing or training of mercenaries" by agents or representatives of a State. The United States questions this unduly limited approach. The mercenaries themselves must (by definition) be private individuals; those who recruit, use, finance and train them are often also private individuals or rebels who are not agents or representatives of a State. Moreover, the Code's use of the phrase "the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law" is not defined and is extremely liable to give rise to dispute, thus undermining and potentially politicizing the entire concept of this crime.

Article 24

17. Article 24 purports to punish international terrorism, even though there is no generally accepted definition of "terrorism" and no adequate definition of terrorism is given by the Code. The Code attempts to define terrorism through the use of tautology. The Code defines terrorism as the

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

This definition is patently defective because "terror" is not defined.

18. Moreover, given the unsuccessful history of attempts to achieve a universally acceptable general definition of terrorism, the United States is sceptical about the possibility of reaching consensus on such a provision, no matter how it is drafted. In response to the difficulty in reaching consensus on a general definition of terrorism, the international community has instead concluded a series of individual conventions that identify specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the transgressors and cooperate with other States for the effective implementation of these duties. As listed in General Assembly resolution 44/29,⁶ these conventions cover aircraft sabo-

⁴ Webster's Ninth New Collegiate Dictionary.

⁵ See the Convention respecting the Laws and Customs of War on Land, and annex thereto; Convention respecting the Rights and Duties of Neutral Powers in Case of Land War; Convention relative to the Laying of Automatic Submarine Contact Mines; Convention concerning Bombardment by Naval Forces in Time of War; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration

of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War.

⁶ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Convention for the Suppression of Unlawful Seizure of Aircraft, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention on the Prevention and Punish-

tage, aircraft hijacking, attacks against officials and diplomats, hostage-taking, theft or unlawful use of nuclear material, violence at airports and certain attacks on or against ships and fixed platforms. By focusing upon specific types of actions that are inherently unacceptable, rather than on questions of motivation or context as the draft Code does, the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism.

19. Another fundamental problem with article 24 of the Code is that it limits the crime of terrorism to acts committed by "agents or representatives of a State". In fact, many terrorist acts are committed by individuals acting in their private capacity. The United States cannot accept a definition of terrorism that excludes acts committed by persons who are either not acting as agents of a State, or whose affiliation with a State cannot be definitively proved in a court of law.

Article 25

20. This article speaks of illicit traffic in narcotic drugs "on a large scale". Apart from the lack of precision of the term "large scale", it is not clear whether the phrase "large scale" is modifying "traffic in narcotic drugs" or "undertaking, organizing, facilitating, financing or encouraging". Therefore, it is not clear whether the individual's role must necessarily be a large one, or whether individuals who play a small role in a large operation are also included. This defect, it may be noted, is common to many of the other articles, insofar as the activities addressed (intervention, aggression, etc.) typically involve many different people, with sometimes incidental roles.

21. The term "narcotic drugs" is also used in a manner inconsistent with its standard usage in existing international conventions. The Code never defines the term "narcotic drugs", but does attempt to define trafficking in narcotic drugs to include trafficking in narcotic drugs and psychotropic substances. Moreover, the Code also fails to define the term "psychotropic substance". This imprecise use of key legal terms renders this article fatally flawed.

22. Under a series of United Nations conventions culminating in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the terms "narcotic drug" and "psychotropic substance" have specific and different meanings. Under this Convention, "narcotic drug" means any of the substances, natural or synthetic, in schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol (art. 1, (q)). In contrast, "psychotropic substance" means any substance, natural or synthetic, or any natural materials in schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971 (art. 1 (r)). The Code's failure to define these terms, cou-

pled with its attempt to define "narcotics trafficking" as trafficking in both narcotic drugs and psychotropic substances, is an open invitation to confusion and uncertainty.

23. Article 25 also provides that trafficking in "narcotic drugs" is "illicit" if it is "contrary to internal or international law". It is unclear whether the reference to internal law is meant to refer only to the law of the State in which the individual is located (in which case it has little point) or whether it is meant to include the internal law of any State that is a party to the Code (in which case it would be amazingly broad).

Article 26

24. This article is perhaps the vaguest of all the articles. The article fails to define its broad terms. There is no definition of "widespread, long-term and severe damage to the natural environment". Similarly, the term "wilfully" is not defined, thereby creating considerable confusion concerning the precise volitional state needed for the imposition of criminal liability. The term "wilfully" could simply mean that the defendant performed an act voluntarily, that is to say, without coercion, that had the unintended effect of causing harm to the environment. "Wilfully" could also be construed to impose criminal liability only when the defendant acted for bad purpose, knowing and intending to cause serious harm to the environment. As presently drafted, the meaning of "wilfully" is subject to a variety of interpretations. This confusion is magnified by the Code's failure throughout to specify the necessary mental and volitional states needed for the imposition of criminal liability.

25. Moreover, as with the other articles, this article fails to consider fully the existing and developing complex treaty framework concerning the protection of the environment.⁷

CONCLUSION

26. The United States cannot support the draft Code in its present form. Furthermore, the United States questions the efficacy of any future efforts to redraft the present Code, because of the numerous fundamental flaws that permeate its entire structure.

⁷ See, for example, United Nations Framework Convention on Climate Change; Convention on Long-range Transboundary Air Pollution, (supplemented by various protocols); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; Convention on International Trade in Endangered Species of Wild Flora and Fauna; International Convention for the Prevention of Pollution of the Sea by Oil; International Convention for the Regulation of Whaling.

Uruguay

[Original: Spanish]
[17 November 1992]

1. The Government of Uruguay expresses its firm support for the idea of drafting a code of crimes against the peace and security of mankind, and is convinced that the entry into force of such a set of norms would contribute in significant measure to the establishment of the universal rule of law through the codification and progressive development of international law.

ment of Crimes against Internationally Protected Persons, including Diplomatic Agents, International Convention against the Taking of Hostages, Convention on the Physical Protection of Nuclear Material, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf.

2. The idea of establishing a permanent international criminal jurisdiction of a universal character, and establishing for that purpose an international criminal court to try those held responsible for crimes under international law likewise merits support.

3. Accordingly, and as a comment on article 6, the Government of Uruguay believes that it would be highly conducive to the achievement of the desired aims for the Commission to devote itself, as soon as possible, to the preparation of the statute of such a court.

4. The approach provisionally adopted by the Commission, which consists of proceeding to draw up a list of crimes against the peace and security of mankind and to define them individually in the draft articles, does not warrant any comments.

5. With regard to the offences listed and their characterization, the Government of Uruguay will reserve its views until the Commission's work has reached a more advanced stage.

6. Despite this reservation, the Uruguayan Government deems it relevant, in connection with article 26, to put forward at this stage some comments and observations in accordance with what has been stated by its representatives in various international forums, and especially by the President of the Republic, Mr. Luis Alberto Lacalle, in the address he delivered on 13 June 1992 at a plenary meeting of the United Nations Conference on Environment and Development.¹

7. Uruguay believes that an effective defence of the environment is possible only within the framework of international cooperation, through joint action by all States and the conclusion of international instruments setting forth specific, legally binding obligations and confer-

ring jurisdiction on national and international courts, as the case may be, making it possible to hold perpetrators of unlawful acts against the environment effectively accountable.

8. In this connection, the Uruguayan Government has summarized its views, at the national level, in a bill on the prevention of environmental impact, which has been submitted to the legislative authorities for consideration, and, at the international level, in the document entitled "Guidelines for a draft international environmental code", which contains a chapter specifically devoted to civil and criminal liability, which was submitted to the General Assembly at its forty-seventh session.

9. With specific reference to article 26 and the characterization of the offence envisaged in this provision, on the basis of the observations outlined above, the Uruguayan Government believes that, given the nature of the consequences of the conduct, namely "widespread, long-term and severe damage to the environment", the requirement of "wilfulness" should be deleted and replaced by the principle of liability which, in the exceptional case of the environment, should encompass not only instances of wilfully caused damage (wilful wrongs), but also damage caused through negligence or lack of precaution (culpable wrongs), since the interest which it is proposed to protect is, in the final analysis, the survival of mankind.

10. The Uruguayan Government also believes that it would be appropriate, from the standpoint of rule-making techniques, to follow the methodological approach taken in several draft articles and to prepare a descriptive enumeration of the principal acts which make up the envisaged offence against the environment for which those responsible are to be punished, be they individuals, corporate managers or representatives of a State.

11. The Government of Uruguay notes with satisfaction the work accomplished by the Commission with regard to the draft Code of Crimes against the Peace and Security of Mankind which has been submitted to the Governments of Member States for comments; it expresses the hope that the Commission will continue to give priority to the pursuit of its efforts.

¹ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. III: Statements Made by Heads of State or Government at the Summit Segment of the Conference, pp. 227 et seq.

II. Comments and observations received from a non-member State

Switzerland

[Original: French]
[14 January 1993]

1. As this is the first time that all the articles of the draft Code of Crimes against the Peace and Security of Mankind have been submitted to States, the Swiss Government wishes to start by making some general comments, before presenting observations concerning specific draft articles.

GENERAL COMMENTS

2. From the moment the Commission began its work, the preparation of a draft Code of Crimes against the Peace and Security of Mankind has proved to be an ardu-

ous task. The draft deals with a subject which is by no means free from political controversy. Nevertheless, the difficulty of the task does not make it any less urgent for States to adopt such an instrument, as is tragically being demonstrated right now by certain regional situations. There is no doubt whatsoever that the prime concern of States should be to establish rules which are sufficiently precise to serve as the basis for an accusation, in accordance with the sacrosanct principle *nullum crimen, nulla poena sine lege*, whereby no one may be charged with or punished for an offence unless he has violated, by commission or omission, an express provision of the law. Accordingly, the acts which are liable to give rise to conviction must be spelled out clearly. It is essential that criminal law should retain its qualities of clarity and predictability. Otherwise, the penalty would be tainted by

arbitrariness and would disregard the basic rights of defence. The Swiss Government therefore supports the Commission's decision to opt for an enumerative definition of crimes against the peace and security of mankind rather than a conceptual definition, which would leave too much to the judges' interpretation. The Swiss Government also approves of the inclusion in the draft of provisions recalling such basic rules as *non bis in idem* (art. 9) and non-retroactivity (art. 10).

3. Another general remark appears to be in order. The basic notion underlying the entire Code—at least, as the Swiss Government sees it—is that certain acts of an especially serious nature should be criminalized in order to strengthen the peace and security to which mankind is entitled. Thus, individuals who, by their conduct, are considered to have deliberately endangered the peace or threatened the security of mankind would be held personally accountable (art. 3, para. 1) for their acts before a national or an international jurisdiction.¹ The Swiss Government endorses this approach, to the extent that it helps to make those who by virtue of their function are able to undermine the very foundations of human society aware of their responsibilities. Reasons of State cannot be cited as a justification in all cases.

4. Nevertheless, a difficulty could arise. Violations of the peace are, in essence, the act of a State. Only State organs—in practice this often means the Government—can commit aggression, resort to intervention or practise colonial domination. It is not certain that violation of obligations incumbent on States in respect of the maintenance of peace can be the sole subject of an accusation. It may even be asked whether, despite article 5 (State responsibility), imputing some State acts to individuals is not liable to lead to a paradoxical result, namely the attenuation of the international responsibility of the State concerned, inasmuch as enforcement of such responsibility would no longer necessarily constitute the ultimate penalty in international relations. The problem posed by the shift in focus from State conduct to individual culpability might warrant further study by the Commission.

5. The Swiss Government starts from the assumption that the definitions of key terms will be set out in a special provision of the future instrument. Moreover, in view of the possible differences in interpretation, the draft Code should contain a clause relating to the settlement of disputes between States parties in a manner likely to lead to a legally binding decision.

6. Lastly, there can be little doubt that the future instrument should deal with the question of penalties. The pronouncement of sentence is an integral part of criminal proceedings and, more specifically, of trial proceedings. Moreover, it is hard to imagine that an international court would be able to rule on a defendant's culpability without also having the authority to impose a penalty. It would thus be appropriate to append to the definition of each crime a statement of the corresponding penalty, as is done in the majority of national penal codes. Moreover, the proposal regarding the inclusion of a scale of penalties applicable to all crimes does not appear to be fully consistent with the rule *nulla poena sine lege*. The latter requires

that each incrimination be accompanied by a specific and individualized penalty. Unless that is done, the future Code would simply have a punitive function whereas, ideally, it should also have a preventive function.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

7. In the Swiss Government's view, it would be preferable not to include in paragraph 3 the phrase "as set out in articles . . .". It is not certain that each of the crimes listed in the draft Code encompasses the notion of attempt. For example, the crime of colonial domination, as defined, appears to imply a minimum of implementation, which would rule out the very concept of attempt. In any case, the phrase is superfluous, since the attempt to commit a crime against the peace and security of mankind—which is punishable—obviously refers to a crime defined in the draft Code and not in some other instrument.

Article 6

8. The provisions relating to extradition are, of course, linked to those concerning the establishment of an international criminal court. Nevertheless, regardless of the choice to be made with respect to jurisdiction, conflicts of jurisdiction may occur where there are several extradition requests. The Commission noted its preference for special consideration to be given to the State where the crime was committed. In the Swiss Government's view, this solution deserves support. Indeed, there is no question but that the State where the crime was committed, which is, to some extent, the victim, is particularly qualified to try the case. Sometimes, however, the State in whose territory the alleged crime was perpetrated will be subject to pressures that are inconsistent with the proper administration of justice. Likewise, in some cases (apartheid, for instance, as explained by the Commission), the State in which the crime occurred might well bear direct responsibility for it and might seek to shield the accused. It is thus with good reason that article 6 confines itself to stating a preference for the principle of territoriality and does not establish a genuine rule of priority.

Article 14

9. The notion of combining in a single article two basic concepts of criminal law which are as alien to each other as defences and extenuating circumstances would appear to be questionable. The effect of a defence is to strip the act of its unlawful character on the ground that the perpetrator did not act knowingly and wilfully. In short, responsibility, which is the prerequisite for punishment, is lacking. Extenuating circumstances, by contrast, do not strip the act of its unlawful character; they simply moderate its penal consequences. It would therefore be advisable to envisage two separate provisions.

Article 15

10. The proposed definition of aggression rests mainly—and with perfect justification—on that contained in the annex to General Assembly resolution 3314 (XXIX). That, however, is a text intended for a political organ. Moreover, under the terms of Article 39 of the Charter

¹ The question of the establishment of an international criminal jurisdiction will be the subject of separate observations in due course.

of the United Nations, it is the Security Council which is responsible for determining the existence of any threat to the peace, breach of the peace, or act of aggression. The question, therefore, is whether the national judge should be bound by the Council's determinations. In some respects, this would appear desirable. Indeed, it is hard to see how a national judge could characterize an act as aggression if the Security Council, which bears the primary responsibility for the maintenance of international peace, had not found it to be so. It is well known, however, that the Council can be paralysed by the exercise of the veto. Decisions of the courts would therefore be subordinate to those of the Council, though it is not certain that the security of law would benefit as a result. To suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound concept of justice. Accordingly, it would be just as well not to include the paragraph which appears in square brackets (para. 5).

Article 16

11. Article 16 characterizes the threat of aggression, like aggression, as a crime against peace. Switzerland has already raised the question in the Sixth Committee, during the annual discussion of the Commission's work,² whether aggression and threat of aggression should be put in the same category. In other words, should the threat of aggression appear in the draft Code as a separate crime against the peace and security of mankind? Doubts about this are justified. How can there be a conviction if the threat has not materialized, if it has not begun to be carried out? How can a threat, which is punishable, be distinguished from preliminary acts, which are not? It can even be argued that by criminalizing the threat of aggression it may encourage recourse to force in exercise of the right to self-defence, with all the unfortunate consequences that this may entail. What about intimidating manoeuvres consisting of "declarations, communications, demonstrations of force"—to quote article 16—which, by definition, are not translated into an act of aggression? Do they constitute an act sufficiently serious to be characterized as a crime against peace? This may well give rise to some hesitation. All in all, the Swiss Government has concluded that it is not advisable to extend the scope of the draft Code to the threat of aggression. In any event it would be difficult to apply such a provision.

Article 17

12. The major difficulty raised by this article probably lies in the definition of intervention. In this connection, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations³ makes a useful contribution. As the Commission notes in its commentary,⁴ intervention must contain an element of

coercion, that is to say, it must undermine the free exercise of its sovereign rights by the State which is a victim. Criminalization, however, should be limited to the most serious forms of intervention. In practice, only coercion involving the use of military force appears to reflect the degree of seriousness required in order to constitute a crime against the peace and security of mankind.

Article 18

13. This provision condemns colonial domination and other forms of alien domination established by force. Should alien domination also be understood in the sense of "neocolonialism", as some members of the Commission seem to think? This is doubtful. However reprehensible it may be politically, "neocolonialism" is not a legally established concept. Moreover, it should be noted that "neocolonialism", to the extent that it can be observed objectively, is not necessarily imposed by force as part of a plan or an understanding. It often results from economic disparities between countries and will be very difficult to prove in practice. Accordingly, the Swiss Government wonders if it would not be better to delete all references to "neocolonialism" from the commentary.⁵

Article 22

14. In international humanitarian law there are now two categories of violations. On the one hand, there are "grave breaches" which have already been enumerated (arts. 50, 51, 130 or 147, depending upon which of the four Geneva Conventions of 1949 is consulted, and article 85 of Additional Protocol I thereto, which also refers to article 11 of the same Protocol): these are also called war crimes. On the other hand, there are all the other violations of international humanitarian law.

15. The Commission, faithful to the principle that only extremely serious acts should be included in the Code, proposes to introduce a third category, that of "exceptionally serious war crimes", which would therefore encompass especially serious "grave breaches". Accordingly, it must be realized that, once the Code is in force, war crimes not enumerated in this provision may, as a result of article 22, be subject only to a relatively light penalty.

16. In addition, it is hard to understand why the Commission characterized "large-scale destruction of civilian property" (para. 2 (e)) as an "exceptionally serious war crime", but not attacks against the civilian population or demilitarized zones, or perfidious use of the protective emblems of the Red Cross and the Red Crescent.

17. It would therefore be advisable for the Commission to reconsider the impact this provision is liable to have on international humanitarian law, before adopting it on second reading.

Article 23

18. In paragraph (2) of the commentary⁶ to this article, the Commission recalls that article 47 of the 1977 Addi-

² *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 22nd meeting, paras. 66 to 74.*

³ General Assembly resolution 2625 (XXV), annex.

⁴ Article 17 was previously adopted as article 14. For the commentary, see *Yearbook . . . 1989*, vol. II (Part Two), p. 69.

⁵ Article 18 was previously adopted as article 15. For the commentary, *ibid.*, p. 70.

⁶ Article 23 was previously adopted as article 18. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), p. 29.

tional Protocol I to the Geneva Conventions of 1949, which deals with the status of mercenaries, specifies that a mercenary shall not have the right to be a combatant or a prisoner of war. Two clarifications are needed which could be taken into account in the commentary. The above-mentioned provision enables a State party to the Protocol to deny a mercenary this right; it does not compel it to do so. In addition, the mercenary deprived of the right to be a combatant or a prisoner of war will, like any civilian definitely suspected of engaging in activities hostile to the security of the State, benefit from the provisions of article 5, paragraph 3, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which guarantees him, in case of prosecution, the right to a fair and regular trial. He will also be afforded the basic guarantees contained in article 75 of Additional Protocol I.

Article 24

19. It would appear that the elements constituting the crime of international terrorism might not, depending on circumstances, be clearly distinguished from those constituting intervention, defined as the act of intervening in the internal or external affairs of a State by fomenting subver-

sive or terrorist activities. Does the act of financing or training armed bands, when carried out by agents of a State for the purposes of sowing terror among the population and thus encouraging the fall of the Government of another State, come under either provision?

Article 25

20. Lastly, the question arises whether the inclusion in the Code of a provision on international drug trafficking is warranted. After all, such traffic may be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of "narco-terrorism". Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include in the draft Code a provision criminalizing such traffic, whether it be carried out by agents of a State or simply by individuals.

DOCUMENT A/CN.4/449*

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

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

[Original: French]
[25 March 1993]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report.....	113
	<i>Paragraphs</i>
INTRODUCTION.....	1-17 113
DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT	
Part 1. Establishment	
Draft article 1. Establishment of the Court	
(a) Proposed text	18 114
(b) Comments.....	19 114
Draft article 2. The Court, judicial organ of the United Nations	
(a) Proposed text	20 115
(b) Comments.....	21 115
Draft article 3. Seat of the Court	
(a) Proposed text	22 115
(b) Comments.....	23 115
Draft article 4. Applicable law	
(a) Proposed text	24 115
(b) Comments.....	25-31 115
Draft article 5. Jurisdiction of the Court	
(a) Proposed text	32 115
(b) Comments.....	33-40 116
Draft article 6. Jurisdictional disputes	
(a) Proposed text	41 116
(b) Comments.....	42 116
Draft article 7. Judicial guarantees	
(a) Proposed text	43 116
(b) Comments.....	44-46 116
Part 2. Organization and functioning	
Draft article 8. Permanence of the jurisdiction of the Court	
(a) Proposed text	47 117
(b) Comments.....	48-52 117
Draft article 9. Residence of the President and the Registrar	
(a) Proposed text	53 117
(b) Comments.....	54 117
Draft article 10. Rules of procedure	
(a) Proposed text	55 117
(b) Comments.....	56 117
Draft article 11. Qualifications required	
Proposed text.....	57 117
Draft article 12. Appointment of judges	
(a) Proposed text	58 118
(b) Comments.....	59-60 118
Draft article 13. Election of the President and Vice-President(s)	
(a) Proposed text	61 118
(b) Comments.....	62 118

* Incorporating document A/CN.4/449/Corr.1.

	<i>Paragraphs</i>	<i>Page</i>
Draft article 14. Appointment of the Registrar		
Proposed text	63	118
Draft article 15. Composition of a chamber of the Court		
(a) Proposed text	64	118
(b) Comments	65-71	118
Draft article 16. Compatibility with other functions		
(a) Proposed text	72	119
(b) Comments	73	119
Draft article 17. Deprivation of office		
Proposed text	74	119
Draft article 18. Diplomatic immunity		
Proposed text	75	119
Draft article 19. Vacancy of a seat		
Proposed text	76	119
Draft article 20. Solemn declaration		
(a) Proposed text	77	119
(b) Comments	78	119
Draft article 21. Allowances, emoluments and salaries		
(a) Proposed text	79	119
(b) Comments	80	120
Draft article 22. Budget of the Court		
Proposed text	81	120
 Part 3. Procedure		
Draft article 23. Submission of a case to the Court		
(a) Proposed text	82	120
(b) Comments	83-84	120
Draft article 24. Intervention		
(a) Proposed text	85	120
(b) Comments	86	120
Draft article 25. Prosecution		
(a) Proposed text	87	120
(b) Comments	88-90	120
Draft article 26. Investigation		
(a) Proposed text	91	121
(b) Comments	92	121
Draft article 27. Judgement by default		
(a) Proposed text	93	121
(b) Comments	94-96	121
Draft article 28. Handing over an accused person to the Court		
(a) Proposed text	97	122
(b) Comments	98-102	122
Draft article 29. Discontinuance of proceedings		
(a) Proposed text	103	122
(b) Comments	104-105	122
Draft article 30. Detention under remand		
Proposed text	106	122
Draft article 31. Hearings		
Proposed text	107	122
Draft article 32. Minutes of hearings		
Proposed text	108	122
Draft article 33. Judgement		
(a) Proposed text	109	123
(b) Comments	110	123
Draft article 34. Penalties		
(a) Proposed text	111	123
(b) Comments	112-113	123
Draft article 35. Remedies		
(a) Proposed text	114	123
(b) Comments	115-118	123

	<i>Paragraphs</i>	<i>Page</i>
Draft article 36. Execution of sentences		
(a) Proposed text	119	124
(b) Comments	120-121	124
Draft article 37. Right of pardon and conditional release		
(a) Proposed text	122	124
(b) Comments	123	124

Multilateral instruments cited in the present report

Source

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, pp. 31 et seq.
and Additional Protocols I and II (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, pp. 3 et seq.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
American Convention on Human Rights (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, p. 123.

Introduction

1. The question of the possible establishment of an international criminal jurisdiction was already studied in the three previous reports.¹ At that stage the aim was not to submit a draft statute for an international criminal court, but rather to initiate a thorough discussion in the Commission on very important aspects of the establishment of such a court, so that the debate could provide the necessary guidelines for drafting a statute.

2. This report, however, offers the Commission a draft statute for an international criminal court. It is submitted further to paragraphs 4 to 6 of General Assembly resolution 47/33 of 25 November 1992, dealing with the report of the Commission on the work of its forty-fourth session,² which read as follows:

The General Assembly,

...

4. *Takes note with appreciation* of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction;

5. *Invites* States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction;³

6. *Requests* the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from

its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

3. It is against this background that this report is presented. First, it should be noted that the present draft is based on the option that the court will be an organ of the United Nations. It is difficult to imagine the United Nations requesting the Commission, by resolution, to draft the statute of a court that would not be an organ of the United Nations. That is why the draft does not propose any other option.

4. Moreover, it is not the intention in this report to offer definitive solutions to a problem of great complexity. Instead, the report consists of a work plan presenting the various subjects to be covered in the statute of a court. At most, an attempt has been made to respect the spirit and approach of the Commission in its desire for an organ with structures that are adaptable, not permanent and of a modest cost.

5. It will be noted that, for this purpose, the draft has been abridged by not covering all the organs usually found in criminal jurisdictions. Hence, there is no investigatory body functioning separately from the trial body. All investigation chambers are permanent in character. That is why this draft has introduced a system in which the investigation is conducted by the court itself, that is to say, by the trial body, more often than not in the course of the hearing itself.

¹ *Yearbook . . . 1990*, vol. II (Part One), p. 27, document A/CN.4/430 and Add.1, *Yearbook . . . 1991*, vol. II (Part One), p. 37, document A/CN.4/435 and Add.1 and *Yearbook . . . 1992*, vol. II (Part One), p. 51, document A/CN.4/442.

² *Yearbook . . . 1992*, vol. II (Part Two).

³ *Ibid.*, annex.

6. Similarly, so far as prosecution is concerned, this draft does not propose to establish a department headed by a public prosecutor, assisted by the whole army of officials that the functioning of such an organ implies. The more flexible solution of leaving the prosecution in the hands of the complainant State has been preferred.

7. There is nothing absurd about this solution; as indicated in the comments to draft article 25 (Prosecution) below, it has been adopted in some criminal court drafts, where the complainant State appoints an officer, also called a "Procurator". However, a more traditional option is also proposed in article 25, alternative B.

8. As for the trial body, it does not have a permanent membership. It is not always the same judges who sit in a chamber. They differ according to the cases, the President of the court having a pre-eminent role to play in this connection. He is the person who chooses from a panel of judges appointed by States. The only permanent feature is the number of judges required to sit on a given case.

9. The fact that the organs of the court do not function on a full-time basis has certain implications, especially as regards the allowances paid to the judges and the compatibility or incompatibility of a judge's functions with other functions.

10. As for the jurisdiction of the court, the proposed draft article does not aspire—far from it—to solve all the problems to which this issue gives rise. It will be borne in mind that the jurisdiction of the court is not exclusive, but concurrent, each State being empowered either to try the case itself or to refer the accused to the court. This option seems to have won the support of the majority in the Commission. Moreover, this jurisdiction depends on the consent of two States: the complainant State and the State on whose territory the crime has been committed.

11. The question of jurisdiction *ratione materiae* is even more difficult. High hopes are being placed on the contribution members of the Commission may make to solving this difficult and delicate issue which has long been debated without any solution emerging. No agreement has been reached on a list of crimes to form the subject of this jurisdiction.

12. For this reason, pending the coming into being of a code of crimes, one solution would be for the jurisdiction

ratione materiae of the court to be established by special agreements between States parties, or by individual acceptance, these instruments being subject to implementation at any time.

13. Another problem is that of applicable penalties. Generally speaking, in national law, the criminal code and the criminal jurisdiction are the subject of separate instruments. As regards the matter under consideration, however, the authors of previous drafts did not consider it useful or timely to draft two separate instruments. It is in the draft statute of the court that provision was made for the penalties and, in general, the court was left to apply whatever penalties it deemed appropriate, without reference to any code. The present draft refers to the criminal law of one of the States concerned. This solution is admittedly imperfect but at least it refers to the law of a State.

14. Another completely different problem is how to ensure that the defendant will appear before the court. This is an important question. According to the present draft, which is in line with the general opinion of the Commission, proceedings by default are not admissible in the court. If the defendant does not appear voluntarily, there must be ways of making him appear. Between States parties provision is made for a simplified rule of handing over the defendant to the court merely upon request, with reservations, however, as concerns respect for certain principles. Between States not parties to the statute, or between States parties and States not parties, only extradition proceedings can guarantee the appearance of the defendant if he fails to appear voluntarily.

15. As the court cannot conclude extradition agreements unless it is recognized to have such authority, it would be for the State party intending to submit the case to the court to obtain extradition of the defendant to its territory and to hand him over to the court.

16. Moreover, it will be appropriate to complete the draft with some ancillary provisions related to cooperation between the court and States parties or States not parties to the statute.

17. The Special Rapporteur provides below a brief presentation of the draft which, it is reiterated, does not claim to solve all the delicate issues to which the establishment of an international criminal jurisdiction gives rise. At most, it constitutes a work plan for the Commission.

Draft statute for an international criminal court

PART I

ESTABLISHMENT

DRAFT ARTICLE 1. ESTABLISHMENT OF THE COURT

(a) *Proposed text*

18. The proposed text of draft article 1 reads as follows:

Article 1. Establishment of the Court

There is established an International Criminal Court whose jurisdiction and functioning shall be governed by the provisions of the present Statute.

(b) *Comments*

19. In this draft article, the adjective "criminal" is used purposely in preference to the adjective "penal", in order to make it very clear that the court is concerned with crimes and not with ordinary offences. The court shall

take cognizance only of such ordinary offences as are linked to a crime which has been referred to the court.

DRAFT ARTICLE 2. THE COURT, JUDICIAL ORGAN OF THE UNITED NATIONS

(a) *Proposed text*

20. The proposed text of draft article 2 reads as follows:

Article 2. The Court, judicial organ of the United Nations

The Court shall be a judicial organ of the United Nations.

(b) *Comments*

21. It is of the utmost importance for the criminal court to be an organ of the United Nations. The coexistence of ICJ and an international criminal court as organs of the United Nations would not be contrary to the Charter. Article 1 of the Statute of ICJ actually provides that "The International Court of Justice ... shall be the principal judicial organ of the United Nations", which leaves room for another judicial organ having jurisdiction in criminal matters. This view seems to be confirmed by the recent Security Council resolution establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.⁴

DRAFT ARTICLE 3. SEAT OF THE COURT

(a) *Proposed text*

22. The proposed text of draft article 3 reads as follows:

Article 3. Seat of the Court

The seat of the Court shall be established at [...]

(b) *Comments*

23. Establishing the seat of the court is essentially a political problem. It is for the Sixth Committee of the General Assembly to discuss the matter and to submit proposals to the General Assembly. Nevertheless, the Commission too may discuss the problem, if it so desires, and submit its own proposals to the General Assembly.

DRAFT ARTICLE 4. APPLICABLE LAW

(a) *Proposed text*

24. The proposed text of draft article 4 reads as follows:

Article 4. Applicable law

The Court shall apply international conventions and agreements relevant to the crimes within its juris-

isdiction [as well as general principles of law and custom].

(b) *Comments*

25. The debates in the Commission have revealed that, of the sources of law that may be applied, only international conventions and agreements did not give rise to controversy.

26. By contrast, the controversy that arose about the general principles of law and custom explains why these two sources have been placed in square brackets.

27. This restrictive approach is perhaps dictated by a sense of caution. It should be noted, however, that no previous draft had gone so far in restricting the law that could be applied by an international criminal court.

28. The draft Statute of the International Penal Court prepared in 1926 by ILA⁵ listed as sources of law to be applied: international treaties, conventions and declarations; international custom; general principles of law; and judicial decisions as subsidiary means for the determination of rules of law (art. 23).

29. According to article 2 of the revised draft statute of the 1953 United Nations Committee on International Criminal Jurisdiction,⁶ "The Court shall apply international law, including international criminal law and, where appropriate, national law".

30. A more recent draft prepared by Chérif Bassiouni⁷ includes the sources listed in Article 38 of the Statute of ICJ.

31. To remain faithful to the views of the Working Group on the question of an international criminal jurisdiction, the present draft article strictly speaking includes only conventions and agreements.

DRAFT ARTICLE 5. JURISDICTION OF THE COURT

(a) *Proposed text*

32. The proposed text of draft article 5 reads as follows:

Article 5. Jurisdiction of the Court

1. The jurisdiction of the Court shall not be presumed.

2. The Court shall have jurisdiction over every individual, provided that the State of which he is a national, and the State in whose territory the crime is presumed to have been committed, have accepted its jurisdiction.

3. Pending the adoption of a criminal code relevant to its jurisdiction, offences within the jurisdiction of the Court shall be defined in special treaties

⁵ ILA, *Report of the Thirty-fourth Conference, Vienna, 5-11 August 1926* (London, 1927), pp. 113-125. See also United Nations, *Historical survey...*, memorandum by the Secretary-General (Sales No.1949.V.8), p. 61, appendix 4.

⁶ See *Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953, Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*, annex.

⁷ Association internationale de droit pénal, *Nouvelles études pénales* (Erès, Syracuse, Italy, 1992).

⁴ Security Council resolution 808 (1993) of 22 February 1993.

between States parties, or in a unilateral instrument of a State.

4. Such treaties or unilateral instruments shall determine and indicate exactly the offences over which the Court is recognized to have jurisdiction.

5. The Court shall not try defendants other than those within its jurisdiction, or try defendants for acts other than those for which they were prosecuted.

(b) *Comments*

33. Draft article 5 deals with jurisdiction *ratione personae* and *ratione materiae*.

34. The jurisdiction of the court to try an individual, or its *ratione personae* jurisdiction, is subject to the agreement of the two States concerned: the State of which that individual is a national and the State in whose territory the crime was presumably committed.

35. In national criminal law, there are two main rules of jurisdiction: territorial jurisdiction and personal jurisdiction. Territorial jurisdiction is, of course, the rule more generally applied. It is not, however, the only one. It encompasses major exceptions in national legislation. In particular, where the honour or the basic interests of a State are at issue that State often gives preference to the personal jurisdiction rule.

36. This draft, if it is not to be totally lacking in realism, cannot exclude either of the two rules in favour of the other. For this reason, jurisdiction should be conferred both by the State in whose territory the crime was committed and by the State of which the perpetrator is a national.

37. The question of the jurisdiction *ratione materiae* of the court is also very complex. A code of international crimes does not yet exist.

38. The discussions in the Commission have not made it possible to define offences within the jurisdiction *ratione materiae* of the court, with the exception of genocide and possibly apartheid. At this stage, the draft should not be too ambitious. The jurisdiction *ratione materiae* of the court should be limited to a few offences about which the international community is in broad agreement. It will thus be incumbent on the Commission to indicate, if it can, in this spirit, the offences which would fall within the jurisdiction of the court.

39. It is proposed here that, until such time as States parties adopt an international criminal code, offences within the jurisdiction of the court should be defined by agreements between States parties. Any State may also, at the time of its accession to the statute of the court or at any other time, define the crimes for which it recognizes the jurisdiction of the court.

40. Such a method, which seems more flexible, was proposed in the draft Statute for the Creation of a Penal Chamber of ICJ.⁸

⁸ Prepared by V. V. Pella and adopted by the International Association for Penal Law, Paris, 16 January 1928, revised in 1946 (United Nations, *Historical survey* . . . , p. 75, appendix 7).

DRAFT ARTICLE 6. JURISDICTIONAL DISPUTES

(a) *Proposed text*

41. The proposed text of draft article 6 reads as follows:

Article 6. Jurisdictional disputes

The Court shall rule on questions relating to its own jurisdiction in a case submitted to it.

(b) *Comments*

42. It is a rule in international law that the judge hearing a dispute shall also be the judge of the court's own jurisdiction. This draft article, therefore, merely applies a rule which has been in force for a long time.

DRAFT ARTICLE 7. JUDICIAL GUARANTEES

(a) *Proposed text*

43. The proposed text of draft article 7 reads as follows:

Article 7. Judicial guarantees

1. Everyone charged with a criminal offence shall be presumed innocent until proved guilty.

2. Everyone shall be entitled:

(a) **To a fair and public hearing;**

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

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

(d) **To be tried without undue delay;**

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

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

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

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

(b) *Comments*

44. Draft article 7 deals with the judicial guarantees which any individual prosecuted before the court enjoys.

45. These guarantees are found in many international instruments, such as statutes of international military tribunals, especially the Charter of the Nürnberg Tribunal⁹

⁹ 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).

(art. 16) and the Charter of the International Military Tribunal for the Far East (the Tokyo Tribunal)¹⁰ (art. 9). They are also found in the following instruments: the International Covenant on Civil and Political Rights (art. 14); the Convention for the Protection of Human Rights and Fundamental Freedoms (arts. 5-6); the American Convention on Human Rights (arts. 5, 7 and 8); the African Charter on Human and Peoples' Rights¹¹ (art. 7); the Geneva Conventions of 12 August 1949 (art. 3 common to the four Conventions) and Additional Protocols I (art. 75) and II (arts. 4-6) thereto.

46. As the draft Code of Crimes against the Peace and Security of Mankind has not yet been adopted, it was deemed useful to devote a specific provision of the statute of the court to judicial guarantees.

PART 2

ORGANIZATION AND FUNCTIONING

DRAFT ARTICLE 8. PERMANENCE OF THE JURISDICTION OF THE COURT

(a) *Proposed text*

47. The proposed text of draft article 8 reads as follows:

Article 8. Permanence of the Court

Although the jurisdiction of the Court is permanent it [shall not function on a full-time basis and] shall be convened only to consider a case submitted to it.

(b) *Comments*

48. This draft establishes two things, namely that: (a) the jurisdiction of the court shall be permanent in nature; and (b) not all of its organs shall function on a permanent basis.

49. If the jurisdiction of the court is permanent, it is easier to convene the court if the need arises.

50. Had the court already been established, it would have been possible to avoid all the delays that the international community is presently facing in setting up a court to judge the war crimes committed in the former Yugoslavia. Such a court would have existed prior to commission of the crimes.

51. The permanence of such a jurisdiction would not be incompatible with the intermittent functioning of its organs.

52. The present draft attempts to combine these two aspects, while responding to the Commission's concern to establish a body that is modest and inexpensive.

DRAFT ARTICLE 9. RESIDENCE OF THE PRESIDENT AND THE REGISTRAR

(a) *Proposed text*

53. The proposed text of draft article 9 reads as follows:

Article 9. Residence of the President and the Registrar

ALTERNATIVE A

[Only] the President and the Registrar shall reside at the seat of the Court and shall exercise their functions on a full-time basis.

ALTERNATIVE B

[Only] the Registrar shall reside at the seat of the Court and shall exercise his functions on a full-time basis.

(b) *Comments*

54. This draft article, which provides that only the President and the Registrar (alternative A), or only the Registrar (alternative B), shall reside at the seat of the court, is also based on a concern for economy.

DRAFT ARTICLE 10. RULES OF PROCEDURE

(a) *Proposed text*

55. The proposed text of draft article 10 reads as follows:

Article 10. Rules of procedure

Rules of procedure elaborated by the Court shall determine the method of functioning of its various organs and their relationship.

(b) *Comments*

56. Since the members of the court will not reside at the place where it has its seat and will be convened only intermittently to consider a case, it will be necessary for the rules of procedure to go into detail as to how communication among the members of the court will be established, especially with regard to the transmittal of evidence and documents, to ensure the closest possible administrative relationships among the members.

DRAFT ARTICLE 11. QUALIFICATIONS REQUIRED

Proposed text

57. The proposed text of draft article 11 reads as follows:

Article 11. Qualifications required

The members of the Court must be jurists of high moral character and recognized competence in international law and, more specifically, in international criminal law.

¹⁰ Signed at Tokyo on 19 January 1946 (*Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 et seq).

¹¹ Adopted in Nairobi on 26 June 1981 (see OAU, document CAB/LEG/67/3/Rev. 5).

DRAFT ARTICLE 12. APPOINTMENT OF JUDGES

(a) Proposed text

58. The proposed text of draft article 12 reads as follows:

Article 12. Appointment of judges

The members of the Court shall be appointed as follows:

(a) Each State party to the Statute of the Court shall appoint a judge who possesses the qualifications provided for in article 11 of this Statute;

(b) The Secretary-General of the United Nations shall prepare a list in alphabetical order of the judges appointed by the States.

(b) Comments

59. The appointment procedure proposed in this draft article avoids the need to appoint full-time judges. The list referred to in paragraph (b) above shall constitute a panel from which judges shall be chosen to sit on a case, in accordance with article 14 below.

60. A different procedure, which would consist of the judges being elected by the General Assembly, could also be considered. Such a procedure, however, would be more appropriate if the judges were to exercise their functions on a full-time basis.

DRAFT ARTICLE 13. ELECTION OF THE PRESIDENT AND VICE-PRESIDENT(S)

(a) Proposed text

61. The proposed text of draft article 13 reads as follows:

Article 13. Election of the President and Vice-President(s)

1. The President and Vice-President(s) shall be elected by the General Assembly of Judges by an absolute majority. They shall constitute the Bureau of the Court.

2. The Bureau shall take all decisions concerning the administrative and financial functioning of the Court.

(b) Comments

62. A larger committee could also be established whose members would be elected by representatives of the States parties. This committee would then elect the President or Vice-President(s). It would be authorized to oversee the administrative and financial management of the court and, in particular, to agree upon the draft budget of the court for submission to the General Assembly. However, a structure of this kind would be too cumbersome and better suited to an inter-State court.

DRAFT ARTICLE 14. APPOINTMENT OF THE REGISTRAR

Proposed text

63. The proposed text of draft article 14 reads as follows:

Article 14. Appointment of the Registrar

On the proposal of the President, the Bureau of the Court shall appoint the Registrar in accordance with the procedure which it has itself established.

DRAFT ARTICLE 15. COMPOSITION OF A CHAMBER OF THE COURT

(a) Proposed text

64. The proposed text of draft article 15 reads as follows:

Article 15. Composition of a chamber of the Court

1. Each chamber of the Court shall consist of nine judges.

2. If the accumulation of cases so requires, the Court may establish several chambers.

3. The President or, in his place, the Vice-President, shall select the judges to sit in the chambers of the Court from the list referred to in article 12.

4. No judge from the complainant State or from the State of which the accused is a national shall be a member of a chamber which is hearing a case involving such States.

(b) Comments

65. The number of judges constituting the court or a chamber of the court has varied according to the different draft statutes. The draft statute for an international criminal court prepared in 1926 by ILA¹² provided that the court could sit in one or more sections of five judges (art. 14, *in fine*).

66. The draft Statute for the Creation of a Penal Chamber of ICJ adopted by the International Association for Penal Law¹³ provided for 15 titular and 8 supplementary members (art. 3).

67. The Convention for the Creation of an International Criminal Court of 16 November 1937,¹⁴ adopted by the International Conference on the Repression of Terrorism, made provision for five regular judges and five deputy judges (art. 6).

68. The 1943 draft Convention for the Creation of an International Criminal Court, prepared by the London International Assembly¹⁵ provided that the court should consist of 35 judges and that the number could be increased if the need arose (art. 9).

¹² ILA, *Report of the Thirty-fourth Conference* . . . (see footnote 5 above).

¹³ See footnote 8 above.

¹⁴ United Nations, *Historical survey* . . . p. 88, appendix 8.

¹⁵ *Ibid.*, p. 97, appendix 9 B.

69. Annex I to the draft Convention on the Crime of Genocide,¹⁶ prepared by the Secretary-General of the United Nations, concerning the establishment of a permanent international criminal court for the punishment of acts of genocide, provided for seven regular judges and seven deputy judges (art. 6). Annex II of the same draft Convention, concerning the establishment of an ad hoc court, provided for seven regular judges but no deputy judges (art. 11).

70. The Charter of the Nürnberg Tribunal¹⁷ provided for four judges representing the signatories to the London Agreement of 8 August 1945, each to be assisted by an alternate (art. 2).

71. Apart from the question of how many judges should have cognizance of a particular case, there is also the question whether the court might be divided into several chambers, if its caseload so warranted. That possibility, for which provision is made in paragraph 2, should not be entirely ruled out.

DRAFT ARTICLE 16. COMPATIBILITY WITH OTHER FUNCTIONS

(a) *Proposed text*

72. The proposed text of draft article 16 reads as follows:

Article 16. Compatibility with other functions

1. **Members of the Court may continue to exercise the functions which they performed before their election. However, they shall not participate in any case in which they have previously been involved in any capacity whatsoever.**

2. **If a judge considers that he should not sit for a particular case, he shall so inform the President.**

(b) *Comments*

73. As judges only receive a daily allowance, they cannot be required to abandon the functions which they previously exercised.

DRAFT ARTICLE 17. DEPRIVATION OF OFFICE

Proposed text

74. The proposed text of draft article 17 reads as follows:

Article 17. Deprivation of office

Members of the Court shall not be deprived of their office unless, in the unanimous opinion of the other members, they have ceased to meet the required conditions.

DRAFT ARTICLE 18. DIPLOMATIC IMMUNITY

Proposed text

75. The proposed text of draft article 18 reads as follows:

Article 18. Diplomatic immunity

Members of the Court, when travelling to or from its seat on Court business, shall be entitled to diplomatic passports and, while engaged in the performance of their duties, shall enjoy diplomatic privileges and immunities.

DRAFT ARTICLE 19. VACANCY OF A SEAT

Proposed text

76. The proposed text of draft article 19 reads as follows:

Article 19. Vacancy of a seat

In the event of a seat being vacated on the death or resignation of a judge or for any other cause, the State having appointed that judge shall simply provide for his replacement by way of a letter addressed to the President of the Court.

DRAFT ARTICLE 20. SOLEMN DECLARATION

(a) *Proposed text*

77. The proposed text of draft article 20 reads as follows:

Article 20. Solemn declaration

Every member shall, in open court, make a solemn declaration that he will exercise his functions impartially and conscientiously.

(b) *Comments*

78. Instead of administering the oath to a judge when he takes office at the time of a case, the oath may be administered once during a plenary session to all judges whose names appear on the list.

DRAFT ARTICLE 21. ALLOWANCES, EMOLUMENTS AND SALARIES

(a) *Proposed text*

79. The proposed text of draft article 21 reads as follows:

Article 21. Allowances, emoluments and salaries

1. **The President of the Court shall receive a special annual allowance.**

2. **The Vice-President [s] shall receive a special allowance for each day that he [they] exercise[s] the functions of President.**

3. **The judges shall receive a daily allowance during the period in which they exercise their functions. They shall also receive free transport to and from the Court according to a scale set by the General Assembly.**

4. **The Registrar shall receive a salary.**

¹⁶ Ibid., p. 120, appendix 12.

¹⁷ See footnote 9 above.

5. The salaries, allowances and emoluments and the running costs of the Court shall be set by the General Assembly.

(b) *Comments*

80. In some draft statutes, it is the States of origin which pay the travel costs and emoluments for the judges, on a scale set by the States parties. Such a system, however, would be more acceptable if the court were merely an inter-State body, rather than a United Nations body.

DRAFT ARTICLE 22. BUDGET OF THE COURT

Proposed text

81. The proposed text of draft article 22 reads as follows:

Article 22. Budget of the Court

The budget of the Court shall be met by the United Nations as decided by the General Assembly.

PART 3

PROCEDURE

DRAFT ARTICLE 23. SUBMISSION OF A CASE TO THE COURT

(a) *Proposed text*

82. The proposed text of draft article 23 reads as follows:

Article 23. Submission of a case to the Court

1. A case shall be submitted to the Court on the complaint of a State.

2. (a) Any State, whether or not it be a party to the Statute of the Court, may, instead of having an accused person tried under its own jurisdiction, refer him to the Court.

(b) Submission by a non-State party of a complaint to the Court shall imply accession to the Statute of the Court and to recognition of its jurisdiction in respect of the offence in question.

(c) The complaint, addressed to the President through the Registrar, shall indicate the name and domicile of the agent who follows the procedure, takes part in the investigation and, where necessary, conducts the prosecution before the Court.

(d) All procedural documents shall be served at the domicile of the agent or at any address which he indicates.

3. On receiving the complaint, the President of the Court shall, provided the States are not complainants, inform the State on whose territory the offence was committed and the State of which the accused is a national.

4. The complaint shall include an exact statement of the charges and the elements on which the complaint is founded.

(b) *Comments*

83. Paragraph 1 restricts the right of complaint to States. Accordingly, individuals and international organizations are excluded from this right. The right of international organizations to complain was a subject of dispute in the Commission and failed to win general approval.

84. Paragraph 2 (a) establishes the optional and concurrent character of the court in that any State also has the right to have an accused person tried by its own courts. It also permits access to the court by non-States parties. In return for the right of a non-party State to submit a case to the court, paragraph 2 (b) creates obligations on the part of that State.

DRAFT ARTICLE 24. INTERVENTION

(a) *Proposed text*

85. The proposed text of draft article 24 reads as follows:

Article 24. Intervention

Any concerned State may intervene in the criminal procedure, submit a memorandum and take part in the proceedings.

(b) *Comments*

86. The "State concerned" must be understood to mean the State of which the offender is a national. It may also mean, provided they are not complainants, other States which are aggrieved or whose nationals are aggrieved, or it could even mean the State or States on whose territory the crime was committed.

DRAFT ARTICLE 25. PROSECUTION

(a) *Proposed text*

87. The proposed text of draft article 25 reads as follows:

Article 25. Prosecution

ALTERNATIVE A

The State which brings a complaint before the Court shall assume responsibility for conducting the prosecution.

ALTERNATIVE B

The prosecuting authority before the Court shall be the Prosecutor-General. He shall act on behalf of all the States parties. He shall be elected by the Court [the States parties] from among the judges on the list provided for in article 12. He shall hold office for three years.

(b) *Comments*

ALTERNATIVE A

88. This option makes the complainant State responsible for conducting the prosecution before the court. It

would seem to respond to the general concern to establish a modest, inexpensive body.

89. This was the option adopted in the 1937 Convention for the Creation of an International Criminal Court,¹⁸ (art. 25, para. 3). It was also one of the solutions identified in the 1928 draft Statute for the Creation of a Criminal Chamber of ICJ¹⁹ whereby the Security Council which, according to the draft, is responsible for undertaking international criminal proceedings, may, if it deems it appropriate, “leave [the presentation of the accusation] to the State concerned” (art. 25). Furthermore, the 1926 ILA draft²⁰ provides that the complainant State shall appoint a “procurator or agent” to conduct the proceedings (art. 27). Alternative A seems to correspond more closely to the spirit of the present draft articles.

ALTERNATIVE B

90. Alternative B, however, offers another option which is the more classic procedure. This solution is to establish a prosecutorial organ, headed by a prosecutor-general. It has the drawback, though, of appointing a permanent official, to head a permanent office with deputies (general lawyers, general substitutes and many junior officials). The Commission has no wish to embark upon this course.

DRAFT ARTICLE 26. INVESTIGATION

(a) *Proposed text*

91. The proposed text of draft article 26 reads as follows:

Article 26. Investigation

1. **The Court, if it deems the complaint admissible, shall summon the defendant to appear before it.**

2. **After examining the defendant and considering the evidence, the Court shall decide whether or not to initiate an investigation.**

3. **To that end, the Court may, at any time, either on its own initiative, or at the request of the parties:**

(a) **Order the disclosure and production of any document or exhibit connected with the proceedings, the production of which appears necessary in order to establish the truth;**

(b) **Under the same conditions, order witnesses to attend and be examined before the Court or one or more of its members, or order that their examination be conducted through letters of request in the manner provided by territorial law and allow their deposition as evidence before the Court;**

(c) **All testimony shall be in written form;**

(d) **When a question arising in a case involves prolonged investigation which cannot be conducted before the Court, the Court may appoint a special**

committee consisting of one or more of its members in order to carry out the inquiry. The Court may act upon the report of this committee as it sees fit;

(e) **The Court, under the same conditions, may summon any person with expert knowledge, particularly in military, naval, aerial or scientific matters, in order to give evidence in any case in which the Court deems his knowledge is required for the determination of the case;**

(f) **No examination of experts and no hearing or confrontation of the defence may take place other than in the presence of the counsel for the defence or the complainant or those duly convened.**

4. **The parties undertake to provide the Court with all necessary assistance, especially in respect of the attendance of witnesses, which shall be secured, where necessary, by means of coercion, in accordance with the rules of the requested State.**

(b) *Comments*

92. This investigation procedure, carried out at the hearing by the court itself, replaces the procedure of entrusting the investigation to a permanent body, in practice the examining magistrate. However, paragraph 3 (d) provides that, if the case requires lengthy investigation, the court may appoint one or more of its members to carry out the investigation. This special committee is dissolved as soon as the investigation is completed however, and is therefore not permanent in nature.

DRAFT ARTICLE 27. JUDGEMENT BY DEFAULT

(a) *Proposed text*

93. The proposed text of draft article 27 reads as follows:

Article 27. Judgement by default

[No defendant may be judged by default.]

(b) *Comments*

94. This provision is placed in square brackets. Indeed, the predominant view was that proceedings by default should not be permitted. However, such a solution would be liable to paralyse the work of the court. It would suffice for the court to be unable to secure the appearance of the defendant.

95. Proceedings by default exist in some of the draft statutes. For example, the 1926 ILA draft statute on an international criminal court²¹ provided for default of appearance (art. 33). In such a case, the court would issue a *mandat d'amener* or a *mandat d'arrêt* and continue the proceedings, after proof of due service of the charge. The court need only to satisfy itself that it has jurisdiction to hear the case.

96. The deterrent effect of an international *mandat d'arrêt* (arrest warrant) should not be underestimated;

¹⁸ See footnote 14 above.

¹⁹ See footnote 8 above.

²⁰ ILA, *Report of the Thirty-fourth Conference . . .* (see footnote 5 above).

²¹ *Ibid.*

such a warrant would greatly limit the defendant's freedom of movement and action.

DRAFT ARTICLE 28. HANDING OVER AN ACCUSED PERSON TO THE COURT

(a) *Proposed text*

97. The proposed text of draft article 28 reads as follows:

Article 28. Handing over an accused person to the Court

1. A State party shall hand over to the Court, at the request of the Court, any person against whom the Court has instituted proceedings for crimes that fall within its jurisdiction.

2. The State required so to do shall, however, ensure that:

(a) The proceedings have not been instituted on political, racial, social, cultural, or religious grounds;

(b) The accused does not enjoy immunity from prosecution;

(c) The handing over would not be contrary to the legal principle of *res judicata*.

(b) *Comments*

98. Among the States parties, it would appear desirable to facilitate the conditions under which an accused person is handed over to the court. However, the present draft article takes account of the concerns expressed within the Commission about the need to safeguard the rights of the accused. That is why the principle stated in paragraph 1 is tempered by the provisions of paragraphs 2 (a) and 2 (b).

99. It should be recalled that this simplified procedure contains no new elements (Art. 5). The 1943 draft Convention on an international criminal court prepared by the London International Assembly²² contained the following provision:

The handing over of an accused person to the prosecuting authority of the ICC is not an extradition. The ICC is deemed for the purpose of this Convention a Criminal Court common to all nations, and justice administered by this Court shall not be considered as foreign.

100. Between non-States parties or between a non-State party and a State party, recourse shall be had to the extradition procedure.

101. The problem would be to determine whether the court would be competent to conclude extradition agreements. It appears that it would not have such competence.

102. Where the accused refuses to appear, one solution would be to require any State which exercises the right to institute proceedings against a person residing in a third State, to obtain the extradition of the accused to its territory, in order to hand him over, as necessary, to the court.

DRAFT ARTICLE 29. DISCONTINUANCE OF PROCEEDINGS

(a) *Proposed text*

103. The proposed text of draft article 29 reads as follows:

Article 29. Discontinuance of proceedings

The Court shall discontinue its proceedings and shall order release of the accused where the charge has been withdrawn and has not been immediately reinstated by a State which is competent to apply for institution of the proceedings.

(b) *Comments*

104. In the national law of certain countries, withdrawal of an accusation does not automatically lead to the discontinuance of the proceedings. It is still necessary for the public prosecutor, the defender of law and order, to agree to discontinuing the proceedings.

105. In the case referred to in article 29, however, the fact that there is no public prosecutor responsible for defending international law and order justifies discontinuance of the criminal proceedings where the accusation is withdrawn.

DRAFT ARTICLE 30. DETENTION UNDER REMAND

Proposed text

106. The proposed text of draft article 30 reads as follows:

Article 30. Detention under remand

1. The Court shall decide whether a person who is brought before it shall be placed or held under arrest. It shall determine, where necessary, the conditions under which he may be released on bail.

2. In making an arrest, the State on whose territory the seat of the Court is established shall make available to the Court an appropriate place of detention and, where necessary, the requisite guards.

DRAFT ARTICLE 31. HEARINGS

Proposed text

107. The proposed text of draft article 31 reads as follows:

Article 31. Hearings

Hearings shall be public unless, because of the nature of the charge or the evidence, the Court decides otherwise.

DRAFT ARTICLE 32. MINUTES OF HEARINGS

Proposed text

108. The proposed text of draft article 32 reads as follows:

²² United Nations, *Historical survey...* (see footnotes 5 and 15 above).

Article 32. Minutes of hearings

1. The minutes of hearings shall be signed by the President or, in his absence, by the Vice-President or by the judge who presided over the hearings.

2. The minutes shall include a succinct statement of the principal elements of the hearings and shall constitute the only evidence that the formalities provided for have been observed.

DRAFT ARTICLE 33. JUDGEMENT

(a) *Proposed text*

109. The proposed text of draft article 33 reads as follows:

Article 33. Judgement

1. When the prosecution and defence have presented their arguments and concluded their pleas, the President shall declare the proceedings closed.

2. The Court may render its judgement immediately, retire to hold deliberations, or set another date for delivery of its judgement.

3. The deliberations of the Court shall be confidential and the judges shall maintain the confidentiality of their deliberations.

4. The decisions of the Court shall be taken by a majority of the judges present and shall be deemed to represent the opinion of the Court as a whole.

5. All judgements of the Court shall be well-founded and read out at the public hearing by the President. Only the grounds which led to the decision of the majority shall be included in the judgement. No dissenting or individual opinion shall be published or divulged in any form whatsoever.

(b) *Comments*

110. Paragraph 5 deserves some explanation. Given the weight and authority attached to judgements in criminal cases, individual or dissenting opinions do not seem desirable. They weaken the authority attached to such judgements, whereas the judgements may have grave consequences insofar as they may seriously affect the personal freedom of those convicted.

DRAFT ARTICLE 34. PENALTIES

(a) *Proposed text*

111. The proposed text of draft article 34 reads as follows:

Article 34. Penalties

Until a code specifying the applicable penalties is adopted, the Court shall apply the penalties provided for by the criminal law of either:

(a) The State of which the perpetrator of the crime is a national; or

(b) The State which lodged the complaint; or

(c) The State on whose territory the crime was committed.

[However, the death penalty shall not be applicable.]

(b) *Comments*

112. The principle of *nulla poene sine lege* requires that the penalties imposed upon a guilty person must have been laid down before the incriminating acts were committed. In the present circumstances, the absence of an international criminal code makes it necessary to refer either to the law of the State of the perpetrator of the crime, or to the law of the State which lodged the complaint, or else to the law of the State in whose territory the crime was committed.

113. It will be for the Commission to choose from among these three options. The inclination is to opt for the law of the State of the perpetrator as the law with which he is presumed to be familiar. However, the principle of territoriality is the ordinary law principle in criminal matters.

DRAFT ARTICLE 35. REMEDIES

(a) *Proposed text*

114. The proposed text of draft article 35 reads as follows:

Article 35. Remedies

ALTERNATIVE A

1. Revision shall be the only remedy against judgements pronounced by the Court. Revision may take place should a fact of a decisive nature be discovered which was unknown to the Court and of which the applicant could not have been aware before the judgement was rendered.

2. Revisions shall be examined by the chamber of the Court which rendered the judgement.

ALTERNATE B

1. The remedies shall be appeal and revision.

2. Revision shall be the only remedy against judgements pronounced by the Court. Revision may take place should a fact of a decisive nature be discovered which was unknown to the Court and of which the applicant could not have been aware before the judgement was rendered.

3. Appeals shall be examined by a special chamber of the Court, composed of judges who did not take part in the judgement contested.

4. Revisions shall be examined by the chamber which rendered the judgement.

(b) *Comments*

115. Of the two remedies provided for in the present draft article, only revision meets with the broad agreement of the members of the Commission.

116. The opinion of the Commission on the subject of appeal is divided. Some believe that judgements rendered by the highest criminal court should not be subject to appeal. Others believe, to the contrary, that respect for human rights demands that an appeal should be authorized against any criminal law decision. For this reason, alternatives A and B are presented.

117. In the case of revision, it must be noted that this procedure has not always been allowed. Thus, according to article 26 of the Charter of the Nürnberg Tribunal, the

“judgment of the Tribunal as to the guilt or the innocence of any defendant . . . shall be final and not subject to review”.²³

118. Such a provision can be explained only in relation to the circumstances, since it is quite exceptional. This wording means that the death penalty would not be subject to revision should a judicial error be discovered. To prevent such an outcome, the revision procedure should be accepted in the draft.

DRAFT ARTICLE 36. EXECUTION OF SENTENCES

(a) *Proposed text*

119. The proposed text of draft article 36 reads as follows:

Article 36. Execution of sentences

ALTERNATIVE A

Sentences of imprisonment shall be executed in the territory of the State of the seat of the Court, which shall provide an appropriate place of detention and the necessary staff and guards.

ALTERNATIVE B

Sentences of imprisonment shall be executed in the territory of the State party designated by the Court

upon approval of the former. The plaintiff State may not refuse to give its approval. However, the plaintiff State shall execute the sentence if it so desires.

ALTERNATIVE C

Sentences of imprisonment shall be executed in the territory of the State designated by the Court upon approval of the former. However, the State of which the accused is a national may not be designated.

(b) *Comments*

120. It is necessary to determine the place of detention for those sentenced. If no provision is made on this matter, every sentence would be a judgement devoid of practical application.

121. Alternative A, which opts for the place of the seat of the court, seems the most appropriate. It affords equal treatment to all prisoners. Nonetheless, the other options have also been proposed in some draft statutes.

DRAFT ARTICLE 37. RIGHT OF PARDON AND CONDITIONAL RELEASE

(a) *Proposed text*

122. The proposed text of draft article 37 reads as follows:

Article 37. Right of pardon and conditional release

The right of pardon and conditional release shall be exercised by the State in charge of executing the sentence, after consultation with the other States concerned.

(b) *Comments*

123. The term “States concerned” must be understood to mean the State on whose territory the crime was committed, the victim State or the State whose nationals have been the victims.

²³ See footnote 9 above.

DOCUMENT A/CN.4/452 and Add.1-3

**Comments of Governments on the report of the Working Group
on the question of an international criminal jurisdiction**

[Original: English/Russian/Spanish]
[10 and 25 May, 20 July and 7 September 1993]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present document	125
INTRODUCTION.....	126
COMMENTS RECEIVED FROM MEMBER STATES	
Australia	127
Belarus	133
Bulgaria.....	135
Denmark*	136
Finland*	136
Iceland*.....	136
Italy	136
Mexico	137
Nordic countries.....	139
Norway*.....	140
Panama.....	140
Spain	140
Sweden*	141
United States of America	141

* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under **Nordic countries**.

Multilateral instruments cited in the present document

	<i>Source</i>
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	Ibid., vol. 75, pp. 31 et seq.

Source

Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of armed conflicts (Protocols I and II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 et seq.
Conventions for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	Ibid., vol. 860, p. 105.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	Ibid., vol. 1035, p. 167.
International Convention against the Taking of Hostages (New York, 17 December 1979)	Ibid., vol. 1316, p. 205.
Convention on Conciliation and Arbitration with the Conference on Security and Cooperation in Europe	<i>Revue générale de droit international public</i> , Paris, vol. XCVII, 1993, p. 213.

Introduction

1. At its forty-seventh session, in 1992, the General Assembly adopted resolution 47/33 of 25 November 1992 concerning the report of the International Law Commission on the work of its forty-fourth session.

2. Paragraphs 4, 5 and 6 of the resolution read as follows:

[*The General Assembly.*]

4. *Takes note with appreciation* of chapter II of the report of the International Law Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction;

5. *Invites* States to submit to the Secretary-General, if possible before the forty-fifth session of the International Law Commission, written comments on the report of the Working Group on the question of an international criminal jurisdiction;¹

6. *Requests* the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the

Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

3. Pursuant to the General Assembly's request in paragraph 5 of that resolution, the Secretary-General addressed a circular letter to Governments dated 1 December 1992 inviting them to submit their written comments, if possible before the forty-fifth session of the Commission.

4. As of 23 July 1993, the Secretary-General had received eight replies, the texts of which appear in the present document; a ninth reply received after the close of the session is also reproduced below.^{2**}

** The paragraphs of the report of the Working Group which are the subject of commentary by Member States appear in parentheses.

² References to the question of an international criminal jurisdiction are also to be found in document A/CN.4/448 and Add.1 (reproduced in the present volume) containing the comments and observations received from Governments on the draft Code of Crimes against the Peace and Security of Mankind adopted on first reading by the Commission at its forty-third session.

¹ *Yearbook . . . 1992*, vol. II (Part Two), document A/48/10, annex.

Comments received from Member States

Australia

[Original: English]
[3 May 1993]

1. Australia supported the granting of a mandate to the Commission to prepare a draft statute for an international criminal court and it hopes that its comments will assist the Commission in this task. Australia reserves its position however on the draft statute that will ultimately be prepared by the Commission. The structure of the following comments closely follows that of the report of the Working Group.

GENERAL COMMENTS

2. In its statement during the debate on this issue in the Sixth Committee on 28 October 1992, Australia assessed the general approach of the Working Group and noted the importance of the following elements of that approach:

(a) The detachment of the statute of an international criminal court from the Code of Crimes against the Peace and Security of Mankind;

(b) The confinement of the jurisdiction of an international criminal court, at least in the first phase of its operation, to individuals and not States;

(c) The establishment of an essentially voluntary jurisdiction for such a court, which would be concurrent with that of national courts;

(d) The establishment of such a court, at least in the first phase of its operations, as a facility to be called upon when needed, rather than a standing full-time body.¹

3. In underlining the importance of these elements, Australia asks the Commission to give them due weight in its work on a draft statute.

SPECIFIC COMMENTS

1. Structural and jurisdictional issues

(a) *Method by which the court is to be established*

4. Australia agrees with the conclusion expressed by the Working Group (para. 45) that an international criminal court should be established under its own statute in treaty form.

(b) *Composition of the court*

5. Australia has already noted the importance of the Working Group's view (para. 46), that the court, at least in the first phase of its operations, should not be a full-time body but constituted on each occasion when it was required to act. This position reflects an understanding of the limited workload that the court would face, at least in its early years of operation, and the costs that would be incurred in establishing and maintaining the court on a full-

time basis with a full complement of judges and a supporting administrative structure. Its workload would also clearly be more limited if it exercised concurrent, rather than exclusive, jurisdiction with national courts.

6. The Working Group rightly points out (para. 48) that judges of the court should be independent and impartial and possess appropriate qualifications and experience. Similar requirements are laid down for the ICJ judges in Article 2 of its Statute. There should also be a requirement (akin to Article 9 of the ICJ Statute) that the judges chosen to sit on the court should represent the "principal legal systems of the world".

7. The Working Group sets out (paras. 50 and 51) one possible arrangement for nominating judges to serve on the court and constituting it when required. Although this arrangement has merit, the Commission should canvass other possible mechanisms to ensure that all relevant issues are fully considered. Such an arrangement should not be cumbersome but built on a simple framework which provides guarantees for the nomination of qualified judges and the speedy convening of a panel of suitable judges to try a given case.

(c) *Ways by which a State might accept the jurisdiction of the court*

8. The report restates the Working Group's view (para. 52) that the court should not have compulsory jurisdiction. Australia has noted the importance of this view. The establishment of a voluntary jurisdiction for the court would require a mechanism by which States could accept this jurisdiction. As outlined in that paragraph, a State becoming a party to the statute would accept "certain administrative obligations". The acceptance of the court's jurisdiction by a State would be done by separate act. As noted by the Working Group, this act could be analogous to acceptance of the Optional Clause of the Statute of ICJ.

9. Any mechanism for accepting the jurisdiction of the court would have to allow States flexibility in nominating the terms upon which they would accept that jurisdiction. The report suggests various approaches (para. 54) to handling this question. In drafting the provisions of the statute on jurisdiction, the Commission should precisely define the terms on which a State may accept the jurisdiction of the court. Such provisions would need to contain a list of specific offences in relation to which a State could accept the court's jurisdiction. The Commission will also need to bear in mind that many States would no doubt have to reconcile national constitutional requirements with the acceptance of the jurisdiction of the court. These requirements may cover trial format, trial procedures and procedural safeguards.

10. The Working Group considers (para. 56) the question of access to the court by States which are not parties to its statute. The Working Group favours access to the court being available to States not parties to the statute on an ad hoc basis. Australia considers that this approach should be encouraged as it would enhance acceptance of the court's role. Article 35 of the ICJ Statute envisages the Court being

¹ *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 22nd meeting, paras. 30-38, in particular para. 31.*

open on a conditional basis to States which are not parties to the Statute. Appropriate conditions akin to those suggested by the Working Group would have to be imposed on States which were not parties to the court's statute.

(d) *Jurisdiction ratione materiae of the court*

11. In its statement during debate on this issue in the Sixth Committee at the forty-seventh session of the General Assembly, Australia noted its general support for the Working Group's approach in dealing with the jurisdiction *ratione materiae* of the court. Australia continues to support this as a basic approach which would see the court's jurisdiction based on "specified existing international treaties defining crimes of an international character" (para. 57), including the Code of Crimes against the Peace and Security of Mankind, subject to its adoption and entry into force. The treaties themselves would obviously not be picked up in their entirety by the statute. It would be a matter of selecting the relevant crimes established by the treaties over which the court would exercise jurisdiction. Such crimes would have to be carefully defined.

12. The establishment of such a jurisdiction, however, is not without its difficulties. The existing treaties, apart from the Convention on the Prevention and Punishment of the Crime of Genocide (especially art. VI), which would form the basis of the jurisdiction, contain no reference to States parties being given the option to submit cases to a court of the type under discussion. A mechanism will need to be found to resolve this problem.

13. A further difficulty would arise where a party to the statute was not also a party to all the treaties forming the basis of the court's jurisdiction. This difficulty would be resolved if there was sufficient flexibility for States to accept the jurisdiction of the court only in relation to those treaties to which they were parties. This issue also arises in deciding whether States which have not accepted the court's jurisdiction in relation to offences established by treaties to which they are not parties should be able to initiate complaints relating to breaches of those offences.

14. In considering the treatment of offences under the statute, attention should also be given to the relationship between existing treaties and the draft Code. Australia noted in its comments on the draft Code² that, as currently drafted, the Code overlaps with and replicates definitions of offences already dealt with under existing conventions. More particularly, in a number of cases, the Code either omits elements of an existing crime or reduces its scope. If substantive differences between the Code and existing treaties remain unresolved, the jurisdiction *ratione materiae* of the court would not function properly. The general question of the definition of crimes in the statute is dealt with in paragraphs 30 et seq. below.

15. The Working Group notes (para. 58) that in the case of some conventions it may be necessary to limit the range of offences which fall within the court's jurisdiction *ratione materiae*, so as to avoid the court being overwhelmed by less serious cases. The example given con-

cerned offences under conventions dealing with illicit trafficking in narcotic drugs. In addressing this issue in its statement to the Sixth Committee, Australia suggested that the court should have sufficiently flexible discretion in determining whether to hear a particular case. The issue would also arise at the time when a State elected to accept the jurisdiction of the court for particular offences. Having accepted the jurisdiction of the court in this manner, that State would no doubt want to be certain of access to that court for the trial of those alleged to have committed offences of that kind. To provide this certainty, offences listed in the statute would need to specify clearly the degree of seriousness attached to them (thus justifying their falling within the court's jurisdiction).

16. Australia accepts the view expressed by the Working Group in its report (para. 59) that, at the first stage of the establishment of the court, its jurisdiction should be limited to those crimes defined by treaties in force and should not be extended to crimes against general international law which have not been "incorporated into or defined by treaties in force".

(e) *Jurisdiction ratione personae of the court*

17. The assertion of the jurisdiction *ratione personae* of the court is a complex task, as the Working Group acknowledges in its report. It is a matter that requires detailed consideration.

18. An initial hurdle is the diversity of bases for jurisdiction *ratione personae* to be found in the domestic criminal law regimes of States. Those States intending to become parties to the statute would no doubt wish to reconcile to the greatest possible extent the jurisdiction *ratione personae* of the court with the equivalent jurisdiction in their domestic criminal law.

19. A further hurdle to be overcome is the definition of the relationship between the court's jurisdiction *ratione personae* and the jurisdiction bestowed on States which are parties to existing treaties to deal with those who have committed offences established by those treaties. This is a further aspect of the broader task of settling the relationship between the statute and existing treaties.

20. Australia notes that the concept of "ceded jurisdiction" advanced by the Working Group (para. 64) offers only a partial solution to resolving possible conflicts between a State's jurisdiction *ratione personae* under an existing treaty and its acceptance of the court's jurisdiction. As the Working Group notes, the device of "ceded jurisdiction" would not be effective where a large number of States have a jurisdictional claim under a treaty which establishes universal jurisdiction over a particular crime. This case would be further complicated where some States claiming jurisdiction were not parties to the statute of the court. Such States might well consider that a State which ceded jurisdiction to an international criminal court rather than making the offender available to one of them for trial was in breach of its treaty obligations to them.

21. The Working Group considers (para. 66) the position of the State of nationality in relation to the jurisdiction *ratione personae* of the court. Australia does not consider as a matter of principle that the consent of the State of nationality should be necessary in every case before the court could exercise its jurisdiction to hear a case. There is merit in the alternative proposal made by the

² Reproduced in document A/CN.4/448 and Add.1 in the present volume (see p. 62).

Working Group in that paragraph that a State of nationality should only be able to prevent the court from exercising its jurisdiction if it is prepared to prosecute the accused before its own courts. This approach presupposes that a State of nationality could prosecute an accused person under its domestic law. Where it could not, that State should not be allowed to prevent an accused from being tried before an international court.

22. In determining the role of the State of nationality, the Commission will have to give careful consideration to the handling of offenders with dual nationality. There is a potential for conflict between the State of residence which had granted that person citizenship and the State of prior residence which still regarded him or her as holding its citizenship. The case could also arise where a person was born in a State and accordingly acquired its citizenship but on account of the citizenship of his or her parents or grandparents was regarded by another State as also holding its citizenship. The rights of respective States in such cases would need to be determined.

23. Australia believes that finding a solution to the problems highlighted by the Working Group in its consideration of the jurisdiction *ratione personae* of the court represents one of the greatest challenges in the drafting of the statute. Any solution will need to allow parties to the statute to take account of the jurisdictional claims of other States.

(f) *The relationship between the court and the Code of Crimes against the Peace and Security of Mankind*

24. Australia supports the use of separate instruments to embody the statute of the court and the Code of Crimes against the Peace and Security of Mankind. The arguments in favour of this approach are cogently set out in the Working Group's report.

(g) *Possible arrangements for the administration of the court*

25. The administrative arrangements for the court will be dictated by its structure, location and workload. If, as has been suggested, the court would not be constituted as a full-time body, at least in the first phase of its operation, there would be a reduced administrative burden which would, in turn, require fewer staff and resources than would be needed to support a full-time body.

26. The Working Group touches briefly (para. 78) on the question of where the court should sit and expresses the view that, where possible, the court should sit in the State where the alleged offence was committed. Australia notes that, if the court is intended to provide States parties to the statute with a forum which can deal with cases quickly and at arm's length in order to remove potential problems from trials, then such States may well be reluctant to have the court sit in their territory.

27. The Working Group has outlined some of the main issues which would arise in the administration of the court. The bulk of these issues do not require detailed consideration at this time. Some attention should, however, be paid to the nature of the court's relationship with the United Nations.

2. An international criminal trial mechanism other than a court

28. While noting the useful exposition in the Working Group's report (paras. 81 to 95) of the arguments in favour of establishing such a mechanism, Australia agrees, however, with the view of the majority of the Working Group that these alternative mechanisms do not address the major concerns which underlie calls for an international criminal jurisdiction.

3. Applicable law, penalties and due process

29. In considering questions of applicable law and due process, proper attention will need to be paid to ensuring that the resulting provisions of the statute accord with the relevant principles of human rights instruments and United Nations standards in the field of criminal justice.

(a) *The applicable law*

(i) Definition of crimes

30. Aspects of the question of the jurisdiction *ratione materiae* of the court have been addressed in paragraphs 11 to 16 above.

31. As the Working Group notes (para. 101), article 15, paragraph 1, of the International Covenant on Civil and Political Rights (hereinafter "the Covenant") embodies the principle of *nullum crimen sine lege*. That provision requires that

No one shall be held guilty of any criminal offence . . . which did not constitute a criminal offence, under national or international law, at the time it was committed.

The requirement of legal certainty and clarity in the definition of criminal offences, including defences and penalties, is fundamental to legality in penal matters. Australia supports the Working Group's commitment to upholding this fundamental rule of criminal law.

32. To observe the requirements of article 15, paragraph 1, of the Covenant, the Working Group argues (para. 101) that the jurisdiction of an international criminal court should be limited to specified crimes of an international character defined by treaties in force. Australia's support for this basic approach was reiterated in paragraph 11 above. It is of the greatest importance that the elements of the crimes selected should be carefully defined so that the prosecutor is required to prove that the conduct of an accused person encompasses the elements of a given crime.

33. Australia believes that, if the jurisdiction of the court is to include international crimes provided for in existing multilateral conventions, the following issues will need to be dealt with:

(a) The inadequacy of the definition of international crimes in existing conventions (including the lack of reference to defences, exculpatory factors and penalties);

(b) The relationship between the draft Code and the existing conventions;

(c) Typology of offences: determining which offences are the most serious and should therefore fall within the court's jurisdiction;

(d) The manner in which the statute would confer jurisdiction over serious crimes with an international character.

a. Specificity

34. While existing international conventions are the most reliable source of international law from which specific penal norms can be identified, existing treaties establish "criminal offences" in a number of different ways.

35. Some conventions proscribe the conduct and impose binding obligations on States to criminalize and punish that conduct at a national level; others refer more generally to an issue of international concern and create obligations to take measures deemed appropriate by respective States; and some simply create a duty to punish or extradite an alleged offender or to cooperate in the prosecution and punishment of certain conduct.

36. Consideration will need to be given to the manner in which specific offences that constitute serious crimes of an international character are to be deduced from the wide range of penal norms established by existing conventions. The criteria for bringing certain conduct defined in existing conventions within the jurisdiction of the court will need to be identified.

37. In general, it is Australian legal practice at both federal and state levels to identify specifically the constituent elements of a criminal offence, as well as defences, exculpatory factors and penalties. Australia is of the view that, despite reliance on existing conventions which define penal norms, the vagueness characterizing some provisions could lead to difficulties in meeting the requirements of article 15, paragraph 1, of the Covenant.

b. Relationship between the Code of Crimes against the Peace and Security of Mankind and existing multilateral conventions

38. As noted in paragraph 14 above, Australia expressed concern in its comments on the draft Code that the Code overlaps and replicates definitions of offences already dealt with under other multilateral conventions, and in some cases either omits elements of existing crimes or reduces their scope.

39. If the court is to derive jurisdiction from multilateral conventions other than the Code, the relationship between these conventions and the Code must be clarified.

c. Typology of offences

40. Australia agrees with the Working Group's recommendation that an international criminal court should be confined to dealing with crimes which are genuinely international in character, but the question arises as to what criteria should be used to determine which offences are to be regarded as: (a) genuinely international in character; and (b) serious enough to warrant inclusion in the jurisdiction of the court.

41. Is the identification of a crime as "genuinely international in character" sufficient for its inclusion? Should jurisdiction ultimately depend on the gravity of the offence committed? Some crimes, such as terrorism, must be regarded as inherently serious. Australia is of the view that these questions need clarification to ensure that

objective criteria are used to determine which offences should fall within the court's jurisdiction.

42. Australia also notes that treaties establishing international crimes have various ways of dealing with the definition of such crimes. These variations can make it difficult to attribute a particular weight to an offence or to give an indication as to its seriousness, based on the way in which such conduct is defined in a given instrument.

d. Provision conferring jurisdiction

43. The question of specificity overlaps with the question of how the statute is to confer jurisdiction on the court. The statute will require a provision or provisions which confer jurisdiction over international crimes. Such a provision or provisions will have an important role to play in ensuring that the statute meets the requirements of article 15, paragraph 1, of the Covenant.

(ii) The general rules of criminal law

44. The Working Group notes (para. 103) that most treaties are silent about defences and extenuating circumstances and that no rules of international criminal law on these matters have evolved. The Working Group suggests (para. 104) that the court could refer to national law. As the Working Group notes, however, national law is in principle only a question of fact at the international level. Two options for dealing with this problem are explored. The first is to refer directly to applicable domestic law where appropriate. The second is to require dual criminality (by place of residence or place where the act was committed) and thereby refer to national law indirectly.

45. Australia appreciates that the main concern of the Working Group was to identify sources of applicable law. If the jurisdiction of the court is to run concurrently with that of national courts (as opposed to exclusively), there is a certain preliminary logic in filling the gaps of international criminal law by recourse to domestic law. Australia believes, however, that on balance this approach will inevitably lead to inconsistencies in treatment from case to case and thus create more problems than it solves. Defences and mitigating circumstances available will depend on the nationality of the accused and/or the place where a crime is committed. Such inconsistency is undesirable and may undermine the legitimacy of the court. The application of the domestic laws of different countries from case to case would also impose a major burden on the judges of the court, who could not be expected to have a detailed knowledge of all such laws.

(iii) Applicable procedure

46. Australia agrees with the view expressed by the Working Group (para. 108) that the statute of the court, or rules thereunder, should specify to the greatest extent possible the procedural rules for trials. The Working Group also indicates that it may be necessary for the court to regulate its own procedure, in cases not covered by the statute or rules, by drawing on the principles common to the codes of procedure of the States parties.

47. While Australia agrees that the principle of *nullum crimen sine lege* does not prevent such a course of action, because that principle is concerned with substantive, as opposed to procedural, law, the application of different procedural rules again raises the issue of inconsistency.

48. To overcome the potential problem of inconsistency, a unified set of rules would need to be applied whatever the national origin of the accused. Questions of procedure and, in particular, rules of evidence are not just technical matters but are central to ensuring a fair trial, as the United Kingdom pointed out in the Sixth Committee at the forty-seventh session of the General Assembly.³ These issues vary across legal systems and in Australia's opinion require detailed analysis.

(b) *The penalties to be imposed*

49. Australia notes that few conventions define penalties. The Working Group suggested (para. 110) that the statute will need a penalties provision, otherwise the court would have to base the penalty on national law or on "principles common to all nations". As stated in paragraph 31 above, Australia believes that the starting point in considering the question of penalties must be article 15, paragraph 1, of the Covenant, which embodies the principle of *nulla poena sine lege*. This requires "clarity and certainty" in penalty provisions. Australia agrees with the view of the Working Group that recourse to national law or "principles common to all nations" may well not meet the requirements of clarity and certainty. It would, therefore, appear necessary to develop penalty provisions for the statute.

50. The Working Group recommended the inclusion of a residual provision in the statute to deal with penalties in the event that no penalty is specified in the applicable law, or where a specified penalty fell outside the range of penalties which the statute allowed the international court to impose. Australia is also of the opinion that the inclusion of a residual penalty provision which is not sufficiently detailed would not necessarily cure the problem and discharge the obligation under article 15, paragraph 1, of the Covenant. If, however, the statute contains penalty provisions, no residual provision would be required.

(c) *Ensuring due process*

51. The Working Group refers (para. 111) to article 14 of the Covenant as the primary source of international law on the question of due process without further elaboration. Australia believes, however, that there are a number of issues which need to be considered.

(i) *Review/appeal*

52. Article 14, paragraph 5, of the Covenant provides that

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

This suggests that in the statute of the court there would need to be provision for the review of conviction and sentence by an appellate tribunal, for example, a full bench of the court. The appellate bench should have the discretion to grant or refuse leave to appeal.

(ii) *Trial by jury*

53. As in other common-law countries, trial by jury is a fundamental element of Australia's legal system. Section 80 of the Constitution of the Commonwealth of

Australia guarantees a right for a person charged with an indictable offence under any law of the Commonwealth to be tried by a jury. Australia is not advocating that the statute should make provision for trial by jury. It wishes, however, to draw the attention of the Commission to the possible constitutional difficulties Australia and other countries may need to address if they are to accept the jurisdiction of an international court.

54. The problem is highlighted where international instruments create a binding obligation on States parties to criminalize certain conduct under domestic law as a serious (indictable) offence. For example, article 2 of the Convention for the Suppression of Unlawful Seizure of Aircraft requires each State party to make the offence "punishable by severe penalties". The Crimes (Aviation) Act 1991 implements Australia's obligations under the hijacking conventions. Section 13 of the Act defines hijacking, within the meaning of the above-cited Convention, as an indictable offence. A person charged with that offence, therefore, would have the right to trial by jury.

4. *Prosecution and related matters*

(a) *The system of prosecution*

55. The Working Group recommends (para. 117) an ad hoc independent prosecutorial system. Australia agrees that such a system is preferable to complainant States conducting the prosecution. Ensuring independence and impartiality in the prosecutorial system is an essential underpinning to the credibility and legitimacy of the court.

56. The Working Group's suggestion that the court should appoint the prosecutor after consultation with the States concerned is sensible in that it would preserve the independence of the prosecutorial system while giving the States concerned an opportunity to be involved. It will be necessary, however, to identify precisely which States parties should be involved in the process of consultation with the court. The exact standing of the States parties in the process of selection and appointment of the prosecutor would have to be made clear.

(b) *The initiation of a case*

57. In paragraph 120 of the report, the Working Group suggests that adopting the system of appointing an independent prosecutor would obviate the need for a preliminary hearing to test the evidence, as the court could dismiss "frivolous or unsubstantiated charges". An additional consideration is that preliminary hearings before the court could well be regarded as unnecessarily time-consuming and expensive.

58. Australia believes that the role, function and duties of a prosecutor should be regulated. Questions of ethics; a prosecutor's duty to the court; and obligations towards the defence are the types of issues that need to be addressed. The exercise of prosecutorial discretion and the criteria for the prosecution's decisions also need to be regulated. Australia agrees with the Working Group's suggestion (para. 119) that there should be scope for appeal against a prosecutor's decision not to prosecute.

59. In the absence of a permanent independent prosecutorial office, a case could only be brought before the court on complaint from a State party or the Security Council.

³ See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 21st meeting*.

Australia agrees with the view expressed by the Working Group (para. 122) that the power of complaint should extend to any State party which has accepted the court's jurisdiction with respect to the offence in question. A difficulty would arise where a State party which wished to initiate a complaint in relation to a number of offences had not accepted the jurisdiction of the court in relation to all those offences. This situation will need to be addressed.

(c) *Bringing defendants before the court*

60. The devising of arrangements to bring defendants before the court presents many difficulties which must be resolved if the court is to operate effectively. The Working Group has explored a number of these difficulties in its report. The differing constitutional requirements of States will be one of the major hurdles to be overcome.

61. Australia agrees with the view expressed by the Working Group (para. 133) in its report that the statute of the court would have to establish minimum requirements for the transfer of alleged offenders which would have to be observed by States parties. In drafting these requirements, the Working Group should draw upon existing extradition arrangements between States. The use of these arrangements as a foundation should result in a set of draft provisions that are more recognizable to States. Conceptual problems may arise, however, over the need for an alleged offender to be extradited to the court rather than to a State.

62. The Working Group (para. 135) deals with what it would regard as some of the basic elements of a request for transfer, including the existence of evidence which would have to be "prima facie sufficient to justify putting the accused on trial". Australia believes there would be difficulties in this approach. The reference to prima facie evidence would mean different things to different States. Moreover, it is not a universal standard in extradition treaties, many of which adopt a "no evidence" approach whereby the requesting State is only required to provide the requested State with a statement of the acts or omissions which are alleged against the person whose extradition is sought.

63. As well as considering how the accused should be brought before the court, Australia believes that attention should also be given to the conditions in which the accused would be held prior to trial. In this regard, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁴ should be used as the basic standard.

64. To the extent that offenders may be juveniles, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)⁵ and articles 37 and 40 of the Convention on the Rights of the Child⁶ should be used as the minimum standard.

(d) *International judicial assistance in relation to proceedings before the court*

65. Paragraphs 136 to 153 of the report usefully explore the issues relating to assistance from States in support of

the prosecution of alleged offenders before an international court. Such assistance could well be crucial to their successful prosecution. In complex cases assistance would no doubt be required from a number of countries.

66. The Working Group notes (para. 136) that assistance would be "one-way" assistance to the court rather than reciprocal assistance". The Working Group is right to point out that assistance would be "one-way". The question arises, however, whether such assistance should be directed to the court. Where mutual assistance agreements and arrangements are established between States, the purpose of the assistance sought is for the most part directed towards preparation of the prosecution case against an alleged offender. Requests for assistance, therefore, are generated by the prosecuting authorities of a requesting State. By the same token, it would be the independent prosecutor who would most likely need to call for the assistance of States in the preparation of cases to be brought before the court. A court which is to hear a case should not be involved nor seem to be involved in the preparation of the prosecution case. To maintain this separation, assistance from States should be provided directly to the prosecutor.

67. The Commission will need to consider what assistance should be provided to the legal representatives of an alleged offender to enable them to prepare a proper defence. The question of financial assistance to defendants unable to fund their defence also needs to be considered. The lack of financial means in such cases could deny a defendant proper representation. The minimum guarantees in relation to the right to legal assistance are set down in article 14, paragraph 3 (d), of the Covenant.

68. The Working Group suggests (para. 139) that there are three options in relation to international judicial assistance. Based on its assessment, the Working Group suggests that the best option for assistance, at least in the first phase of the court's operation, would be a general provision in the statute supplemented by a non-exclusive list of the types of assistance which may be sought from States parties. The possibility of a mutual assistance treaty between States parties could then be addressed at a later time. Australia accepts the reasoning behind this assessment. It would stress, however, the fundamental requirement of establishing an effective assistance regime if successful prosecutions are to take place.

(e) *Implementation of sentences*

69. Australia regards the implementation of sentences as one of the most difficult questions to be addressed. There are a number of issues to be taken into consideration.

(i) *Humanitarian considerations*

70. First, a term of imprisonment should not be served under conditions less favourable than those provided in the United Nations Standard Minimum Rules for the Treatment of Prisoners.⁷ Secondly, even where the imprisonment of an offender is implemented in a State

⁴ General Assembly resolution 43/173, annex.

⁵ General Assembly resolution 40/33, annex.

⁶ General Assembly resolution 44/25, annex.

⁷ See United Nations, *First United Nations Congress on the Prevention of Crime and Treatment of Offenders, Geneva, 22 August-3 September 1955: Report prepared by the Secretariat* (Sales No. 1956.IV.4), annex I, pp. 67-73.

which complies with those standards, the differences in language, climate and culture may still contribute to difficult conditions of imprisonment.

(ii) States

71. There needs to be flexibility in determining which State is to take responsibility for carrying out the sentence. The extent of this responsibility will need to be established, including such matters as the cost of imprisonment.

(iii) Transfer of prisoner to State of nationality

72. A number of countries have concluded mutual repatriation agreements in relation to citizens of one party convicted and sentenced in the courts of the other. Australia suggests that consideration should be given to including a provision in the draft statute allowing the State of which a convicted offender is a national to implement the sentence, if it so wishes. There are two qualifications to that view. First, the court should be satisfied that the State has a facility which meets the United Nations Standard Minimum Rules for the Treatment of Prisoners. Secondly, consideration needs to be given to whether the consent of the prisoner should be a prerequisite to granting custody to the State of which he or she is a national.

73. If transfer of prisoners is to be permitted, there needs to be provisions dealing with proceedings to determine applications for transfers; lawful custody of a prisoner in transit; transfer in the custody of an escort; and so on. Guidance on the handling of the transfer of prisoners might be obtained from the Model Agreement on the Transfer of Prisoners⁸ and the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.⁹

(iv) Review of sentences

74. Australia agrees with the view expressed by the Working Group (para. 154) that consideration should be given to providing for applications to adjust the penalty. A system of parole, reduction of sentences and remission would need to be considered.

(f) *Relationship of the court to the existing extradition system*

75. The Working Group correctly raises the issue of the relationship between treaties which adopt the *aut dedere aut judicare* approach and the jurisdiction of an international court (para. 160).

76. It is possible that a State party to the statute which elects to have recourse to the jurisdiction of an international court may be regarded as being in breach of its obligation to prosecute under another treaty, where a State to whom extradition has been refused under that treaty does not recognize the jurisdiction of an international court.

77. Australia supports the suggestion (para. 161) that the system for handing over the accused should be complementary to the existing "try-or-extradite" regime. To achieve maximum flexibility and facilitate the widest possible support for the court, States parties which have

accepted the jurisdiction of the court in respect of a given offence should have the option of surrendering the accused to an international court as a third alternative. Imposing on States that are willing to accept the jurisdiction of the court an obligation to hand over the accused for trial may deter some States from becoming parties to the statute.

78. In the light of the particular problems arising from the existence of entirely separate treaty regimes, Australia believes that the issue of a State party to the statute receiving multiple requests for the extradition of an alleged offender needs detailed consideration.

Belarus

[Original: Russian]
[19 May 1993]

GENERAL COMMENTS

1. The competent bodies of the Republic of Belarus look upon the idea of the establishment of an international criminal court as an extremely promising one.

2. Based on an analysis of the various categories of crimes and of the various components of such crimes, the competent bodies of the Republic of Belarus support the view that different models of international criminal jurisdiction are needed for different purposes. In their opinion, the need for an international criminal court may vary depending on the situation; specifically, it may be either the only possible means or merely an additional means of conducting a criminal trial. They consider that the international criminal court should be established mainly to administer justice in respect of crimes of an international character.

3. In view of the fact that a highly developed body of substantive international criminal law is already in existence, the establishment of an international criminal court ought not to be closely bound up with the adoption of the draft Code of Crimes against the Peace and Security of Mankind, should that be a protracted process. In such a case, the crimes within the competence of the court might initially be those defined by international treaties in force. Once adopted, the Code could become one of the international instruments defining crimes within the competence of the international criminal court. It would be logical to link participation in the Code strictly with participation in the statute of the international criminal court. The converse might initially not be so strict, although it is to be hoped that the international community will arrive in the long term at the position of regarding the Code as mandatory for all States without exception.

4. In the opinion of the Republic of Belarus the international criminal court should initially have mixed competence in relation to international crimes. The crimes within the exclusive competence of the international criminal court should initially include aggression, the threat of aggression, systematic and mass violations of human rights, genocide and apartheid. Being a party to the statute of the court should automatically entail recognition of its exclusive competence in relation to these international crimes. In addition, provision could be made for

⁸ General Assembly resolution 45/116, annex.

⁹ General Assembly resolution 45/119, annex.

individual States to widen the scope of the exclusive competence of the court by means of declarations or agreements with the court. Other international crimes could temporarily fall under the competing competence of the international criminal court and national courts. They would not thereby lose their characteristics as international crimes, although once the court had been in existence for a sufficient time the categorization of an act as an international crime could be linked to its inclusion within the exclusive competence of the international criminal court. With respect to crimes of an international character (general criminal offences with an international element which have serious consequences for international relations) only optional jurisdiction might be established. In that case the international criminal court might merely be an alternative to the existing system of universal jurisdiction.

5. The jurisdiction *ratione personae* of the international criminal court would have to be universal, that is to say it would have to extend to the whole range of persons with respect to whom its jurisdiction could be legally established (for the transfer of such persons by a State party to the statute, their extradition by a State that is not a party, and their arrest as a result of measures to maintain international peace and security taken in accordance with the Charter of the United Nations). Accordingly, no agreement to accept the jurisdiction of the court would be required. This should apply to crimes within the exclusive competence of the international criminal court. In relation to crimes that are not within the compulsory jurisdiction of the court, there should be an optional element, that is to say jurisdiction should depend on the agreement of the State (or several States) competent by virtue of existing national and international law. Failure to comply with the provisions on the compulsory jurisdiction of the international criminal court should be regarded as a threat to international peace and security and should entail the adoption by the United Nations Security Council of appropriate measures following the submission to it of the report of the international investigative body.

6. Organization of the other links in international criminal justice, in the first instance an international investigatory body, is of great importance to the establishment of an international criminal court. It should be emphasized that the need for such a body is long overdue—not only in connection with the establishment of the court. The Republic of Belarus is of the opinion that the establishment of an independent prosecutorial body would be inappropriate in the initial phase of operation of the international criminal court, but what could be discussed would be an independent prosecutor designated by the court for each specific case from a previously compiled list of candidates. The prosecutor's functions should not include the investigation, collection and production of evidence to the court, as that is the role of the investigatory body. The prosecutor should prepare the formal accusation and appear as the prosecutor at the trial, relying in the first instance on the information gathered by the investigatory body. Only the court has the power to dismiss unsubstantiated charges in the course of the hearing.

7. The view that the statute of the international criminal court should take the form of an international treaty is worthy of support. The United Nations could actively

assist with its preparation and adoption. Close interaction with the United Nations, which will require fairly broad participation of States in the statute of the court, could have a bearing on the effectiveness of the international criminal court. Obviously, the basic interaction between the international criminal court and the United Nations will take the form of contact between the Security Council and the court on matters concerning the transfer to the latter of cases involving aggression or the threat of aggression, implementation of the court's decisions concerning the appearance of the accused, and the execution of judgments. The link between the court and the United Nations, in particular the Security Council, might initially be an informal one of an ad hoc nature, and matters of an administrative and budgetary order could be settled on the basis of a special agreement between them.

8. In the opinion of the Republic of Belarus, the circle of those entitled to appeal to the court would have to be fairly broad from its very inception and be continuously extended. States not parties to the statute of the court should be allowed to appeal to it in cases where the accused is under their jurisdiction, provided that they recognize the statute to be mandatory for the case in question. The United Nations Security Council should certainly also have the right to appeal to the court.

9. The international criminal court would have to be a permanent body, which presupposes the existence of established machinery and a permanent membership. What might be discussed would be a system whereby each State party to the statute of the court would nominate, for a prescribed term, a qualified specialist to act as a judge. The judges would, in turn, elect the president of the court and, possibly, the "bureau" of the court. When the court was required to act, the "bureau" would choose five to seven judges to constitute the court taking into account the prescribed criteria. It is to be hoped that, as the number of cases increased, the court would in fact be converted into a permanently functioning international body.

10. As regards the law applicable to the international criminal court, the applicable procedural law (standards concerning the rights of the accused and procedure) should be established along with the court itself, while the applicable substantive law would require the inclusion of an exhaustive list of specific international treaties defining the crimes subject to the court's jurisdiction. The general rules of applicable law should necessarily include a reference to the principal sources (treaty-based and customary) and could also refer to secondary sources, which include national law, the application of which by the court should be sanctioned by an international legal standard.

SPECIFIC COMMENTS

11. Ways of solving the question of the regime of jurisdiction *ratione personae* with respect to crimes within the optional competence of the international criminal court would obviously have to be worked out before the adoption of the Code. The options (see paragraph 66) should be based on provisions concerning the jurisdiction of existing international treaties. Belarus has doubts regarding the use (para. 109) of the term "secondary law" in relation to resolutions of organs of international organizations. The basis for their inclusion in applicable law should be

that they are additional sources of international law facilitating the application of international treaties and custom. The proposal (para. 110) concerning the definition of the penalties to be imposed may be regarded as a temporary solution pending the adoption of the draft Code of Crimes against the Peace and Security of Mankind. It must be emphasized that, in relation to crimes within the competence of the international criminal court (paras. 129 to 135), the handing over of the accused should be made mandatory.

12. Consideration may be given to the question of a reservation concerning non-use of the death penalty in the case of the handing over of the accused by a State which totally rejects the use of such a punishment. Mention may be made (para. 139) that the court's statute could include a general provision supplemented by a non-exclusive list of matters with respect to which judicial assistance could be sought, with an indication of the procedure for executing requests for assistance. In the long term a full-scale treaty on judicial assistance could be drafted as an annex to the statute of the international criminal court. How the implementation of sentences is organized will be largely dependent on the number of convictions handed down by the court. In the first phase, provision will evidently have to be made for the sentence to be served in the complainant State, and this must be subject to monitoring by the court (by a representative of the "bureau").

13. The Republic of Belarus finds the international criminal court, as outlined in the report, to be a "minimalist", rather flexible concept. Understatement of the characteristics of international criminal jurisprudence envisaged in the report may lead to the establishment of an ineffective mechanism, whereas what the international community needs, as practice shows, is, on the contrary, a really effective mechanism.

Bulgaria

[Original: English]
[25 August 1993]

1. The Government of the Republic of Bulgaria supports the proposal for the establishment of an international criminal tribunal with jurisdiction over the most serious violations of international humanitarian law and shares the view of the Working Group that the establishment of such a court is feasible in practice.

2. The Bulgarian Government is of the opinion that it is highly pertinent for the international criminal tribunal to be established under the auspices of the United Nations by the conclusion of a multilateral international treaty, open to international intergovernmental organizations as well.

3. With a view to giving a universal character to such a court and for making it available to States at any time, as well as for the purpose of enhancing the authority of this legal institution and the continuity of its jurisprudence, the Republic of Bulgaria would prefer the international criminal tribunal to function on a permanent basis. However, bearing in mind current realities, Bulgaria would support the less ambitious kind of judicial body, set up ad hoc, as long as an effective mechanism is devised for

referring a matter to the court and convening it in a reasonably short period of time whenever the need arises.

4. It is the view of the Bulgarian Government that it would be best if the jurisdiction of an international court competent to prosecute those responsible for serious violations of international humanitarian law (first and foremost against the peace and security of mankind) was made compulsory for all States Members of the United Nations, or at least for the States parties to the court's statute. Before deciding finally on optional jurisdiction, everything possible should be done, even at the price of adopting compromise approaches, to find a solution based on some form of compulsory jurisdiction. The following could be considered as examples of such approaches:

(a) "*Selective*" jurisdiction: States acceding to the statute are obliged to recognize the jurisdiction of the court with respect to at least one of the categories of violations of international humanitarian law for which it makes provision;

(b) "*Delayed*" jurisdiction: States are obliged to recognize the jurisdiction of the court within a certain period of time (three years, five years, or other) from the entry into force of the statute in their respect;

(c) *Optional jurisdiction under the "contract-out" system*: States on acceding to the statute may make a declaration that they do not recognize the jurisdiction of the court with respect to all or some of the categories of violations.

The above approaches could also be used in combination.

5. The parallel drawn with ICJ is not very felicitous, since the Statute of the latter is part of the Charter of the United Nations, and on becoming a Member of the United Nations each State becomes a party to the Statute of ICJ, whether it wishes to or not. In the case of the international criminal tribunal, however, accession to its constituent instrument is a matter of absolutely free sovereign will and is not dependent on such vital State interests as may be relevant to membership in the United Nations.

6. Moreover, ICJ already represents an earlier stage in the development of the international legal process, and it is hardly necessary to replicate its experience after the positive experience with the system of the Convention on the Protection of Human Rights and Fundamental Freedoms, and other regional systems for the protection of human rights.

7. The idea of this proposed legal institution becoming some sort of court of appeal which will review sentences imposed by a national court is controversial. From the point of view of the effectiveness of the court, as well as of the sovereign interests of States, concurrent jurisdiction is the most acceptable. It will enable the States which are not parties to its statute to recognize its jurisdiction.

8. The Republic of Bulgaria shares the view that the Code of Crimes against the Peace and Security of Mankind should be considered separately from the proposal for the establishment of an international criminal tribunal. This would make it possible for States which do not wish to accede to the Code to join the statute of the court, and

vice versa, and this would eventually lead to the strengthening of the international rule of law. At the same time, certain categories of international violations which are not included in the Code should be defined again in the statute of the court so that it could deal with them. In this way the principle of *nullum crimen sine lege* will effectively be observed, since not all States are parties to the same international conventions and therefore it will not be possible to apply the same legal standards as far as they or their nationals are concerned, because that would be a departure from the principle of equality in criminal proceedings.

9. For the same reason the domestic laws of States should not serve even indirectly as a basis for jurisdiction *ratione materiae*, since the crimes and their respective penalties have been defined in a different way in those laws; this would again be a serious violation of the principle of equality of all before the court and the law, regardless of the nationality of the defendants. For the principle of equality to be guaranteed during the trial the respective penalties must be defined accurately and clearly in the statute, otherwise the principle of *nulla poena sine lege* will not be observed. In this case too there can be no reference to the domestic laws of States, since there are considerable differences in this respect as well.

10. The mechanism proposed for the establishment of the court needs some improvement, for the following reasons:

(a) On one hand, it does not seem right for a given State which is a litigant in a trial to appoint the prosecutor in the respective case, because that State is not impartial and this would affect the prosecutor's independence of judgement. However, in view of the fact that the prosecutor should act as an independent organ, as should the court itself, the idea of the court appointing the prosecutor in a given case is not a very good one either, since it would not be possible to lodge an effective appeal against the prosecutor's actions. The possibility of establishing an independent office of the prosecutor, which would appoint the prosecutor in a given case in accordance with a set procedure, could be provided for under the court's statute. This will allow for appeals against the actions of the prosecutor before a panel of the court which will not thereafter have the right to try the case;

(b) The States concerned should be entitled to have their "own" national judges on the panel which will hear the case. In this connection the Commission could usefully draw upon the experience of the Convention on the Protection of Human Rights and Fundamental Freedoms, as well as on the practice of ICJ. Thus, the interests of the State would be guaranteed with maximum objectivity and impartiality on the part of the panel.

11. As far as the financial aspects of the establishment of the court are concerned, the Bulgarian Government believes that, in view of the universal importance of the functions which this court is supposed to perform, its financing should be provided by the United Nations, be it constituted ad hoc or as a permanent court, and established by international treaty or by any other means.

Denmark
[See *Nordic countries*]

Finland
[See *Nordic countries*]

Iceland
[See *Nordic countries*]

Italy

[Original: English]
[3 May 1993]

1. In the opinion of the Italian Government, the court should have general jurisdiction and be universal in character. In fact, as in any domestic legal system, the criminal jurisdiction would not be credible if it was not applicable to all citizens; likewise, the jurisdiction of an international court would lose credibility if its application differed according to the region or some other type of grouping. Italy, therefore, is not in favour of the establishment of various regional tribunals, which would be unsuited to guaranteeing observance of the fundamental principle of equality of treatment of the accused before the court.

2. As for the selection of judges, due account should be taken, in each case, of the characteristics of the crimes to be judged, in order to ensure that the specific circumstances associated with the facts relevant to the proceedings are better understood. The panel of judges should therefore include persons who are in the position to understand and evaluate such characteristics.

3. The convention establishing the court should grant all States (including, as the case may be, non-contracting States) the right to designate judges with the requisite qualifications of competence and impartiality to sit on the court for the various cases to be examined. Moreover, the general assembly of the designated judges (or the assembly of contracting States) should elect the president of the court and the "bureau", who will select the judges to constitute the court from the general list of names drawn up in accordance with the principles described above, and bearing in mind the model provided by the Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe (CSCE). At the same time, the seat of the judicial body must be located in a place which gives the widest possible guarantees of independence and freedom of judgement. This location could be different from the official seat of the court, which could best be established at one of the seats of the United Nations, in order to facilitate as far as possible the activity of the new institution in relation to the rules on privileges and immunities.

4. The statute of the court should be independent from the Code of Crimes against the Peace and Security of Mankind, whose provisions may in fact include crimes that are not subject to the jurisdiction of the international court. The Code must certainly be defined in the most appropriate form (either as a convention or another type of instrument) and, once defined, it will provide substantial

guidance for the court. The statute of the court must none the less remain independent from the Code.

5. The structure of the court must include, first, a prosecuting authority competent to examine each case on the basis of the evidence collected following the *notitiae criminis* or any other elements that may be given to the court; secondly, a body to judge the case; and, thirdly, an appeal body.

6. On the jurisdiction of the court, it is the view of the Italian Government that such jurisdiction must be extended to all crimes listed in conventions of a universal character. For example, the war crimes, crimes against peace or crimes against mankind considered by the Geneva Conventions for the protection of war victims and Protocols thereto, the Convention on the Prevention and Punishment of the Crime of Genocide, the conventions of the United Nations and of the specialized agencies against terrorism, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the International Convention against the Taking of Hostages, and the like. The list should remain open in order to allow reference to other conventions as they gradually become more universally accepted. When doubts arise in this respect, the court should be authorized to issue a "preliminary ruling" which could be linked to the acceptance of jurisdiction. In any event, the intervention of the Security Council should be excluded.

7. Aggression is a different case. Here it would be impossible to preclude the intervention of the Security Council for the purpose of establishing whether or not an act of aggression had taken place in a given situation. But, once that had been established, the exercise of the court's jurisdiction must be kept free from any political influence.

8. The jurisdiction of the court must apply to individuals. The fact that an individual is vested with the power of a State organ must be declared irrelevant and it must be stated that the rules of immunity do not apply in such a case. On the contrary, the State as such must not be subject to the jurisdiction of the court. It may be admissible for the jurisdiction of the court *ratione loci* (i.e. relating to events which had occurred within the territory of a State) to be the subject of a possible declaration of acceptance. Conversely, no limits could be admissible as regards the jurisdiction *ratione personae* or *ratione materiae*, except those for which provision is made in the convention establishing the court. Furthermore, concurrent jurisdiction of the court with national jurisdiction, if the latter is in fact exercised, may be acceptable. However, the rules of the convention establishing the court should to a certain extent tilt in favour of the court's jurisdiction. The faculty must also be granted to the Security Council to disqualify a national jurisdiction, even if only temporarily, whenever it deems that that jurisdiction does not possess the impartiality which is universally considered necessary for the conduct of the proceedings.

9. All the internationally recognized provisions concerning the inapplicability of grounds for exceptions to criminal responsibility, such as acting on the order of a superior, lack of knowledge of the act by a subordinate, and so forth, must be reproduced in the statute. To this end, it is suggested that in drafting the statute of the court

the content of part one of the draft Code, which considers the general principles of criminal responsibility and punishment, should largely be used as a model.

10. On the question of trials *in absentia*, Italy has some doubts about the need to accept proceedings of this type. In fact, while many arguments may be adduced both in favour of and against the admissibility of trials *in absentia*, Italy tends to share the view that their exclusion is more consistent with the idea of credible, rather than merely declamatory, justice. The statute of the court must also accurately specify the procedural guarantees provided in favour of the accused, on the basis of the existing rules of international law.

11. Finally, the court must impose penalties and determine where the sentences will be executed. At the same time, if the court is given authority to decide on compensation for the victims of crimes and the victim's right to compensation is recognized by the court, other mechanisms (resulting, for example, from the establishment of special funds) may also come into play to resolve issues such as the amount of compensation, the identification of the debtor and the implementation of the court's decision. The execution of the sentences of the court must take place under United Nations control in order to prevent the granting of undue amnesties or pardons.

Mexico

[Original: Spanish]
[5 May 1993]

1. The draft under consideration constitutes a distinctly novel initiative. The international community does not yet have experience in the establishment of permanent international criminal courts. The only existing precedents, the Tokyo and Nürnberg Tribunals, were the product of special circumstances, having been established by Powers which had emerged victorious from armed conflicts of great magnitude; they cannot, therefore, serve as a precedent for a notion such as the one presently under consideration.

2. In the light of recent experience with regard to the establishment of a war crimes tribunal for the former Yugoslavia, and the role which the United Nations plays in the maintenance of international peace and security, some countries have proposed the establishment of an international criminal court within the framework of, and closely linked to, the Organization. The absence of provisions in the Charter of the United Nations regarding the establishment of bodies of this type, and the fact that the Organization is based on the principles of the legal equality of States, self-determination of peoples and non-intervention in the internal affairs of States, prompts the suggestion that the establishment of an international criminal court is feasible only with the express consent of States, as embodied in an international treaty, and only to the extent to which States are willing to be bound by its provisions.

3. Until now, it has been an internationally accepted general rule that the criminal courts of States are the normal and natural bodies with jurisdiction to try individuals who commit crimes. The rendering and administration of

justice within its territory is a basic function of a State and an obligation from which it cannot escape. Transferring that obligation to a supranational body may not only have direct effects in the area of territorial sovereignty, but may also conflict with the constitutional basis of some States.

4. The tremendous differences that exist among the various penal systems constitute a further obstacle to the notion of an international jurisdiction. Not all systems agree, for example, on such concepts as capacity, penalties, legality, and so on, as is clear from the discussions held in the various forums in which the notion has been raised.

5. In its report, the Working Group, recognizing the obstacles confronting an initiative of such magnitude, has proposed the establishment, by a statute in the form of a treaty, of an ad hoc mechanism, having optional jurisdiction, in the first instance only, to be exercised in the first phase of its operations only over private persons (without prejudice to State responsibility, when appropriate).

6. Despite the flexibility of the mechanism proposed by the Working Group, the close link that exists between the proposed international criminal court and the draft Code of Crimes against the Peace and Security of Mankind—which, if adopted, will be applied and interpreted by that court—adds a number of difficulties to those that already exist; it requires the study of such questions as the principles of non-retroactivity and of legality of the crime, penalties, prescription of the public right of action, and so on, which in the terms proposed, conflict in almost every case with the principles on which the various penal systems in the world are based. For example, the draft Code seeks to establish the non-applicability of statutory limitations to international crimes, whereas the majority of national codes have so far provided for such limitations; it also envisages referring to other bodies of law in connection with such sensitive issues as penalties, when, in fact, penalties constitute an essential element of these types of norms.

7. Furthermore, some questions which play an important role in the decision to establish an international criminal court—questions relating to the establishment of an international prison system which can guarantee the implementation of the penalties imposed by the court or a similar mechanism; verification of the implementation of such penalties by the judicial body which imposes them; the handing over of alleged perpetrators of international crimes by the States which have custody of them; and the establishment of a prosecutorial organ responsible for instituting criminal proceedings—have yet to be clarified.

8. In the specific case of Mexico, acceptance of an international criminal jurisdiction would appear extremely doubtful in the light of its domestic legal system, under which imposition of penalties is the exclusive prerogative of the judicial authorities, and therefore of the Mexican courts (arts. 21, 103 and 104 of the Political Constitution).

9. While the State's monopoly on criminal proceedings could be compatible with the notion of optional and concurrent jurisdiction, the nature of the jurisdictional mechanism proposed could lead to its being connected with a special court; this would conflict with the provisions of articles 13 and 14 of the Constitution.

10. The exceptions envisaged by the draft to the principle *non bis in idem*, which permit double jeopardy in circumstances that are by no means clear, and the international nature of the court, which makes it necessary to rely on general principles of law and to consider referring to other bodies of legislation in respect of situations not provided for in the statute (as the Working Group acknowledges in its report), conflict with the guarantees of legal safeguards afforded by Mexico's system of law, especially criminal law, in which norms are strictly applied and analogies are tightly restricted.

11. Moreover, the fact that a number of international instruments do not envisage the penalties to be imposed for crimes of an international character, but simply provide that States have an obligation to prevent and suppress them, indicates that the norms have not been properly incorporated. In order for a penal norm to meet constitutional requirements, it must consist of a rule (a description of the offence) and must envisage a punishment. According to the principle *nullum crimen sine lege, nulla poena sine lege*, which is the basis of Mexico's legal system, absence of a punishment constitutes an impediment to the application of the norm (no agreement has been reached on the penalties to be included in the draft Code, although it has been decided that their inclusion is absolutely necessary).

12. In its report, the Working Group supports the view that the court should have jurisdiction over crimes committed prior to its establishment, provided that the offences in question are crimes of an international character defined by treaties in force at the time when they were committed. That argument, in the Group's opinion, is rooted in the notion that a retrospective change in proceedings in no way affects the principle of non-retroactivity. Mexico considers such an approach to be unreasonable. Aside from the fact that article 14 of the Constitution provides that no person shall be deprived of rights without a trial held before a pre-existing court, in accordance with laws enacted prior to the commission of the offence, the existence of an international treaty which envisages some crime of this type is not in itself sufficient to confer on the court automatic jurisdiction to try and punish the crime, especially if such an instrument recognizes that the national courts of States have the power and the obligation to suppress such offences.

13. One of the more sensitive issues relates to the handing over of alleged perpetrators to the international court. Under the assumption that an international court is not a foreign court, the Working Group favours the immediate handing over of the accused, without need for an extradition proceeding, which is questionable. While it is true that an international court would not be a foreign court, it would not be a domestic court, either; for purposes of handing over an accused person, it would have to be equated with a foreign court and, accordingly, it would be necessary for the competent national authorities in an extradition proceeding to guarantee that the accused was able fully to exercise his right.

14. New difficulties emerge in this connection. In the first place, in accordance with practice, the handing over of citizens is subject to the discretion of the federal executive authorities; secondly, the Mexican Act on International Extradition (which would be the applicable law, initially at least), establishes specific requirements for ac-

ceding to an extradition request (*inter alia* arts. 7-10), which conflict with the principles on which an international court would be based, one example being the rule that, where the right of action in respect of the offence in question is time-barred under Mexican criminal law, the extradition request is inadmissible.

15. There are still a number of ambiguities in the report of the Working Group which would benefit from more thorough analysis, *inter alia*, those relating to the establishment of a prosecutor's office and to the prison system. However, since the Working Group has given them only preliminary consideration, Mexico will refrain from commenting on them until such time as further information is available.

16. Currently, the Mexican legal system is incompatible with the establishment of an international criminal jurisdiction. Nevertheless, it is suggested that, in the discussion of the topic, careful consideration should be given to the following:

(a) The nature of, and the close link between, the rendering of criminal justice and the exercise of State sovereignty. Whatever jurisdictional mechanism is finally adopted should reflect maximum respect for the territorial jurisdiction of the judicial organs of individual States, and should have the latter's express consent;

(b) The need to guarantee the total independence of the jurisdictional body, if and when it is established, and the impartiality of its judges. Several States have expressed support for a special agreement linking the court to the United Nations system. Although that proposal is logical, in view of the forum in which the concept has been developed, the types of crimes over which the court would have jurisdiction (aggression, threat of aggression, systematic human rights violations, and so on) make it especially vulnerable to political fluctuations. A court whose decisions in respect of specific crimes could be overruled by the Security Council might diminish confidence in the international community;

(c) The need to ensure that the statute which governs the functioning of the court is drafted in such a way as to envisage specifically each of the cases in which penal norms would be applied, so as to leave little or no room for referral and the application of other additional legislation;

(d) The fact that rules and punishments constitute basic elements of penal norms which is, moreover, expressed in the universally accepted principle *nullum crimen sine lege, nulla poena sine lege*, must be reflected in the statute of any court which applies the law. The characterization of the offence and the applicable penalty should not be omitted from either the international instruments which define crimes of that nature, or the statute of the court; in the latter case, the principle of legality of the crime requires their inclusion;

(e) The retroactive application of law, the question of whether statutory limitations should, in fact, apply to crimes deemed to be of an international character, as has been the case up to now under the legal systems of many countries, and the notion of permitting double jeopardy are some of the sensitive issues which must be clarified before further steps are taken towards the establishment of the court. A jurisdictional body should, in principle, try

only offences committed following its establishment, and should apply the laws that were in force at the time when the offence was committed;

(f) The definition of the arrangements for the handing over of alleged perpetrators to the court. Respect for the right of all persons to a hearing, to due process and to legal safeguards requires the proper observance of extradition treaties and their recognition as the sole mechanism for handing over those accused of committing an offence to foreign courts.

17. Lastly, until such time as the international conditions required for the establishment of an international criminal jurisdiction are generated, and further progress is made in the progressive development of the law of nations, emphasis should be given to strengthening both national institutions and international judicial assistance to States, as the sole viable alternative means for States to combat crime.

Nordic countries

[Original: English]
[27 April 1993]

1. The Nordic countries welcome resolution 47/33, and believe that the Commission should consider the preparation of the draft statute as a matter of priority during its forthcoming session.

2. The ideal outcome would be for the Commission to draft a statute which could be submitted to the forty-eighth session of the General Assembly. In order to make this possible, it should consider whether certain questions of detail could be clarified at a later stage, for example, during the Commission's second reading of the draft statute. One such question, for example, would be the composition of the court. Another would be the implementation of sentences, which should be given closer consideration.

3. However, it may seem expedient and necessary for the Commission to devote more attention to procedural questions than to substantive matters such as describing offences and determining sentences. A number of detailed proposals for procedural provisions have already been forwarded to the Security Council under resolution 808 (1993) of 22 February 1993.

4. The Nordic countries would also emphasize that the question of an international criminal court must be viewed separately from that of a Code of Crimes against the Peace and Security of Mankind. Many basic international crimes have already been covered in existing and generally accepted treaty law, and the effective implementation, *inter alia*, through the establishment of an international criminal court should not await the finalization of the draft Code, a project that may take considerably more time than drafting a statute for the court.

5. Although the Nordic countries support the idea of establishing a permanent court through an international convention, they are at the same time of the view that the establishment of such a court should be based on an evolutionary approach. This implies, for example, that the court, at least in its initial phase and until a clear idea is gained of how much it would be used, should not be a full-

time body, but rather an established structure which can be called into operation when required.

6. The suggestion in the Working Group's report that by becoming a party to the statute a State would only accept certain administrative obligations is endorsed. The States parties should accept the court's jurisdiction by making a declaration to this effect, analogous to acceptance of the compulsory jurisdiction of ICJ. States that are not parties to the statute should, in conformity with the two-step process described in the report (para. 52), also be given an opportunity to declare their acceptance of the court's jurisdiction on an ad hoc basis.

7. As regards the jurisdiction *ratione materiae* of the court, this should be based on international conventions, such as the Geneva Conventions of 12 August 1949 and the Protocols thereto and a prospective code of crimes, rather than on national legislation. The use of national legislation could pose certain problems, particularly in a long-term perspective, for example, as regards which acts are defined as offences in the legislation of the various countries, descriptions of offences, determination of sentences, and the like.

8. The offences within the jurisdiction of the court should be limited to serious crimes against mankind, such as war crimes, be they committed by high military commanders or by soldiers on the battlefield. However, there is a great need for a more precise definition of war crimes, as well as of the concept of a "serious offence".

9. As regards the jurisdiction *ratione personae* of the court, the consent of the State of which the accused is a national should not be required. Nor should the consent of the State where the offence was committed be required unless the perpetrator is under the jurisdiction of that State. Generally speaking, the jurisdiction of the court should be very wide; if the consent of the various States involved is required, this could easily impair the effectiveness of such a court.

10. Reference should also be made to Norway's statement to the Sixth Committee on behalf of the Nordic countries during the forty-seventh session of the General Assembly.¹

Norway

[See *Nordic countries*]

Panama

[Original: Spanish]
[14 July 1993]

1. The Government of Panama would like to see a uniform and equitable system of justice in the world, which would be accessible to all States and would severely punish acts that constitute international crimes detrimental to the international community, as well as a mechanism permitting States to claim reparation for the consequences of such acts, in order to guarantee the continued existence of humankind and of civilization. The Government of Pana-

ma therefore supports the establishment of a permanent international criminal judicial body with compulsory and exclusive jurisdiction.

2. The legal framework on which the international criminal jurisdiction is based should take the form of a treaty which should be ratified by States wishing to submit to its jurisdiction. The court's jurisdiction should be compulsory, regardless of the nationality of the accused, with respect to all crimes defined in the Code of Crimes against the Peace and Security of Mankind and in other international agreements, in accordance with the principle *nullum crimen sine lege*.

3. The Government of Panama considers that one of the most serious offences which should be covered by the Code are attacks on staff members of the United Nations, Permanent Missions or their representatives, and troops or other personnel whom Member States place at the disposal of the Organization.

4. The procedure to be followed in such cases should be set forth in the treaty establishing the court, in order to guarantee the principle of due process, and the applicable penalties could be defined in the draft Code in order to safeguard the principle *nulla poena sine lege*.

5. The Government of Panama supports the establishment of an international detention centre for the detention of those found guilty of international crimes. The operation of this centre should be governed by the provisions of the treaty or of a special agreement on the matter. In many cases, States Members of the Organization lack adequate infrastructure and security mechanisms for the detention of such criminals.

6. Notwithstanding the foregoing, Panama considers that the question of the Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal court are closely linked and cannot be dealt with separately. It is therefore of the view that the adoption of a code without adequate means for its implementation would render it toothless. Similarly, a court without a code would be meaningless, since it would lack objective jurisdiction. The two projects are thus closely related.

7. The ratification by States of the treaty establishing the court should imply *ipso facto* acceptance of the Code, while leaving open the possibility that States parties to the treaty could apply any other relevant agreement or statute in force on the matter which is mentioned in the treaty.

Spain

[Original: Spanish]
[19 May 1993]

1. The Spanish Government is firmly in favour of the establishment of an international court with general jurisdiction to punish international crimes. It takes the view that such a court can make good the consequences of international crimes and also believes that its mere existence will unquestionably be an important deterrent. It therefore endorses the main ideas in the Working Group's report, and particularly the keynotes of prudence, flexibility and a gradual approach.

¹ *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 21st meeting, paras. 4-19.*

2. The most appropriate legal basis for establishing the court is a treaty open to universal participation, negotiated and concluded in the framework of the United Nations. This would make the new court highly representative and impart to it the political and moral authority of the United Nations.

3. Initially, at least, the criminal court should not be a standing full-time body. It would seem preferable, in the beginning, for the statute simply to establish a straightforward, streamlined and inexpensive mechanism for the administration of justice in each specific case, as required. However, once the new court's activities have been assessed in the light of reality, a step could be taken towards making it a standing full-time body.

4. In the first phase, at least, the new court's jurisdiction should not be compulsory. This means that a State's acceptance of the jurisdiction of the court would depend on an ad hoc document, different and separate from that State's expression of consent to be bound by a treaty.

5. As to jurisdiction *ratione personae*, initially the court should only have jurisdiction to punish international crimes committed by individuals. Punishment for international crimes perpetrated by States involves highly complex legal and political problems and the question of assigning this function to the court should be left for later.

6. As to jurisdiction *ratione materiae*, the need to observe the principle *nullum crimen sine lege* means that the only international crimes that can be punished are those regarded as such by general international law at the time they are committed. The actual substance of international law in this matter would be determined by those conventions and treaties that unquestionably express the *opinio juris* of the international community.

Sweden

[See *Nordic countries*]

United States of America

[Original: English]
[13 May 1993]

Introduction

1. The Government of the United States of America appreciates the opportunity to submit written comments on the report of the Working Group. Along with other States, it has made clear during the forty-seventh session of the General Assembly¹ that the request to begin work on the draft statute is not to be viewed as an endorsement of an international criminal court. Rather, in view of the significance of this matter and the importance of ensuring that such a proposal would best advance the important ideals and objectives which a permanent court might serve, the task ahead is further to consider, and find sound and effective solutions to, the difficult questions involved.

2. The following comments are accordingly not intended as a comprehensive commentary on the Working Group's report. Rather, they present the views of the United States on some of the more important initial questions which have so far been identified. These views are presented without prejudice to any further submissions on these and other aspects of the report which the United States may subsequently provide. Moreover, the United States wishes to emphasize that its silence on other aspects of the report should not be viewed as an endorsement.

General approach

3. In requesting the Commission to undertake this project, the General Assembly also requested it to

... [begin] with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee... taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States... and to submit a progress report to the General Assembly at its forty-eighth session.

It is noteworthy in this regard that the General Assembly requests the Commission to submit a progress report.

4. During consideration of this matter at the last session of the General Assembly, the United States indicated that it welcomed the report as a significant contribution to the discussion of this very important subject. In its view, the report provided very useful analysis of many of the complex issues associated with the proposal to establish an international criminal court. In particular, the basic approach advocated in the report (paras. 39-43), namely that the court should be a "flexible and supplementary facility" for States parties to its statute and that it should not have compulsory or exclusive jurisdiction, strikes a proper and realistic balance between the many competing interests at stake. The report helped focus the attention of Member States on these issues and others identified during the course of the discussions in the Sixth Committee.

5. The United States hopes that the Commission will re-establish its Working Group and continue its useful work by providing detailed analysis of the issues relating to the establishment of an international criminal court, including appropriate options. In this respect, it encourages the Commission to seek the views of the General Assembly in order to prepare draft articles for the establishment of a tribunal which will be capable of attracting the widest possible support.

6. It is noted that the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind has proposed in his eleventh report² a draft statute for an international criminal court, which it will be studying carefully before making any detailed comments. The United States welcomes the Special Rapporteur's proposal as a significant contribution to the process of identifying and analysing the various issues related to the establishment of an international criminal court. However, it believes that more analysis and further guidance from the General Assembly are required before the Commission can provide the General Assembly with a draft

¹ See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee, 21st meeting.*

² See document A/CN.4/449 reproduced in the present volume (p. 111).

statute capable of attracting the support necessary to make an international court a reality.

7. The United States believes that both the Commission and the General Assembly will want to take into account the developments regarding the establishment, under Security Council resolution 808 (1993) of 22 February 1993, of an ad hoc tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. While there are many important differences both in circumstances and objectives that in some respects will likely compel different approaches, the establishment of such an ad hoc tribunal may provide significant insight into the many issues associated with establishing an international criminal court. A number of comments and proposals were submitted to the Secretary-General in response to the Security Council decision to establish the tribunal.³ There has also been considerable activity outside the United Nations, for example, the recent International Meeting of Experts on the Establishment of an International Criminal Tribunal, held at Vancouver, Canada, hosted by the International Centre for Criminal Law Reform and Criminal Justice Policy, which addressed in detail the issues relating to the establishment of both the ad hoc tribunal and the international criminal court.⁴

8. Consideration of the establishment of an international criminal court should be governed by three major principles: first, the development and implementation of such a tribunal should further, and not harm, international law enforcement efforts. This is of particular concern in the case of narco-traffickers and terrorists. Secondly, such a court should be fashioned so as to minimize the potential for politicization of any sort. Finally, and fundamentally, it is imperative to make sure that the tribunal is both fair and effective and that questions concerning such issues as scope of jurisdiction, applicable law, rules of procedure and evidence, and appeal are adequately addressed in a realistic, just and workable fashion.

The need to identify and consider fully the issues involved

9. As the Commission recognized, the report was not meant to be an exhaustive treatment of the many issues associated with such an undertaking and further examination is needed on a number of important matters. Thus, while the report is a helpful start, it is clear that further consideration is required on how best to resolve many of the difficult questions which it raises, such as the jurisdiction *ratione materiae* of the court; how matters are to be brought to the court; whether States must consent to the court's jurisdiction and, if so, which States must consent; and how the court will secure jurisdiction *ratione personae* over an offender. Other important issues were identified during discussion of this subject in the Sixth Committee. Additional issues have been identified in connection with proposals to establish the ad hoc war crimes tribunal for the former Yugoslavia. For example, the important requirement for a separate (and independent)

appellate court, to which appeals can be taken on the basis of an error of law invalidating the decision or an error of fact that caused a manifest miscarriage of justice.

10. Still other issues have been identified in the consideration of these proposals outside the United Nations, for example, those relating to the rules of procedure and of evidence which were the subject of extensive discussion at the Vancouver meeting of experts. The United States believes that the approach adopted in regard to fundamental issues such as these may have implications for other aspects of any resulting regimes.

11. The Working Group acknowledges (para. 23) that in some cases it has done no more than outline a range of solutions without indicating a preference or an analytical basis for arriving at those solutions. However, as discussions among international experts, such as those that took place at the recent Vancouver meeting, demonstrate, many issues warrant fuller treatment. For example, with respect to six critical issues (the system of prosecution; the initiation of the case; bringing defendants before the court; international legal assistance; implementation of sentences; and the relationship of the court to the existing extradition system), the report acknowledges that

... in the time available the Working Group has not been able to discuss these issues in much detail, what follows is accordingly tentative and exploratory. The issues will need fuller examination if it is decided that the Commission should proceed to draft a statute for the court (para. 113).

In several instances, when addressing such questions as the jurisdiction of the court over offences and the acceptance of its jurisdiction by States, the regime of jurisdiction *ratione personae*, and the interplay between national and international law, the report contained statements to the effect that the precise details of such a system did not have to be worked out at that point (paras. 49, 53 and 57).

Jurisdiction ratione materiae of the court

12. One of the more fundamental preliminary questions, as the report recognizes, is the scope of jurisdiction *ratione materiae* of the court. The report notes at the outset that the idea of an international court originated as a forum for prosecuting State-sponsored war crimes and genocide that otherwise go unpunished (para. 27). The report expands this limited jurisdiction, however, to all crimes of an "international character". An analysis of the issues (such as those involving consent and how cases and defendants are brought before the court) may not be the same for the narrow class of State-sponsored war crimes as for narco-trafficking. These issues are characterized in the report as "details" to be worked out later.

13. These are, however, critical questions, which have important implications in the light of the proposed regime of consent rather than compulsory jurisdiction. As noted in paragraph 4 above, the United States agrees with the basic premise that the court should be conceived as a flexible, supplementary facility, based on consent. This has a bearing, however, on the scope of crimes involved. Who consents where the crime is one of an "international character"? What happens when the views of equally interested States are not in harmony? And how will a State be convinced to surrender its nationals to the international court if it is not willing to extradite its nationals to another forum?

³ See "Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)" (document S/25704 and Corr.1 and Add.1).

⁴ Document S/25504, annex, contains the report of the meeting.

14. The United States has particular and major concerns about the report's approach to the proposed court's jurisdiction *ratione materiae* and the substantive definition of crimes. The report assumes that the draft Code of Crimes against the Peace and Security of Mankind will serve as a basis for the jurisdiction *ratione materiae* of the court (paras. 68-74). Although the report provides that States may not need to accept the Code in order to submit to the jurisdiction of the international court, it states explicitly that "[t]here are clearly important links between the two projects" (para. 68). Reference to this strong linkage between the two also appears elsewhere in the report (para. 57). The United States, like many other States, has expressed its serious reservations about the draft Code, which are detailed elsewhere in the present volume.⁵ To the extent that the proposal to establish the court is tied to the Code, those reservations extend to the proposed court as well.

15. In addition, under the Working Group's proposal, the crimes assigned to the international criminal court potentially include all crimes that may be the subject of multilateral treaties. The Working Group explains that

It is not necessary to reach agreement at this stage on the precise list of international criminal law treaties: they would certainly include serious war crimes, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the various conventions on hostage-taking, hijacking of ships and aircraft, and the like (para. 57).

However, most multilateral treaties dealing with criminal offences are clearly premised on, and are designed to facilitate, national prosecution. The proposed internationalization of crimes presently subject to multilateral treaties does not appear to take into account this underlying premise.

16. Moreover, the United States seriously questions whether an international criminal court is appropriate where the crime may be international or multinational but where an effective national forum for prosecution nonetheless exists. In particular, is it desirable to provide nations with a means of abdicating their responsibility

where "the criminal justice system of a small State is overwhelmed by the magnitude of a particular offence" (para. 28 (b)) or prosecution is otherwise awkward?

17. The additional limitation proposed in the report that the court's jurisdiction should be restricted to the "most serious offences . . . which themselves have an international character" (para. 58) is also not particularly instructive. Many crimes have an "international character". The United States questions whether all categories of crimes that have an international character should potentially come within the jurisdiction of the criminal court. And, if only the most serious of these offences are to fall within the court's jurisdiction, how are they to be identified?

Surrender of defendants to the court

18. A matter that merits specific mention here is the report's novel proposal that the surrender of defendants to an international criminal court was not to be regarded as "extradition" (para. 127). As characterized in the report, this would enable the many States that have legislative or constitutional prohibitions against the extradition of their nationals nevertheless to surrender them to the international criminal court, on the theory that the international criminal court is, in effect, simply an extension of their own national courts. It is not at all clear that the United States could be party to a court constituted under this theory without running afoul of article III, section 1, of the United States Constitution, which requires that any court exercising the judicial power of the United States must apply United States law; be established by Congress; and be composed of judges who are assured of tenure during good behaviour and who are appointed by the President with the advice and consent of the Senate.

19. In addition, the United States believes that it is important for the Commission to conduct a survey of States to determine their willingness or ability to accept this theory. The answer to this question may turn out to be among the most important in determining the efficacy of the approach proposed in the report. The results of this survey should be included in the Commission's progress report to the General Assembly.

⁵ See document A/CN.4/448 and Add.1 (reproduced in the present volume, p. 59).

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 4]

DOCUMENT A/CN.4/447 and Add.1-3

Comments and observations received from Governments

[Original: Arabic/English/French/Spanish]
[3 March, 15 April, 18 May and 14 June 1993]

CONTENTS

	<i>Page</i>
<i>Note</i>	146
INTRODUCTION	146
I. COMMENTS AND OBSERVATIONS RECEIVED FROM MEMBER STATES	147
Argentina	147
Canada	147
Chad	150
Costa Rica	150
Denmark*	151
Finland*	151
Germany	151
Greece	154
Hungary	155
Iceland*	159
Iraq	159
Netherlands	160
Nordic countries	164
Norway*	165
Poland	165
Spain	166
Sweden*	167
Syrian Arab Republic	167
Turkey	167
United Kingdom of Great Britain and Northern Ireland	168
United States of America	172
II. COMMENTS AND OBSERVATIONS RECEIVED FROM A NON-MEMBER STATE	174
Switzerland	174

* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under **Nordic countries**.

NOTE

Multilateral instruments cited in the present document

Source

Treaty of Versailles (Versailles, 28 June 1919)	G. F. de Martens, <i>Nouveau Recueil général de Traités</i> , 3rd series, vol. X (Leipzig, Weicher, 1923), p. 323.
Agreement on the International Commission for the Protection of the Rhine against Pollution (Bern, 29 April 1963)	United Nations, <i>Treaty Series</i> , vol. 994, p. 3.
Convention and Statutes relating to the development of the Chad Basin (Fort Lamy, 22 May 1964)	United Nations, <i>Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa, Natural Resources/Water Series No. 13</i> (Sales No. E/F.84.II.A.7), p. 8.
Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (The Nordic Environmental Protection Convention) (Stockholm, 19 February 1974)	United Nations, <i>Treaty Series</i> , vol. 1092, p. 279.
Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974)	UNEP, <i>Selected Multilateral Treaties in the Field of the Environment</i> , Reference Series 3 (Nairobi, 1983), p. 405.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (Sales No. E.84.V.3), p. 151, document A/CONF.62/122.
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Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	ECE, <i>Environmental Conventions</i> , 1992, p. 95.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	<i>International Legal Materials</i> , Washington, D.C., vol. 31, No. 6, November 1992, p. 1313.
Convention on the Protection and Use of Transboundary Water Courses and International Lakes (Helsinki, 17 March 1992)	<i>Ibid.</i> , p. 1335.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	<i>Ibid.</i> , No. 4, July 1992, p. 822.

Introduction

1. At its forty-third session, held in 1991, the Commission provisionally adopted on first reading a set of draft articles on the law of the non-navigational uses of international watercourses.¹ At its 2237th meeting, on 9 July 1991, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such com-

ments and observations should be submitted to the Secretary-General by 1 January 1993.²

2. By paragraph 9 of resolution 46/54, and again by paragraph 12 of resolution 47/33, relating to the reports of the Commission on its forty-third and forty-fourth sessions respectively, the General Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on the

¹ *Yearbook . . . 1991*, vol. II (Part Two), para. 58.

² *Ibid.*, para. 58.

law of the non-navigational uses of international watercourses, adopted on first reading by the Commission, and urged them to present in writing their comments and observations by 1 January 1993, as requested by the Commission.

3. Pursuant to the Commission's request, the Secretary-General addressed to Governments circular letters

dated 20 December 1991 and 1 December 1992 respectively, inviting them to submit their comments and observations by 1 January 1993.

4. As of 14 June 1993, the Secretary-General had received 16 replies from Member States and one from a non-member State, the texts of which appear in the present document.

I. Comments and observations received from Member States

Argentina

[Original: Spanish]
[15 March 1993]

GENERAL COMMENTS

1. The Argentine Government's comments concern the subsidiarity of the draft articles on the non-navigational uses of international watercourses and the question of parties to watercourse agreements. In order to ensure that the draft articles do not affect pre-existing agreements on the uses of watercourses, it is recommended that an article should be included to establish beyond any doubt that the future instrument on non-navigational uses of watercourses will be supplemental in nature and will not apply to watercourses governed by a convention unless the States parties to that convention agree otherwise.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 4

2. Article 4 as drafted provides that both in agreements affecting the entire watercourse and in those affecting only a part thereof, a third riparian State "is entitled" to take part in the negotiations and to become a party to the agreement or project in question.

3. The Argentine Government considers that this article unduly favours the third riparian State. Therefore, it is considered advisable to replace article 4 with an article making accession to the treaty a possibility rather than a right, in view of the fact that the rights of third parties are protected in other draft articles, for example, those concerning equitable and reasonable utilization of watercourses (arts. 5-6), and concerning the obligation not to cause appreciable harm (art. 7), to cooperate (art. 8), and to exchange data (art. 9) and information concerning planned measures (arts. 11 et seq.).

4. The Argentine Government therefore suggests that article 4 should be replaced by the following text:

"1. Every watercourse State may become a party to a watercourse agreement that applies to the entire international watercourse, subject to the terms and conditions to be agreed on between the said State and the States Parties to the agreement. The latter shall negotiate in good faith with the former the terms and conditions of its accession to the agreement.

"2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed water-

course agreement that applies only to a part of the watercourse or to a particular project, programme or use may become a party to the same to the extent that its use of the water is affected by that agreement or by that particular project, programme or use, subject to the terms and conditions to be agreed on between the said State and the States Parties to the agreement or to the particular programme or use. The latter shall negotiate in good faith with the former the terms and conditions of its accession."

Canada

[Original: English]
[30 March 1993]

GENERAL COMMENTS

1. The Government of Canada commends the Commission on the preparation of the draft articles on the law of the non-navigational uses of international watercourses, an effort requiring considerable compromise that has spanned two decades. This effort has attempted to resolve the inevitable differences of opinion with respect to the appropriate international legal framework for rivers and lakes that cross and form political boundaries. That said, Canada nevertheless has some questions to raise and comments to make on the draft articles.

2. As an introductory comment, the Government of Canada recognizes that the draft articles deal with the traditional concerns of international water law, which are uses and pollution. However, it would be appropriate to integrate post-United Nations Conference on Environment and Development concepts with respect to sustainable development¹ into the document wherever possible.

3. Generally, Canada favours a framework of residual rules that would be legally binding when watercourse States do not otherwise agree on a governing regime. A concern that arises is how the residual rules might apply to a bilateral regime where one portion of the watercourse may be subject to such a regime and others not. Similarly, questions of the applicable legal regime may arise where an existing bilateral arrangement covers certain, but not all, of the matters governed by the articles.

¹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1))* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference, resolution 1, annexes I (Rio Declaration on environment and development) and II (Agenda 21)*.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

4. Canada recognizes that the international management of water resources must apply to various geographic situations which are likely to call for different solutions. Thus, in some cases, the rules contained in a set of general articles may not produce the desired result. Recognizing that the most durable solutions are often those achieved through bilateral negotiation by the States involved, and mindful of the general obligation in international law to seek to resolve differences by negotiation, Canada strongly supports article 3 permitting States to adjust the provisions of the draft articles. An issue arises, however, as to the status of existing agreements dealing with water management or certain aspects thereof.

5. This issue is of considerable concern to Canada as the international legal regime governing Canada's transboundary rivers and lakes consists essentially of a number of bilateral treaties and practices between Canada and the United States of America. The Government of Canada wishes to ensure that these agreements could be continued within the framework of the draft articles without any further action by parties to the agreements. It is important therefore that it should be explicitly stated that the draft articles do not take precedence over existing agreements.

Articles 5 to 7

6. Canada wishes to express serious reservations regarding the formulation of the general principles contained in articles 5 to 7. While acknowledging that there is a great deal of support for the doctrine of reasonable and equitable utilization, it should be emphasized, however, that equitable utilization can be equal utilization, as has been seen in certain international conventions or as has evolved in certain regional practices. Indeed, the practice in Canadian-United States water management has generally been based on the principle of the equal apportionment of waters and has provided a sound basis for the management of bilateral water issues.

7. Another concern is that the draft articles have not resolved the inherent conflict between articles 5 and 7, as formulated. Under article 5 the issue of competing uses of international watercourses is resolved through a balancing of the interests of the parties concerned on the basis of a full understanding of all relevant factors. However, the proposed article 7 appears to preclude that balancing of interests once it is established that appreciable harm is likely to occur. The Commission's position, as stated in the commentary,² seems to be that the conflict between articles 5 and 7 can be made to disappear by adopting a non-rebuttable presumption that a utilization of the waters of an international watercourse system that causes appreciable transboundary harm is *ipso facto* unreasonable and inequitable and thus would be unlawful under both article 5 and article 7. However, it is noted that the Commission in its commentary has recognized that, in some

cases, the attainment of equitable and reasonable utilization will depend on the toleration by one or more watercourse States of a measure of harm. In these cases the Commission suggests that the necessary accommodations would be arrived at through specific agreements.³ Yet, it is precisely in these situations that the inclusion of a no-harm rule will make agreement difficult to reach. The Government of Canada is concerned that the doctrine of reasonable and equitable use set out in articles 5 and 7 will not permit a balancing of interests of States.

8. Further, the adoption of the no-appreciable-harm rule would seem to revive the principle of prior appropriation (first in time, first in right), for it would prevent an upstream State from undertaking any development that would cause appreciable harm to undertakings in a downstream State.

9. The conflict between articles 5 and 7 might be resolved in various ways. The Government of Canada wonders whether article 7 needs to be a separate article when the causation of harm would seem to be implicitly included in the weighing and balancing of the factors found in article 6, with respect to any particular utilization of an international watercourse.

10. Alternatively, a previous formulation of the principles of equitable use and of no appreciable harm proposed by a previous Special Rapporteur, Mr. Schwebel, in his third report balanced the two principles as follows:

The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.⁴

The interrelationship of these two principles should therefore be further reviewed.

11. With respect to article 6, in order to arrive at a reasonable determination of equitable use it is important to take the appropriate considerations into account. From the perspective of the management of Canada's international waters, it is essential that past uses and apportionment practice, as developed through bilateral relations with the United States, should be recognized and taken into account. While accepting that article 6 is not an exhaustive or exclusive list of considerations, it is suggested that the Commission should consider the addition of others that would reflect Canada's concerns. Possible formulations would be to add references to "regional State practice", "historical uses" and "traditional access".

Articles 11-18

12. Canada supports the process of notification and consultation with respect to the use of international watercourses. It notes, however, that in the event States continue to disagree after consultation, there is no provision for dispute settlement in the articles. As a result, should States fail to agree, once the time limit for consultations has been respected, the articles provide no further

² For the commentary on article 7, initially adopted as article 8, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 35-41, in particular, p. 36, para. 2.

³ *Ibid.*, para. (3).

⁴ *Yearbook . . . 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156 (art. 8, para. 1).

assistance. A provision to deal with dispute settlement would be a welcome addition to the draft articles.

13. Currently, article 16 provides that notifying States, in accordance with their obligations under the articles, may, in the absence of a response from the notified States, proceed with a planned measure, but subject to obligations under articles 5 and 7. The possibility exists that a notified State which chooses not to respond to notification can still raise its objections and possibly claim compensation at a later stage. As a result, a State complying with the notification provisions of the articles may find itself alleged to be in breach of the basic principles of the articles without having had the opportunity to consult about the proposed measures. It is important that an informed State should not be able to benefit from intentional delaying tactics. One possible solution would be to interpret the silence as acquiescence to the proposed measures, thus preventing the notified State which has failed to respond from raising objections later. The Commission should take another look at this issue.

Articles 19 and 26

14. Canada supports the use of joint management mechanisms for international watercourses as provided for in article 26. The International Joint Commission, established as a quasi-independent body to deal with a number of Canada-United States water issues, may provide a model for consideration elsewhere. The scope of the term "management" as provided in article 26 seems limited, and may benefit from further revision. Canada regrets the absence of stronger emphasis in the articles on the organizational aspects of implementing all of the relevant articles to achieve the management envisaged in article 26.

15. In general, the articles on management and implementation do not go far enough in developing legal rules on what, in daily practice, is the most important aspect of the utilization of international watercourses. Although the minimal rules proposed in the articles do not create difficulties for Canada, it would be desirable to have clear rules on procedures and remedies in the case of an insoluble dispute.

Article 21

16. With respect to the obligation not to cause harm by pollution, as formulated in article 21, paragraph 2, of the draft articles, however, the Government of Canada believes a strong argument can be made that pollution which causes appreciable harm is *prima facie* unreasonable and inequitable. Mindful that not all harm is proscribed—rather the prohibition is on appreciable harm—in these circumstances, Canada agrees that with respect to pollution the principle not to cause appreciable harm should be accorded primacy.

Other concerns

17. A number of the terms used in the draft articles are open to varying interpretations. It is suggested that the articles should be reviewed to ensure that those terms that would benefit from clarification are defined in the articles themselves. At the least, the following terms need to be defined: "vital human needs" (art. 10), "appreciable ad-

verse effect" (art. 12) and "harm" and "appreciable harm" (arts. 7 and 21). Similarly, Canada suggests that these terms should be reviewed for consistency of usage with other international environmental agreements.

Article 22

18. This article, dealing with the introduction of new species, obliges States to take "all measures necessary to prevent the introduction of a new species". As this duty could be interpreted in an unduly expansive way, it might be appropriate to limit it.

Article 27

19. A gap in the draft articles that is of concern to Canada is the absence of any reference to the principle of sharing downstream benefits. There is no mention in article 27 of sharing the benefits accruing downstream from works in an upstream State. This issue should be considered.

Article 31

20. The article provides for a limited exception (national defence and security) with regard to a State's obligation to provide information under the procedures governing notification and consultation and exchange of information. As in many States, Canada's domestic legislation and its legal practices require that certain documents and confidences should not be divulged. Therefore article 31 should include a phrase stating that the obligations in the draft articles would be subject to national laws on the protection of information.

Article 32

21. This article, concerning access on a non-discriminatory basis to domestic judicial systems, reflects a growing realization by States that judicial systems often do not permit those harmed by transboundary pollution to seek redress because non-citizens and non-residents do not have equal access to judicial systems. Indeed, a similar and further-reaching provision was agreed to in Principle 10 of the Rio Declaration on environment and development, which states that "Effective access to judicial and administrative systems, including redress and remedy, shall be provided [by States]". In Canada, jurisdiction over water issues is shared between the provincial and federal levels of government. Thus, although access to the courts in certain federal matters and before certain federal administrative tribunals may be provided by the federal level of government, changes at the provincial level must be undertaken by the provinces. Accommodation of this issue could be considered by the Commission.

CONCLUSION

22. Finally, in view of the debate surrounding the draft articles, the Government of Canada urges the Commission to consider whether it may not be preferable to pursue the development of the draft articles as a set of principles or guidelines, rather than pursuing the goal of a multilateral convention that may or may not receive widespread support.

Chad

[Original: French]
[10 March 1993]

GENERAL COMMENTS

1. Chad is an entirely land-locked country and its climatic circumstances are such that its watercourses are not navigable all year round. Most of its watercourses are temporary, save for the Chari and its affluent, the Logone, which are permanent and semi-navigable.

2. In the main, Chad's watercourses and those which it shares with neighbouring countries, known as international watercourses, can be used only for purposes other than navigation, such as irrigation, water supply, construction of small dams, and so forth. Unfortunately, however, since independence, various problems resulting from civil wars have served to delay the country's development, making it impossible to undertake projects for the reasonable utilization of watercourses.

3. The conservation measures dealt with in the draft articles on non-navigational uses of international watercourses should attract much more attention from the State, since Chad is a Sahelian country where the shortage of water is acute, and where what little water there is needs to be conserved and protected.

4. The country has not yet reached the stage of having industrial waste pollution, but it is necessary to start thinking now about implementing measures to protect against possible future pollutants. Consideration could also be given to measures to protect against natural pollutants. Chad could agree to a convention with its southern neighbour, the Central African Republic, with a view to regulating the flows of watercourses and preventing floods.

5. It would be desirable for the State to take account of the provisions of articles 3, 4 and 5, concerning international watercourse agreements, principally in the framework of the Lake Chad Basin Commission.¹ In part II of the draft articles, it should also take account of Recommendation 51 of the Action Plan for the Human Environment,² concerning the establishment of international river commissions to supervise the equitable utilization of international watercourses and the implementation of agreements between States, bearing in mind that such agreements should concern only those watercourses which extend over several States, as stipulated in article 1 of that Recommendation.

6. Another factor to be considered is that watercourses are gifts of nature, and the latter did not take equity into account when distributing them among States. Consequently, it would not be very logical for a State having a large part of a watercourse to have to agree to equitable

utilization with other States which only have a small part of that same watercourse (as foreseen in article 5).

7. These draft articles are well conceived and could serve as a basis for regulations concerning international watercourses, as well as for cooperation between watercourse States.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 9

8. Bearing in mind the observations regularly made in Chad, it would be desirable, in the framework of article 9, paragraph 3, to add the following:

“Riparian States should at all times permit temporary installations, such as stakes, buoys, etc. . . for the purpose of taking measurements of international watercourses.”

Costa Rica

[Original: Spanish]
[1 September 1992]

GENERAL COMMENTS

1. First, in the view of the Government of Costa Rica the draft is a remarkable achievement, not only as regards the regulation of the non-navigational uses of watercourses as such, but also as regards its compatibility with the work accomplished in various forums, through various instruments, in respect of environmental protection, and thus with the broad outlines set out in that connection in the United Nations Convention on the Law of the Sea, from the regime and terminology of which the draft frequently draws its inspiration.

2. Secondly, praise is also due to the work of the Drafting Committee, whose commentaries, based on a wide-ranging comparison of the literature and case-law, serve as guidelines for interpreting the scope of the proposed articles.

3. In this field, where the task is to elucidate and refine existing rules, thus progressively developing watercourse law, the draft is remarkable for its constant search for balance and negotiated solutions tailored to the reality of the various relationships involved.

4. The Costa Rican Government welcomes and supports the work of those responsible for preparing the draft articles. In so doing, it reaffirms the spirit which led Costa Rica to ratify the United Nations Convention on the Law of the Sea, as well as its devotion to and profound respect for international law.

5. Notwithstanding the foregoing and in the light of the interest aroused by the draft articles, Costa Rica takes this opportunity to convey a few brief concerns or reflections regarding the regime envisaged by the Commission.

6. Concerning the definition of an “international watercourse”, as Costa Rica understands it, the draft makes the international character of a watercourse dependent solely on physical rather than political criteria. Thus, a watercourse is international when parts of it are situated in different States (art. 2 (a)). Consequently, a “watercourse

¹ Established under article 1 of the Convention and Statutes relating to the development of the Chad Basin.

² *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), chap. II.

State" is that State in whose territory part of an international watercourse is situated (art. 2 (c)).

7. The Commission states in its commentary that the most common example of an international watercourse would be a river that forms or crosses a boundary.¹ Could this concept be construed in such a way as to change the nature of a river which has been designated by treaty as a boundary between two countries but is recognized as belonging to only one of them? In other words, could a boundary river formally subject to the territorial sovereignty of one State but under a regime whereby it is freely navigable at all times by another State, because it is a boundary, and because two neighbouring States have ratified a convention of this kind, be regarded as an "international watercourse" for the various purposes of these draft articles?

8. Would the watercourses of the other State which feed the boundary river be regarded, because they flow into it, as international when they enter waters under the territorial sovereignty of the bordering neighbour State? Would the proportion of a watercourse which penetrates or infiltrates the boundaries of another State have any effect on whether it was regarded as international or not?

9. The Government of Costa Rica wonders, for example, if a medium-sized river whose channel runs for the most part in State X but whose lower reaches cross a certain small portion of the territory of a neighbouring State and from there drain into that State's tributaries, lakes and other watercourses, would the circumstance of crossing a small part of the territory of a neighbouring State and flowing into its waters be sufficient to qualify that entire river or tributary as an "international watercourse"? If the reply is in the affirmative, would this reasoning not make it possible to extend the character of "international" to the watercourse into which the hypothetical rivers flow, insofar as these form a water system "constituting a unitary whole and flowing into a common terminus" (art. 2 (b))?

10. What bearing does the distinction made by the Commission between watercourses and their waters (art. 1, para. 1), for the purposes of applying the regime envisaged in the draft articles, have on all this?

11. Attention may also be drawn to a number of other questions which, though different, are closely linked to what has been said above.

12. The Government of Costa Rica wonders if an eventual ratification of an instrument of this kind would be accompanied by a declaration indicating the rivers to which the States intend to apply the regime envisaged therein. Does the criterion of the residual character of the draft convention, as established in articles 2 and 3 particularly, continue to apply in respect of pre-existing agreements?² To what extent, by merely subscribing to a convention of

this kind, and in the absence of any declaration indicating the watercourses to which a possible convention would apply, could those watercourses be used for non-navigational purposes when the existing regime governing them refers only to navigation?

13. Although it is true that many of the rules in the draft articles belong in the category of "soft" law³ which is dependent on subsequent specific regulations, it is also true that a regime of responsibility emerges from this framework instrument. However, as is frequently the case in international law, although the principle of responsibility is established, it is not reinforced by any penalty regime. Is there no possibility of establishing such a regime? Further, would the regime of responsibility be extended to the management of the waters of tributaries of an international watercourse? The draft articles take as their starting point the "system" concept to cover the aspects of environmental protection. Does the indirect contamination of watercourses through the contamination of tributaries involve responsibility on the part of the State in which these are situated? Would failure to protect the land and forests of the basins referred to by the draft articles constitute a fault on the part of the State in which these are situated?

14. Do not the procedural aspects of the draft articles, such as those established in the rule on non-discrimination in article 32, need to be revised or made more specific, as in the case of article 3 of the Convention on the Protection of the Environment concluded among the Nordic countries, on which article 32 is based?

15. Lastly, in Costa Rica's view, a body of provisions on the peaceful settlement of disputes is absolutely indispensable.

16. It is hoped that the concerns outlined above will serve to encourage the Commission to continue its work, which has already produced fruitful results.

Denmark

[See *Nordic countries*]

Finland

[See *Nordic countries*]

Germany

[Original: English]
[11 January 1993]

GENERAL COMMENTS

1. Germany welcomes the provisional adoption by the Commission of draft articles on the law of the non-navigational uses of international watercourses. Germany attaches particular importance to the subject dealt with in this draft, not only because of its geographical situation in the centre of Europe, but especially in view of the fact that it shares several major international watercourses. It is of the opinion that the draft articles also meet a global need

¹ *Yearbook . . . 1991*, vol. II (Part Two), p. 70, para. (2) of the commentary to draft article 2.

² According to well-known principles of law, a later rule takes precedence over an earlier one, and the specific over the general provision. However, in this field, where innovations are also taking place, these principles may not be sufficient and it may be necessary to combine them with the principle governing the relationship between principal and residual rules.

³ General and flexible rules.

for regulation in this matter, owing to the fact that since the Second World War the general use of watercourses has been the focus of attention, pushing navigational needs into the background.

2. For this reason the German Government is pleased to note that the Commission has reacted positively to the special challenge arising from the increased global demand for water over the past decades and the enormous level of water utilization. Germany welcomes the fact that in formulating this draft the Commission, from the start, considered other instruments of international law with a similar aim. Germany supports the idea of basing the future convention on existing regulations, particularly on regional agreements for the protection of specific watercourses, as this serves to create a highly comprehensive framework of complementary global and regional regimes for international watercourses.

3. Germany supports the underlying concept of a framework agreement, for various reasons. On the one hand, this approach does not deny the contracting parties the opportunity to deal with the specific characteristics and use of a certain international watercourse by means of bilateral and multilateral agreements. On the other hand, it provides them with general principles and thus establishes a minimum standard. In addition, it fills a regulatory gap for all those cases of international watercourses for which there are as yet no binding agreements.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

4. The German Government welcomes the fact that the draft now begins with a clear statement as to the scope of its application (para. 1). The exception made in paragraph 2, namely that navigational use falls within the scope of the convention insofar as this use affects or is affected by the use described in paragraph 1, is appropriate and does not conflict with the primary content of the regulation. The formula "international watercourses and waters" rightly makes it clear that, for example, in the case of a river the regulation is not limited to the river bed. It thus serves to avoid misunderstanding.

Article 2

5. Another positive feature is that the Commission has dropped the idea of a "relative international character" of watercourses (subpara. (a)). This would merely have led to misinterpretations of the individual articles. The adoption of the concept of "watercourse systems" makes it clear that the use of all components of a system must be regulated so that it would not adversely affect other watercourse States or the watercourse itself.

6. It is a good sign that the concept of "international watercourse systems" has been adopted in the draft articles. The definition of watercourses as a system including surface water and groundwater corresponds to the idea of providing the most comprehensive and effective watercourse protection possible, which Germany supports. This broad approach is in line with physical and hydrologic reality. Thus, tributary watercourses far from State boundaries can be included, with the result that the waters in these remote areas fall within the framework of the

draft articles. However, this common area is limited by the fact that the watercourses have a "common terminus". The significance of the inclusion of groundwater—except for "confined groundwater"—becomes particularly obvious when bearing in mind that it feeds the watercourses as part of the hydrologic cycle. The Commission was right not to include "confined groundwater" as it has no physical relationship to surface water and thus does not form part of a whole in need of protection. For this reason it was vital to replace the term "watercourse" by "watercourse system" in order to take into account the idea of the best possible use of a watercourse as a common resource, using environmental criteria.

Article 3

7. In this article, which codifies the framework character of the future draft convention, the second sentence of paragraph 2 is particularly significant: it makes clear that agreements concerning international watercourses must always consider their use by all watercourse States, even if they are not parties to the negotiations. Thus, the situation in which a few States agree on the use of the water at the expense of others is rightly avoided.

Article 4

8. Germany welcomes the fact that article 4 makes it clear who can become party to a watercourse agreement. Paragraph 2 can be positively singled out since it ensures that an agreement at the expense of a third party is not possible when it is affected to an "appreciable extent", even if the watercourse agreement applies to only part of an international watercourse.

Article 5

9. Germany supports the principle of "equitable utilization" or "equitable apportionment" laid down in article 5, which should ensure that the use of a watercourse by several States leads to optimal utilization and at the same time minimum limitation of other States' rights to utilize the water (para. 1, second sentence). Thus, the fact that article 5 contains both a right to utilize the water and a duty not to limit other States in their right to equitable utilization of that water is welcomed by Germany. The concept of "equitable participation" embodied in paragraph 2, ensures the goal of optimal utilization, which is only possible when the watercourse States cooperate by participating in the protection and development of the watercourses.

Article 6

10. This article contains an important aid to interpretation in deciding what constitutes "equitable and reasonable" use. It describes the main factors, although the list is not exhaustive, which is only natural in view of the framework character of the future convention. As the possibility of a dispute concerning the interpretation of this most important undefined legal term (equitable and reasonable utilization) cannot be ruled out, paragraph 2 obliges the parties to enter into consultations in a spirit of cooperation, thus reiterating a basic principle contained in many international conventions.

Article 7

11. This article, which establishes the level of protection, is the central element of the draft articles. It is especially important when formulating this article to strike a fair balance between conflicting interests. Thus, on the one hand, the principle of good neighbourliness means that States must tolerate as part of "normal relations between States" limited effects on their territory that cause irritation rather than actual physical damage. Even if the rule of common use and the compatibility of all such use is taken into account, it would be excessive and contrary to international practice to forbid all damaging effects, however minor, upon other riparian States. On the other hand, it has to be borne in mind that today the danger to international watercourses through pollution, warming, and the like, mostly originates with a number of users who, from their own point of view, do not individually cause grievous harm to the watercourse or damage to other States sharing that watercourse. Only when taken *in toto* does the damage become "serious" or "grave" for the international watercourse itself and for other riparian States. For this reason, Germany cannot but agree with the Special Rapporteur and the majority of the members of the Commission when they reject a level of protection described as "serious" or "grave".

12. The term "appreciable" used in the draft articles has the disadvantage of having a double meaning. "Appreciable" may mean "detectable" or "significant" in connection with risk or harm. As this double meaning involves considerable differences in substance, it is suggested that the term "significant" should be used, especially as this also corresponds to the Commission's interpretation of "appreciable". Thus, "appreciable" should be replaced by "significant" in article 7. Similar changes should be made in articles 3, 4, 12, 18, 21, 22, 28 and 32.

13. Regarding the relationship between articles 5 and 7, Germany would suggest that the Commission's appropriate commentary to the effect that any "appreciable" or, as Germany suggests, "significant" damage constitutes a violation of the principle of equitable and reasonable utilization pursuant to article 5 should be explicitly included in the future convention for the sake of clarity.

Article 8

14. Germany welcomes the fact that article 8, which regulates the general principles and objectives of cooperation between watercourse States, contains such long-recognized formulas as "sovereign equality", "territorial integrity", and "mutual benefit".

Article 9

15. Germany also supports the procedural obligation of States, codified in article 9, to inform and consult each other in good time when planning watercourse utilization. This obligation has rightly featured in numerous treaties concerning water and river use and results from the material legal duty to avoid doing anything which might lead to serious damage to another State. Germany regards the regular exchange of information as particularly important for the effective protection of international watercourses.

Article 10

16. Article 10 rightly says that no use of an international watercourse has priority over another in the absence of agreements to the contrary.

Articles 11 to 19

17. The fact that articles 11 to 19 envisage a highly detailed process for "planned measures", in which the positions and possible objections of watercourse States are considered when a project is to be undertaken which might have an "appreciable adverse effect" on these States (art. 12) meets with Germany's agreement. The process for the "planned measures" contains elements of international environmental impact studies.

18. The German Government welcomes the fact that by means of binding waiting periods of one year at most (arts. 13, 15, para. 2, and 17, paras. 1 and 3), the obligation to consult and negotiate is also procedurally guaranteed. While this entails quite considerable interference for the riparian State wishing to carry out the project, the exceptions made in article 19 in the case of urgent projects, provide the necessary balance. In addition, exhaustive national planning procedures where citizens' views are aired (for instance, the environmental impact study) are usually also envisaged for the projects, with the result that delays resulting from the simultaneous involvement of affected riparian States are unlikely.

19. However, the detailed process for "planned measures" can only be of assistance in the case of "large-scale" projects: the damage caused to international watercourses by cumulative pollution arising from several sources is not covered by the above regulations.

Articles 20 to 25

20. Germany attaches great importance to these articles, which deal on the one hand with environmental protection and, on the other, with harmful conditions and emergency situations connected with the utilization of international watercourses. As has already been mentioned (see paragraph 1 above), the Federal Republic of Germany, as a country sharing several large international watercourses, has a particular interest in developing international law in this area. This is especially true of the formulation of rules for environmental protection.

21. Important environmental law principles, such as the demand for use and development of international watercourses which is in keeping with their adequate protection (art. 20) or the listing of certain substances with the aim of preventing their introduction into certain media (art. 21, para. 3), rightly feature in these articles. What constitutes pollution according to article 21 should, however, be more clearly stated. International watercourses can only be protected on a long-term basis if the grave danger of damage by pollution is avoided. For this purpose, a definition of pollution which goes beyond the one set forth in article 21, paragraph 1, is needed. The United Nations Convention on the Law of the Sea in article 1, paragraph 1.4, contains such a definition which has been widely recognized and should be incorporated in this convention. Article 22 innovatively deals with the introduction of "new" animal and plant species into international

watercourses. Germany welcomes article 23, which states that rivers should not be freed from pollution at the expense of the seas. The reduction of pollution in the seas from land-based sources, especially in the North and Baltic Seas, is particularly important to Germany, since rivers play the largest role in sea pollution.

22. Finally, Germany regards the wide range of responsibility in article 24, as well as the obligation of States to cooperate in emergency situations with States not parties to the future convention (art. 25) as positive features.

Article 26 to 32

23. The regulation on non-discrimination (art. 32) is particularly welcome. This is in keeping with Germany's understanding of the law and recent trends in international environmental policy. Because of the highly successful treatment of the Rhine, which was due in no small measure to the excellent work of the International Commission for the Protection of the Rhine,¹ Germany would welcome the placing of greater emphasis on the joint management aspect of international watercourses. Thus, for example, article 26 could be taken out of what was part IV and moved to a prominent position. In order to specify the meaning of "joint management" in an institutionalized form, the clauses of article 26 could be extended, based on the principles of article 10, paragraph 2.

CONCLUSION

24. The 32 draft articles constitute a balanced set of rules. They guarantee effective river protection and supply a framework for more specific bilateral or regional watercourse agreements. All the main principles of international environmental law have been taken into account, such as limited territorial sovereignty, the ban on abuse of rights recognized in international law pertaining to State responsibility, and the procedural obligation to supply information in good time and to consult other parties when planning utilization, documented above all with regard to the use of water within an international drainage basin.

25. Germany would welcome an early diplomatic conference for the purpose of adopting a draft convention.

¹ Established under the Agreement on the International Commission for the Protection of the Rhine.

Greece

[Original: French]
[3 February 1993]

GENERAL COMMENTS

1. The provisions of the draft articles are generally acceptable to the Government of Greece. The draft manages, on the whole, to reconcile the opposing rights and interests in this field—those of upstream countries, on the one hand, and those of downstream countries, on the other. The draft is thus on the right track and constitutes an excellent basis for future work.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 2

2. The Government of Greece notes that the Commission has adopted in draft article 2 the "system" concept in relation to international watercourses. However, it would have preferred the adoption of the modern concept of "international catchment area", which is more comprehensive and sounder from the scientific point of view. A positive point, however, is the fact that the underground waters of a system have been included within the scope of the draft articles.

Articles 5 to 7

3. Articles 5 and 6 may be considered as the keystone of the draft articles, for in reality they determine the conduct of watercourse States with respect to the utilization of a watercourse in their respective territories. Such utilization must be equitable and reasonable. The use of the notion of equity in connection with relations involving international watercourses is entirely apposite. It should be emphasized, however, that equity is not something that is outside the scope of the law, a sort of solution *ex aequo et bono*, but rather a legal standard imposed by customary international law. Equity is, therefore, a verifiable concept, meeting the specific criteria listed in article 6.

4. Article 7 lays down the obligation not to cause "appreciable harm". In the view of the Greek Government, the term "perceptible harm" would have been preferable, as it more closely reflects current practice in this regard. This comment also applies to the other draft articles in which this term appears.

Article 10

5. With regard to article 10, which deals with the relationship between uses, the Government of Greece maintains that, especially in the case of small rivers, account should be taken, even if only by way of exception, of certain specific interests, such as protection of public health and preservation of water quality for domestic and agricultural use, interests which may be of vital importance for some regions.

Articles 11 to 18

6. These articles establish a mechanism which appears to be both realistic and effective. However, in the view of the Greek Government, the six-month period provided for is too short. A period of at least one year should therefore be allowed, especially with respect to article 13. Otherwise, if States do not have sufficient time to study and evaluate the possible effects, they will be inclined to oppose projects of which they are notified in every case.

Article 19

7. This article, which allows a State to take unilateral action when a matter of the utmost urgency is involved, based on its own judgement, upsets the balance which the draft articles strive to achieve in this respect and undermines the system of safeguards based on articles 12 and the following. Abuses and faits accomplis will be inevi-

table. Accordingly, in the view of the Government of Greece, this article should be carefully reviewed.

Articles 20 to 25

8. The provisions of these articles appear to be satisfactory on the whole. They are patterned to a large extent on the United Nations Convention on the Law of the Sea and other relevant international legal instruments dealing, *inter alia*, with the prevention of water pollution. In particular, the Government of Greece supports the use of the term "ecosystem", which is a sound and scientifically accepted concept.

9. The Government of Greece considers that article 21, paragraph 2, does not yet succeed in striking the requisite balance between the rights of upstream and downstream countries. In addition to the prevention, reduction and control of pollution, the paragraph should also refer to the elimination of pollution, even if only in certain conditions. The words "control" and, possibly, "eliminate" should also be added after the words "prevent" and "mitigate" in article 24.

Articles 26 to 29

10. The importance of articles 26 and 27, which deal with the management and regulation of international watercourses, is obvious and the wording of the articles is, on the whole, satisfactory. The same applies to article 28, dealing with the maintenance and protection of installations. Article 29, on the protection of international watercourses and installations in time of armed conflict, deserves its place in the draft articles. It deals carefully with a sensitive issue.

Article 32

11. While not denying the importance of the principle set forth in article 32 (Non-discrimination), the Government of Greece believes that the issue is outside the scope of the draft articles. In fact, the provision relates to the right of access to justice, a matter governed by other international legal instruments. Accordingly, further thought should be given to whether the inclusion of such a provision is necessary.

12. Lastly, the draft articles should definitely be completed by the addition of provisions on the settlement of disputes. Given the nature of the matter, these provisions should relate to binding procedures for settlement, namely arbitration and judicial settlement.

13. The Government of Greece reserves the right to make further comments on the draft articles at a later stage.

Hungary

[Original: English]
[13 May 1993]

GENERAL COMMENTS

1. In evaluating the draft articles on the law of the non-navigational uses of international watercourses prepared by the Commission, the reply of the Hungarian Govern-

ment to the Commission's 1975 questionnaire,¹ which *grosso modo* agreed with the necessity to codify this field of international law, may be used as a starting point. That reply strongly emphasized that the water management agreements that were in force with respect to Hungary had brought about only partial results from the point of view of Hungarian interests. The same reply expressed a preference for the application of the concept of hydrographic (drainage) basins.

2. In the opinion of Hungary, the latest draft is, *on the whole, worthy of support* and it may serve as a good basis for a legally binding international treaty. This view is not antithetical to the fact that this response also contains critical observations.

3. The results to date of the codification undertaken by the Commission reflect the fact that the international community has largely already accepted the existence of general international legal principles and rules governing the relations between States concerning the non-navigational uses of international watercourses. General international law—even in the absence of treaties—limits the freedom of action of the watercourse States. The draft articles identify these general principles and rules of international law, with greater authority than the resolutions adopted by international legal associations, such as the Institute of International Law and the International Law Association. As other examples too have proved, *even a draft may become part of international usage and a point of reference*, both in negotiations aimed at the conclusion of international treaties and in disputes related to international watercourse issues.

4. As for the structure of the draft, although it would seem more logical to include the various *definitions* (art. 21, para. 1, art. 25, para. 1, art. 26, para. 2, and art. 27, para. 3) in a single article—this possibility is mentioned in the commentary²—the approach taken, which is to give only the definition of an international watercourse (and by derivation that of the watercourse State) in article 2, has the advantage of stressing the special weight of this notion, by defining *the territorial scope of application* of the general rules set forth in the draft.

5. The inclusion of the *general obligation to cooperate* (art. 8) among the general principles (part II) is more problematic. This general obligation is presumably identical with the principle of cooperation (the only difference being that the practical purpose of cooperation is defined, namely to attain optimal utilization and adequate protection), which is more general in nature, since it appears in such documents as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations³ or the Final Act of the Conference on Security and Cooperation in Europe.⁴ Even from a practi-

¹ *Yearbook . . . 1976*, vol. II (Part One), pp. 150 et seq., document A/CN.4/294 and Add.1.

² *Yearbook . . . 1991*, vol. II (Part Two), p. 71, para. (8) of the commentary to article 2.

³ General Assembly resolution 2625 (XXV), annex.

⁴ *Final Act of the Conference on Security and Co-operation in Europe*, signed at Helsinki on 1 August 1975 (Lausanne, Imprimeries Réunies).

cal point of view it would be better to include the *various modes of cooperation* under a general obligation to cooperate, including the regular exchange of data (art. 9), procedural obligations concerning planned measures (arts. 11-19), management (art. 26) and regulation (art. 27), which should be moved up from the miscellaneous provisions.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

6. The previous Hungarian reply to the Commission's questionnaire had already supported the broad interpretation of the non-navigational uses, which includes the utilization of the waters and measures of conservation and protection. This article of the draft fulfils this requirement.

Article 2

7. By defining the term "international watercourse" the draft also defines the territorial scope of the rules contained in the draft. During close to two decades of codification, the definition of the term "international watercourse" has been the most difficult and most controversial issue. From the very beginning the restrictive, so-called traditional, notion of the term "international watercourse" (which can be traced back to the 1815 Congress of Vienna), limiting it to watercourses forming or crossing boundaries, has been in conflict with the wider interpretation, which—largely as a result of the effect of the Helsinki Rules⁵ identifies international watercourses with drainage basins (recently the expression "international catchment area" has been used) or with international river systems (the commentary⁶ here refers to the Treaty of Versailles). The Commission's provisional working hypothesis of 1980⁷ tried to solve the conflict of the two perceptions by introducing a functional term, creating a link between the international nature of the watercourse and the transboundary effects: if the consequences of an action taken with respect to a hydrological system affect the territory of another watercourse State, then the watercourse is an international one, in the absence of such consequence, however, it is not international.

8. It could still be useful to *enumerate examples of the most important elements of an "international watercourse"*, which may be found in the commentary, including aquifers,⁸ while at the same time the exclusion of *confined groundwaters* not related to surface waters can be supported.

⁵ The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 et seq.; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 et seq., document A/CN.4/274, para. 405.

⁶ *Yearbook . . . 1991*, vol. II (Part Two), p. 71, para. (9) of the commentary to article 2.

⁷ *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 90.

⁸ *Yearbook . . . 1991*, vol. II (Part Two), p. 70, para. (5) of the commentary.

Articles 3 and 4

9. These may be considered two of the key provisions of the draft. They are premised on real situations, supported by precedents and underpinned by theoretical considerations, namely that the best way to regulate international relations with respect to non-navigational uses is for watercourse States to conclude *international treaties*, which the draft articles call *watercourse agreements*.

10. The utility of and need to conclude watercourse agreements are generally recognized in the commentary to article 3⁹ and are in harmony with the basic idea expressed in the Hungarian response of 1976.

11. The result of this approach is the twofold nature of the regulations concerning international watercourses, relating on the one hand to watercourse agreements and on the other to the general principles and rules codified in the draft. *This parallel nature of the regulation of the matter under international law*, however, creates *problems* from both directions.

12. The commentary attributes two *functions* to the general principles and regulations codified in the draft: on the one hand—in the absence of watercourse agreements—they define the rights and obligations of watercourse States,¹⁰ on the other hand—as a framework or umbrella treaty¹¹—they provide guidelines on the watercourse agreements to be concluded. It is difficult to question the correctness of this latter function. However, it is also difficult to envisage how each and every one of these general principles and rules could be applied directly, and *whether—in the absence of an agreement—they describe the rights and obligations of watercourse States with the required precision*.

13. The draft articles leave it to the watercourse States to decide whether they want to conclude watercourse agreements and gives them the freedom to define the territorial and *ratione materiae* scope of application of these agreements. It means, in other words, that *there is no obligation to conclude agreements*¹² (here the draft follows the explanation of the arbitral award in the *Lake Lanoux* case),¹³ but every watercourse State is entitled to a *pactum de contrahendo*, that is to say, it has the right to initiate negotiations with a view to concluding agreements.

14. If there are more than two watercourse States to an international watercourse, further problems are to be taken into account. The draft deals with the situation when one watercourse State's use of the watercourse *may be affected to an appreciable extent*. Hungary believes that the

⁹ For the commentary to article 3, initially adopted as article 4, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 27-30, in particular para (2) *in fine*.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. (3) *in fine*.

¹² *Ibid.*, p. 29, paras. (18)-(20) of the commentary.

¹³ 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.

English expression “appreciable extent” and the French *de façon sensible* are not fully consonant with the application of a watercourse agreement limited in its territorial or *ratione materiae* scope. The State in question is entitled to participate in the negotiations of and to become a party to the agreement.¹⁴ The problem, however, is not fully solved, because there is no mention of what will happen if the parties to a—presumably bilateral—agreement which affects to an appreciable extent the use of the watercourse by a third State, *do not recognize the rights of the latter, or make it impossible to apply the agreement.*

15. According to the draft articles, the purpose of the watercourse agreements is *to apply the general principles and rules and to adjust them to the particular situation.* The latter provides sufficient latitude for specific considerations, since these principles and rules should be taken into account when concluding agreements,¹⁵ and are recognized as guidelines.¹⁶ Even so, the provision of article 3 is still not unambiguous. It may be interpreted as containing a certain cogency, evidenced by the absence of the formula “unless otherwise provided by international treaty”. Even in this latter case the problem may arise—as is apparent from the commentary to article 1 of the Rules of International Law Applicable to Transfrontier Pollution (Montreal Rules):

... States concerned are free to agree on a higher level of protection ... such an agreement cannot dispose of the rights of other States or free a State from the responsibility for the protection of the global environment.¹⁷

and similarly from article I of the Helsinki Rules.

16. If the rights of other (third) watercourse States, or simply other States (that is to say, “non-directly injured States”), as referred to by Mr. Arangio-Ruiz, the Special Rapporteur, in his third report on State responsibility¹⁸ are being harmed by opting out from, excluding, or modifying the principles and rules contained in this draft, under the pretence of “apply and adjust”, then *would it be sufficient to refer the case to the rules of international legal responsibility*, or would not the draft require some kind of *procedural solution of its own?*

17. Another problem of the relationship between the watercourse agreement and the general principles and rules is that these principles and rules also involve nations which are *per definitionem* in change, meaning that their importance and weight vary over time.¹⁹ Such notions are the technical conditions influencing the measure of reasonable and equitable use, in the interests of the protection of the environment, and the like. In what way could the development of the general principles and rules in turn affect the watercourse agreements? Could this development be qualified as a significant change of circum-

stances, or is it necessary to adapt the treaties in force (especially the older ones) to the new circumstances? (This approach is envisaged, for example, in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes).

Articles 5 to 10

18. The title of part II (General principles) is rather unfortunate. There are only three such obligations that may meet the traditional parameters of a legal principle, namely the principles of reasonable and equitable utilization, the obligation not to cause harm, and cooperation. In Hungary’s view the regular exchange of data and information is rather a general obligation, while the lack of hierarchy in the uses of the watercourse is more a consequence of the principle of a reasonable and equitable share, therefore it should be more appropriately placed after article 6.

19. The above-mentioned principles of water utilization have their roots in *international customary law*, but a *progressive development of law* can also be detected. Rational and equitable utilization, as well as the obligation not to cause harm, have already appeared as a pair of principles in the resolution adopted by the Institute of International Law at its Salzburg session in 1961 (Salzburg resolution).²⁰ Contrary to this, the Helsinki Rules recognized only one key principle, that of reasonable and equitable share (art. V). While ILA, drifting away from this concept in its resolution on the law of international groundwater resources (Seoul Rules)²¹ places the obligation not to cause harm next to the principle of reasonable and equitable share, the resolution on the pollution of rivers and lakes and international law (Athens resolution), adopted in 1979 by the Institute of International Law²²—at least in the sphere of protection against pollution—neglects the principle of reasonable and equitable share.

20. With respect to the development of law, first the essence of the principles and then their interrelationship must be identified.

21. The principle of *reasonable and equitable utilization*, described in article 5, contains a *prima facie* axiomatic element, which the Hungarian Government considers to be especially important, namely the declaration of the right of the watercourse State to utilization as an attribute of sovereignty.²³ The immanent limit of this right is the equal and correlative right of other watercourse States to the utilization and benefits of the watercourse.

22. The inherent limitation within the reasonable and equitable utilization itself—apart from extreme cases (such as the obvious deprivation of the watercourse State

¹⁴ See the commentary to article 4, initially adopted as article 5, in *Yearbook . . . 1987*, vol. II (Part Two), p. 30, para. 2.

¹⁵ See paragraph (5) of the commentary (footnote 9 above).

¹⁶ See paragraph (2) of the commentary (*ibid.*).

¹⁷ ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 158, para. 2 of the commentary to article I of the Rules.

¹⁸ *Yearbook . . . 1991*, vol. II (Part One), p. 26, document A/CN.4/440 and Add.1, paras. 89-95.

¹⁹ See the resolution of the Institut de Droit International about the inter-temporal problem in public international law (*Annuaire de l’Institut de droit international*, vol. 56, 1975, p. 340).

²⁰ “Utilization of non-maritime international waters (except for navigation)”, *Annuaire de l’Institut de droit international*, vol. 49, part II (1961), pp. 381-384.

²¹ ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987), pp. 238 et seq.

²² “La pollution des fleuves et des lacs et le droit international”, *Annuaire de l’Institut de droit international*, vol. 58, part II (1980), p. 196.

²³ For the commentary on article 5, initially adopted as article 6, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31-36, in particular, p. 32, para. (8) *in fine*.

of its rights to utilization²⁴—does not secure delimitation of the rights to utilization and the obligations to protect the waters against harm. To put it differently, the *conclusion of an international treaty, a watercourse agreement, is required for the realization of the principle mentioned in paragraph 21 above*. In cases of conflicts of uses, adjustment and accommodation of these uses can be best achieved through special watercourse agreements,²⁵ at the same time the commentary to article 7 mentions that

... a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is 'equitable', in the absence of agreement between the watercourse States concerned*.²⁶

23. The factors mentioned above determine the *relationship* of the principles of reasonable and equitable use and the no harm rule. Prima facie, they would be considered twin principles among which the interested parties may choose according to need. However, the Commission—as specifically recognized by McCaffrey²⁷—*chose the primacy of the no harm rule* and gave a subordinate role to the principle of equitable use. The reasons for this decision are as follows: (a) the unambiguity and easier application of the no harm rule compared to the very flexible nature of the equitable utilization rule, which requires the balancing of a number of factors; (b) the no harm rule provides greater protection to the weaker or the downstream State; (c) the principle of reasonable and equitable use is less effective in solving problems related to pollution and environmental protection.

Article 7

24. The draft articles consider only *appreciable harm* to be relevant. The emphasis on the appreciable character of the harm causes not only a problem of interpretation, but also creates a legally relevant discrimination between two degrees of harm. The thesis that insignificant, minor harm is irrelevant, is obviously true. However, the maxim of *de minimis non curat praetor* tacitly forms part of every legal instrument. The underlining of the "appreciable" extent of the harm leads to the conclusion that there must be a harmful effect in the "grey area", between the *de minimis* harm (which requires no mention in the instrument) and appreciable harm.

25. Since the *no harm rule* prohibits the causing of appreciable harm, any act contrary to this is a violation of international law, the illegality of which may be excluded only through agreement, aimed at the realization of reasonable and equitable utilization.

26. In the Government of Hungary's judgement the *no harm rule* should be complemented with a general obligation of prevention, which should not be limited exclusively to the protection against pollution (as is done in article 21). This would harmonize with the theory of the

impact assessment system, which is gaining ground. In the article cited above (see paragraph 23), McCaffrey mentioned that this problem came up also in the work of the Commission, raising the question of what is the standard of responsibility for the violation of the *no harm rule*. In Hungary's view this question could be adequately solved by a general obligation of prevention. The consequences of its violation, however, are to be established under the rules of international responsibility.

27. Article 28 concerning installations is closely related to the general obligation of prevention, which structurally should have been mentioned here. Also belonging to the obligation of prevention is the rule formulated in the *Lake Lanoux* case, according to which

... construction and functioning of abnormal installations, i.e. installations exceeding normal technical and political risks are prohibited*.

Hungary attaches great importance to this rule.

28. The commentary identifies the obligation not to cause harm with the maxim of *sic utere tuo ut alienum non laedas*.²⁸ According to authoritative writers (Oppenheim, Lauterpacht, Starke, et al.),²⁹ the above-mentioned rule expresses the prohibition of the abuse of law, which is obviously much narrower than the general obligation not to cause harm.

Articles 11 to 19

29. Together with the prohibition on causing harm (and the provisions of environmental protection) articles 11 to 19 belong to a group of rules which do not require the conclusion of watercourse agreements for their application. Apart from the provisions setting specific deadlines, part III (Planned measures) of the draft articles codifies customary international law. Even so, it would have been useful to mention the dispute at the United Nations Conference on the Human Environment³⁰ over the obligation to provide notification. Hungary has only two observations on the formulation used in the draft.

30. First, it would be desirable to insert a *pactum de contrahendo* "with a view to negotiating in good faith for the purpose of concluding a watercourse agreement" into paragraph 1 of article 17, which would be in harmony with the logic and specific provisions (see articles 4 and 5) of the draft, and thus provide greater guarantees of respect for the general principles and rules of international law.

31. Secondly, paragraph 2 of article 17, as a reflection of the previous concept of reasonable and equitable share, prescribes that consultations and negotiations should be based on the principle that reasonable regard should be paid to the rights and legitimate interests of other States.³¹ This formulation is difficult to justify, since rights are to be respected, not to be paid regard to; the obligation to pay regard therefore applies only to the interests. For a

²⁴ Ibid., p. 31, para. (2) *in fine*.

²⁵ Ibid., p. 33, para. (9) *in fine*.

²⁶ For the commentary to article 7, initially adopted as article 8, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 35-41, in particular, p. 36, para. (3).

²⁷ "The International Law Commission and its efforts to codify the international law of waterways", in *Annuaire suisse de droit international*, vol. XLVII (1990), p. 32.

²⁸ See footnote 26 above.

²⁹ See J. Bruhács, *The Law of Non-navigational Uses of International Watercourses* (Dordrecht, Boston, Nijhoff, 1993).

³⁰ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part 3, chap. VIII, para. 60.

³¹ See articles VII and VIII of the Helsinki Rules.

similar interpretation see the award in the *Lake Lanoux* case.

32. Hungary's objection to the notification-consultation mechanism is based on the fact that it limits the *procedure* to a "single instance". This follows, *inter alia*, from the wording of paragraph 3 of this article and paragraph 4 of the commentary, which states that: "After this period has expired, the notifying State may proceed with implementation of its plans".³²

33. It could be argued, however, that the existing uses and functioning installations might also have such adverse effects, resulting, for example, from the accumulation of effects that were latent or were unforeseen. (An example which takes account of the latter is the 1957 Agreement between Norway and the Union of Soviet Socialist Republics on the utilization of water-power on the Paatsojoki (Pavsik) River.)³³ While the extension of the obligation to consult-notify to this case would be in harmony with the no-harm rule and the obligation to cooperate, it would not terminate the application of the utilization rights stemming from territorial sovereignty, it would merely restrict it to a small degree.³⁴

Articles 20 to 23

34. Part IV (Protection and preservation) of the draft articles contains those principles and rules of customary international law that evolved in the areas of protection of the environment and defence against pollution. This part also deals with norms of international law *in statu nascendi* pertaining to the subject, among which—interestingly enough—the provisions of the United Nations Convention on the Law of the Sea and the instruments drafted by ECE also play an important role (para. (2) of the commentary to art. 20,³⁵ para. (1) of the commentary to art. 23,³⁶ and the whole of art. 24 have been based on the Convention on the Law of the Sea).

35. It would be correct to amend article 20 (Protection and preservation of ecosystems) to include an obligation to restore the original state of the environment in case of damage. Such a solution would harmonize with paragraph 2 of article 21 (Prevention, reduction and control of pollution), which requires the reduction and control (the English verb "to control" and the French *maîtriser* are not totally identical in meaning) of pollution, because presumably it could also refer to the cleaning up of damage that had already occurred.

36. Finally, it should be noted that it would be more logical to move the definition of "ecosystem" from paragraph (2) of the commentary³⁷ to the text of article 20.

37. Article 21 adequately reflects the need for stricter measures to protect the water quality of international watercourses. However, the enumeration of the different

kinds of harm in paragraph 2 seems superficial, even troubling. What is the purpose of singling out harm to the living resources from all the types of ecological damage? It is undoubtedly true that the various forms of harm need to be defined. However, that would best be achieved through watercourse agreements—perhaps agreements on civil law liability damages.

Articles 26 to 32

38. As mentioned above, some of the provisions grouped as miscellaneous provisions (arts. 27, 28, 30 and 31) are logically connected to other articles. They should therefore have been included in those articles.

39. The Government of Hungary agrees with the provision of article 29 dealing with rights and obligations in time of armed conflict.

Iceland

[See *Nordic countries*]

Iraq

[Original: Arabic]
[28 January 1993]

GENERAL COMMENTS

1. All the articles and provisions of the draft on the law of the non-navigational uses of international watercourses and the comments thereon are useful and accord with Iraq's concept of the non-navigational uses of international watercourses.

2. In paragraph (4) of the commentary to article 8,¹ reference is made to the term "transboundary waters" as used in the "Principles regarding cooperation in the field of transboundary waters" adopted by ECE in 1987. This is incompatible with the definition of an international watercourse. In Iraq's view, this term is unacceptable in instances where it occurs.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 6

3. Iraq proposes that the following should be added to the end of draft article 6, paragraph 1 (*d*):

"taking into account that particular importance is to be accorded to existing uses over potential uses in the event they should conflict."

4. Iraq also proposes that a subparagraph (*g*) should be added to article 6, paragraph 1, of the draft to take account of the quality of the water entering any watercourse State in determining equitable and reasonable quantity.

Article 8

5. Iraq proposes that the word "possible" should be added after "optimal utilization" because this expression is non-restrictive and is tied to scientific and technological development.

¹ Initially adopted as article 9. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 41-43.

³² *Yearbook . . . 1988*, vol. II (Part Two), p. 52.

³³ United Nations, *Treaty Series*, vol. 312, p. 274.

³⁴ See analogy with the *Lake Lanoux* case.

³⁵ Initially adopted as article 22. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), pp. 57-60.

³⁶ Initially adopted as article 25. For the commentary, *ibid.*, pp. 64-65.

³⁷ See footnote 35 above.

Netherlands

[Original: English]
[4 June 1993]

GENERAL COMMENTS

1. Before examining each article individually, the Netherlands Government will first give a general assessment of the draft articles on the law of the non-navigational uses of international watercourses as a whole and then make a number of general comments on the nature of the instrument to be proposed after adoption on second reading, as well as pointing out some inconsistencies, and a number of issues on which regulations have not been included.

General assessment

2. The Netherlands Government is of the opinion that the draft articles should generally be assessed as positive. The Commission has formulated very adequate regulations on these very complex issues. To be more specific, however, its assessment of the draft as a whole and of the articles individually depends to a significant extent on whether the draft is to be regarded as a draft recommendation, a draft declaration or a draft treaty. For the reasons referred to in paragraph 5 below, the Netherlands Government believes that preference should be given to the first of these options, namely that the draft should be regarded as a draft recommendation. In this event, the draft is found to be satisfactory and, subject to some amendments, the Netherlands would favour its adoption.

3. The second part of these comments examines those articles which should be amended. However, if it is finally decided to make the draft articles into a draft treaty, other parts of the draft would require amendment and the text would thus need to be re-examined.

Nature of the instrument

4. As stated in paragraph 2, the Netherlands Government is of the view that the draft articles should not become a legally binding instrument, but that they should be adopted as a recommendation by the United Nations General Assembly. It is acknowledged that a number of arguments may be put forward in favour of turning the draft into a treaty. Legally binding regulations on the uses of international watercourses could, in a number of cases, help to clarify the rights and obligations of riparian States and thus contribute towards international agreement on the use of international watercourses. Partly, at least, the issue covered by the draft articles has been sufficiently refined to warrant regulation in a treaty.

5. However, the Netherlands Government attaches greater weight to the case for a form which is not legally binding. In particular, it questions whether the issue involved lends itself to a worldwide treaty which specifies the rights and obligations of States to a sufficient degree. In view of the differences between rivers, the largely opposing interests of upstream and downstream States, and the great differences between regions, it will be no easy matter to reach agreement on a framework treaty which includes such specific provisions. For these reasons, its preference would be to incorporate the draft articles in a

recommendation providing guidelines for the conclusion of binding agreements on individual watercourses.

6. In this connection, the Netherlands would observe that the recommendation option does not preclude regarding parts of the draft articles as a reflection of existing customary law.

Inconsistencies

7. The Netherlands Government notes that there are a number of inconsistencies in the formulation of the articles, in some cases for no apparent reason. In other cases, reasons may well exist, but they are insufficiently clear in the accompanying commentary. The inconsistencies relate in particular to the way in which obligations are qualified. It is not always clear why, in the articles concerned, different adjectives are used to qualify obligations. For example, article 21, paragraph 2, obliges States to prevent the occurrence of "appreciable harm", article 24 refers to the prevention of circumstances that are "harmful", and article 25 relates to situations in which "serious harm" may occur. In a number of cases, the reasons for the various modifiers given to thresholds are clearly indicated and are convincing (for example, in the case of the notification threshold in article 12), but in other cases a satisfactory commentary is not given.

8. The draft articles would gain in clarity if the terminology used were consistent. Whenever a different formulation is chosen the commentary should indicate the reasons and the effect it will have on the substance and extent of the obligations in question.

Issues not included in the regulations

9. The Netherlands Government is of the view that a number of issues have wrongly been excluded from the draft articles, such as the lack of a provision on environmental impact assessment (para. 11 below) and, in particular, of provisions on the settlement of disputes.

10. The absence of dispute settlement provisions from the draft articles is perceived as a shortcoming. In view of the fact that should the draft articles be regarded as a recommendation, they will serve as a model for the conclusion of treaties on individual watercourses, the Netherlands Government regards a reference to suitable and effective regulations for the settlement of disputes as essential.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

11. The Netherlands Government stresses the importance of the indication in the commentary¹ that the term "uses" of international watercourses is to be interpreted in its broad sense. Although, for example, the construction of dykes by an upstream State to counter possible damage to its land may affect the use of water by the downstream State, such an activity may not be regarded as a "use"

¹ Initially adopted as article 2. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 25-26, in particular, p. 26, para. (1) *in fine*.

within the meaning of article 1. In view of the close connection between such activities and the issues regulated in the draft articles, the commentary should be adapted accordingly.

Article 2

12. The Netherlands Government would observe that the use of the term "watercourse" may lead, in practice, to a lack of clarity. According to this definition, the Maas and the Rhine, which flow into a common terminus, should be regarded as one watercourse. Although the riparian States may themselves define the extent to which they wish to cooperate under the provisions of article 3, in the absence of such agreements a number of the obligations contained in the draft agreement will apply to the watercourse as a whole. This problem could be solved if the definition were to be amended to the effect that those watercourses which follow their own course but flow into a common terminus are to be regarded as separate watercourses for the purposes of the draft articles. An alternative solution would be to delete the words "and flowing into a common terminus", although this would entail the loss of a restrictive element.

13. This article does not define where a watercourse terminates in the seaward direction. This may occasionally be of importance to the scope of the draft articles, and it might therefore have been desirable to examine the matter, at least in the commentary.

Article 3

14. In the event of the draft articles finally being submitted as a treaty for ratification, the words "apply" in paragraph 1 and "application" in paragraph 3 are superfluous and should be deleted. There is no objection, however, to their retention in the event of the draft articles being submitted as a recommendation.

Article 6

15. It is noted that the criterion "potential uses of the watercourse" in article 6, paragraph 1 (d), has not been further defined. It is relevant to emphasize that not every conceivable future use can be taken fully into account in the consideration of interests on the basis of article 6. Only potential uses which may be regarded as feasible in the near future may be considered.

Article 7

16. The Netherlands Government regards it as desirable for the commentary to emphasize that this is a due diligence obligation which does not imply strict liability. A similar clarification has in fact been included in the commentary accompanying a number of the other articles, to wit article 21, paragraph 2,² article 24,³ and article 28, paragraph 1.⁴

² Initially adopted as article 23. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), pp. 60-63, in particular para. (4).

³ Initially adopted as article 26. For the commentary, *ibid.*, p. 65, para. (2).

⁴ For the commentary, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 75-76, in particular para. (2).

Article 10

17. The words "or custom" in paragraph 1 of this article should be deleted or at any rate qualified. In its present form, article 10 could lead to absolute priority being given to existing uses over new uses. The Netherlands Government regards this as an undesirable construction. Moreover, such a priority would not be consistent with article 6, paragraph 1, which stipulates that existing uses constitute only one of the factors to be taken into consideration. This is, of course, different if the protection of existing uses is based on a rule of (regional) customary law. The commentary could contain a separate provision to cover this eventuality.

Article 16

18. It is unclear how the liability of the notifying State will be affected in the event of the notified State failing to respond to the notification. According to this article, the notified State retains scope to hold the notifying State liable under the provisions of articles 5 to 7. According to paragraph (1) of the commentary,⁵ the notified State's failure to respond may be interpreted as tacit consent. It might therefore be regarded as inconsistent if the said State were then to invoke draft articles 5 to 7 at a later date should the notifying State conduct the activities in accordance with the notification.

19. The procedural obligations contained in articles 12 and those following do not in principle affect the substantive obligations contained in articles 5 to 7. The regulation proposed by the Commission should therefore be maintained. Failure to respond to a notification may, of course, affect the extent to which the notifying State may foresee damage arising from its planned activity and, thus, the extent to which it may be held liable. The Netherlands Government therefore regards it as desirable that the commentary accompanying article 16 should make it clear that failure to respond may not automatically be interpreted as consent.

Article 20

20. The relationship between draft article 20 and the other articles contained in part IV should be clarified. The statement in the commentary that

... in view of the general nature of the obligation contained in [this] article . . . , the Commission was of the view that it should precede the more specific articles in part IV⁶

leads to the conclusion that the purpose of the article is not to grant individual subjective rights but to serve as an introduction to the further provisions of part IV. In the view of the Netherlands Government, a separate obligation to protect the ecosystems of international watercourses is required to supplement the obligations arising from the subsequent, more specific provisions of part IV. This obligation should relate, *inter alia*, to the protection of fauna and flora, including the preservation of diversity

⁵ *Yearbook . . . 1988*, vol. II (Part Two), p. 51.

⁶ Initially adopted as article 22. For the commentary, *Yearbook . . . 1990*, vol. II (Part Two), pp. 57-60, in particular para. 1.

of species, insofar as this is not guaranteed by the obligation to prevent pollution.

21. Article 20 has been formulated in more general terms than article 21, paragraph 2. In particular, it does not contain restrictive definitions such as “appreciable harm”. Should it indeed be the intention to attach a separate meaning to article 20, the Netherlands Government would recommend that the scope of the obligation be defined and the reasons for possible differences with article 21, paragraph 2, indicated.

22. A definition of the ecosystem has been included in the commentary only. This article therefore departs from other draft articles which themselves contain a definition of the terms determining the obligation in question. Should article 20 indeed be interpreted as a provision from which subjective rights may be derived, the Netherlands Government considers it essential to define the term “ecosystem” more precisely, particularly if the draft articles were ultimately to lead to a treaty.

Article 21

23. The wording of the objectives of article 21, paragraph 2, should be altered. The obligation “(to) prevent, reduce *and* control pollution” should be replaced by the obligation “(to) prevent, reduce *or* control pollution” in view of the fact that these measures cannot be taken simultaneously.

24. It is important that the observations made with regard to article 7 concerning the due diligence nature of the obligation should also apply to article 21, paragraph 2. The commentary accompanying article 21, paragraph 2, would seem to imply that the due diligence element is restricted to the obligation “(to) . . . reduce and control pollution . . .”,⁷ leaving it unclear as to whether another standard is to be applied to prevention. The fact that there is no question of liability in this case either should be clarified.

Article 24

25. As stated in paragraph 7 above, in contrast to article 21, paragraph 2, this obligation is not restricted to a prohibition of activities leading to appreciable harm but relates to all harmful consequences. The Netherlands Government regards it as desirable to give an explanation of the reasons for this distinction.

26. Partly in view of the inconsistent wording, the Netherlands Government regards the distinction drawn between the obligations contained in article 21, paragraph 2, in particular those relating to “harm to human health or safety”, and those contained in article 24, in particular those relating to “water-borne diseases”, as insufficiently clear. It would be desirable to limit the application of article 24 to damage arising from causes other than pollution. In addition, the Netherlands Government is of the opinion that the obligations relating to pollution and other causes of damage should be harmonized.

Article 25

27. The observation relating to the wording of article 21, paragraph 2, applies in this case too. The word “and” in “prevent, mitigate and eliminate pollution” in paragraph 3 should be replaced by the word “or”.

Article 26

28. It is noted that article 26 does not refer to the desirability or need to institutionalize cooperation between riparian States. In view of the importance attached in practice to institutions such as river commissions, the Netherlands Government perceives this to be a shortcoming. It would be desirable to amend article 26 in this respect by the inclusion of a reference to opportunities to institutionalize cooperation and by ensuring that under “joint mechanisms” provision is made for the establishment of river commissions and other possible institutional frameworks, particularly if the draft articles are to become a recommendation.

Article 27

29. In the opinion of the Netherlands Government, the words “where appropriate” should be deleted from paragraph 1 of this article, as they entail an unwarranted restriction of the scope of the obligation to cooperate.

30. For the sake of consistency, for example with article 21, preference should be given to the inclusion in paragraph 1 of the definition now contained in paragraph 3.

Article 29

31. In view of the fact that this article does not envisage imposing new obligations but serves only to remind States of the application of the law concerning armed conflict, it will probably have no practical implications. It is also questionable whether the riparian States of international watercourses will include this provision in specific agreements they conclude to implement the framework treaty to which these draft articles are intended to lead. It would probably be preferable to delete this article.

Article 30

32. The Netherlands Government finds the proposed formulation of this article unsatisfactory. In particular, the qualification in the concluding words “accepted by them” could render the obligation of no practical significance. The obligation would be reinforced if these words were replaced by “available to them” or if they were deleted entirely.

Article 32

33. It is noted that the scope of article 32 is very limited. The article only prohibits discrimination in relation to access to judicial or administrative procedures, but it does not stipulate that such access must be available. The Netherlands Government would regard it as desirable to amend article 32 to ensure the availability of national judicial procedures and to provide for access to procedures and possibly rights to compensation. In addition, this would bring the draft articles more closely into line with

⁷ See footnote 2 above.

the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

Special issues

Compulsory cooperation and institutional regulations

34. The obligations to cooperate as stipulated in the draft articles are found to be largely satisfactory. Comments on article 16 have already been made in paragraphs 18 and 19 above.

35. The Netherlands Government would observe that articles 11 to 19 concerning the procedural rights and obligations applicable when States plan to undertake activities which might affect other States overlap to some extent with the obligations laid down in the Espoo Convention. In some respects the obligations are not entirely consistent. Paragraphs 43 to 45 below concerning the connection with State practice contain some observations on this matter.

36. As it already noted with regard to the observations on article 26 (para. 28 above), the Netherlands Government regrets that the draft articles contain very few provisions with regard to institutional regulations and is of the opinion that they should be amended in this regard. Reference may also be made to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention) in which provision is expressly made for the "establishment of joint bodies" (art. 9) to which certain responsibilities have been assigned.

The terms "equitable use" and "pollution"

37. In addition to the remarks already made, the Netherlands Government would regard the provisions relating to equitable use (arts. 5-6) and pollution (in particular art. 21) as satisfactory. However, some comments on the relationship between these provisions are deemed desirable.

38. The regulation envisaged by the Commission gives priority to article 21 over the principle of equitable use. Article 21, paragraph 2, does not make an exception for appreciable harm caused by activities conducted in accordance with this principle. The Netherlands Government concurs with this construction. The importance currently attached to the prevention of transboundary water pollution within many international frameworks appears difficult to reconcile with a regulation which regards such pollution, even if it led to appreciable harm, as lawful, in view of the interests involved in the activity giving rise to it. Even the more recent conventions provide no point of contact. Although equitable use is regulated in the Helsinki Convention, the latter does not appear to subordinate it to the ban on appreciable harm.

39. However, the Netherlands Government regards the relationship between the provisions relating to equitable use and the ban on appreciable harm contained in article 7 as less satisfactory. In this case too, the Commission would seem to give priority to article 7; this is evident from both the unconditional formulation of the article and the accompanying commentary, according to which the use of a watercourse is inequitable *prima facie* if it causes

appreciable harm to another State. This option has the advantage of providing a certain measure of objectivity. Article 7 has been formulated in considerably less flexible terms than article 5. Should appreciable harm be caused, a consideration of interests under the provisions of article 5 is no longer relevant. However, attention should be drawn to the possible consequences of this regulation.

40. As existing uses of a watercourse are protected against the appreciable harm to which new uses might give rise, the draft articles would seem to give priority to existing uses over new uses. Partly as a result of this, the downstream States would enjoy a stronger position than they would under the principle of equitable use. In addition, if it is accepted that the definition of unlawfulness under article 7 may conflict with the outcome under article 5, the proposed regulation could have an undesirable effect in that the draft articles stipulate an outcome that is "inequitable". Finally, the construction chosen departs from what is largely regarded as customary law doctrine, as formulated in the Helsinki Rules,⁸ under which the principle of equitable use has priority. In view of these considerations, the Netherlands Government regards it as desirable to adjust the relationship between article 5 and article 7 with a view to permitting appreciable harm if it is reconcilable with the principle of equitable use.

Environmental impact assessment

41. The Netherlands Government has established that the draft contains no explicit provisions on environmental impact assessment. A number of provisions are, however, relevant, in particular those which relate to notification and consultation (see paragraph 35 above) and which serve to establish the transboundary effects of planned measures. These may be regarded as elements of environmental impact assessment procedures.

42. The absence from the draft articles of specific provisions on environmental impact assessment is perceived as a shortcoming. The inclusion of a general provision recommending the conduct of environmental impact assessments is desirable.

State practice

43. A number of the draft articles relate to issues already dealt with in the obligations arising from existing conventions. Reference has already been made to differences between the provisions of the draft article and those of the Espoo and the Helsinki Conventions in particular. A number of the differences may be regarded as improvements.

44. The above applies, for example, to article 12, which obliges States to give notification in cases in which their activities might lead to appreciable adverse effects in other States. This criterion represents a departure from the "appreciable harm" criterion which, under the provisions of article 7 and article 21, paragraph 2, is the determining

⁸ The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 et seq.; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 et seq., document A/CN.4/274, para. 405.

factor in establishing the lawfulness of activities. Bringing the criteria into line would have the undesirable consequence of obliging a notifying State to give notification that it was planning to commit an unlawful act. Article 12 is therefore more satisfactory than the corresponding provisions of the Espoo Convention, which links the obligation to avoid "significant adverse transboundary impact from proposed activities" to the obligation of States to give notification of activities which may lead to "significant adverse transboundary impacts".

45. On some points, the draft articles represent an unfavourable departure from existing conventions. This applies to article 32, which provides the public with less protection than the Espoo Convention, and to draft article 26, which, due to the failure to include a provision on institutionalized cooperation, compares unfavourably with the Helsinki Convention. In addition, there are no references to the principle of precaution, which is enshrined in the Helsinki Convention, or to environmental impact assessment, provisions which figure in both the above-mentioned Conventions.

Nordic countries

[Original: English]
[18 December 1992]

GENERAL COMMENTS

1. The Nordic countries have a special interest in these draft articles, not only because General Assembly resolution 2669 (XXV), which recommended that the Commission should take up the study of the law of the non-navigational uses of international watercourses, resulted from a Nordic initiative, but also because of the importance of legal problems relating to the use of international watercourses and the need to coordinate the work carried out by many international organs. The draft articles adopted by the Commission may now be regarded as a decisive step towards the final codification of the law of the non-navigational uses of international watercourses.

2. In the opinion of the five Nordic countries, the framework agreement approach adopted by the Commission in drafting the articles provides a good basis for further negotiations. It leaves the specific rules to be applied to individual watercourses to be set out in agreements between the States concerned, as has been the current practice. However, this approach should not lead solely to producing recommendations.

3. As a general comment the Nordic countries would like to draw attention to the two conventions concluded recently under the auspices of ECE, namely the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention) and the Convention on Environmental Impact Assessment (Espoo Convention). Both conventions and the draft articles on the non-navigational uses of international watercourses are partly similar in scope and deal with analogous legal problems, but the solutions are not necessarily always consistent. In order to avoid a situation where conflicting rules may apply, the Nordic countries submit that attention should be paid to harmonizing the

draft articles with the above-mentioned conventions where possible.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 2

4. The Nordic countries consider the term "international watercourse" somewhat unclear and ambiguous. Admittedly, the use of other terms already rejected by the Commission, such as "drainage basin", would also entail difficulties. Of course, it is of fundamental importance that whichever concept is used in article 1, it should encompass an adequate definition in article 2. However, it is submitted that the Commission might still consider as a new alternative to "international watercourse" the term "transboundary waters", which is used in a very similar context in the above-mentioned Helsinki Convention.

5. One of the most important questions relating to the adoption of the term "watercourse" is whether the rules governing surface waters would be applicable also in regard to groundwater and, more specifically, so-called confined groundwater. There are rich and important confined groundwater resources intersected by State boundaries in many parts of the world, but which are physically unrelated to any surface water systems. Nevertheless, such confined groundwater resources may react like any other hydrologic unit.

6. Although the present definition of the term "watercourse" seems not to encompass confined groundwater, it should not be deduced that aquifers without any physical relationship with surface waters must be left outside all legal regulation. There might be reason to take up once again the question of confined groundwater, for the purpose of making clear the essence of that concept and preparing draft rules on its application.

Articles 5 and 7

7. Since the early stages of the work of the Commission the question of the relationship between equitable and reasonable utilization and participation on the one hand (art. 5), and the obligation not to cause appreciable harm on the other hand (art. 7), has proved to be problematic. The principle of equitable utilization should probably not be subordinated to the prohibition on causing appreciable harm, because it was originally introduced in order to modify that prohibition. It is the view of the Nordic countries that in cases of uses not involving pollution, the obligation not to cause appreciable harm should perhaps rather be subject to the principle of equitable utilization. But then it would follow that prevention, reduction and control of pollution should also be subject to more explicit safeguards under article 7.

8. It might also be mentioned that the doctrine of equitable utilization is still lacking precise procedural machinery for implementation in concrete cases. It sets no a priori standards that are universally applicable concerning the uses of international watercourses.

Parts III and IV

9. Finally, it is suggested that the relationship of part III (Planned measures) and part IV (Protection and preserva-

tion) of the draft articles should be further elaborated. This is important since the implementation of planned measures in accordance with part III may in many cases also entail the probability of pollution of an international watercourse dealt with in article 21.

Norway

[See *Nordic countries*]

Poland

[Original: English]
[29 March 1993]

GENERAL COMMENTS

1. The draft articles on the law of the non-navigational uses of international watercourses is an abstraction of a very high level. It is therefore a typical "framework agreement" which clearly takes into consideration the concluding of detailed agreements between watercourse States. The practical significance of control seriously decreased for Poland, and for Europe, after the changes which occurred in this part of the world after 1989. In the new situation in Europe, and as a result of the initiatives of the Conference on Security and Cooperation in Europe there were three vital conventions signed under the auspices of ECE which to a greater extent specify the subject matter of the draft on the law of the non-navigational uses of international watercourses, namely the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the Convention on the Transboundary Effects of Industrial Accidents, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention). Covering a smaller territorial area, more detailed cooperation is provided for in the Convention on the Protection of the Marine Environment of the Baltic Sea Area.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Articles 1 to 4

2. Part I (Introduction) consists of four articles. Article 1 outlines the subject matter of the draft, which actually concerns everything except navigation, unless navigation influences the non-navigational uses of watercourses, which is often the case of small and medium-sized rivers used for transport (such as, for example, the Oder). The most significant, but also the most controversial aspect of this part is article 2, which defines "international watercourse" and "watercourse". The latter is understood as surface and underground waters which are in physical relationship and flow into a common terminus. This interpretation of "watercourse" in an international context means that the basins of the Vistula (as the "national river") and of the Oder constitute international watercourses. Apart from the main subject matter of the draft, there are underground waters of a particular type—those which are not in relationship with the surface waters. The Commission's approach seems questionable for at least two reasons: (a) the significance of underground waters near the borders is continuously increasing; and (b) the principles and procedures concerning

such underground waters are identical or similar to the principles adopted for the waters which are the subject of the draft articles. Taking into consideration the conflict which may arise from the unsolved problem of underground waters, and the Commission's slow progress (there were suggestions in the commentary that this issue could be the subject of a separate study by the Commission),¹ the solution adopted is not very satisfactory.

Articles 5 to 10

3. The articles included in part II (General principles) constitute the foundation on which the whole draft has been based. Its key elements are articles 5 and 7. Article 5 provides that "watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner . . .". Such a policy should be accompanied by an active attitude towards the proposals for cooperation put forward by other watercourse States. An attempt to give more details on the principle of equitable and reasonable use is made in article 6. Actually, it is an open list of factors and circumstances which should be considered when assessing given behaviour and "weighing" the interests of the watercourse States. Those two articles reflect quite faithfully the emerging practical aspect of the treaty and the relatively well-established opinions of scholars.

4. The difficulties start in article 7, which puts the watercourse States under an obligation to utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States. According to most scholars the acceptance of the "appreciable harm" threshold is a step backwards in the development of international law, and a departure from a famous principle expressed in the Latin maxim, *sic utere tuo ut alienum non laedas*. The issue is complicated because in practice States tolerate "appreciable harm" (as opposed to substantial harm) as the inevitable consequence of having neighbours, but the acceptance of it in a document as significant as the draft under discussion, would mean more than just passive tolerance of the harm done by the neighbour. What is more, the lack of objective criteria for the "appreciable harm" seems to create new, "legal" possibilities of ignoring the interests of other States. It also seems that such assessment lessens the preventive value of the principle of equitable and reasonable use. Poland, being for the most part a country located in the lower reaches of a watercourse exposed to high pollution, should solicit a reduction of the "appreciable harm" threshold. The obligation of "non-harmful behaviour" fails to meet the sense of realism: a happy medium should be found. Poland has no ready solution, but in searching for such a medium, one thing should not be forgotten, namely that article 7 provides a certain safety net for article 5—that is in situations where negotiations fail.

Articles 11 to 19

5. Part III (Planned activities) is of a procedural character and as such raises fewer doubts. In the case of Poland and its neighbours, these issues will better be settled by the provisions of the Espoo Convention (the Convention

¹ *Yearbook . . . 1991*, vol. II (Part Two), p. 70, para. (5) *in fine* of the commentary to article 2.

has not come into force because it has not been ratified by the minimum 16 countries. Poland has not so far ratified the Convention, although it is in its interest to do so because it is a basic instrument for the establishment of ecological security in the areas near the borders). The provisions of this part could be completed by including public participation in the consultations concerning the planned activities which affect the public interest. It does not seem that this issue could be dealt with under the provisions of article 32 (Non-discrimination). The institution of public participation is making progress in treaty practice, and is a sign of the democratization of international law. Such an initiative may be expected to win the support of the majority of States in the United Nations.

6. Article 18 should be completed by the inclusion in paragraph 2 of a precise time limit for the reply (for example, one month). Otherwise there will be a lack of balance on the side of the State which makes the investment without prior consultations because it could delay unduly the reply and the consultations.

Articles 20 to 25

7. Part IV (Protection and preservation) and part V (Harmful conditions and emergency situations) do not give rise to any objections. From the point of view of Poland's interests these issues will be settled by the above-mentioned ECE conventions (the comment that Poland has not ratified the Espoo Convention applies also to the Convention on Transboundary Effects of Industrial Accidents).

Articles 26 to 32

8. Part VI (Miscellaneous provisions) was added at the last moment and attracts attention because of the lack of a central idea or an internal logic. This does not mean, however, that the provisions included therein are meaningless. Article 27 of the draft, which concerns the cooperation of watercourse States in flow regulation, and particularly in the construction and maintenance of hydraulic works, or appropriate cost-sharing, is of greater interest. In practice, the wording of paragraph 2 may raise the question whether a State which did not participate in the investment on the watercourse, but turned out to benefit from it, will be obliged to cover part of the costs of this investment. The answer to this question can only be negative, unless the watercourse States had reached prior agreement on the defrayal of costs. It would appear appropriate to reformulate paragraph 2 in such a way as to indicate that the agreement should form the basis for the calculations.

9. Article 32 (Non-discrimination) is one of the most significant provisions of the draft. It concerns guaranteeing access to courts and to proceedings before other compensation bodies to foreign natural and juridical persons, and protection from damage. The acceptance of such a provision will be a great step forward in international practice. It is a kind of civil-legal substitute for international responsibility of the State-responsibility and strict-liability type. There are objections to the title of the article. The notion of "non-discrimination" in international practice has a much broader sense, and is, moreover, associated with the material norm. The expression "Access

to judicial and other procedures" would appear better to reflect the content of the article.

10. The draft lacks even general provisions concerning the transfer of water between basins. The general principles of the draft do not constitute a sufficient basis.

11. To sum up, it should be stated that the law under discussion will be mainly of significance in those regions of the world where the degree of treaty regulation is limited or non-existent. This basically concerns the areas with the most conflicts, where there has long been a water deficit. This is mainly the case in the Middle East (Islamic Republic of Iran, Iraq, Syrian Arab Republic, Turkey), but also in Asia (Bangladesh and India) and Africa (Egypt, Ethiopia, Sudan). The passing of this law and its implementation in the above-mentioned areas would improve the situation in the world and decrease the number of armed conflicts.

12. In general, the proposed draft is deserving of Poland's support. It constitutes a fairly accurate reflection of the state of international law, in the development of which Poland has actively participated. The provisions of the future convention appear to provide a good starting point for negotiating more detailed international instruments, when formulating new treaty-based cooperation agreements on transboundary waters with the new neighbouring countries.

Spain

[Original: Spanish]
[27 January 1993]

GENERAL COMMENTS

1. In the view of the Spanish Government, the draft articles constitute an acceptable basis for discussion.

2. The Spanish Government believes that it would also be appropriate to prepare draft articles relating to the utilization of "confined" groundwater in cases where a frontier crosses the aquifer in which such groundwater exists;¹ such articles could perhaps be incorporated into the draft under consideration.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

3. Attention is drawn to the reference made in article 3 to the application of the draft articles. As currently drafted, paragraphs 1 and 3 imply that the rights and obligations enumerated in the draft articles would be applicable only in the event of an agreement between watercourse States. A close reading of all the draft articles and the commentaries thereto shows that that is not the intention of the Commission.² One possible solution would be to delete the words "or application" from paragraph 3; the

¹ See paragraph (5) of the commentary to article 2, *Yearbook . . . 1991*, vol. II (Part Two), p. 70.

² For the commentary to article 5, initially adopted as article 6, see *Yearbook . . . 1987*, vol. II (Part Two), p. 32, para. (5) *in fine*.

words "apply and" could also be deleted from paragraph 1, for greater clarity.

Article 6

4. In paragraph 1, the Spanish Government would like to insert a new subparagraph between subparagraphs (d) and (e), which could read as follows: "the extent of the dependence of each watercourse State upon the waters in question;". In the view of the Spanish Government, while the idea reflected in the above wording is implicit in several subparagraphs of paragraph 1 of article 6, it has not been made sufficiently explicit in that paragraph as currently drafted. Furthermore, the proposed text has been taken from the United States Memorandum of 1958 on juridical aspects of the use of international water systems, to which paragraph (7) of the commentary to the article under consideration refers.³

Article 8

5. It might perhaps be appropriate to mention explicitly in this article the principles of good faith and good neighbourliness, to which paragraph (2) of the commentary refers.⁴

Article 9

6. In the Spanish version of paragraph 2, the words *recogida* or *recolección* [collection] could be used in lieu of the word *reunión*.

Article 11

7. The article as currently drafted lays down a number of obligations for watercourse States which, in the view of the Spanish Government, would be difficult to apply in practice. It is suggested that the wording should be changed so as to limit the scope of the article to those planned measures which are likely to have appreciable effects or, alternatively, to eliminate the obligation to consult.

Article 18

8. It is suggested that paragraph 3 should be amended with a view to establishing a more balanced system which would take into account the various interests involved. The proposed amendment could read as follows:

"3. During the course of the consultations and negotiations, the State planning the measures shall refrain from implementing or permitting the implementation of those measures for a period not exceeding six months if the other State, at the time it requests the initiation of consultations and negotiations, submits a request to that effect accompanied by a documented explanation setting forth the reasons for the request."

Article 24

9. In the Spanish version, the conjunction *y* [and] should be inserted at the end of the paragraph, before the words *que puedan ser nocivos para otros Estados del curso de agua* [that may be harmful to other watercourse States].

Sweden

[See *Nordic countries*]

Syrian Arab Republic

[Original: English]
[10 April 1992]

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 7

1. Insert a new paragraph reading as follows:

"In utilizing an international watercourse, watercourse States shall undertake not to cut off or reduce the watercourse discharge below the sanitary discharge needed in the river bed under any circumstances."

Article 8

2. Insert a new paragraph reading as follows:

"Cooperation, in this context, means, *inter alia*, that watercourse States shall determine and agree upon their reasonable and equitable shares of water uses in accordance with the water resources of the international watercourse concerned."

Article 9

3. Reformulate paragraph 1 as follows:

"1. Pursuant to article 8, watercourse States shall, on a regular basis, through joint committees, exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydro-geological, ecological and reservoir operational nature, as well as related forecasts; and this before and after reaching the final agreement(s) on water uses of the international watercourse concerned."

4. The Government of the Syrian Arab Republic attaches great importance to the reflection of these comments and observations in the draft articles by the Commission when it again considers the draft with a view to its adoption.

Turkey

[Original: English]
[25 January 1993]

GENERAL COMMENTS

1. If it is to be realistic, a general draft of articles prepared by the Commission, which codifies and improves upon the rules of law on the non-navigational uses of international watercourses, has to take the form of a non-detailed framework law, on account of the variety of

³ Initially adopted as article 7. For the commentary, *ibid.*, p. 37.

⁴ Initially adopted as article 9. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 41.

geographical locations, hydrological constructions, demographic features and characteristics of international watercourses.

2. One main point of possible criticism as regards the draft articles is that those on environmental damage do not take the problems of development of States into proper consideration. The general emphasis on the "damage" factor has resulted in a text constraining utilization by the upstream States. There is a need for a more balanced approach on this subject.

3. The draft articles should be a set of rules that can be applied in the context of good neighbourliness rather than general principles to be applied to all international watercourses.

4. In determining the regime to be applied to international watercourses, Turkey believes that the sovereignty of States over their own natural resources and their right to manage these resources have not been taken sufficiently into consideration.

5. The term "watercourses", as it is used in the draft, is a term that might create difficulties in the future. This term has a broad definition which also includes underground waters. Additionally, the term "watercourse system" has also been given too broad a meaning. This term includes glaciers, canals and, especially, underground waters, and naturally leads to the sharing of these resources. This result would be inconsistent with the generally accepted principle of international law concerning the permanent sovereignty of States over their own natural resources. For this reason, only if the application of the draft articles is limited to surface waters could Turkey give its approval.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 5

6. According to paragraph 1, a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable manner and the obligation not to deprive other watercourse States of their right to equitable utilization.

7. Paragraph 2 covers cooperation between the watercourse States. Although article 5 contains some positive elements for the upper riparian State, it needs to be more balanced. For the sake of a well-balanced article, it will be appropriate to expand this paragraph to include a clause which restricts use (and especially new uses) by the lower riparian States. If this balance cannot be obtained, the subject of "participation" should be excluded from article 5. The resulting general article, containing the principles of equitable, reasonable and optimal use, would be equitable and sufficient.

Articles 11 to 19

8. The provisions of part III of the draft are too detailed. They need to be simplified. The arrangements on notification and consultation procedures should be left to regional and local agreements, which can better consider the actual needs in each and every case. Those arrangements may complete the framework agreement.

Article 20

9. Article 20 deals with the protection and preservation of the ecosystems of watercourse States. However, the article does not contain the criteria of what constitutes "important damage". It would be appropriate to include such criteria in the article.

Article 26

10. Paragraph 1 stipulates the initiation of consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism, at the request of any of the watercourse States. The clause "at the request of any of them" has a mandatory character. Turkey believes that this article should be rephrased in order to ensure flexibility. The formulation of paragraph 1 of the article may lead to the obligation to negotiate an agreement in order to establish a joint management mechanism. This point needs to be clarified.

United Kingdom of Great Britain and Northern Ireland

*[Original: English]
[15 January 1993]*

GENERAL COMMENTS

1. The Government of the United Kingdom commends the Commission for the draft articles on the law of the non-navigational uses of international watercourses. Although the United Kingdom is not a major international watercourse State, it nonetheless welcomes these draft articles as a valuable contribution to the international protection of the environment as well. It is largely on this basis that the following comments are made.

2. It is opportune to consider the work of the Commission in the light of recent developments in international environmental law, including the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention) and the United Nations Conference on Environment and Development. That Conference marked the adoption of an ambitious programme of environmental action into the next century, Agenda 21,¹ which devotes a chapter to freshwater resources (chap. 18). This acknowledges that sustainable development of water resources is essential both for the satisfaction of basic needs and for the safeguarding of ecosystems.

3. The draft articles provide a good basis on which to build legal arrangements which address the international dimension of watercourse development. But if the draft articles, amended and refined in the light of these and other comments and further discussion, are to provide a sound foundation for future action, it is important that

¹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1))* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference, resolution 1, annex II.*

they should accurately reflect the current state of international environmental law. The recently concluded Helsinki and Espoo Conventions and Rio Declaration on Environment and Development (Rio Declaration)² should be taken fully into account, and particularly their emphasis upon preventing significant adverse impacts or effects upon the environment. The international community attaches importance to work by the Commission on this and other environmentally related topics. Paragraph 39.1 (e) of Agenda 21 states, *inter alia*, that

Future projects for the progressive development and codification of international law on sustainable development should take into account the ongoing work of the International Law Commission.

4. On previous occasions the United Kingdom had indicated its reservations concerning the final form of the instrument containing the text drawn up by the Commission. The United Kingdom still believes the work of the Commission on this topic is best embodied in a set of model rules, recommendations or guidelines, to be applied and modified as the circumstances of the case require. Such rules, recommendations or guidelines would provide authoritative guidance respecting the legal rules to be applied, yet would have the flexibility necessary to accommodate the wide diversity of international watercourse systems. Their character would be essentially residual, leaving States free to enter into agreements on specific watercourses. In this form the draft articles would be more likely to meet with general acceptance. If, however, the Commission continues to favour a convention, the United Kingdom would suggest that it should consider amending the articles so as to form a framework convention which would serve as a guide to watercourse States for the conclusion of bilateral arrangements tailored to the circumstances of the particular watercourse concerned.

5. There remains also the issue of overlap between the present topic and those of State responsibility and international liability for injurious consequences arising from acts not prohibited by international law. Although the United Kingdom would not wish to urge any delay in the completion of the Commission's work on international watercourses, it is vital that its work on all these topics should be consistent. In particular, the threshold of harm set in article 7 should accord with the work of the Commission on the other topics and with current generally accepted principles of international law. For example, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law which have been produced to date³ are broadly consistent with the Helsinki and Espoo Conventions. This point is returned to in the consideration of the details of the draft articles.

6. Against the background of these introductory remarks, the United Kingdom has a number of detailed comments to offer on the draft articles.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 2

7. The United Kingdom supports the application of the draft articles to "international watercourse systems" defined to include groundwater. This reflects scientific and geographic reality. In many areas of the world groundwater provides the main source of fresh water needed for all forms of life. The Commission's definition accords with the approach taken in Agenda 21, which views the freshwater environment as part of the hydrological cycle encompassing both surface water and groundwater (paras. 18.1 and 18.3). It is also consistent with the definition of "transboundary waters" contained in article 1, paragraph 1, of the Helsinki Convention.

8. While the inclusion of groundwater is welcome, the United Kingdom considers that the potential scope of the draft articles is too wide. As they stand, they impose obligations on States which would be very difficult to define and are likely to be unacceptable if the draft articles are embodied in legally binding form. The draft articles depend upon States being able to define the scope of their obligations by reference to the physical presence of international watercourses within their territory. Such identification is difficult and expensive in the case of groundwater. One of the seven action programmes contained in Agenda 21 (para. 18.27 (a) (iv)) is addressed to the problem of water resources assessment, including the identification of potential sources of freshwater supply. It encourages all States, according to their capacity and available resources, to

Cooperate in the assessment of transboundary water resources, subject to the prior agreement of each riparian State concerned.

In addition, research-and-development programmes, at the national, subregional, regional and international levels in support of water resources assessment activities, are to be established or strengthened. Model rules, recommendations or guidelines would overcome these difficulties. They would permit States to conclude specific agreements with respect to those watercourses they had identified, rather than assuming general obligations, the extent of which could not readily be determined.

Article 3

9. The United Kingdom would urge the Commission to reconsider the wording of paragraph 1, which reflects the present uncertainty regarding the final form of these draft articles. On the one hand, these provisions are stated in article 1 to be of general application, yet, on the other, they are adjustable on a case-by-case basis under article 3, paragraph 1. Whilst flexibility is a desirable feature which should be retained, the function of these articles needs to be clearly identified and reflected in the draft text.

10. Paragraph 2 includes the phrase "adversely affect, to an appreciable extent". On numerous occasions the United Kingdom has expressed its reservations regarding use of the word "appreciable". It remains its view that "significant" is a more accurate reflection of the meaning of these articles, particularly when used to modify "harm". The term "appreciable harm" is at the heart of several key provisions of the draft articles, most notably article 7, yet its meaning is far from clear. Paragraph 5 of the commentary to article 7 states that "appreciable" embodies a factual

² *Ibid.*, annex I.

³ For the text, see *Yearbook... 1990*, vol. II (Part Two), footnotes 341-345, 347, 349, 352 and 359.

standard. The harm must be capable of being established by objective evidence ... [it] is not insignificant or barely detectable, but it is not necessarily "serious".⁴ The United Kingdom is in agreement with the meaning attributed to "appreciable" in the commentary, but does not consider that "appreciable" adequately conveys the intended meaning. The word used should convey a sense of harm which is significant, not of a transitory or limited effect. And it should convey this sense in the text, rather than requiring recourse to the commentary for clarification. (This comment applies also where the word "appreciable" appears elsewhere in the draft, namely in art. 4, para. 2, arts. 7 and 12, art. 18, para. 1, art. 21, para. 2, art. 22 and art. 28, para. 2.)

11. Nor does "appreciable" reflect the threshold of responsibility that has been adopted in the most recent treaties in the environmental field, most notably the Convention on Biological Diversity. Articles 7 and 14 of that Convention, which has been signed by nearly all the States which participated in the United Nations Conference on Environment and Development, uses the terms "significant adverse impacts" and "significant adverse effects", respectively. Principles 17 and 19 of the Rio Declaration refer to "significant adverse impact" and "significant adverse transboundary environmental effect", respectively. Article 1, paragraph 2, of the Helsinki Convention refers to "significant adverse effect", while article 2, paragraph 1, of the Espoo Convention employs the phrase "significant transboundary environmental impact".

Articles 5 and 7

12. It is clear that the reason for qualifying "harm" is to ensure that the draft articles do not unnecessarily hamper the utilization of international watercourses. This balance between utilization and environmental protection was the direct focus of the Rio Conference. The Commission is to be commended for its approach to the present topic, which has placed the utilization of watercourses firmly in the context of sustainable development. International watercourse States may utilize an international watercourse in an equitable and reasonable manner, but this obligation of equitable use in draft article 5 is subordinate to the obligation not to cause "appreciable" harm contained in article 7.

13. In principle, the United Kingdom supports the subordination of the obligation of equitable utilization to the obligation not to cause "appreciable" harm, but considers that the balance between environmental protection and utilization would be clearer if the word "significant" modified "harm". (See comments on article 3 above.) This is consistent with Agenda 21 which attaches equal importance to the satisfaction of basic needs and safeguarding of ecosystems in the programme area of integrated water resources development and management (paras. 18.6-18.12).

⁴ For the commentary to article 7, initially adopted as article 8, see *Yearbook* . . . 1988, vol. II (Part Two), pp. 35-41.

Article 8

14. This article prescribes a duty to cooperate, a duty which is recognized in many treaties in the environmental and other spheres. The Convention on Biological Diversity includes in article 5 such a duty with respect to matters beyond national jurisdiction, and on other matters of mutual interest. While welcoming the inclusion of a general obligation to cooperate, the United Kingdom maintains certain reservations regarding the practical working of article 8. In particular, the United Kingdom questions whether the concepts of "optimal utilization" and "adequate protection" are measurable in a way which allows States to meet the obligation set forth in article 8, and to identify failures to attain the required standard. The Commission might wish to reconsider setting forth in detail the objectives of cooperation, thereby fleshing out the substance of the duty to cooperate.

Article 9

15. The duty to exchange data and information is likewise found in a wide range of existing international instruments, and gives concrete expression to one facet of the duty to cooperate in article 8. It is important to ensure that the obligation to exchange "reasonably available data and information" (para. 1) does not become excessively burdensome for the States concerned. For this reason the United Kingdom welcomes use of the term "reasonable". What is "reasonable" will vary from case to case, depending upon a variety of factors ranging from technological capability to national laws regarding data protection. It would be helpful, however, to provide guidance in the form of a (non-exhaustive) list of what constitutes "reasonably available data", such an approach is to be found in article 13, paragraph 1, of the Helsinki Convention.

Article 10

16. The United Kingdom doubts whether the reference in paragraph 2 to "vital human needs" is sufficiently specific to perform a useful function additional to the criteria already specified in the article. If the intention of this paragraph is to assign priority to the satisfaction of specific vital human needs, such as the availability of clean drinking water, then it would be preferable to redraft the article so as to make specific reference to such needs.

Articles 11 to 19

17. Subject to the specific comments in the following paragraphs, the United Kingdom welcomes articles 11 to 19, which achieve an adequate balance between the interests of the State planning the measure and other watercourse States potentially affected thereby. These provisions, particularly article 12, are consistent with Principle 19 of the Rio Declaration.

Article 12

18. The United Kingdom would prefer this article to refer to "significant adverse effect" in place of "appreciable adverse effect" (see comments on article 3). It is important to distinguish between the level of impact which triggers the duty to notify and the level of harm which breaches the duty contained in article 7. The clear inten-

tion of article 12 is to ensure that the duty to notify is triggered at a lower level than the duty contained in article 7. This suggestion is also consistent with article 14 of the Helsinki Convention, which imposes the duty to inform other riparian parties of "any critical situation that may have transboundary impact". "Transboundary impact" is defined in article 1, paragraph 2, of that Convention as "any significant adverse effect on the environment".

Articles 20 to 23

19. Protection and preservation of the ecosystems of international watercourses is an essential component of the draft articles. Another of the seven action programmes detailed in Agenda 21 is devoted to protection of water resources, water quality and aquatic ecosystems (paras. 18.35-18.39). The draft articles are broadly consistent with one of the targets set by the action programme, which is "to initiate programmes for the protection, conservation and rational use of these resources on a sustainable basis" (para. 18.39 (a)). The United Kingdom is in favour of the approach adopted in this part of the draft articles which distinguishes between pollution and environmental protection. Agenda 21 also includes an action programme directed at marine environmental protection (paras. 17.18-17.35). The provisions of part IV are welcome also as a positive contribution to the fulfilment of the objectives of that chapter.

Article 21

20. The United Kingdom welcomes paragraph 1, which provides a factual definition of "pollution of an international watercourse". The trigger for the obligation of States to prevent, reduce and control pollution of an international watercourse is contained in paragraph 2, which refers to "appreciable harm". The United Kingdom regrets the use of "harmonize" in the last sentence of this paragraph. This conveys an impression that national policies should be rendered similar, rather than the milder obligation intended by the article of avoiding policy conflicts.

21. The United Kingdom would therefore prefer the final sentence of paragraph 2 to be replaced by:

"Watercourse States shall take steps to coordinate their policies to this end."

Article 22

22. To achieve drafting consistency, the United Kingdom suggests the addition of the phrase "or to their environment" at the end of the article. The reason for inclusion of this in article 21 would seem equally to apply to this article.

Article 23

23. The United Kingdom welcomes this article, which is consistent with the provisions of article 192 of the United Nations Convention on the Law of the Sea. It recognizes that damage could be caused to the marine environment, including estuaries, without violating the duty not to cause "appreciable [or, as we would prefer, "significant"] harm" to other watercourse States, the latter being the focus of article 22. The importance of article 23 is

underlined by the fact that 70 per cent of marine pollution emanates from land-based sources.

Article 26

24. The United Kingdom welcomes this article, which complements the first action programme contained in Agenda 21, concerned with integrated water resources development and management (paras. 18.6 et seq.). Effective implementation and coordination mechanisms are recognized as necessary for the sustainable development of water resources. In this connection paragraph 2 (a) is particularly welcome, with its emphasis upon the sustainable development of an international watercourse and providing for the implementation of any plans adopted. The Commission might, however, follow the lead given by article 9 of the Helsinki Convention, which provides for the establishment of joint bodies under bilateral or multilateral agreements which embrace relevant issues covered by the Convention, and specifies some of the tasks which might be performed by such bodies.

Article 27

25. The United Kingdom remains unconvinced of the need for this article, which is no more than a specific application of the obligation to cooperate contained in draft article 8.

Article 29

26. The United Kingdom has previously voiced its reservations regarding the inclusion of a draft article dealing with international watercourses and installations in time of armed conflict. The protection of the environment, and specifically of watercourses and related installations, facilities and other works, is already provided for under existing rules of international law relating to armed conflicts. The United Kingdom believes it is thus undesirable to insert such a general article in a text otherwise devoted to a quite different topic. This does not of course foreclose discussion of the issue in other, more appropriate, forums. The United Kingdom would invite the Commission to consider redrafting the article along the following lines:

"These articles are without prejudice to the application to international watercourses of the principles and rules of international law applicable in international and internal armed conflicts."

Article 30

27. It is difficult to see what this article adds to the obligations of States under articles 9 to 19. There is no mention of "direct contacts" under the preceding articles, and it would be assumed that in carrying out their obligations in good faith States would employ both direct and indirect means, as appropriate.

Article 32

28. The United Kingdom welcomes the principle of non-discrimination contained in this article, which facilitates the application of the "polluter pays" principle in domestic legal systems. However, since it is for each domestic legal system to set the threshold of harm which

gives rise to a cause of action, the use of “appreciable” is inappropriate. Given the particular purpose of this article, it is not necessary to qualify “harm”.

United States of America

[Original: English]
[4 January 1993]

GENERAL COMMENTS

1. The United States appreciates the Commission’s efforts in completing a first reading of the draft articles. The United States fully supports the decision to structure the draft as a framework document, which sets forth general rights and obligations that will guide watercourse States in developing management practices tailored to their circumstances. The emphasis on cooperation among watercourse States is particularly salutary. The following general comments and observations apply to the text as a whole:

Appreciable harm

2. The draft articles impose obligations not to cause “appreciable” harm to watercourse States. “Appreciable” harm is established by “objective evidence” of a “real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment in the affected States”.¹

3. The United States endorses the Commission’s effort to exclude insignificant or trivial harm from the articles. The United States is concerned, however, that “appreciable” sets too low a threshold. The landmark Helsinki Rules² set a standard of “substantial” in 1966. As more is learned about the effects of human activity on the environment, it becomes possible to identify impacts at ever lower thresholds. Recent international agreements relevant to watercourses adopt “significant”³ or “serious”⁴ as the standard. The United States believes that the Commission should bring its standard into accord with these documents.

Public participation

4. The involvement of the public in a State’s consideration of activities affecting transboundary watercourses can enhance protection and use of those watercourses and

¹ For the commentary to article 7, initially adopted as article 8, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 35-41, especially p. 36, para. (5).

² The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 et seq.; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 et seq., document A/CN.4/274, para. 405.

³ See Convention on Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention), art. 1, para. 2; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), art. 2.

⁴ See Convention on Transboundary Effects of Industrial Accidents, art. 1 (d).

is an approach followed recently in various conventions.⁵ The United States recommends that the Commission should consider ways in which the articles could encourage public involvement. The most appropriate articles appear to be articles 12 and/or 15, as part of the obligations of both the notifying and notified States, and article 25, in emergency planning and response measures. As redrafted, these articles would supplement current article 32, which provides that States shall not discriminate against a person who has suffered harm “on the basis of nationality or residence” in granting access to “judicial and other procedures”, but does not describe those procedures. In the view of the United States, however, the redrafted articles need not and should not create private causes of action or require States to establish proceedings beyond those available to their own citizens. For ideas on the content of revisions to these articles, the proposals made by the Special Rapporteur in his sixth report⁶ might be given further consideration.

The primacy of equitable and reasonable utilization

5. “Equitable and reasonable” utilization is the fundamental rule regarding international watercourses, as article 5 notes. Article 6 sets forth the factors relevant to determining when use is equitable and reasonable. (Article 7 is also relevant, although it serves as an independent legal requirement as well.) Unfortunately, subsequent articles appear to blur the meaning of this rule. Article 26, paragraph 2, for example, speaks of management for “sustainable development” of watercourses and for “rational and optimal” use of watercourses. The relationship of these terms to “equitable and reasonable” is not specified, and their meaning in international law is not clear. Part IV (Protection and preservation) also appears to set forth specific obligations that may supersede the obligation declared in article 5.

6. The United States favours making clear that all subsequent articles are subordinate to the requirement of “equitable and reasonable” utilization in article 5. The lone exceptions to this might be those articles reflecting legal responsibilities already well established (for example, the obligation not to harm another’s property or marine protection obligations accepted in the customary law of the sea). In the view of the United States, the Commission should consider redrafting these subsequent articles to incorporate the terms used in article 6, paragraph 1; alternatively, the terms in the later articles could be incorporated into article 6, paragraph 1, if they can be properly defined.

7. In addition, the United States believes that close attention should be paid to the relationship between the rules of equitable utilization and the “no harm” rule of article 7. While the commentary to article 7 states that the “no harm” rule prevails in the event of conflict, this is not apparent in the articles as drafted, and indeed there may be circumstances where this should not be the case.

⁵ See footnotes 3 and 4 above.

⁶ *Yearbook . . . 1990*, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

8. The United States recommends replacing, in paragraph 2, the phrase “adversely affect, to an appreciable extent” by “cause significant harm to”. The reason for changing “appreciable” to “significant” was explained in the general comments above. The meaning of “extent” is not clear, and is confusing since it does not appear in other articles, such as article 7. Under the United States’ approach, localized harm, if “significant”, would fall within the proposed articles, even if its “extent” were not “significant”.

9. The United States supports the framework approach of the article, which is mirrored by the Helsinki Convention. It also recommends moving articles 8 and 26 to precede article 3, to give those two articles a greater sense of priority. The primary objective of the draft articles is cooperation in the use and protection of a transboundary watercourse. An agreement is merely one means to that end, as article 3, paragraph 1, acknowledges by not making agreements mandatory.

Article 4

10. The United States questions the meaning of paragraph 2 of this article, on the ground that “applies to” is ambiguous. If it is synonymous with “affects appreciably”, it adds nothing to paragraph 2. If “applies to” means “governs” or “regulates”, then the paragraph is tautological, because every watercourse State must be involved in an agreement that regulates a watercourse within its territory.

11. For the same reasons as those given in paragraph 8 above, the phrase “may be affected to an appreciable extent” in paragraph 2 should be replaced by “may incur significant harm”.

Article 5

12. The United States supports the principle of equitable utilization. It notes that, once use by one State becomes inconsistent with its obligations not to cause effects in another State, there is an inexorable tension between uses. Although accommodations for these competing principles can be fashioned, often on a case-by-case basis, the tension should be avoided when possible. It is therefore important that article 7 should not be triggered by harm that is less than “significant”.

Article 6

13. The United States supports the concept of paragraph 2, but suggests that it is redundant to article 8 and article 10, paragraph 2. Accordingly, the Commission should consider its deletion.

Article 7

14. In addition to the points mentioned in paragraph 2 above, the United States believes that either in the draft article itself or in the commentary thereto, it should be made clear that this article expresses a rule of responsibility (in effect, due diligence) rather than one of liability.

15. The United States also urges the Commission to evaluate this article’s possible effects on market-oriented mechanisms, such as tradeable quantity and emissions allowance systems. Market-oriented mechanisms allow market actors to decide (within certain limits) whether it is more efficient for them to curtail individual activities or to pay a premium for their continuation. Because persons other than States are responsible for deciding about specific uses that may harm a watercourse, it is not clear that these mechanisms are consistent with article 7. The Commission should ensure that the article does not inhibit adoption of such policies.

Article 10

16. The United States proposes that paragraph 2 of this article should refer to article 8, which sets forth bases for State cooperation, as one of the articles to be consulted in resolving competing uses.

Article 25

17. The United States attaches great importance to preventing emergencies and mitigating damage from them. For example, it has concluded joint marine emergency contingency plans with Canada, Mexico and the former Soviet Union and has actively participated in the development of emergency response measures within ECE, OECD and IMO, as well as within regional agreements such as the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, which contains a protocol on emergency response to oil spills.

Article 26

18. See paragraph 4 above. The United States questions whether the components of “management” mentioned in paragraph 2 exemplify States’ obligations concerning “equitable and reasonable” utilization (art. 5). It does not support adding obligations to the one expressed in article 5. As suggested above, to the extent that they have independent meaning, “sustainable development” and “rational and optimal utilization” should be incorporated into article 6, paragraph 1, which sets forth the factors relevant to determining whether use is “equitable and reasonable”. If they do not have independent meaning, the phrases should be replaced with phrases used in article 6, paragraph 1.

Article 29

19. The United States supports the conclusion that the applicable rules in this area are those of armed conflict.

Article 32

20. The United States strongly supports the principle of non-discrimination, especially as it pertains to the public’s participation in proceedings relating to threats to an international watercourse. It notes, however, that a claimant could be denied standing in a suit in a United States court in part based on the fact that the claimant is not resident in the area of the international watercourse and therefore cannot show any harm. International law does

not, and should not, require that standing be granted in such circumstances.

21. In our view, this article should not be interpreted as requiring a State to provide proceedings or relief beyond those available to its own citizens. Recent practice in ECE, for example, calls for an opportunity for the affected public to participate in proceedings "equivalent to that provided to the public of the Party of origin" (see Espoo

Convention, art. 2, para. 6). The Convention on Transboundary Effects of Industrial Accidents contains comparable wording in article 9, paragraphs 2 and 3.

CONCLUSION

22. The United States appreciates the opportunity to provide these comments and observations.

II. Comments and observations received from a non-member State

Switzerland

[Original: French]
[14 January 1993]

GENERAL COMMENTS

1. The Swiss Government wishes to express its appreciation to the members of the Commission and the Commission's Special Rapporteurs who have been studying the substantive and procedural rules on the non-navigational uses of international watercourses since 1974. The draft articles adopted on first reading by the Commission in 1991 are a valuable contribution to the law of international watercourses. The continuing lacunae and uncertainties in this law stem mainly from the nature of the subject: problems relating to the utilization of shared natural resources are particularly difficult to solve. The Commission's task was made easier, to a certain extent, by the previous work of two learned societies, the Institute of International Law¹ and ILA.² Although the Commission's draft differs from those two documents in certain respects, the three texts agree on a fundamental point: they accept the principle of equitable and reasonable utilization (and participation).

2. On the whole, the Swiss Government takes a favourable view of the draft articles prepared by the Commission. The observations made here are intended to be constructive. In an area as crucial to the future of mankind as the sharing of water resources, it is very much in the international community's interest to achieve rapid results.

Scope of the draft articles

3. The Commission proposes that its work should lead to a "framework agreement", that is to say, a model convention which could be used by States preparing to enter into an agreement on the use of the resources of a shared watercourse (art. 3, para. 1). The formula thus proposed makes it possible to link elements of *lex ferenda* to *lex*

lata without having to identify either, which could facilitate the adoption of the text by the community of States. It can nevertheless be assumed that most of the substantive rules contained in the draft are supposed to reflect customary law, while procedural rules, by their very nature, fall in the category of the progressive development of international law. Generally speaking, the Swiss Government endorses this approach.

4. The Commission suggests the drawing up of a model convention with which States parties may choose to comply entirely or in part when entering into watercourse agreements. This should mean (a) that even if States become parties to the model convention, they will be free when they enter into an agreement on an international watercourse or part thereof to do so either within or outside the framework of the model convention (art. 3, para. 1); and (b) that the very many existing watercourse agreements will remain in force until the States that are parties both to such agreements and to the framework convention decide to adjust the former to the latter. This second point, unlike the first, is not clarified in the draft articles. The Swiss Government would like this lacuna to be filled by means of an indication in the same article that the framework convention does not affect in any manner whatsoever the validity and content of existing watercourse agreements.

5. Article 1 provides that the articles shall apply to "international watercourses". The term "watercourse" as defined in subparagraph (b) of article 2 means

... a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus.

Paragraph (5) of the commentary to article 2 indicates that a "system" of waters is composed of a number of different components, including "rivers, lakes, aquifers, glaciers, reservoirs and canals", and that so long as these components are interrelated they constitute "a unitary whole".³ This definition covers both surface and underground components, at least insofar as the underground components are related to surface water and are therefore integrated into the system; the definition does not include "confined" groundwater. The "watercourses" thus defined are "international" under article 2, subparagraph (a), if their parts are situated in different States.

¹ In 1961, the Institute of International Law adopted a resolution entitled "Utilization of non-maritime international waters (except for navigation)", *Annuaire de l'Institut de droit international*, vol. 49, part II (1961), pp. 381-384.

² In 1966, ILA adopted the Helsinki Rules on the Uses of the Waters of International Rivers; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 et seq.; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 et seq., document A/CN.4/274, para. 405.

³ *Yearbook . . . 1991*, vol. II (Part Two), p. 70.

6. The decision to exclude the concepts of a drainage basin⁴ and a watercourse system is to be welcomed because many countries would have found them unacceptable, given their scope. But the concept of a watercourse, which has traditionally been confined to surface water, has been given such a wide definition in the draft that it in fact bears a resemblance to concepts that the Commission had wanted to exclude. As defined at present, this concept is likely to give rise to difficulties, especially for upstream States. Moreover, it is difficult to understand why in article 2 the definition of an "international watercourse" (subpara. (a)) precedes the definition of a "watercourse" (subpara. (b)); the Swiss Government believes that the order of the two provisions should be reversed.

The content of the draft articles

7. The main provisions of the draft articles will now be considered, and the issue of whether the draft takes a balanced approach to the interests of upstream and downstream States will be left aside for the time being; that issue will be considered below.

8. The key provisions of the Commission's draft are undoubtedly article 7, which prohibits causing appreciable harm (*sic utere tuo ut alienum non laedas*), article 5, on equitable and reasonable utilization, and article 6, on the application of article 5. The Swiss Government feels that these two precepts are now part of international customary law. Their inclusion in the draft articles is therefore fully justified. However, some additions or changes may prove desirable.

9. The question arises, first of all, as to whether articles 5 and 6 should be supplemented by a provision stipulating the modalities through which they are to be implemented, namely territorial apportionment, or the allotment of areas or segments of the watercourses to each State concerned, as was done in the Indus Waters Treaty between India and Pakistan of 19 September 1960;⁵ sharing by rotation, where the waters or their use are reserved for a given watercourse State for one period, and for another State for another period, as provided for in the Final Act of 11 July 1868 concerning the delimitation of the international frontier of the Pyrenees between France and Spain;⁶ or sharing of the stream flow, its use or the energy generated (see, for example, the Agreement of 8 November 1959 between the Syrian Arab Republic and the Sudan for the full utilization of the Nile waters⁷ and the Franco-Swiss Convention of 23 August 1963 concerning the Emosson hydroelectric project⁸). Moreover, it should be recalled that equal apportionment between two parties on the basis of a treaty is common in respect of

contiguous rivers. Other methods, such as the allotment of exclusive uses to various watercourse States, or setting up compensation systems, such as that provided for in the Agreement of 4 December 1959 between India and Nepal on the Gandak irrigation and power project,⁹ can also be envisaged, as can a combination of several of these methods.

10. A description of possible methods, which would be the subject of an additional provision, might be of some use, since the text prepared by the Commission is intended to serve as a framework agreement, that is to say, it would provide States which are contemplating the conclusion of a watercourse agreement with information concerning the various possible means of implementing the principle of equitable and reasonable utilization.

11. Article 7, as has been noted, calls upon watercourse States to utilize an international watercourse "in such a way as not to cause *appreciable** harm to other watercourse States". This provision departs from what might have been regarded as the general rule, namely the prohibition of not just "appreciable", but rather "major", "substantial", "significant" or "serious" harm.¹⁰ By confining itself to the prohibition of "appreciable" harm, article 7, in its current wording, raises two problems. First, the adjective "appreciable" seems to reflect the intention to lower the threshold of allowable causes of harm, which is likely to antagonize upstream States, in particular. Secondly, this adjective is ambiguous. On the one hand, it is even vaguer than such adjectives as "major", "substantial", "significant" or "serious" and, accordingly, makes the application of the *sic utere tuo* rule more difficult. On the other hand, the word "appreciable" can have two meanings: it can serve either to distinguish harm which has certain consequences from harm which does not have such consequences, or to designate harm which can be "appreciated", that is to say, perceived and estimated, as opposed to harm which cannot.¹¹ In view of these prob-

⁹ United Nations, *Legislative Texts* ..., p. 295, Treaty No. 96; see also *Yearbook* ... 1974, vol. II. (Part Two), p. 105, document A/5409, paras. 347-354. India agrees to construct, in Nepalese territory, a hydroelectric power station and transmission lines; it also agrees to supply Nepal with a certain quantity of power. For its part, Nepal agrees to construct, in its territory, a transmission and distribution system for the power generated.

¹⁰ See, for example, J. Andrassy, "Les relations internationales de voisinage", *Recueil des cours* ... 1951-II, vol. 79, pp. 77-181. In support of his statement, this author cites several decisions of United States courts, a resolution adopted in 1911 by the Institute of International Law and treaty provisions. With regard to the assessment of harm, Andrassy states as follows:

"The magnitude of harm must be assessed in relation to the two parties concerned. The proportion or disproportion between the benefit gained by one party and the disadvantage suffered by the other must be taken into consideration. The diversity of cases admits of no fixed rules, and allows broad scope for equity. It has been taken into account in the above-mentioned cases, in which the principle of equitable apportionment has been applied." (p. 112.)

It can be inferred from this passage that the prohibition against causing harm is an element of the principle of equitable utilization, rather than vice versa.

¹¹ Cf. M. Solanes, "The International Law Commission and legal principles related to the non-navigational uses of the waters of international rivers", *Natural Resources Forum*, vol. 11 (1987), pp. 353-361, especially p. 357. The author states that:

"... the principle [proscribing 'appreciable' harm] does not prohibit 'minor' or irrelevant harm, but 'appreciable' harm meaning such

(Continued on next page.)

⁴ Article II of the Helsinki Rules defines an international drainage basin as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus".

⁵ United Nations, *Treaty Series*, vol. 419, p. 125.

⁶ United Nations, *Legislative Texts* ..., p. 674, Treaty No. 186. For summary in English, see *Yearbook* ... 1974, vol. II (Part Two), p. 182, document A/5409, paras. 979-984.

⁷ United Nations, *Treaty Series*, vol. 453, p. 51.

⁸ RGDIP, 3rd series, vol. XXXVI, No. 1 (January-March 1965), p. 571; see also *Yearbook* ... 1974, vol. II (Part Two), p. 311, document A/CN.4/274, paras. 228-236.

lems, the Swiss Government would support the replacement of the adjective "appreciable" by one which more faithfully reflects the status quo in customary law.

12. Articles 8 to 19 contain procedural rules. Articles 11 to 19 indicate the course to be followed where a State envisages a new (or increased) watercourse activity. In general, these provisions appear to be acceptable to the Swiss Government. Two questions, however, warrant consideration.

13. As a commentator on the draft articles rightly indicates, a State which notifies other watercourse States of its intention to use a watercourse in a new way will, for a certain period, be prevented from implementing the planned measures (art. 14) and will, if objections are raised, be subject to a complex process of consultations and negotiation. For their part, notified States retain all their international rights, even if they do not reply to the notification within the prescribed period, as their situation continues to be governed by articles 5 to 7.¹² It would appear to be desirable to adopt a stricter approach towards notified States by acknowledging, in accordance with the maxim *qui tacet consentire videtur si loqui debuisset ac potuisset*, that a watercourse State which has failed to raise objections within the prescribed period to a new activity announced by another watercourse State is deemed to have consented thereto.

14. Article 15 indicates that planned measures may give rise to objections if a notified State "finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 (equitable utilization) or 7 (*sic utere tuo . . .*)". It is this unilateral and subjective finding which triggers the negotiation process and the six-month moratorium provided for in article 17. Thus, a unilateral finding by the State or States concerned suffices to block a new activity temporarily, without giving the State which wishes to undertake that activity the least opportunity to have its merits validated by an impartial third party. This situation is likely to be especially prejudicial to developing countries wishing to undertake a new activity and which request financial support to that end from international financial institutions. Such support may be temporarily denied solely on the basis of another watercourse State having raised an objection pursuant to article 15.

15. This observation leads to another, more general one. The problem just outlined illustrates the special importance of an effective system of dispute settlement within the framework of the law of international watercourses, as recognized, moreover, by ILA in its Helsinki Rules and by the Special Rapporteur of the Commission, Mr. McCaffrey. In his sixth report, in the proposed annexes I and II to his draft articles, he in fact proposed mechanisms for the settlement of disputes between States and the means to facilitate private recourse for actual and

potential damages.¹³ While the wording of the relevant article in annex II leaves something to be desired,¹⁴ both texts have the merit of having raised the question. For their part, the draft articles which have now been submitted to Governments for comments maintain total silence on this question. Filling this gap would appear to be one of the Commission's primary tasks.

Achieving a balance among the draft articles

16. If the future framework convention is to fulfil its aim, it must be balanced. It should not, for instance, favour either upstream or downstream States. Does the Commission's draft meet this requirement? In order to answer this question, two aspects must be considered: the relationship between, on the one hand, the prohibition against causing "appreciable" harm and the principle of equitable utilization and, on the other hand, the participation of watercourse States in agreements concluded among other States sharing the same watercourse.

17. The Commission had initially juxtaposed the *sic utere tuo* rule with the principle of equitable utilization, without specifying the relationship between these two elements, although the inclusion of the possible adverse effects of an activity among the factors determining the extent of the right of equitable participation would suggest subordination of the first element to the second. Some members of the Commission, however, desired a clearer rule. Two of the Special Rapporteurs—Schwebel and McCaffrey—proposed wording which gave priority to the principle of equitable utilization. Article 8, paragraph 1, of the text suggested by Schwebel called upon system States to use the water resources of a watercourse system in such a manner as not to cause

. . . appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.¹⁵

18. Mr. Evensen, on the other hand, wished to afford priority to the *sic utere tuo* rule by not including any text on this subject in the draft articles and by deleting the possible adverse effects of a use from the list of factors determining the extent of the right of equitable participation.¹⁶ This is the solution which finally prevailed, as shown by the notion that even minor harm—for example, to the environment—cannot be tolerated, whether or not it

¹³ *Yearbook . . . 1990*, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1, chap. III, sect. B and chap. IV, sect. F.

¹⁴ At issue is article 5, which provides that a State party to a dispute concerning the interpretation or application of the future framework convention (cf. art. 3 of annex II) may, if other methods fail to produce a settlement

" . . . submit the dispute to binding arbitration by any permanent or ad hoc arbitral tribunal that has been accepted by all of the parties to the dispute".

Such a provision would be doubly inadequate because: (a) it should apply not to disputes relating to the framework convention—which is only a model and, as such, is hardly likely to give rise to difficulties—but to those arising from the interpretation or application of watercourse agreements concluded on the basis of the model; and (b) it should suggest that the parties to such agreements submit their disputes to binding, rather than discretionary, arbitration.

¹⁵ *Yearbook . . . 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156.

¹⁶ *Yearbook . . . 1983*, vol. II (Part One), pp. 171-172, document A/CN.4/367.

(Footnote 11 continued)

injury apt to cause international liability. The term 'appreciable', meaning enough to be perceived or estimated*, ought to be distinguished from 'substantial', meaning of considerable size or amount, or in more ordinary terms large."

¹² C. B. Bourne, "The International Law Commission's draft articles on the law of international watercourses: principles and planned measures", *Colorado Journal of International Environmental Law and Policy* (Boulder), vol. 3 (1992), No. 1, pp. 65-92, particularly pp. 68-70.

comes under the heading of the right of equitable utilization by the State of origin. This notion is expressed in paragraph (2) of the commentary to draft article 7:

A watercourse State's right to utilize an international watercourse . . . in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—*prima facie*, at least—utilization of an international water-course . . . is not equitable if it causes other watercourse States appreciable harm.¹⁷

This solution, which is subject to criticism from the doctrinal point of view,¹⁸ seems infelicitous, as the Swiss representative on the Sixth Committee of the General Assembly suggested in the statement which he made on 31 October 1991.¹⁹

19. Since the problem outlined above has a substantial bearing on the fate of the draft articles, it seems advisable to give it thorough consideration.

20. Mr. McCaffrey argued in support of the solution finally adopted: (a) that it would be simpler to establish the existence of "appreciable" harm than to judge the equitable nature of a use; (b) that this solution would favour the "weaker" watercourse States; and (c) that it would afford better protection to the environment.²⁰ These arguments are either inaccurate or not compelling.

21. It is not clear why it would be easier to apply the vague notion of "appreciable" harm than to gauge a right of "equitable" utilization on the basis of the series of factors listed in draft article 6; and, even if the contention were correct, the easiest solution is not necessarily the best. Nor is it clear that the hierarchy of norms suggested by the Commission would favour economically weak States. Quite the contrary, giving priority to the prohibition against causing "appreciable" harm is tantamount to giving almost unlimited protection to the current users of the watercourse, since any harm suffered necessarily has to do with existing uses. In other words, acquired rights are given preference. To assert that protecting acquired rights is the same as helping the weak is something of a paradox, especially in the area at issue here, because newcomers are, generally, less economically developed than first users and are, historically, upstream rather than downstream States.²¹ Lastly, while it may be that McCaffrey and the Commission are correct in thinking that the environment would be better served by the article 7 rule than by the principle of equitable utilization, the desired objective could be achieved without elevating the *sic utere tuo* precept, and with it the protection of existing uses, to the status of a priority rule. The protection sought could be just as easily ensured by restricting the priority of the *sic utere tuo* rule where the environment is concerned or, as Lammers has suggested, by considering

the application of a "mitigated" no-substantial-harm principle.²²

22. Thus, the system being proposed by the Commission does not offer compelling advantages. Furthermore, it entails serious disadvantages. First, as was indicated, it gives pre-eminence to the status quo, protecting the more developed watercourse States from heeding the inclinations of less developed States. The principle of equitable utilization would in effect be eclipsed by the *sic utere tuo* rule; priority would be given to existing uses over future activities.²³ Such a system might, moreover, imply that each user has a veto when a watercourse State plans to undertake a new activity or increase an existing activity. Secondly, the pre-eminence of the prohibition against causing "appreciable" harm, ostensibly prompted by the desire to give better protection to the environment, might actually work to protect the sovereignty of watercourse States: for to speak of equitable participation is to speak of apportionment of uses and resources, and the concept of apportionment transcends that of sovereignty. The concern to give priority to safeguarding sovereignty would in any case run counter to the commonly accepted idea that watercourse States form a community of interests and law²⁴ and that, consequently, the sovereignty of each of the States is and must be restricted. Under the guise of full protection of the environment, the new hierarchy of rules advocated by the Commission would mean that State sovereignty would be better protected than it has been in the past. That, in the view of the Swiss Government, is an unwelcome trend. Lastly, this hierarchy departs from State practice, as pointed out in a recent study on United States-Canadian relations.²⁵

23. For all these reasons, the Swiss Government would like the Commission to reconsider its draft articles in the light of this important point and, in that case, to endorse the concept which for more than 30 years has underlain the work of ILA: the pre-eminence of the principle of

²² J. P. Lammers, "Balancing the equities" in international environmental law", *The Future of the International Law of the Environment, Hague Workshop, 12-14 November 1984*, Hague Academy of International Law (Dordrecht, Boston, Lancaster, Martinus Nijhoff Publishers), 1985, pp. 153-165. The prohibition against causing substantial harm would thus not apply (a) if its application affected objects or activities especially sensitive to transboundary pollution; (b) if the State of origin could not be held liable for the polluting activity according to the classic rules governing international liability; or (c) if the sacrifice that the cessation of the polluting activity constituted for the State of origin was disproportionate to the advantages that the victim State would gain from such cessation.

²³ The Helsinki Rules satisfactorily regulate how existing uses are to be dealt with. Article VIII, paragraph 1, of the Rules reads as follows:

"1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use."

This provision gives existing activities presumptive pre-eminence. The potential user may overturn this presumption by establishing that the activities in question no longer fall within the framework of the right of equitable utilization of the States conducting them.

²⁴ *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, PCIJ, Series A, No. 23*, p. 27.

²⁵ P. K. Wouters, "Allocation of the non-navigational uses of international watercourses: Efforts at codification and the experience of Canada and the United States", *Canadian Yearbook of International Law* (Vancouver), 1992, vol. XXX, pp. 43 et seq.

¹⁷ *Yearbook . . . 1988*, vol. II (Part Two), p. 36.

¹⁸ See, for example, Bourne, loc. cit., pp. 72-91.

¹⁹ *Official Records of the General Assembly, Forty-sixth Session, Sixth Committee, 26th meeting*, paras. 40-44.

²⁰ "The law of international watercourses: some recent developments and unanswered questions", *Denver Journal of International Law and Policy*, vol. 17, No. 3 (1989), pp. 505-526 particularly pp. 509-510 and "The International Law Commission and its efforts to codify the international law of waterways", in *Annuaire suisse de droit international*, vol. XLVII (1990), pp. 32-55, particularly pp. 51-52.

²¹ McCaffrey, "The International Law Commission . . .", loc. cit., pp. 49-50.

equitable and reasonable utilization. This result could be achieved by deleting draft article 7, by reintroducing the possible adverse effects of an activity as one of the factors listed in draft article 6 by which the scope of the right of equitable utilization is determined, and by restricting the priority of the *sic utere tuo* rule where protection of the environment is concerned, possibly by mitigating that rule.

24. In the view of the Swiss Government, the balance between downstream and upstream States is also compromised by draft article 4, paragraph 2. When some of the States sharing a watercourse negotiate an agreement *inter se* that applies to a part of the watercourse or to a particular use of the watercourse, any other watercourse State which may be affected to an appreciable extent by the agreement is entitled to participate in the negotiations and even to become a party to the agreement. Because such agreements are more likely to be concluded among downstream States, they are the ones whose freedom to conclude agreements is primarily curtailed by article 4, paragraph 2. Since the usefulness of such a provision is unclear, it would appear to be more appropriate to provide that all States wishing to regulate a new use by means of an agreement *inter se* are bound by the obligations stipulated in articles 11 to 19.

Recapitulation

25. The foregoing remarks are not exhaustive. In recent years, the Swiss representative on the Sixth Committee has commented on three occasions—3 November 1988, 31 October 1990 and 31 October 1991—on the articles proposed for inclusion in the draft by the Commission.²⁶ Some of his comments have been reiterated or expanded in these remarks. Others—those, for example, having to do with the protection and preservation of the environment²⁷ and those on draft article 26 concerning

management²⁸—have not been recalled but are still valid and must also be considered an integral part of this statement.

26. By way of conclusion, the Swiss Government offers this recapitulation of the points in respect of which it believes changes could be made in the draft articles adopted on first reading by the Commission:

(a) Reversal of the order of the text in sub-paragraphs (a) and (b) of article 2;

(b) Deletion of article 4, paragraph 2;

(c) Addition of the adverse effects of a use to the factors listed in article 6;

(d) Possible addition of a provision enumerating ways of giving effect to the principle of equitable and reasonable use;

(e) Deletion of article 7;

(f) Introduction of a procedure in article 15 allowing the watercourse State providing notification of a new activity to seek the objective opinion of an impartial third party as to whether the activity would be consistent with articles 5 or 7 (or only article 5);

(g) Amendment of article 16 to include a provision that any State failing to respond to a notification within the prescribed period shall be presumed to have approved the planned use;

(h) Use of identical terms in articles 20 and 21 (either “environment” or “ecosystems”);

(i) Restriction to the States actually threatened of the obligation provided in article 25 to cooperate in the development of contingency plans;

(j) Deletion of article 26; and

(k) Establishment of binding arrangements for the peaceful settlement of disputes between States and of disputes involving individuals.

²⁶ *Official Records of the General Assembly, Forty-third Session, Sixth Committee, 28th meeting, paras. 30-45; ibid., Forty-fifth Session, Sixth Committee, 25th meeting, paras. 55-64; ibid., Forty-sixth Session, Sixth Committee (see footnote 19 above) respectively.*

²⁷ Statement of 31 October 1990 (*ibid.*, *Forty-fifth Session, Sixth Committee (see footnote 26 above)*).

²⁸ Statement of 31 October 1991 (*ibid.*, *Forty-sixth Session, Sixth Committee (see footnote 19 above)*).

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**First report on the law of the non-navigational uses of
international watercourses, by Mr. Robert Rosenstock, Special Rapporteur**

[Original: English]
[20 April 1993]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report.....	179
	<i>Paragraphs</i>
INTRODUCTION.....	1-5 180
<i>Chapter</i>	
I. ISSUES OF A GENERAL CHARACTER.....	6-9 180
A. Draft convention or model rules.....	6-7 180
B. Dispute settlement.....	8-9 181
II. ISSUES RELEVANT TO PART I (INTRODUCTION) OF THE DRAFT ARTICLES.....	10-20 181
Comments on specific articles	
Article 1 (Scope of the present articles).....	10 181
Article 2 (Use of terms).....	11 181
Article 3 (Watercourse agreements).....	12-17 182
Article 4 (Parties to watercourse agreements).....	18-20 183
III. ISSUES RELEVANT TO PART II (GENERAL PRINCIPLES) OF THE DRAFT ARTICLES.....	21-28 184
A. General comments.....	21-23 184
B. Comments on specific articles	
Article 5 (Equitable and reasonable utilization and participation).....	24 184
Article 6 (Factors relevant to equitable and reasonable utilization).....	25-26 184
Article 7 (Obligation not to cause appreciable harm).....	27 185
Article 8 (General obligation to cooperate).....	28 185
Article 9 (Regular exchange of data and information).....	28 185
Article 10 (Relationship between uses).....	28 185

Multilateral instruments cited in the present report

	<i>Source</i>
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	ECE, <i>Environmental Conventions</i> , United Nations publication, 1992, p. 95.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	Ibid., p. 161.

Introduction

1. The Special Rapporteur does not doubt that by preparing an instrument along the lines of the draft articles provisionally adopted after first reading,¹ the Commission will be making a significant contribution towards ameliorating some of the water-related problems humankind will confront in the next few decades as a result of increased use and needs generated by the drive for development and the expanding population.

2. An incalculable debt is owed to the former Special Rapporteur, Mr. McCaffrey, to his predecessors, to Mr. Hayton, and to the members of the Commission who worked so hard to complete the first reading in a timely fashion. A standard has been set which is more aspirational than achievable.

3. The Special Rapporteur believes that what is necessary at this stage is, in large measure, fine tuning. In sum, there appears to be no basis to disagree with the written comments of one Government that the draft is a remarkable achievement. This is not to deny that not all States were equally affirmative or that there was a tendency of some States to pull or push the draft one way or another depending, *inter alia*, on their respective geographic situations vis-à-vis key watercourses. Questions have, moreover, been raised as to the final form the Commission's product should take, and several States have urged that the Commission should reconsider the question of including provisions for the settlement of disputes.²

¹ For the texts of draft articles 1 to 32 provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70. For the reader's convenience, the articles to which the comments in this report refer are reproduced in footnotes 6, 7, 9, 17 and 21 to 23 below.

² The comments and observations received from Governments are reproduced in the present volume (document A/CN.4/447 and Add.1-3), p. 147.

4. There have, of course, been developments in the world since the Commission completed its first reading. In this connection, particular reference is made to the outcome of the United Nations Conference on Environment and Development,³ the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and the Convention on Environmental Impact Assessment in a Transboundary Context. It is opined, however, that nothing in these instruments requires fundamental change in the text of the draft as it stands after completion of the first reading. The main impact of these instruments is to underline the importance of the Commission expediting its work and avoiding taking a narrow view of what is comprehended by the topic.

5. This initial report of the Special Rapporteur will be confined to parts I and II of the draft, except to the extent that issues or comments of Governments with regard to other parts affect or potentially affect those two parts.

³ See Agenda 21 (*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II, which states: "The widespread scarcity, gradual destruction and aggravated pollution of freshwater resources . . . demand integrated water resources planning and management" (para. 18.3). To respond to this situation, Agenda 21 stresses the importance of "holistic management of freshwater" (para. 18.6), based on a balanced consideration of the needs of people and the environment. By inclusion of the notion of a "holistic" approach this report is not departing from a fundamentally anthropocentric approach, but rather seeking to recognize that in the long run that which harms flora and fauna impoverishes humankind. Agenda 21 does not attempt to grapple in any detail with the international or transboundary implications of these concerns but rather leaves it to the Commission to come up with the framework for the necessary global response to the problems identified.

CHAPTER I

Issues of a general character

A. Draft convention or model rules

6. It is not always necessary for the Commission to defer to the end the question of the form its work should take. Indeed, in the present case, as well as others in related fields, it may expedite the work to resolve this issue at the earliest practicable stage, as several Governments have suggested in their comments.⁴ At a minimum, a brief preliminary exchange on this point would seem appropriate before any further drafting is undertaken. Conversely, if there is a determined insistence to defer the question of form to a later stage, then there is no wish to delay substantive work by insisting on resolving the issue of form at this stage.

⁴ See the comments by Canada and the United Kingdom (footnote 2 above).

7. There is much to be said for both approaches, that is to say, a framework convention and model rules. The utility of the former approach is in large measure a function of the width and extent of its ratification; the utility of the latter is largely a function of the strength and depth of the endorsement of the rules that the Commission is prepared to recommend and the General Assembly is likely to endorse. There would, in short, seem to be little point in advocating the framework convention approach in the absence of some expectation of widespread acceptance and, even more so, no defensible point in advocating any other approach at this stage unless such advocacy is combined with a willingness to support a recommendation for very strong endorsement of the Commission's final product by the General Assembly. It can also be argued that a model law would facilitate including more specific guidance. To the extent that this is so, it is at least in part offset by the vaguer nature of any obligation flowing from the

instrument. If the model law approach were to be adopted, it would be useful to expand the commentaries, to the extent possible, in order for States to conclude more readily when they are dealing with statements *de lege lata* and when not. The difficulty of this last suggestion is recognized, however.

B. Dispute settlement

8. Particular attention is drawn to the fact that a number of Governments have urged the Commission to review

the question of including dispute settlement provisions.⁵ This report fully endorses Mr. McCaffrey's view that, in the light of the nature of the issues, the Commission would be making an important contribution by recommending a tailored set of provisions on fact-finding and dispute settlement in the event that it decides to recommend a draft treaty and, arguably, also if it opts for model rules.

9. The comments on specific articles set out in chapters II and III below are to be understood as being without prejudice to the question of form.

⁵ See the comments by Costa Rica, Greece and Switzerland (*ibid.*).

CHAPTER II

Issues relevant to part I (Introduction) of the draft articles

Comments on specific articles

ARTICLE 1 (SCOPE OF THE PRESENT ARTICLES)⁶

10. There does not appear to be anything in the text, in the commentary or in the comments of Governments to require changes to this article or even to the commentary, though in the latter connection it might be worth noting explicitly in the commentary that the enjoyment of the riches of an ecosystem is as much a use thereof as any other. Some Governments, in their comments, would reopen the question of the term "watercourses". In view of the compromise reached, no useful purpose would seem to be served at this late stage in going back over the pros and cons of using the term "drainage basin". The suggestion for the use of the term "transboundary waters" in the light of its use in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes seems to be a matter of drafting since there is no substantive difference between the terms used in article 1 and the term "transboundary waters" as used in that Convention.

ARTICLE 2 (USE OF TERMS)⁷

11. In the interest of building on what has been achieved, the temptation has been resisted, with one

⁶ Article 1 reads as follows:

"Article 1. Scope of the present articles"

"1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

"2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation."

⁷ Article 2 reads as follows:

"Article 2. Use of terms"

"For the purposes of the present articles:

"(a) 'International watercourse' means a watercourse, parts of which are situated in different States;

exception, to tinker with article 2. It is recommended that the phrase "flowing into a common terminus" in subparagraph (b) should be deleted. The notion of "common terminus" does not seem to add anything beyond possible confusion to what is covered by the rest of the subparagraph and, if retained, the phrase risks creating artificial barriers to the scope of the exercise. Were these comments to yield to the temptation to tinker, it would be in the direction of including "unrelated" confined groundwater.⁸ In the event that preliminary exchanges in the Commission indicate a receptivity to such a change, a draft could readily be prepared accordingly. It does not seem that such a change would require much, if any, change to any other articles. On balance, the article as it stands seems to provide a viable compromise between two conceptual approaches which at the theoretical level clash, but which in practice must and can be harmonized. Subject to one, or possibly two, of the questions discussed above, it is recommended that the Commission should treat article 2 as a valid working hypothesis for the second reading and revert to it only to the extent that work on subsequent articles uncovers an unexpected need to re-examine article 2. The definition of the term "pollution" currently contained in article 21 could usefully be transferred to article 2. Such a shift is helpful to what is being proposed for article 7, but is not essential, and to accept it in no way implies agreement to, or enhances the utility of any change in, parts II or III of the current draft.

"(b) 'Watercourse' means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

"(c) 'Watercourse State' means a State in whose territory part of an international watercourse is situated."

⁸ For an excellent discussion of the limitations of the approach taken, see R. D. Hayton, "Observations on the International Law Commission's draft rules on the non-navigational uses of international water courses: Articles 1-4", *Colorado Journal of International Environmental Law and Policy*, vol. 2 (1992), pp. 37-38. The comments by Governments submitted on behalf of the Nordic countries, Spain and the United Kingdom (see footnote 2 above) urge a similar approach.

ARTICLE 3 (WATERCOURSE AGREEMENTS)⁹

12. One change would appear to be advisable in article 3, namely the replacement of the word “appreciable” by the word “significant”. The comments of Governments articulate their reasons for suggesting this change in a number of ways, including the practice to date in roughly comparable instruments.¹⁰ The two arguments which are found to be particularly convincing are: (a) the word “appreciable” has two quite different meanings, that is to say (i) capable of being measured, and (ii) significant; (b) since the commentary makes clear that “appreciable” is to be understood as “significant”,¹¹ it would be preferable for the article so to state rather than to have to read the commentary to understand the meaning of the term. This change to article 3 should be understood as implying the same change throughout the draft.¹² The complexity and risk of confusion of using one term in articles 3 and 4, for example, and another in article 7, far outweigh any benefit that might derive from any such attempt at hyper-fine-tuning.

13. The following possible texts are proposed for article 3, paragraph 2:

ALTERNATIVE A

“2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to a *significant* extent, the use by one or more other watercourse States of the [waters of the]¹³ watercourse.”

⁹ Article 3 reads as follows:

“Article 3. *Watercourse agreements*

“1. Watercourse States may enter into one or more agreements, hereinafter referred to as ‘watercourse agreements’, which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

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

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

¹⁰ Comments urging this change were made, *inter alia*, by Canada, Germany, Switzerland, the United Kingdom, and the United States of America (see footnote 2 above).

¹¹ Article 3 was previously adopted as article 4. For the commentary, see *Yearbook . . . 1987*, vol. II (Part 2), pp. 26-30, especially p. 29, paragraphs (15) and (16).

¹² That is to say, in articles 7 and 12, article 18, paragraph 1, article 21, paragraph 2, article 22 and article 28, paragraph 2.

¹³ Since “watercourse” is defined as a “system of . . . waters” it seems unnecessary to repeat the reference to “waters”. The Drafting Committee should consider this simplification throughout the draft.

ALTERNATIVE B

“2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not *cause significant harm* to the use by one or more other watercourse States of the [waters of the]¹³ watercourse.”

14. The perceived advantage of alternative B is the deletion of the word “extent”. The function of this deletion is to make totally clear on the face of the text that the harm can be localized and still be significant. If this draft is accepted, it would be advisable, for the same reason, to make a drafting change in the current article 4, paragraph 2,¹⁴ by replacing the phrase “may be affected to an appreciable extent” by the phrase “may incur significant harm”. There do not appear to be any other changes required by alternative B that are not required by alternative A.¹⁵

15. The suggestion of some Governments in their comments that this article should also contain the notion that becoming party to the convention will not affect existing watercourse agreements may not be without problems and does not seem necessary. The Commission is not in a position to know with any certainty what bilateral or even multilateral agreements there are or whether some may be inconsistent with the fundamental premises of the draft. While there is nothing in the current text which would or should rule out any subsequent agreements, whether consistent with the current text or not, it seems excessive to presume the continued validity of *lex posterior* inconsistent with the current draft, without some indication of intent to that end by the State or States concerned. It hardly conduces to the stability of the regime if some assume that *lex posterior* is superseded and others that, contrary to the normal rules regarding successive treaties, it is not. States which decide to become parties to the current draft may be expected to be fully conversant with existing conventions or arrangements to which they are parties. States so situated are in a position to avoid any unintended application of this convention in a variety of ways, including by means of a clear statement of intent or understanding with regard to some or all existing agreements to which they are parties at the time they sign or become parties to the current treaty. A general statement to this effect at the time of signing or ratifying would suffice. This would avoid uncertainty.

16. Attention is also directed to paragraph 3 as currently drafted. It might in theory be possible to add to “characteristics and uses” the notion of agreements, so that the paragraph would read:

“3. Where a watercourse State considers that adjustment or application of the provisions of the

¹⁴ See footnote 17 below.

¹⁵ That is to say, in articles 7 and 12, article 18, paragraph 1, article 21, paragraph 2, article 22 and article 28, paragraph 2.

present articles is required because of the characteristics, uses of, or *existing agreements concerning* a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements or reaching an understanding.”

Such a change would avoid the “blank-cheque” concern expressed above. In the light of the framework nature of the current text, which foresees that specific situations are likely to be the subject of particular arrangements, there may be some merit in including wording to this effect. It may, however, be an unnecessary complication of the draft in the light of the means by which States can protect themselves in particular cases. The suggested redraft is, moreover, a diversion of the main purpose of paragraph 3, which is to provide for developments which take place after States become parties to the current draft rather than to take account of pre-existing circumstances. Nevertheless, a redraft of paragraph 3, along the lines indicated could be made without adverse effect and no additional drafting changes to other articles appear necessary. It could be left to the Drafting Committee to decide on the utility of such a change.

17. There are also various suggestions made in the comments of States to reorder the articles. The suggestions reflect the view that the draft is first and foremost a framework for cooperation, with agreements watercourse States may enter into being but one possible means to this end. Placing articles 8 and 26 ahead of article 3 would have no effect on the substance of the draft but would make the flow of the articles more logical. The removal of articles 8 and 26 from parts II and III respectively does not appear to create any problems. It is consequently recommended that the Drafting Committee should seriously consider reordering the articles.¹⁶

¹⁶ At the time article 26 is considered in substance, it will be necessary to examine the extent to which the terms “equitable and reasonable”, “rational and optimal” and “sustainable development” are sufficiently clearly synonymous to avoid creating uncertainty or confusion. There are other suggestions concerning the content of article 26 in the comments of Germany, Switzerland, Turkey, the United Kingdom and the United States of America (see footnote 2 above).

ARTICLE 4 (PARTIES TO WATERCOURSE AGREEMENTS)¹⁷

18. Article 4 as drafted is appropriate and no change is recommended other than drafting adjustments consequential to changes to article 3 (“significant” *vice* “appreciable”). Paragraph 1 of article 4 covers the situation in which an agreement relating to the entire watercourse is involved, and paragraph 2 covers a case in which only a portion of the watercourse is affected.

19. While the term “applies to” in paragraph 1 is doubtless not the only way to make the distinction, it should be clear that “applies to” relates to the scope of the agreement and is not synonymous with and does not serve the same function as “affects appreciably”. Rather, what the text says is that, if there is such an agreement being negotiated, all watercourse States are entitled to participate without any requirement of establishing that they will be appreciably affected. It is, in effect, a presumption, and one which is considered entirely appropriate and in keeping with the thrust of the overall draft.

20. It would seem inappropriate not to include all watercourse States in the former case and equally inappropriate in the case covered by paragraph 2 to insist on the inclusion of watercourse States not affected by the agreement. The deletion of paragraph 2, as suggested in the comments of Governments, would have the effect of creating the latter inappropriate situation, which would indeed be likely to burden lower riparian States unduly. It would not be too difficult a drafting endeavour to merge the two paragraphs with phrases such as “in whole or in part” and “to the extent it is affected thereby”. No discernible benefit is apparent from such a redrafting, and the resulting paragraph would be heavy and more difficult to comprehend than the current text.

¹⁷ Article 4 reads as follows:

“Article 4. Parties to watercourse agreements

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

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

CHAPTER III

Issues relevant to part II (General principles) of the draft articles

A. General comments

21. As has been indicated by various comments and commentators, articles 5 and 7 provide a key element of the entire draft. Some suggestions would eliminate article 7 or tip the balance more clearly in favour of article 5 and make "equitable and reasonable" virtually the sole criteria for use, that is to say, to subordinate article 7 to article 5. Others would regard appreciable or significant harm in all cases as evidence of inherently inequitable and/or unreasonable use and implicitly or explicitly subordinate article 5 to article 7. The current text of the articles themselves is not without ambiguity on this crucial issue and on the nature of the responsibility of the States from which the harm flows.

22. While these issues, in particular the nature of the responsibility of the State causing the effect, are clarified to some extent by the commentary,¹⁸ it is submitted that a better job could be done to clarify these issues in an acceptable manner in the text of the articles themselves. To this end, a revision of article 7 is proposed. The intended result of the revision is a regime in which equitable and reasonable use is the determining criterion, except in cases of pollution as defined in the draft articles. In those cases, article 5 is subordinated to article 7, subject to the subordination being defensible by a clear showing of extraordinary circumstances, that is to say, in effect a rebuttable presumption.

23. It is clear that such a revision in article 7 in no way diminishes the desirability of making articles 5 and 6 as clear as possible. No way has been found, however, of adding detailed guidance to article 5 that would make sense in a framework agreement. In some cases territorial apportionment was agreeable to the watercourse States,¹⁹ in others periodic rotation,²⁰ or sharing the benefits of a hydroelectric facility, apportionment or allotment of uses, compensation arrangements, and so forth. Each of these applications of reason and equity is specific to the facts of the particular situation and thus it does not seem appropriate to recommend them for inclusion in a framework treaty as being of general utility. It is possible, and indeed likely, that a commentary of some greater length could provide a description of the possibilities States could consider in reaching equitable and reasonable results. This is clearly a major area in which the problems could be alle-

¹⁸ For the commentaries to articles 5 and 7 (initially adopted as articles 6 and 8), see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31-36 and *Yearbook . . . 1988*, vol. II (Part Two), pp. 35-41, respectively.

¹⁹ Indus Waters Treaty 1960 of 19 September 1960 between India and Pakistan, United Nations, *Treaty Series*, vol. 419, p. 125.

²⁰ Final Act of the delimitation of the international frontier of the Pyrenees between France and Spain (Bayonne, 11 July 1868), 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), p. 674, Treaty No. 186. For summary in English, see *Yearbook . . . 1974*, vol. II (Part Two), p. 182, document A/5409, paras. 979-984, particularly paras. 982 (a), 983 (a) and 984 (a).

viated by provision for third-party involvement should the States concerned be unable to reach a mutually acceptable solution.

B. Comments on specific articles

ARTICLE 5 (EQUITABLE AND REASONABLE UTILIZATION AND PARTICIPATION)

24. No change is recommended in article 5.

ARTICLE 6 (FACTORS RELEVANT TO EQUITABLE AND REASONABLE UTILIZATION)²¹

25. None of the changes to article 6 that have been suggested by the comments of Governments seem to be compelling in the light, *inter alia*, of the contents of the existing articles, including in particular the logic of the entire draft, of article 6, paragraph 1 (d), concerning existing uses; article 21, paragraph 1, concerning the quality of the water; article 6, paragraph 1 (c), and, paragraph 1 (f); article 10, paragraph 2; and the suggested revised article 7, so far as situations of particular dependence are concerned. These comments are without prejudice to the consideration of article 6 in connection with that of the

²¹ Articles 5 and 6 read as follows:

"Article 5. *Equitable and reasonable utilization and participation*

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

"2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles."

"Article 6. *Factors relevant to equitable and reasonable utilization*

"1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

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

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

"(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

"(d) existing and potential uses of the watercourse;

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

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

"2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation."

substance of article 26, which is not ripe for comment at this time.

26. Paragraph 2 of article 6 seems to be a sufficiently particular case and to require sufficiently specific action to merit retention, even though article 8 and article 10, paragraph 2, arguably impose a like obligation. Moreover, if there is to be any reconsideration of the inclusion of third-party involvement in this part of the draft, article 6, paragraph 2, may be as good a hook to hang it on as any.

ARTICLE 7 (OBLIGATION NOT TO CAUSE APPRECIABLE HARM)²²

27. Pursuant to the general comments in paragraphs 21 to 23 above, the following redraft of article 7 is proposed:

“Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States, absent their agreement, except as may be allowable under an equitable and reasonable use of the watercourse. A use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is: (a) a clear showing of special circumstances indicating a compelling need for ad hoc adjustment; and (b) the absence of any imminent threat to human health and safety.”

ARTICLE 8 (GENERAL OBLIGATION TO COOPERATE)

ARTICLE 9 (REGULAR EXCHANGE OF DATA AND INFORMATION)

ARTICLE 10 (RELATIONSHIP BETWEEN USES)²³

28. At the present time the inclination is not to recommend any changes in articles 8 to 10. There is a measure

²² Article 7 reads as follows:

“Article 7. *Obligation not to cause appreciable harm*

“Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.”

²³ Articles 8 to 10 read as follows:

“Article 8. *General obligation to cooperate*

“Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain

of sympathy, however, with the expression of concern by some Governments about the generality of article 8 and a recognition that the remainder of the draft only partly ameliorates the situation. Further reflection is called for on ways of making article 8 more precise without detracting from the ability of the draft as a whole to serve as a framework applicable to a wide variety of situations. It is noted in this connection that the Commission has already considered the matter in some detail and concluded “that a general formulation would be more appropriate”.²⁴ It is neither prudent nor legally accurate to attempt to apply the principle of good faith expressly to part of an agreement: neither would it be prudent to add the notion of good neighbourliness to one provision of an instrument such as the one before the Commission. In any event, such additions would not appear to decrease the generality of article 8 to any appreciable, significant or important degree.

optimal utilization and adequate protection of an international watercourse.”

“Article 9. *Regular exchange of data and information*

“1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

“2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

“3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.”

“Article 10. *Relationship between uses*

“1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

“2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.”

²⁴ *Yearbook . . . 1988*, vol. II (Part Two), p. 41, paragraph (2) of the commentary to article 9.

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

[Agenda item 5]

DOCUMENT A/CN.4/450

Ninth 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]
[15 April 1993]

CONTENTS

	<i>Page</i>
Multilateral instruments cited in the present report.....	188
	<i>Paragraphs</i>
INTRODUCTION.....	1-8 188
A. The mandate of the Special Rapporteur.....	1-3 188
B. Some comments on prevention.....	4-8 189
<i>Chapter</i>	
I. THE DRAFT ARTICLES.....	9-75 190
A. General considerations.....	9-10 190
B. The texts.....	11-75 190
1. Article entitled "Preventive measures"	
(a) Text.....	11 190
(b) Basic principles	
(i) The obligation to cooperate.....	12 190
(ii) Prohibition against the harmful use of a territory.....	13 190
(c) Comments made at the forty-fourth session of the Commission.....	14 190
d) Unilateral preventive measures	
(i) Prior authorization	
a. General comments.....	15-16 191
b. Existing activities.....	17 191
c. Failure to suspend the activity.....	18 191
d. The concept of prevention.....	19 192
(ii) Transboundary impact assessment.....	20 192
(iii) Other unilateral measures.....	21-24 192
(e) Texts proposed to replace article I.....	25 193
2. Article entitled "Notification and information"	
(a) Text.....	26 193
(b) General comments.....	27 193
(c) Participation of the affected State.....	28 193
(d) Promotion of special regimes.....	29 194
(e) Participation of international organizations.....	30-31 194
(f) Other comments.....	32-34 194
(g) Information.....	35-36 195
(h) Public participation.....	37 195
(i) Texts proposed to replace article II.....	38 195

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
3. Article entitled "National security and industrial secrets"		
(a) Text.....	39	196
(b) Comments.....	40-41	196
(c) Text proposed to replace article III.....	42	196
4. Article entitled "Consultations on a regime"		
(a) Text.....	43	196
(b) Comments.....	44-52	196
(c) Text proposed to replace article VI.....	53	198
5. Article entitled "Initiative by the affected States"		
(a) Text.....	54	198
(b) Comments.....	55-56	198
(c) Text proposed to replace article VII.....	57	199
6. Article entitled "Settlement of disputes"		
(a) Text.....	58	199
(b) Comments.....	59-62	199
(c) Elements of a proposed future text to replace article VIII.....	63	200
7. Article entitled "Factors involved in a balance of interests"		
(a) Text.....	64	200
(b) Comments.....	65-70	200
(c) Proposal relating to article IX.....	71	201
8. The principle of non-transference of risk or harm		
(a) General comments.....	72-73	201
(b) Text proposed concerning the non-transference of risk or harm.....	74	202
9. The "polluter pays" principle.....	75	202
II. CONCLUSION.....	76	202

Multilateral instruments cited in the present report

	<i>Source</i>
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (Sales No. E-84.V.3), p. 151, document A/CONF.62/122.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	ECE, <i>Environmental Conventions</i> , United Nations publication, 1992, p. 95.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	<i>Ibid.</i> , p. 119.

Introduction

A. The mandate of the Special Rapporteur

1. At its forty-fourth session, the Commission decided, with regard to the scope of the topic, that

Attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm and [that] the Commission should not deal, at this stage, with other activities which in fact cause harm ... the articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm ...¹

Thus, the Commission

... requested that the Special Rapporteur, in his next report to the Commission, should examine further the issues of prevention solely in respect of activities posing a risk of causing transboundary harm and propose a revised set of draft articles to that effect.²

2. These decisions mean that the discussion on the need for rules of prevention is suspended for the time being; there will be articles on that topic, but a decision on

¹ *Yearbook* ... 1992, vol. II (Part Two), para. 346.

² *Ibid.*, para. 349.

whether they should be binding or not will be taken at a later stage. They also mean that discussions should be confined to the draft texts on prevention, and should not be extended to the topic of *liability*, which will be considered in due course.

3. The Commission's decisions also mean that, subject to the outcome of the discussion, the draft articles should be transmitted to the Drafting Committee as soon as possible so that their adoption may be expedited. Inasmuch as there have already been three discussions concerning specific articles on prevention, namely on the fifth report of the Special Rapporteur,³ the sixth report,⁴ which incorporated numerous comments from the previous discussion and, lastly, on the eighth report,⁵ the Commission cannot expect to give the Drafting Committee even more material with which to carry out its task.

B. Some comments on prevention

4. In his eighth report the Special Rapporteur examined the nature of prevention in the context of activities involving risk, as follows:

It has already been seen that the preventive measures to be taken by the State would be very different from those to be taken by individual operators: the State would have to set forth a prudent and comprehensive set of rules (including legislation and administrative regulations) in respect of prevention, and would have to monitor compliance using the legal means at its disposal. Individual operators would be obliged to adopt whatever substantive measures the State required of them.⁶

5. The aim of such measures would be *to attempt* to ensure that activities under the jurisdiction or control of a State are carried out in such a way as to minimize the probability of an incident occurring which would have transboundary effects, and to reduce the harm resulting from each incident (in other words, not only to lessen the risk of harm, but also the risk of even minor harm), and, once an incident with transboundary effects has occurred, *to attempt*, within the State's sphere of action, to reduce, limit or control the harmful effects.

6. The words "to attempt" are emphasized in order to show that the purpose of the obligation is not *to prevent the occurrence of any harm*—which, by definition, is problematic, since the activities involved are those which create a risk—but to compel the adoption of particular measures in order to achieve the results mentioned in paragraph 5 above. Thus, the State will not, in principle,⁷

be liable for private activities in respect of which it carried out its supervisory obligations, namely where it granted prior authorization upon completion of the steps required by the relevant articles; notified those presumed to be affected; held the requisite consultations; promulgated legislation which was *reasonably* designed to achieve the desired results; and exercised proper administrative control (requested operators to submit reports, carried out inspections, etc.).

7. Although this report examines the steps required for prevention, as set out above, it should be pointed out that the obligations of prevention constitute what are called "due diligence" obligations, which are deemed to be unfulfilled only where no reasonable effort is made to fulfil them. Therefore, they would not have the character, which it might initially be tempting to ascribe to them, of obligations of *result* in the sense of article 21 (Breach of an international obligation requiring the achievement of a specified result) and, more specifically, of article 23 (Breach of an international obligation to prevent a given event) of part 1 of the draft articles on State responsibility.⁸ The Commission itself has warned against confusing the two types of obligations in its commentary to article 23:

Obligations requiring the prevention of given events are therefore not the same as those that are commonly referred to by the blanket term "obligations of due diligence". The commission of a breach of the latter obligations often consists of an action or omission by the State and is not necessarily affected by the fact that an external event does or does not take place.⁹

8. It is chiefly in relation to the obligations of the State and its potential liability that the observed inequality between developing and developed countries would come into play. The point has repeatedly been made, in the Commission and in the Sixth Committee, that developing countries lack the requisite technological know-how or financial resources to regulate the activities of transnational corporations, and that it is these corporations which are often responsible for activities involving risk. In support of this view, it is proposed to include wording which, *in general terms*, can help to address that. The best place for it may perhaps be in the chapter containing the principles which would guide the application of all the specific rules. Some comments will be made later in this report about the assistance which international organizations can provide to developing countries (see paragraphs 30-31 below).

³ *Yearbook* . . . 1989, vol. II (Part One), p. 131, document A/CN.4/423; for a summary of the discussions, *ibid.*, vol. II (Part Two), paras. 307-397.

⁴ *Yearbook* . . . 1990, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1; for a summary of the discussions, *ibid.*, vol. II (Part Two), paras. 469-530.

⁵ *Yearbook* . . . 1992, vol. II (Part One), p. 59, document A/CN.4/443; for a summary of the discussions, *ibid.*, vol. II (Part Two), paras. 281-349.

⁶ *Yearbook* . . . 1992, vol. II (Part One) (see footnote 5 above), para. 14.

⁷ "In principle" because the State might have residual liability in some cases, for example, where the operator or his insurers cannot

produce the sum required to cover the harm caused (as provided for in some conventions), or in other cases which might be imagined. Whether the State can have such residual liability, and what it consists of, will be dealt with when considering the chapter on liability. It is mentioned here merely as a possibility; its existence and the manner in which it will come about will depend on what the Commission decides.

⁸ For the texts of articles 21 and 23 as adopted on first reading, see *Yearbook* . . . 1980, vol. II (Part Two), p. 30.

⁹ *Yearbook* . . . 1978, vol. II (Part Two), p. 82, para. (4) of the commentary, footnote 397.

CHAPTER I

The draft articles

A. General considerations

9. In the eighth report of the Special Rapporteur, the articles on prevention were numbered I to IX,¹⁰ which was natural, since it had been proposed to place them in an annex and they had therefore been removed from the general numbering. As the possibility of setting up such an annex was rejected by the Commission, those articles have to be reincorporated into the regular numbering. Since the Drafting Committee is considering draft articles 1 to 9, and since article 10 (Non-discrimination) will surely also be among those to be considered by that Committee, the numbering of the articles on prevention should proceed consecutively thereafter, beginning with number 11 (former art. I).

10. First, this report will set out the texts, no longer drafted as recommendations for inclusion in the annex, as proposed in the eighth report, but as legal propositions, purged of references to activities having harmful effects, the consideration of which has been postponed to a later stage. Those texts, thus purged and redrafted, will serve as a basis for the preparation of new articles taking into account, to the extent possible, the comments made in the discussions at the forty-fourth session of the Commission¹¹ and in the General Assembly at its forty-seventh session.¹²

B. The texts

1. ARTICLE ENTITLED "PREVENTIVE MEASURES"

(a) Text

11. The following text, which is closely modelled on article I, has been taken as a basis for the formulation of this article:

"Preventive measures"

"The activities referred to in article 1 shall require for their legal performance the prior authorization of the State under whose jurisdiction or control they are to be carried out. Before authorizing or undertaking any such activity, the State shall arrange for an assessment of any transboundary harm it might cause and shall ensure, by adopting legislative, administrative and enforcement measures, that the persons responsible for conducting the activity use the best available

technology to prevent or to minimize the risk of significant transboundary harm."

(b) *Basic principles*(i) *The obligation to cooperate*

12. The first step is to assess the transboundary impact. As was stated in the eighth report, and earlier in the fifth report, that obligation is closely linked to the obligations to notify, to inform and to consult, and all three should be borne in mind when they are commented upon individually:

... one of the basic principles ... is the obligation to cooperate laid down in article 7... From the duty to cooperate flows, in the first place, a duty for the State to ascertain whether an activity which appears to have features that may involve risks or produce harmful effects actually causes such risks or effects. This means that the activity must be subjected to sufficiently close scrutiny to allow for definite conclusions to be reached.¹³

(ii) *Prohibition against the harmful use of a territory*

13. The other basic principle is the prohibition against the use by a State of its territory in a manner contrary to the rights of other States, which requires it to adopt all necessary measures to avoid such use. The Special Rapporteur commented:

The duty to cooperate is one basic principle, therefore the other is expressed in the general rule emerging from the international case law frequently cited in this connection, namely that the conscious use by a State of its territory to cause harm to another State is impermissible under international law. It may be recalled, first, that in the *Trail Smelter* case the arbitral tribunal stated:

"... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein ..."

And in the *Corfu Channel* case (Merits), the ICJ referred to: "... every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".¹⁴

(c) *Comments made at the forty-fourth session of the Commission*

14. The text of article I combined the obligation to "assess transboundary effects" contained in former article 11 (Assessment, notification and information)¹⁵ with the unilateral measures provided for in former article 16 (Unilateral preventive measures).¹⁶ A preference was expressed in the discussion for separate texts for each obligation, which is feasible. It was also suggested that the obligation of a State to require individual operators to carry insurance to cover any eventual compensation should be retained in the chapter on prevention; that reference had

¹⁰ All subsequent references to draft articles with Roman numerals, unless otherwise stated, concern the articles on prevention proposed in chapter II of the eighth report (*Yearbook* ... 1992, vol. II (Part One) (see footnote 5 above), pp. 67-70) for inclusion in an annex.

¹¹ For detailed comments, see *Yearbook* ... 1992, vol. I, 2268th-2273rd meetings; for summary, *ibid.*, vol. II (Part Two) (see footnote 5 above).

¹² See "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-seventh session, prepared by the Secretariat" (A/CN.4/446), sect. D, paras. 264-276.

¹³ *Yearbook* ... 1989, vol. II (Part One) (see footnote 3 above), para. 76.

¹⁴ *Ibid.*, para. 78.

¹⁵ For the text, see *Yearbook* ... 1990, vol. II (Part Two), p. 96, footnote 345.

¹⁶ *Ibid.*, p. 97, footnote 347.

been omitted and was to be included in the chapter on liability, since insurance does not prevent accidents, but simply covers the harm caused. There is likewise no objection to adopting this suggestion and including the topic of insurance in the article, since it is a step which the State will undoubtedly take prior to authorizing the activity, in other words, concurrently with the assessment of transboundary harm.

(d) *Unilateral preventive measures*

(i) *Prior authorization*

a. *General comments*

15. Various views were expressed concerning the obligation of prior authorization. In general, the opinions were favourable, although one member of the Commission doubted the need to make it a binding obligation. Another member considered such an obligation unnecessary, believing, on the one hand, that there was no country in the world which, to protect its own people, would not require prior authorization for hazardous activities and that, on the other hand, countries would rebel against it as a treaty requirement on the ground that it constituted interference in their internal affairs—a notion explicitly rejected by another member. It is not felt that such a requirement can be regarded as unlawful interference in the internal affairs of another State, since it is established to prevent the violation of the right of States to physical and territorial integrity. In order to show that it is unnecessary to establish such an obligation, it has been argued that it is the people or the environment of the State of origin which are the first to be harmed by a hazardous activity and that, in the end, it is that State which has a primary interest in requiring prior authorization. In the first place, however, it should be noted that the affected State is not going to view itself as having been compensated for the harm which it has suffered by the fact that the State of origin may also suffer as a result of activities carried out in its territory; secondly, such damage to the territory of a State does not exempt it from the prohibition against the use of its territory in a manner contrary to the rights of third States.¹⁷ Moreover, there may be cases in which an activity causes harm totally or partially outside the territory of a State, so that the people or environment would not be affected, or would be affected to a far lesser extent than in a neighbouring State. One example of the first case would be a facility located next to a border, where the emissions would be carried to neighbouring territory by steady winds, or on the bank of a river which would carry the pollution directly to the neighbouring country without affecting the part of the river adjacent to the State of origin. The second case can be exemplified by a hazardous waste dump located next to an international border; the harmful effects could, in part, be transferred abroad. These examples are in no way imaginary, but are drawn from real life and international practice. Accordingly, the fact that the State of origin is usually the first to be injured cannot, in principle, be invoked to exempt it from its

obligation to consider the rights of potentially affected States.

16. It has also been stated that in some cases it would not be feasible to assess the transboundary impact of particular activities. It is possible, however, in a large number of cases, to assess, without the need to approach the affected State, whether an activity with particular features that involve risk is liable to cause transboundary harm. A simple assessment of the substances handled or the technology used, or a general knowledge of the neighbouring territory, is sufficient to determine, without the need for a special visit, whether a particular activity could harm especially vulnerable or protected areas. If that is not possible, then the cooperation of the affected State would obviously be required for on-site visits which could enable definitive conclusions to be drawn regarding the risk entailed by the activity. To that end, the participation of the affected State must be ensured through notification, exchange of information and consultation. If the State presumed to be affected refuses admission to its territory or in any other way impedes the efforts of the envoys of the State of origin, there will clearly be no grounds for complaint if harm results from such refusal.

b. *Existing activities*

17. In the case of an activity which has been conducted for some time in the State of origin, without prior authorization having been granted for some reason, and comes to the attention of another State as an activity presumed to be hazardous, the State concerned must request the operator to apply to the competent bodies for the requisite authorization, following the same procedures as for the authorization referred to in article 11.¹⁸

c. *Failure to suspend the activity*

18. Should the territorial State order the suspension of the activity pending the fulfilment of the procedural obligations of notification, and especially, consultation with the affected State or States? The majority view in the Commission appears to oppose this. There may be some abstract logic in suspending the activity until all the obligations of prevention have been fulfilled in an ideal way—in other words, with the participation of the affected party or parties—but it should be recalled that many voices were raised in the Commission and in the General Assembly against any possibility of the affected parties being granted a virtual veto, as would be the case if international bodies decreed that the activity should be suspended. In response to the view expressed, the best solution might be to authorize the territorial State to initiate or to continue the activity, while at the same time extending its guarantee to cover any transboundary harm which might result therefrom, as stipulated in chapter IV concerning liability.¹⁹

¹⁷ See, for example, the *Trail Smelter* case (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.) and the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 4).

¹⁸ See paragraph 25 below.

¹⁹ Arts. 21-27. For texts, see *Yearbook . . . 1990*, vol. II (Part Two), pp. 100-101, footnotes 353-354.

d. *The concept of prevention*

19. Up to this point, the amendments considered are those proposed during the discussion. In article 14,²⁰ the wording of former article I is changed slightly. The concept of prevention is introduced in the sense of (a) minimizing the risk of transboundary harm occurring, in other words, reducing the frequency of accidents; (b) minimizing, if possible, the magnitude of the potential harm, for example, by replacing a very powerful element used in the activity, which is liable, ultimately, to have a major impact, with another, less powerful one, even if that does not change the statistical frequency of accidents;²¹ and (c) containing or minimizing the harmful effects of an accident which has already occurred, for example, by taking specific measures, where possible, in the territory where it has occurred, to cushion the harmful effects it has unleashed before they reach the border, or other measures to help contain such effects; this constitutes the famous "prevention *ex post facto*" which is dealt with in most agreements on civil liability.

(ii) *Transboundary impact assessment*

20. The requirement that a transboundary impact assessment should be undertaken as a precondition for obtaining authorization from the State to conduct the activity is provided for in the Convention on Environmental Impact Assessment in a Transboundary Context, particularly article 2, paragraphs 2 and 3 thereof, and in article 4, paragraph 2, of the Convention on the Transboundary Effects of Industrial Accidents. The latter Convention also stipulates that such assessment and authorization are also required when a major change is proposed in the activity concerned. In the same connection, Principle 12 of the UNEP Goals and Principles of Environmental Impact Assessment (EIA) states that:

When information provided as part of an EIA indicates that the environment within another State is likely to be significantly affected by a proposed activity, the State in which the activity is being planned should, to the extent possible:

(a) Notify the potentially affected State of the proposed activity;

(b) Transmit to the potentially affected State any relevant information from the EIA, the transmission of which is not prohibited by national laws or regulations; and

(c) When it is agreed between the States concerned, enter into timely consultations.²²

Similarly, Principle 17 of the Rio Declaration on Environment and Development states that:

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant

adverse impact on the environment and are subject to a decision of a competent national authority.²³

(iii) *Other unilateral measures*

21. With regard to other unilateral measures, the Code of Conduct on Accidental Pollution of Transboundary Inland Waters²⁴ requires States to

... take strict measures according to safety standards using the best available technology to prevent, control and reduce accidental pollution of transboundary inland waters (sect. II, art. 1)

including measures to (a) "minimize the *risk of damage*"* and (b) "*mitigate and contain the damage*"* from such pollution" (sect. II, art. 1). Section III of the Code lays down the

... legislative and administrative measures to be taken by parties for the prevention, control and reduction of accidental pollution of transboundary inland waters and for the mitigation and containment of damage resulting therefrom (art. 1).

The measures are required to

... promote the development and sound application of the best available technologies and their safe operation for efficient prevention, control and reduction of accidental pollution (art. 2).

22. The Convention on Environmental Impact Assessment in a Transboundary Context states in article 2 (2) that:

The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

This provision is very important because it means that the Convention requires the parties not only to assess the environmental impact, but also to prevent, reduce and control it. That is why this article is mentioned here in the remarks on unilateral measures (although in this case they are taken jointly with other States). This very general provision (para. 2) is followed by a more specific one:

Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

23. Article 3 of the Convention on the Transboundary Effects of Industrial Accidents states:

1. The Parties shall ... take appropriate measures and cooperate within the framework of this Convention, to protect human beings and the environment against industrial accidents by preventing such accidents as far as possible, by reducing their frequency and severity and by mitigating their effects. To this end, preventive, preparedness and response measures, including restoration measures, shall be applied.

...

3. ... the Parties shall ensure that the operator is obliged to take all measures necessary for the safe performance of the hazardous activity and for the prevention of industrial accidents.

4. To implement the provisions of this Convention, the Parties shall take appropriate legislative, regulatory, administrative and financial

²⁰ See paragraph 25 below.

²¹ The dual function represented by (a) and (b) would be in keeping with the definition of risk proposed in the eighth report, namely that it would encompass both dimensions: the combined effect of the probability of the occurrence of an accident and the severity of its impact.

²² Goals and Principles of Environmental Impact Assessment (Drawn up by the Working Group of Experts on Environmental Law) (UNEP/GC.14/17, annex III), adopted by the UNEP Governing Council (Official Records of the General Assembly, Forty-second Session, Supplement No. 25 (A/42/25 and Corr.1), as decision 14/25 of 17 June 1987.

²³ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, annex I.

²⁴ ECE, Code of Conduct on Accidental Pollution of Transboundary Inland Waters (United Nations publication, Sales No. E.90.II.E.28).

measures for the prevention of, preparedness for and response to industrial accidents.

24. The relevant provisions of the three above-mentioned instruments have been cited in preference to those of other instruments on liability for transboundary harm because they place special emphasis on prevention and contain the most modern thinking on the subject.

(e) *Texts proposed to replace article I*

25. The following articles are proposed to replace the text of article I, taking into account the views expressed at the Commission's forty-fourth session:

Article 11. Prior authorization

The activities referred to in article 1 shall require the prior authorization of the State under whose jurisdiction or control they are carried out. Such authorization shall also be required when a major change in the activity is proposed.

Article 12. Transboundary impact assessment

In order to obtain the authorization referred to in article 11, the territorial State shall order an assessment to be undertaken of the possible transboundary impact of the activity and of the type of risk that impact will produce.

Article 13. Pre-existing activities

If a State ascertains that an activity involving risk is being carried out without authorization under its jurisdiction or control, it must warn those responsible for carrying out the activity that they must obtain the necessary authorization by complying with the requirements laid down in these articles. Pending such compliance, the activity in question may continue on the understanding that the State shall be liable for any harm caused, in accordance with the corresponding articles.

Article 14. Performance of activities

The State shall ensure, through legislative, administrative or other measures, that the operators of the activities take all necessary measures, including the use of the best available technology, to minimize the risk of significant transboundary harm and reduce its probable scale or, in the event of an accident, to contain and minimize such harm. It shall also encourage the use of compulsory insurance or other financial guarantees enabling provision to be made for compensation.

2. ARTICLE ENTITLED "NOTIFICATION AND INFORMATION"

(a) *Text*

26. The following text, which is closely modelled on article II, has been taken as a basis for the formulation of this article:

"Notification and information

"If the assessment referred to in the preceding article indicates the possibility of significant transboundary harm, the State of origin shall notify the States presumed to be affected regarding this situation and shall transmit to them the available technical information in support of its assessment. 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, the State of origin shall seek the assistance of an international organization with competence in that area in identifying the affected States."

(b) *General comments*

27. There are many instruments requiring notification to be given in cases such as those provided for in the above draft article. Article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context includes that requirement, as does the Convention on the Transboundary Effects of Industrial Accidents, which provides, implicitly in article 3 and explicitly in article 10, for the need to inform those concerned. Principle 19 of the Rio Declaration on Environment and Development includes the same requirement:

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.²⁵

(c) *Participation of the affected State*

28. As was explained in the fifth report of the Special Rapporteur and reiterated in the eighth, the obligations regarding transboundary impact assessment, notification, information and consultation are closely linked and are all geared to an objective which is very important for the purposes of prevention, namely that of encouraging the participation of the State presumed to be affected so that it can help to ensure that the activity is carried out more safely in the State of origin and at the same time be in a position to take precautions in its own territory to prevent or reduce the transboundary impact. Cooperation is an essential part of these obligations and is one of the principles reflected in article 7 of the draft:

... notification flows from the general obligation to cooperate because in some cases there is a need for joint action by both the State of origin and the affected State if prevention is to be effective. Perhaps some measures taken from the territory of the affected State can provide protection and prevent effects arising in the State of origin from being transmitted to its own territory. Or perhaps the cooperation of the other State is helpful for the exchange of information that may take place between the parties, especially if the other State possesses technology that is relevant to the problem at hand. Perhaps it is because a joint investigation is usually more productive than individual efforts. What this means then is that the participation of the affected State is neces-

²⁵ See footnote 23 above.

sary if prevention is to be genuine and effective and, consequently, it may be argued that the obligations of the State of origin, according to which it must accept such participation, have the same purpose.²⁶

(d) *Promotion of special regimes*

29. Notification serves another purpose connected with one of the objectives of the draft articles, namely the promotion of special regimes governing specific activities. When a State authorizes the conduct of an activity involving risk, the ideal solution would be for an agreement to be reached between that State and the potentially affected States on a special regime which takes into account the specific characteristics of the activity and establishes specific preventive measures, including possible provision for compensation.

The first step towards a regime has been taken, therefore, with notification . . . The participation of the affected State in this process is also desirable from the standpoint of the State of origin, which presumably has an interest in finding a legal regime to govern an activity involving risk . . . for which it is responsible . . .

The purpose of the regime towards which we are moving with the obligation of notification would be not only to prevent accidents but also to strike a balance between the interests of the parties by introducing order into a whole array of factors. For example, a decision could be taken on preventive measures which weighed their cost against the cost of accidents and the benefits of the activity, the magnitude of the risks involved in the activity, the economic and social importance of the activity, possible sharing by each of the States of the cost of the operations (where there is agreement that certain expenses are to be shared), the objections that might be raised to these obligations, etc.²⁷

(e) *Participation of international organizations*

30. Various comments were made in connection with this article, both in favour and against intervention by international organizations and in relation to the form such intervention should take. Opinions ranged from total scepticism about its value, to support for much greater involvement, notably with reference to the situation of developing countries. There are undoubtedly organizations capable of providing the assistance which developing countries might request of them under this article, since they are already doing so at present in many similar fields and have ample capacity to meet such requests. Upon further reflection, however, the question to be considered appears to be a different one, namely to what extent can the articles *oblige* such organizations to make such assistance available? It is not the willingness to provide assistance that is in question but what the effect would be if an instrument to which a certain number of States are parties were to establish an obligation requiring international organizations not parties to the instrument to provide aid. An instrument of this kind could be binding only on its parties and the most that could be done would be to stipulate that if one State requests the intervention of an international organization the other State may not oppose that request, provided the organization accepts the role assigned to it.

31. In this connection, it was suggested that the precedent offered by articles 202 and 203 of the United Nations Convention on the Law of the Sea should be used. Article 202 concerns scientific and technical assistance to developing States and reads:

²⁶ *Yearbook . . . 1989*, vol. II (Part One) (see footnote 3 above) para. 77.

²⁷ *Ibid.*, paras. 100-101.

States shall, *directly or through competent international organizations**:

(a) Promote programmes of scientific, educational, technical and other assistance . . .

This is clearly an obligation for States parties, with which they can comply by acting directly or through international organizations. It is taken for granted that the organization concerned will agree to comply with the request from the State in question. There may be various reasons for that assumption, including the fact that the organization's statute may require it to comply with requests from a State which promotes its activities. Article 203, however, requires international organizations to give preferential treatment to developing States in (a) the allocation of appropriate funds and technical assistance and (b) the utilization of their specialized services. This is understood to be an obligation for international organizations which are parties to the Convention pursuant to article 305, paragraph (f), and within the limits set by the provisions of annex IX. This is not the case of the present draft articles, which make no provision for international organizations to become parties. Any suggestions on this question will be welcome. Though proposals on the role of international organizations in this field were introduced on a trial basis, it is now difficult to see how such organizations could be subject to legal obligations under an instrument to which they are not parties. The wording of former article II would reflect the concerns expressed above, since it indicates to States of origin that they may try to avail themselves of the assistance of a competent international organization in identifying the States presumed to be affected. The wording suggested is inspired by the UNEP Global Environment Monitoring System, the objectives of which are (a) to make comprehensive assessments of major environmental issues and thus provide the scientific data needed for the rational management of natural resources and the environment; and (b) to provide early warning of environmental changes by analysing the monitoring data. Other international organizations and programmes have studied and gathered data on questions such as the environment, the protection of human health from transboundary impact, and so on, which could undoubtedly help the developing countries to acquire a better understanding of these issues. The organizations concerned include ECE, through its own committees and in conjunction with FAO, WHO, UNDP or UNEP, WMO, IAEA and OECD.

(f) *Other comments*

32. One worthwhile comment was made stressing the need to introduce some idea of urgency as regards the time period within which the State of origin should provide notification. This idea appeared in the version of draft article 11 contained in the sixth report, which stipulated that States should provide notification "as soon as possible"²⁸ and it could be reintroduced in the new article 15²⁹ which has been proposed by the Special Rapporteur.

33. There were some who felt that in cases such as the launching of a satellite, it might be impossible to notify all

²⁸ See footnote 15 above.

²⁹ See paragraph 38 below.

those concerned or conduct a transboundary impact assessment. Needless to say, notification of all concerned and the assessment should be carried out as quickly as possible. In some cases, that could simply be done *urbi et orbi* or through an international organization with global influence willing to lend assistance for that purpose. If it is impossible at the outset to identify all those presumed to be affected, the State of origin should notify all those which it believes will be affected. If it subsequently appears that another State may also be affected by the transboundary impact, the State of origin should notify it and provide it with the relevant information. If it failed to do so, the State presumed to be affected would be entitled to request consultations under article 18 below,³⁰ together with the necessary precautions.

34. The question of the assessment is less problematic because it does not require the *certainty* that significant transboundary harm will occur, but only the certainty that a significant risk of such harm exists. The activities concerned will therefore have to be defined as accurately as possible, since both the General Assembly and the Commission have rejected the idea of lists of dangerous activities or of dangerous substances that would render hazardous any activity employing them. It had been suggested that lists of dangerous substances should be included in an annex *simply as a guide*, to illustrate what the general definition embraced and to make it easier to define new activities more accurately.³¹ In any case, notification and possible consultations, together with an advisory system of the kind considered below, could help those concerned to reach an appropriate settlement.

(g) Information

35. Under the Code of Conduct on Accidental Pollution of Transboundary Inland Waters, in addition to a general obligation to exchange information on measures adopted, it is recommended in section VI, article 4, that

Riparian countries should exchange information regarding the authorization of planned activities involving a significant risk of accidental pollution of transboundary inland waters³²

and the Convention on the Transboundary Effects of Industrial Accidents lists in annex XI, pursuant to article 15, the elements of information that should be exchanged among the parties concerned, such as legislative and administrative measures, programmes for monitoring, planning, and research; experience with industrial accidents; and the development and application of the best available technologies for improved environmental protection and safety. Article 3, paragraph 2, contains the same obligation.

36. Thus, in addition to the information that the State of origin is required to provide while it is processing the request for authorization of an activity that is presumed to involve risk, the parties must have a general obligation periodically to exchange information concerning the implementation of that activity.

(h) Public participation

37. Furthermore, there is a principle which is found in a considerable number of instruments on the transboundary effects of activities carried out in a particular country. It relates to the participation of individuals and private entities presumed to be affected by the accident. This principle is applied in the first place to the population of the country of origin and stipulates that sufficient information shall be provided relating to the possible harmful effects of any activity involving risk in order to allow for public participation in the administrative decision-making that affects that population in a significant manner. In other instruments, the right is extended to individuals and entities of the affected States.³³ In the present case, under the principle of non-discrimination, States that offer these possibilities to their own population should naturally extend them to the inhabitants of affected countries on the same conditions. Since the purpose is to draft universally applicable norms and since there are very considerable differences in levels of development and degrees of political and social awareness among countries, it is opined, in view of the scope of the issue, that a State's obligation vis-à-vis its own inhabitants should be incorporated in the text along the lines indicated above, with the proviso "whenever possible and as appropriate", and that this obligation should be extended to the inhabitants of the affected countries who are similarly situated.

(i) Texts proposed to replace article II

38. The following articles are proposed to replace article II:

Article 15. Notification and information

If the assessment referred to in the preceding article indicates the possibility of significant transboundary harm:

(a) The State of origin shall notify the States presumed to be affected regarding this situation and shall transmit to them the available technical information in support of its assessment;

(b) Such notification shall be effected either by the State of origin itself or through an international organization with competence in that area if the transboundary effects of an activity may extend to more than one State which the State of origin might have difficulty identifying;

(c) Should it later come to the knowledge of the State of origin that there are other States presumed to be affected, it shall notify them without delay;

(d) States shall, whenever possible and as appropriate, give the public liable to be affected information relating to the risk and harm that might result from an activity subject to authorization and shall enable such public to participate in the decision-making processes relating to those activities.

³⁰ See paragraph 53 below.

³¹ *Yearbook . . . 1991*, vol. II (Part One), p. 80, document A/CN.4/437, para. 29.

³² See footnote 24 above.

³³ See article 9 and annex VIII of the Convention on the Transboundary Effects of Industrial Accidents as well as Principle 10 of the Rio Declaration on Environment and Development (footnote 23 above).

Article 16. Exchange of information

While the activity is being carried out, the parties concerned shall periodically exchange any information on it that is useful for the effective prevention of transboundary harm.

3. ARTICLE ENTITLED "NATIONAL SECURITY AND INDUSTRIAL SECRETS"

(a) Text

39. The following text, which is closely modelled on article III, has been taken by the Special Rapporteur as a basis for the formulation of this article:

"National security and industrial secrets"

"Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on circumstances."

(b) Comments

40. This article did not elicit many comments. It was generally noted that it would be acceptable, subject possibly to some redrafting. The text is based on article 20 of the draft articles on the law of the non-navigational uses of international watercourses³⁴ and modifies the former article 11.³⁵ On a number of occasions attention has been drawn to the fact that because of differences between the draft articles on international liability and those on the law of the non-navigational uses of international watercourses, the latter provisions cannot always be transposed by analogy. However, the Commission's commentary to what was previously article 20 of the draft articles on the law of the non-navigational uses of international watercourses contains views that seem to be perfectly applicable to the more general context of the present articles since, while recognizing the interest of a State in not releasing information vital to its national defence or security, it nevertheless holds the view that the affected [watercourse] State should not be left entirely without information concerning the possible effects of the measures in question:

The article is thus intended to achieve a balance between the legitimate needs of the States concerned: the need for the confidentiality of sensitive information, on the one hand, and the need for information pertaining to possible adverse effects of planned measures, on the other.³⁶

41. In a much broader context, the present draft article draws upon the Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States drafted by the UNEP Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States, principle 6, paragraph 2, of which states that:

³⁴ Adopted on first reading as article 31. For the text, see *Yearbook . . . 1991*, vol. II (Part Two), p. 69.

³⁵ See footnote 15 above.

³⁶ See *Yearbook . . . 1988*, vol. II (Part Two), p. 54.

In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good-neighbourliness, cooperate with the other interested State or States with the aim of finding a satisfactory solution.³⁷

Likewise, article 22, paragraph 1, of the Convention on the Transboundary Effects of Industrial Accidents stipulates that:

The provisions of this Convention shall not affect the rights or the obligations of Parties in accordance with their national laws, regulations, administrative provisions or accepted legal practices and applicable international regulations to protect information related to personal data, industrial and commercial secrecy, including intellectual property, or national security.

(c) Text proposed to replace article III

42. The following text is proposed to replace article III:

Article 17. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

4. ARTICLE ENTITLED "CONSULTATIONS ON A REGIME"

(a) Text

43. The following text, which is closely modelled on article VI, has been taken as a basis for the formulation of this article:

"Consultations on a regime"

"The States concerned shall enter into consultations, if necessary, in order to determine the risk and amount of potential transboundary harm, aiming at arriving at an arrangement with regard to such adjustments and modifications of the planned activity, preventive measures and contingency plans as will give the affected States satisfaction, on the understanding that liability for the harm caused will be subject to the provisions of the corresponding articles of this instrument."

(b) Comments

44. It will be recalled that articles IV and V dealt with activities with harmful effects, which will be considered later. That is why the discussion passes directly to article VI, which deals with consultations concerning activities involving risk. This is the place to examine thoroughly the nature of the consultations on such activities and to make a number of comments that are equally appli-

³⁷ The final text of these principles appears in UNEP, *Environmental Law, Guidelines and Principles* (No. 2), *Shared Natural Resources* (Nairobi, 1978). The General Assembly, in resolution 34/186, para. 3,

"Requests all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good-neighbourliness".

cable to assessment, notification and information; it is better to try to cover these points before closing the chapter in which these four very closely linked functions occur. It is useful to recall what the Special Rapporteur said in the fifth report:

It is clear that the kind of procedure under consideration here involves three functions that are closely linked, no one of which can be divorced from the other two. They are assessment, notification and information concerning an activity referred to in article 1. In some cases, one of the functions is implicitly assumed. How, for example, can a State be notified of certain risks or the harmful effects of an activity unless the State of origin has first made an assessment of the activity's potential effect in other jurisdictions? How can information on the activity be provided without at the same time notifying or without having previously notified the affected State about what is involved? How can one notify someone of certain dangers without providing any information which one may have about them?

Furthermore, consultation with affected States is also linked to these three functions. What is the use of assessment, notification and information if the opinion of the affected State is not to be consulted? As already noted, there are limits to the freedom which a State of origin has with respect to activities referred to in article 1, and the limit is to be found at the point where appreciable harm occurs to the rights emanating from the sovereignty of other States, specifically affected States. To the extent that those rights are, or may be, infringed, affected States have some say in respect of activities such as those referred to in article 1. Moreover, what consultations would be possible unless the preceding steps were taken first?³⁸

45. Consultations are therefore needed to complete the process of participation by the affected State, but it is clear that the aim of any consultation is limited in principle by the *legal nature of activities involving risk*. If such activities are lawful when the State of origin fulfils certain conditions, despite the possible transboundary harm they may cause, the scope of the consultations may be limited: initiation of an activity will be subject neither to agreements reached during consultations nor to the completion of procedural requirements for prevention; nor in principle can cessation be requested insofar as it is really an activity involving risk and not an activity with harmful effects disguised as such.

46. The Commission's earlier discussions as to the lawfulness or unlawfulness of an activity that may cause transboundary harm gave rise to what is probably simply a misunderstanding. One line of reasoning, if understood correctly, ran as follows: if transboundary harm is *prohibited*—a view possibly supported by principle 21 of the Stockholm Declaration³⁹ or by the precedents set in the *Trail Smelter*⁴⁰, *Corfu Channel*⁴¹ and other cases—the question of liability for acts not prohibited by international law would not arise, *because all acts leading to transboundary harm would be unlawful*, which is the same as saying that they *would be prohibited*. One of the first normal consequences of such acts, if they take the form of a continuing activity, would be the requirement that they cease.

47. On the other hand, it will be recalled that in paragraph 18 of the eighth report the following comment was made by the Special Rapporteur on the subject:

³⁸ *Yearbook* . . . 1989, vol. II (Part One) (see footnote 3 above), paras. 73-74.

³⁹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

⁴⁰ See footnote 17 above.

⁴¹ *Ibid.*

As to the need to consult at the start of the activity, it is worth analysing how *activities involving risk differ from activities with harmful effects*. The former create a risk of transboundary harm, whereas the latter cause harm directly* because they are activities which by definition cause harm in the course of their normal operation. There is already a considerable body of international theory and practice to support the view that transboundary harm caused by these activities, when significant, is, in principle, prohibited under general international law*.⁴²

48. It seems clear that by "these activities" are meant activities with harmful effects rather than activities involving risk. This emerges not only from the passage cited, but from the eighth report,⁴³ a careful reading of which is recommended to those members who expressed the reservation discussed in paragraph 46 above. In reviewing the analysis carried out by the Group of Experts on Law and the Environment of the World Commission on Environment and Development (Brundtland Commission), it was pointed out that article 10 of the text they adopted⁴⁴ prohibits *in principle* any transboundary environmental interference . . . which causes *substantial** harm ("harm which is not minor or insignificant").⁴⁵ But also that:

With respect to activities involving risk, article 11 . . . sets forth the *first exception**, based on the balance-of-interests concept.

"1. If one or more activities create a significant risk of substantial harm as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail*, the State which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur . . . in an area beyond the limits of national jurisdiction."⁴⁶

49. It was further stated in the eighth report that:

. . . if the opposing interests present themselves in the proportions indicated [that is, the balance of interests tilts in favour of the activity] a principle of law exists here that authorizes the activity in question to be undertaken or to continue . . .⁴⁷

The position expressed in the discussions does not therefore reflect the view expressed in the eighth report of the Special Rapporteur, which, as can be seen, was very explicit on the point.

50. Despite reservations about some aspects of the thinking of the Group of Experts of the Brundtland Commission on this question, the overall thrust of their reasoning, namely that activities involving risk are, under certain conditions, lawful, is not a creation *ex nihilo* but has a basis in international practice. Again, as stated by the Special Rapporteur in the eighth report:

Dangerous activities have been conducted that have caused, or threatened to cause, harm to third States. After a while, States have sought legal regimes for such activities to establish the principle of balance of interests, generally by transferring liability to the individual operators. Examples include nuclear activity, on which there are several conventions, the maritime carriage of oil, aviation, and accidental and non-accidental transboundary pollution of inland waters.⁴⁸

⁴² *Yearbook* . . . 1992, vol. II (Part One) (see footnote 5 above).

⁴³ *Ibid.*, para. 19.

⁴⁴ See *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham and Trotman/Martinus Nijhoff, 1987), p. 75.

⁴⁵ *Yearbook* . . . 1992, vol. II (Part One) (see footnote 5 above), para. 19.

⁴⁶ *Ibid.*, para. 20.

⁴⁷ *Ibid.*, para. 21.

⁴⁸ *Ibid.*, para. 22.

It went on to give some instances, where, to the contrary, because of the intolerable risk or harm they created certain activities were ultimately prohibited, as in the case of nuclear weapon tests in the atmosphere, in outer space and under water; military or any other hostile use of environmental modification techniques; emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof, and so on.⁴⁹ Of interest here are the examples of international practice cited in the eighth report,⁵⁰ because in the light of such practice it is clear that an activity involving risk is lawful in principle, on condition that the State of origin ensures *at least* the payment of compensation. Its liability, as the Group of Experts of the Brundtland Commission indicated, can be transferred as a civil liability to those in charge of the activity, normally the operators.

51. Accordingly, consultations should be entered into *at the request of the State or States presumed to be affected* or possibly at the request of the State of origin itself, but not automatically. The purpose, then, will be to provide answers to any questions the State had *in mente* when it requested the consultations, probably in the nature of clarification of points that are unclear, further explanation about prevention, information about conditions in the territory or environment of the affected State, and the like. The affected State might propose a more complete regime governing either prevention, containment of harm (contingency plans, for example, or other forms of cooperation) or liability, or perhaps some measures that in its view would better balance the interests at stake, taking into account, *inter alia*, the criteria laid down in article IX. A mutually acceptable treaty regime could conceivably be worked out governing everything relating to the activity in question.

52. In response to an opinion put forward in the debate of the forty-fourth session, the Special Rapporteur makes it clear that the sovereignty of the State of origin is not affected by the obligation to consult, since it is duty-bound to do so when it authorizes or undertakes an activity that may cause transboundary harm. Clearly, too, the authorization of the affected State is not required prior to start-up of the activity in question. Hence there is no possibility of a veto by the affected State or States. The same speaker also emphasized that *technical means must be used* to assess the activity's potential for causing transboundary harm. It is indeed difficult to see how else that potential could be assessed.⁵¹

(c) *Text proposed to replace article VI*

53. The following article is proposed to replace article VI:

⁴⁹ Ibid.

⁵⁰ Ibid., p. 66, footnote 31.

⁵¹ It should be recalled, however, that principle 15 of the Rio Declaration on Environment and Development (see footnote 23 above) establishes the so-called precautionary principle:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

Article 18. Prior consultation

The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to finding mutually acceptable solutions regarding the preventive measures proposed by the State of origin, cooperation among the States concerned in order to prevent harm, and any other issue of concern in connection with the activity in question, on the understanding that in all cases liability for any transboundary harm it might cause will be subject to the provisions of the corresponding articles of this instrument.

5. ARTICLE ENTITLED "INITIATIVE BY THE AFFECTED STATES"

(a) *Text*

54. The following text, closely modelled on article VII, has been taken as a basis for the formulation of this article:

"Initiative by the affected States"

"If a State has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm or creating a significant risk of causing it such harm, it may ask that State to comply with the provisions of article 15. The request shall be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin shall pay compensation for the cost of the study."

(b) *Comments*

55. In this case the State presumed to be affected has, for some reason, not been notified as provided for in article 15 above. This may have happened because (a) the State of origin did not perceive the hazardous nature of the activity although the other State was aware of it; (b) some effects made themselves felt beyond the frontier; (c) the affected State had a greater technological capability than the State of origin, allowing it to infer consequences of which the latter was not aware; or (d) for some other reason. In such cases, it is natural that the State presumed to be affected should give the technical grounds for its belief that a specific activity conducted in the State of origin is causing or may cause it significant harm.

56. Some members of the Commission objected to the last sentence of article VII concerning the passing on of the cost of assessing the transboundary harm if the activity is found to be one of those referred to in article 1. There is, however, a reason for including it. The study providing a proper technical assessment of the hazardousness of the activity in question is, in fact, not free of charge. While the State of origin may not have been at fault in thinking that a given activity did not involve a significant level of risk, once the study shows that the activity *was actually a dangerous activity*, it is obvious that the affected State has done some work and incurred costs for which the State of origin would normally have been responsible, and there is no apparent reason why those costs should be borne by the affected State. It would be possible

to accept this if the State of origin was a developing country and the affected State a developed country, on the grounds that developing countries should be given a measure of special treatment, but not the reverse, and not if both countries are in the same position. In any case, this should not be made a question of principle, and the material value involved does not warrant the Commission's losing time to discuss it. Therefore, if the Commission considers it advisable, the last sentence could be deleted.

(c) *Text proposed to replace article VII*

57. The following article is proposed to replace article VII:

Article 19. Rights of the State presumed to be affected

Even when no notification has been given of an activity conducted under the jurisdiction or control of a State, any other State which has reason to believe that the activity is causing it or has created a significant risk of causing it substantial harm may request consultations under the preceding article. The request shall be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State of origin shall pay compensation for the cost of the study.

6. ARTICLE ENTITLED "SETTLEMENT OF DISPUTES"

(a) *Text*

58. The following text, which is identical to article VIII, was taken by the Special Rapporteur as a basis for the formulation of this article:

"Settlement of disputes . . .

"If the consultations held under articles . . . and . . . above do not lead to an agreement, the parties shall submit their differences for consideration under the procedures for the settlement of disputes set out in Annex . . ."

(b) *Comments*

59. Many members found this draft article to be useful and, indeed, necessary, but some changes were suggested, such as specifying the articles to be invoked in any settlement procedure; making the article more explicit— notwithstanding the fact that it refers to other more explicit articles in the annex; or requiring a speedy settlement procedure. One member was definitely opposed on the grounds that in cases where consultations resulted in a disagreement, he did not see the need for a procedure to resolve it. In his view, there were also likely to be abuses by the affected States and this part of the draft should be left entirely to the area of international cooperation. Lastly, there were some proponents of an optional settlement procedure.

60. However, it is still felt that a speedy procedure for resolving any impasse occurring at the time of the consultations would be very useful, although it might be better to try to draft an article on the matter at the end of the development of the topic, in order to take into account not

only disputes arising on the occasion of the consultations, which seem to merit separate consideration, but also any disputes that may arise as to the interpretation and application of the draft articles. In the case of a settlement procedure for problems arising in relation to these first articles, a means should be devised *that is specifically adapted to difficulties that might come up during consultations*, such as the major differences of interpretation that could arise regarding the nature of the activity in question. One of the parties, for instance, could maintain that it was not an activity involving risk but simply an activity with harmful effects, in which case the possibility of its being unlawful would be in doubt. The settlement of this difference of opinion would be crucially important for the final fate of the activity. The activity could be seen as not involving a real risk of significant transboundary impact, or the parties could differ over the assessment of the actual effects of any of the substances involved in the activity, and so on. In all these hypotheses, the opinions of experts would seem to be decisive, and a good solution might therefore be to establish an inquiry commission procedure like the one set out in appendix IV to the Convention on Environmental Impact Assessment in a Transboundary Context and in annex II to the Convention on the Transboundary Effects of Industrial Accidents. In both instruments, that procedure serves to provide *advice to the parties*, but it is at the same time automatic. Article 3, paragraph 7, of the first of those Conventions establishes that

If [the] Parties cannot agree whether there is likely to be a significant adverse transboundary impact, *any such Party may submit that question to an inquiry commission** in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question.

Appendix IV to the Convention establishes a procedure that is to continue until completion, in which both parties are entitled to appoint an expert to represent them, but which may begin and continue even if one of the parties does not cooperate in any way.

61. Articles 4 and 5 of the Convention on the Transboundary Effects of Industrial Accidents follow a similar pattern in establishing, in a manner similar to that set out in the present draft articles, that the parties should first take measures to identify industrial activities within their jurisdiction that are considered hazardous under the Convention and to that end should consult with the States presumed to be affected. The identification of an industrial activity as one covered by the Convention will depend on whether or not it involves the presence of certain hazardous substances listed in annex I, in the specific concentrations and proportions, and according to the criteria indicated. If the parties do not agree on whether a given activity is to be identified as one covered by the Convention and if they have not agreed on another method of resolving the matter, any party is entitled to submit it to an inquiry commission for advice. This procedure is exactly the same as the one described in paragraph 60 above.

62. This type of procedure clearly has virtues that recommend it for adoption in other draft texts, even those which are supposedly universal in scope. For one thing, it is a touchstone of the good faith of States when they differ on the nature of an activity. Even though it is merely technical, the opinion of an inquiry commission of the type

provided for in the Conventions in question has the advantage of emanating from an *impartial* body and would serve as an element of scientific or technical authority concerning the question submitted to that body. A solution of this kind seems particularly well suited to matters like those which fall within the scope of the present draft articles.

(c) *Elements of a proposed future text to replace article VIII*

63. It would be most helpful if, during the debate, members of the Commission would make clear their opinions on the various possibilities, even though no actual text is being proposed to establish the procedure. This would facilitate the submission of a proposed text at the appropriate time.

7. ARTICLE ENTITLED "FACTORS INVOLVED IN A BALANCE OF INTERESTS"

(a) *Text*

64. The following text, which is identical to article IX, was taken by the Special Rapporteur as a basis for the formulation of this article:

"Factors involved in a balance of interests"

"In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:

"(a) 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) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

"(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

"(e) Economic viability of the activity in relation to possible means of prevention;

"(f) 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) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

"(h) Benefits which the State of origin or the affected State derive from the activity;

"(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

"(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

"(k) 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) Extent to which assistance from international organizations is available to the State of origin;

"(m) Applicability of relevant principles and norms of international law."

(b) *Comments*

65. This provision did not give rise to major opposition with respect to its *content*, but there was disagreement as to the form it should take. It is noted that most of the positive reactions seem to come from members whose legal training is based on common law, while some members trained in civil law feel that it should be placed in a non-obligatory annex or in the commentary, or should plainly and simply be deleted. In the sixth report it was stated that:

The Special Rapporteur must confess to a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework.⁵²

In retrospect, that confession now appears to reveal the writer's own background in civil law. Nevertheless, he went on to say that the provision in question could be included in the draft:

However, it is not unusual to do so, and their inclusion in the present articles, apart from lending some substance to the concept of "balance of interests", which is, so to speak, behind a number of the proposed texts, and providing guidance to the States concerned, would be of some legal value for assessing the extent to which those States have acted in good faith in the negotiations. It may be useful in this connection to establish whether the State of origin could have conducted an equivalent activity in a less dangerous, if slightly more expensive, way or the extent to which the affected State protects its own nationals from the impact of that or a similar activity. The introductory paragraph of the article is permissive: the parties may take into account the factors indicated, since doing so would be a matter of free will which can yield only to compulsory norms of international law. Furthermore, so great is the variety of circumstances in each particular case that the States concerned could not be required to take into account the factors included in the article, for some other factor that is not listed may be more relevant in that particular instance. Concerning the list itself, the various subparagraphs are self-explanatory and there is no need for further comment.⁵³

66. The statement that "it is not unusual to do so" (i.e. to include similar norms in treaty instruments) was developed by reference to article 7 of the draft articles on the law of the non-navigational uses of international watercourses, in which the factors constituting "equitable and reasonable" utilization of the waters in an international watercourse are listed.⁵⁴ In the commentary to that article, it is stated, not by the Special Rapporteur, Mr. McCaffrey, but by the Commission, that:

The purpose of article 7 is to provide for the manner in which States are to implement the rule of equitable and reasonable utilization contained in article 6. The latter rule is necessarily general and flexible, and requires for its proper application that States take into account concrete

⁵² *Yearbook* . . . 1990, vol. II (Part One) (see footnote 4 above), para. 39.

⁵³ *Ibid.*

⁵⁴ Adopted on first reading as article 6. For the text, see *Yearbook* . . . 1991, vol. II (Part Two), p. 67.

factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. What is an equitable and reasonable utilization in an individual case will therefore depend upon a weighing of all relevant factors and circumstances. This process of assessment is to be performed, in the first instance at least, by each watercourse State, in order to assure compliance with the rule of equitable and reasonable utilization laid down in article 6.⁵⁵

67. Incidentally, there are great similarities between article 7 just mentioned and the present draft article: both attempt to give structure to a concept of equity which, without this intermediary, would be so general as to be almost amorphous, and could not be applied to a specific draft. Similarly, in the present draft articles, this balance of interests can only be evaluated in each individual case, taking into account the concrete factors pertaining to the activity in question, as well as the needs of and use made of the activity by the States concerned. It is also necessary for each State of origin to conduct a preliminary assessment of the interests at stake, in order to take them into account when planning its own future action.

68. The "balance of interests" meets a basic criterion of equity and means, in broad terms, that the State of origin which has introduced a certain risk by undertaking or authorizing a dangerous activity must make some contribution to restoring the balance. Otherwise, it would be gaining an unfair advantage, especially if harm is actually caused (enrichment without cause, externalization of costs, expropriation, or any other desired designation). In the sixth report, an approximation of the concept was attempted by citing two passages from international arbitral decisions, one by the arbitral tribunal in the Lake Lanoux case and the other by PCIJ in the River Oder case.⁵⁶ The first states that:

The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.

and the second that:

This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.

69. The Special Rapporteur noted there that the balance of interests "is behind a number of the proposed texts". Upon rereading this phrase, it now appears too mild to describe the role of this concept in the draft. Actually, it is the very foundation of the draft, which gives it meaning and can even serve as an important guiding principle for reparation. For example, it provides justification for the possibility of dispensing, in some cases of liability for risk, with full compensation in *integrum restitutio*, which is the rule of reparation in responsibility for wrongful acts. This function of *restitutio* could be fulfilled in some cases by making the contribution necessary to restore the balance of interests. But above all, this concept serves to justify the lawfulness of an activity which, by creating a risk of transboundary harm, would also create the risk of unlawfulness if the possibility of re-establishing equality

between the parties were not available. The very words of the Group of Experts of the Brundtland Commission ("if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail") (see paragraph 48 above), which, in their opinion, give a lawful character to an activity involving risk, appear to be the expression, albeit partial, of a balance of interests between the parties in respect of a specific activity. Whether or not there is agreement with the exact formulation of this concept by the experts of the Brundtland Commission, their reasoning certainly appears to reflect international practice in very general terms: an activity involving risk is normally permitted when its usefulness to the State of origin is superior to the harm caused, and even more so if it is also useful to society. But the State of origin must re-establish the balance by reducing the risk created to a minimum, by paying the costs of prevention or seeing that they are paid by those responsible, and by compensating, or seeing that compensation is provided by those responsible, for any harm caused.

70. Therefore, if the above reasoning is valid, it is appropriate to give some guidelines to States as to some of the factors that are usually involved in the process of balancing the interests of the parties, on the understanding that they are but a few among the many that could be relevant and that they merely provide guidelines for States in their relations in this field.

(c) Proposal relating to article IX

71. There is no definite preference as to the best placement for this article, but preferably it should not be deleted. It could remain in the main text as article 20, given the precedent set by the Commission in the case of article 7 of the draft articles on the non-navigational uses of international watercourses.

8. THE PRINCIPLE OF NON-TRANSFERENCE OF RISK OR HARM

(a) General comments

72. Some instruments, including the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,⁵⁷ contain a provision that could be called the *principle of non-transference of risk or harm*; this provision refers mainly to prevention, but can also be applied to all measures taken in response to transboundary impact, such as the cleaning and rehabilitation of the environment. A rule of this type could be included among the principles, perhaps as part of draft article 8,⁵⁸ or else in this chapter, simply as a guideline for preventive action. The Commission's views on where it should be placed are solicited. Section II, article 2, of the Code of Conduct states as follows:

In taking measures to control and regulate hazardous activities and substances, to prevent and control accidental pollution, to mitigate damage arising from accidental pollution, countries should do everything so as not to transfer, directly or indirectly, damage or risks

⁵⁵ *Yearbook* . . . 1987, vol. II (Part Two), p. 36, para. (1) of the commentary to article 7.

⁵⁶ *Yearbook* . . . 1990, vol. II (Part One) (see footnote 4 above), para. 39 and footnote 60.

⁵⁷ See footnote 24 above.

⁵⁸ For text, see *Yearbook* . . . 1990, vol. II (Part Two), p. 95, footnote 343.

between different environmental media or transform one type of pollution into another.⁵⁹

73. Article 195 of the United Nations Convention on the Law of the Sea states:

In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

There is one difference: this article uses the expression "from one area to another", whereas in the Code of Conduct cited above, the expression "between different environmental media" is used. Article 195 of the Convention was taken from principle (13) of the General Principles for Assessment and Control of Marine Pollution endorsed by the United Nations Conference on the Human Environment:

Action to prevent and control marine pollution (particularly direct prohibitions and specific release limits) must guard against the effect of simply transferring damage or hazard from one part of the environment to another.⁶⁰

Another useful instrument is the recent Rio Declaration on Environment and Development, principle 14 of which appears to give rather more limited scope to this concept:

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.⁶¹

This text would be covered by the other, more general, one which is being proposed, but perhaps a reference in the commentary would help to make it clearer what the various implications of this principle are.

⁵⁹ See footnote 24 above.

⁶⁰ *Report of the United Nations Conference on the Human Environment* . . . (see footnote 39 above), annex III.

⁶¹ See footnote 23 above.

(b) *Text proposed concerning the non-transference of risk or harm*

74. The Special Rapporteur proposed for the Commission's consideration an article 20 bis, which is left in square brackets pending the decision on its final placement, and which reads as follows:

[Article 20 bis. *Non-transference of risk or harm*

In taking measures to prevent, control or reduce the transboundary effects of dangerous activities, States shall ensure that risks or harm are not transferred between areas or environmental media, and that one risk is not substituted for another.]

9. THE "POLLUTER PAYS" PRINCIPLE

75. The Code of Conduct on Accidental Pollution of Transboundary Inland Waters and the Convention on the Transboundary Effects of Industrial Accidents both contain the "polluter pays" principle. An examination of this principle suggests that it should be considered by the Commission for inclusion in the draft articles, since it plays a very substantial role in both prevention and civil liability. Bearing in mind, however, that the most recent formulations of this principle do not limit it to preventive action (i.e. by stating that the operator should be liable only for the costs of prevention), but also link it to reparation, it might perhaps best be placed in the chapter on principles, rather than in this chapter on prevention. Thus, the best time to propose it might be at the next session, so that the Drafting Committee could examine it in a timely fashion, together with the other principles it is considering.

CHAPTER II

Conclusion

76. The chapters on prevention in conventions dealing with specific topics or activities, especially activities of the kind being considered in this report, generally contain fairly detailed provisions concerning other aspects which have not been touched upon here, such as emergency preparedness, contingency plans and early warning systems for accidents. This report endeavours to interpret the Commission's view that articles such as those it is preparing, which are intended to serve only as a framework and to be universally applicable, should be broadly formulated and kept at a fairly general level. It is felt therefore that the drafting of the chapter on prevention could be concluded with the articles proposed in this report.

**PROGRAMME, PROCEDURES AND WORKING METHODS OF
THE COMMISSION, AND ITS DOCUMENTATION**

[Agenda item 6]

DOCUMENT A/CN.4/454

**Outlines prepared by members of the Commission on selected topics
of international law**

[Original: English/French]
[9 November 1993]

CONTENTS

	<i>Page</i>
<i>Note</i>	203
INTRODUCTION.....	208
OUTLINES PREPARED BY MEMBERS OF THE COMMISSION ON SELECTED TOPICS OF INTERNATIONAL LAW	
The legal conditions of capital investment and agreements pertaining thereto, by Mr. Mohamed Bennouna.....	209
Ownership and protection of wrecks beyond the limits of national maritime jurisdiction, by Mr. Derek William Bowett.....	211
<i>Jus cogens</i> , by Mr. Andreas Jacovides.....	213
State succession and its impact on the nationality of natural and legal persons and State succession in respect of membership of international organizations, by Mr. Vaclav Mikulka.....	220
The law concerning international migrations, by Mr. Guillaume Pambou-Tchivounda.....	225
The law and practice relating to reservations to treaties, by Mr. Alain Pellet.....	228
Extraterritorial application of national legislation, by Mr. Pemmaraju Sreenivasa Rao.....	237
The law of (confined) international groundwaters, by Mr. Alberto Szekely.....	242
The global commons, by Mr. Christian Tomuschat.....	245
Rights and duties of States for the protection of the human environment, by Mr. Chusei Yamada.....	247

NOTE

Bilateral and multilateral accords cited in the present document

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Sources

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Introduction

1. At the forty-fourth session (1992) of the Commission, the Planning Group of the Enlarged Bureau of the Commission established a Working Group with the following membership: Mr. Derek Bowett (Chairman); Mr. Awn Al-Khasawneh; Mr. Mohamed Bennouna; Mr. Peter Kabatsi; Mr. Mochtar Kusuma-Atmadja; Mr. Guillaume Pambou-Tchivounda; Mr. Alain Pellet; Mr. Jiuyong Shi; Mr. Alberto Szekely; Mr. Vladlen Vereshchetin and Mr. Chusei Yamada. The Working Group was to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission.¹

2. Under the procedure proposed by the Planning Group on the Working Group's recommendation, which was subsequently endorsed by the Commission, designated members of the Commission, with Mr. Bowett acting as coordinator, were asked to prepare short outlines or explanatory summaries, on topics included in a pre-selected list. Each outline or explanatory summary was to indicate:

(a) The major issues raised by the topic;

(b) Any applicable treaties, general principles or relevant national legislation or judicial decisions;

(c) Existing doctrine;

(d) The advantages and disadvantages of preparing a report, a study or a draft convention if the Commission decided to include the topic in its programme of work.

3. The outlines prepared in accordance with this procedure were considered by the Working Group at the forty-fifth session of the Commission.

4. At the same session, the Commission decided, on the Working Group's recommendation, that the outlines would be published in an official document of the Commission in the A/CN.4/ series, for subsequent inclusion in the *Yearbook* of the Commission for 1993. The general document has been prepared further to this request. It reproduces the outlines in alphabetical order of the surnames of the respective authors.²

¹ See *Yearbook . . . 1992*, vol. II (Part Two), document A/47/10, para. 369.

² *Yearbook . . . 1993*, vol. II (Part Two), document A/48/10, paras. 425-443

**OUTLINES PREPARED BY MEMBERS OF THE COMMISSION
ON SELECTED TOPICS OF INTERNATIONAL LAW**

**The legal conditions of capital investment and agreements pertaining thereto,
by Mr. Mohamed Bennouna**

1. The past decade has seen a worsening of the indebtedness of most third world countries, a decline in North-South investment flows, and a glut of aid and assistance policies whose impact on the real development of populations has been negligible.

2. Promotion of direct private foreign investment in those countries is justified by the following advantages:

(a) Achievement of long-term financing;

(b) Infusion of a spirit of enterprise, acquisition of know-how and introduction of new technologies;

(c) Absence of any adverse effect on balance-of-payments that are already heavily in deficit. Income is repatriated only if the operation shows a profit, whereas, in the case of loans, fixed interest must be paid regardless of profitability.

However, a prerequisite for attracting private capital is the creation of a climate of confidence in which to offer the investor certain guarantees.

3. In classical international law, the question is dealt with from the standpoint of the status of foreigners and their property, and thus in terms of relations between the place of nationality and territorial sovereignty. However, classical law doctrine, which was strongly favourable to capital-exporting countries, gave protection of the "acquired rights" of foreigners precedence over the prerogatives of the territorial State.

4. The challenging of that doctrine by third world countries during the 1960s was to result in the conclusion of a considerable number of bilateral agreements governing the status of foreign investment. The development and complexity of international economic relations also produced a need for a new legal regime.

5. As Jean-Pierre Laviee remarks :

[...] The concept of investment has no equivalent in any specific categories of private law. It retains a generic aspect and a functional dimension. Frequently, an investment operation is performed by means of a series of legal acts which, taken in combination, constitute that investment; if each of those acts was considered in isolation, some of them could not be regarded as such.¹

That point had already been made by an arbitral tribunal in the *Holiday Inns/Occidental Petroleum v. Government of Morocco* case (the first judgement delivered by the World Bank's International Centre for the Settlement of Investment Disputes in 1975).²

6. The fact remains that what characterizes direct investment is that the foreigner controls the final opera-

tion. Thus, the unconditional link of nationality is no longer sufficient to determine the national or foreign nature of an investment; the criterion of control must always be applied.

7. In addition, the phenomenon of transnational corporations will complicate the interaction of those criteria and determination of the nationality of an investment. A transnational corporation consists of a series of private enterprises, subject to different territorial sovereignties and bound together by a common strategy laid down by the parent company.

8. In the absence of any legal codification, or of an exact and generally accepted definition, the criterion of control, like the concept of a transnational corporation, is a de facto determination based on an assessment of the actual economic situation.

9. The legal status of a foreign investment should be sought both in domestic law (national investment codes), and also in international law, by examining international jurisprudence, international bilateral and multilateral agreements and international customary practice.

1. NATIONAL LEGISLATION

10. National legislation is designed to govern investment on the national territory; in some countries it is consolidated in codes; in others, it is spread among the various relevant fields of local law (commercial, financial, social, etc.). It may be consolidated in a single code applicable to all investments, or take the form of sectoral codes for the various economic sectors concerned.

11. National legislation spells out the conditions for admissibility of the foreign investment (prior approval, contractual procedure), whether or not it needs to be associated with local capital, the specific advantages accorded (tax advantages, customs advantages, etc.), the legal guarantees and procedures for settlement of disputes. More often than not, the legislation refers to procedures established under international agreements.³

12. In any attempt at codification, it would be useful to list the broad legal principles set forth in the national legislation with regard to protection of foreign investment (such as the principles of non-discrimination and national treatment).

2. INTERNATIONAL JURISPRUDENCE

13. An analysis of international jurisprudence helps to define where general international law stands on this

¹ *Protection et promotion des investissements—Étude de droit international économique*, Paris, Presses universitaires de France, 1985, p. 25.

² See United Nations, *Juridical Yearbook 1976* (Sales No. E.8.V.5), p. 116.

³ This is the case, for example, with conciliation and arbitration in the case of the Convention on the Settlement of Investment Disputes Between States and Nationals and Other States.

matter. Reference is made briefly to two recent cases brought before ICJ: *Barcelona Traction, Light and Power Company, Limited (Second Phase)* and the *Elettronica Sicula S.p.A.* case.

14. In the *Barcelona Traction, Light and Power Company, Limited* case,⁴ the Court stressed that, with regard to unlawful acts directed against a foreign capital company, the general rule of international law was that only the national State of that company could bring a claim (the company in question was of Canadian nationality, the majority of the shareholders were Belgians, and it conducted its operations in Spain). In these circumstances, apart from the stipulations of conventions, the question of the protection of shareholders remains unresolved. The Court did, however, admit two exceptions, which allow the national State of the shareholders to act:

(a) Where the company has ceased to exist; or

(b) Where the national State of the company has no authority to act on behalf of the company.

The Court did not consider the case where the State whose responsibility is at issue is at the same time the national State of the company (whereas the shareholders are foreign). The Court was called upon to consider that question in 1989.

15. In the *Elettronica Sicula S.p.A. (ELSI)*⁵ case, the national State of the company is Italy. Italy is also the State having committed the unlawful acts cited in the claim, and the shareholders are of United States nationality.

16. Although the Court⁶ dismissed the United States application on the basis of its interpretation of a treaty between the two countries, it seems to allow the possibility of a State applying diplomatic protection to shareholder nationals of that State, at least where the foreign company has the nationality of the respondent State. The question consequently arises whether the Court failed to take into account the trend in a great number of bilateral agreements towards the protection of the shareholders and due regard for the control criterion.

3. BILATERAL AGREEMENTS

17. Bilateral agreements for the promotion and protection of investment have appeared relatively recently (in the past 30 years).

18. As a result of decolonization and the challenging of customary law, the industrialized countries have sought other mechanisms for protecting their nationals abroad.

19. The agreements show great similarity since they are based on prototypes devised by the capital-exporting industrialized countries. It follows that this legal regime essentially involves North-South relations.

⁴ Second phase, Judgment, *I.C.J. Reports 1970*, p. 3.

⁵ Judgment, *I.C.J. Reports 1989*, p. 15.

⁶ This dispute was decided by a Chamber of the Court.

20. As of 1987, 265 bilateral treaties for the promotion and protection of investment have been counted.⁷ Most of these agreements refer to the control criterion: "The investment must belong to or be controlled by a national or company of one of the parties." The protected juristic person is defined as "... a company in which either natural persons who are nationals of a State, or that State itself, its agencies or its agents have a substantial interest". These agreements repeat a number of customary rules regarding the treatment of foreigners: (a) non-discrimination; (b) fair and equitable treatment; and (c) most-favoured-nation status. They also provide detailed procedures for the settlement of disputes.

4. MULTILATERAL AGREEMENTS

21. Two conventions are particularly noteworthy in this connection. One is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which came into force on 14 October 1966. Under the Convention, a State in exchange for the national State's waiver of diplomatic protection, enables its nationals to have recourse to conciliation and arbitration with the host State.

22. This Convention makes it possible to internationalize the relationship between the host State and the investor; it defines investment and authorizes recourse to the control criterion. Although we cannot go into a detailed analysis here of the arbitral jurisprudence it has generated, it does contain elements of judgement found in general international law.

23. The other is the Convention establishing the Multilateral Investment Guarantee Agency (MIGA). This Convention establishes an agency which insures the foreign investor and also contains several substantive norms defining investment and the investor (the control criterion). Insurance is made contingent on minimum legal guarantees provided by the host State.

5. INTERNATIONAL CUSTOM

24. Custom in this field has traditionally centred on the host country's obligation to respect a minimum standard in its treatment of the foreign investor. In the event of a breach of this obligation, the State is liable. From this minimum standard the principles of non-discrimination and national treatment are derived.

25. The third-world States have contested this custom, alleging that it provides absolute protection for the "acquired rights" of foreign investors and limits the prerogatives of the host State with respect to the management of the natural resources and economic activities in its territory (principle of permanent sovereignty over natural resources).⁸

⁷ See the study by the United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties*, 1988 (ST/CTC/65), Part One, para. 15.

⁸ See Samuel K. B. Asante, "Droit international et investissements," *Droit international: bilan et perspectives*, Bedjaoui, ed., and Georges Abi-Saab, "La souveraineté permanente sur les ressources naturelles et les activités économiques" (*ibid.*), chap. XXVII, pp. 640 et seq.

6. CONCLUSIONS

26. To date, it has not been possible to adopt either a multilateral regime for the protection of investments or a code of conduct for transnational corporations but there are a great number of bilateral and multilateral agreements dealing with some aspects of the legal regime for investments. There is likewise no ample international jurisprudence from which to glean the main themes in the evolution of general international law.

27. Furthermore, the proliferation of market economies and economic liberalism is one more reason to scrutinize all these legal instruments and the jurisprudence in order to identify common principles that reflect universal legal opinion and are therefore eligible for codification.

28. This codification might well take the form of a general multilateral convention which would be capable of correcting the existing imbalances of bilateral agreements imposed by one of the parties. Such a convention could make a valuable contribution to the regulation of North-South relations in the vital field of investment.

Ownership and protection of wrecks beyond the limits of national maritime jurisdiction, by Mr. Derek William Bowett

INTRODUCTION

1. Advances in the science and technology of underwater exploration have facilitated the discovery and recovery of wrecks and their cargoes.

2. Competing interests surrounding this topic include (a) sport and leisure (the "amateur"); (b) economic (valuable cargo); (c) governmental (security, national heritage, etc.); and (d) scientific (marine scientific research).

1. DEFINITION OF A WRECK

3. The legal definition for the purpose of the law of salvage concentrates on the notion of a vessel "in peril", and the law of salvage presumes that there is an owner and that the salvor is entitled to a reward from the owner for effective salvage.

4. But there is considerable uncertainty over whether a "wreck" is subject to salvage, as being "in peril". The following United States federal cases are of relevance to this issue: *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*,¹ *Platoro Limited, Inc., v. The Unidentified Remains of a Vessel*² and *Hener v. United States of America*.³

5. In addition, the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, and the 1967 Protocol amending the Brussels Convention, as well as the IMO's 1989 International Salvage Convention are of relevance to this issue. (These Conventions do not resolve the question, but leave the matter to national law.)

2. COASTAL STATE JURISDICTION

6. Coastal State jurisdiction can take various forms, including:

(a) Power to remove wrecks in the interests of the safety of navigation;

(b) Jurisdiction to entertain salvage claims;

(c) Jurisdiction to "protect" the wreck and regulate access to the site of the wreck; and

(d) Jurisdiction to entertain claims to ownership of the wreck and/or its cargo.

7. In principle, the points made in (a) and (b) are limited to internal and territorial waters.⁴

8. But in relation to archaeological objects and objects of historical origin found at sea, the United Nations Convention on the Law of the Sea, article 303, paragraph 2, provides:

In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

Thus, there is this additional jurisdiction in the contiguous zone.

9. The areas of the continental shelf/exclusive economic zone and the high seas beyond the limits of national jurisdiction remain subject to great uncertainty in this regard, and it is clear that the Convention has not established any comprehensive regime to cover wrecks.

(a) *The continental shelf/exclusive economic zone*

10. Despite the efforts of some States, notably Greece, to extend coastal State jurisdiction to cover wrecks of archaeological or historic interest within 200 miles, the majority opposed these attempts to extend coastal State jurisdiction to resources other than "natural" resources. But there is some State practice to support such a power (see paragraphs 21 and 22 below), and the more limited duty of protection of archaeological and historic objects (United Nations Convention on the Law of the Sea, art. 303, para. 1) certainly covers these areas.

¹ *Federal Reporter, Second Series*, vol. 569 (United States Court of Appeals, Fifth Circuit, 13 March 1978), pp. 330 et seq.

² *Federal Supplement*, vol. 518 (United States District Court W.D. Texas, Austin Division, 6 May 1981), p. 816 et seq.

³ *Ibid.*, vol. 525 (United States District Court, S.D. New York, 15 October 1981), pp. 350 et seq.

⁴ See Whiteman, *Digest of International Law*, United States Government Printing Office, Washington, D.C., 1965, vol. 4, pp. 4-5.

11. However, Australia and Papua New Guinea, in a maritime boundary agreement of 1978, article 9 have assumed a general jurisdiction over wrecks within their sea-bed jurisdiction. Australia has also legislated to this effect in the Historic Shipwrecks Act, 1976.⁵

(b) *High seas beyond national jurisdiction*

12. Here, too, there is no general regime, but there is in article 149 of the United Nations Convention on the Law of the Sea a special provision dealing with archaeological and historic objects:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

13. The failure to establish the Seabed Authority, however, means that this provision is largely devoid of content, and no authority exists with clear power to protect wrecks, and regulate their disposal, in areas beyond national jurisdiction, at least in cases where ownership has been abandoned.⁶

3. THE ISSUE OF OWNERSHIP OR TITLE

14. Several questions remain concerning ownership or title:

(a) Are there agreed criteria for determining whether ownership has been retained or abandoned, so that the property is *res derelicta*?

(b) What law provides these criteria? (The options are the law of the coastal State, the law of the flag, the law of the nationality of the owners, or the law of the State before whose courts the issue is to be adjudicated.)

(c) Wrecks may lose a flag registration, and therefore nationality, under the law of some States after a certain time has elapsed, and they are "de-registered": but this does not affect ownership.

(d) Does the law of State succession adequately deal with problems of a State-owned vessel, where that State has disappeared (i.e. the vessels of Troy and Carthage)?

(e) Are certain categories of vessels subject to special rules?

(a) *Naval vessels, military aircraft, and other State-owned vessels operated for non-commercial purposes*

15. Current practice suggests that there is a presumption against abandonment of title over such vessels, and that an explicit act of transfer or abandonment is required. The rationale for this view lies in part in the security implications of the vessel or aircraft falling into the possession of

unauthorized persons, and in part in the desire to keep the wreck untouched as a "war grave".⁷

(b) *Wrecks of archaeological or historical interest*

16. The attempt by some States to introduce a special regime for such wrecks in the Convention on the Law of the Sea failed, but the Convention does contain certain limited provisions in article 149 (cited in para. 11 above) and article 303, paragraphs 1 and 3, which read:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

[...]

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

17. It is difficult to extract from this a general duty of protection, utilizing the State's legislative, administrative and judicial powers, beyond the contiguous zone. So, beyond this zone, the primary issue is: who protects such wrecks? There are consequential issues too relating to ownership and disposal of the wreck and its cargo. Certain States, such as Greece, have argued for a latent right of ownership vested in the State to whose cultural heritage the vessel belongs.

18. Reference is made to a number of articles on the subject which are relevant to this issue.⁸

19. Furthermore, there are a number of UNESCO Conventions dealing with the cultural heritage, i.e. the Convention for the Protection of Cultural Property in the Event of Armed Conflict; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and the Convention for the Protection of the World Cultural and Natural Heritage. But none of these deals explicitly with

⁷ See United States Department of State memorandum of 1980 (Marian Lloyd Nash, *Digest of United States Practice in International Law* (Washington, D.C.), p. 1005); Michael G. Collins, "The salvage of sunken military vessels", *The International Lawyer*, vol. 10, No. 4 (1976), p. 681; Alfred P. Rubin, "Sunken Soviet submarines and Central Intelligence: laws of property and the Agency", *AJIL*, vol. 69, No. 4 (1975), p. 855; Frederic A. Eustis III, "The *Glomar Explorer* incident: implications for the law of salvage", *Virginia Journal of International Law*, vol. 16, No. 1 (1975), p. 177; *Exchange of notes between the United Kingdom of Great Britain and Northern Ireland and South Africa concerning the regulation of the terms of settlement of the salvaging of the wreck of H.M.S. Birkenhead* (United Kingdom Treaty Series, No. 3 (1990)); Protection of Military Remains Act 1986 (cap. 35), *Current Law Year Book 1986*, "Statutes and orders", para. 130; and J. Ashley Roach, "France concedes United States has title to the *CSS Alabama*", *AJIL*, vol. 85, No. 2 (1991), p. 381.

⁸ See Anthony Clark Arend, "Archaeological and historical objects: the international legal implications of UNCLOS III", *Virginia Journal of International Law*, vol. 22, No. 4 (1982), p. 777; Jean-Pierre Beurier, "Pour un droit international de l'archéologie sous-marine", *RGDIP*, vol. 93 (1989), p. 45; Lucius Cafilisch, "Submarine antiquities and the international law of the sea", *Netherlands Yearbook of International Law*, vol. XIII (1982), p. 3; John P. Fry, "The treasure below: jurisdiction over salvaging operations in international waters", *Columbia Law Review*, vol. 88, No. 4 (1988), p. 863; Bruce E. Alexander, "Treasure salvage beyond the territorial sea: an assessment and recommendations", *Journal of Maritime Law and Commerce*, vol. 20, No. 1 (1989), p. 1; and Lyndell V. Prot and P. J. O'Keefe, *Law and the Cultural Heritage*, London, Butterworths, 1984.

⁵ *Acts of the Parliament of the Commonwealth of Australia*, No. 190, p. 1596.

⁶ See Anastasia Strati, "Deep seabed cultural property and the common heritage of mankind", *The International and Comparative Law Quarterly*, vol. 40 (Part 4), 1991, pp. 859 et seq.

wrecks, and the obligations imposed on States will presumably not apply beyond the territorial sea.

20. The Council of Europe has the Convention on Offences relating to Cultural Property (likewise not extending beyond the territorial sea); and, more to the point, there is a draft Convention on the Underwater Cultural Heritage, drawn up following the Prott report.⁹

21. But there is little specific legislation. The exceptions include:

(a) Australia: Historic Shipwrecks Act of 1976;¹⁰ and

(b) United States of America: The R.M.S. Titanic Maritime Memorial Act of 1986,¹¹ and the Abandoned Shipwrecks Act of 1987¹² (which essentially regulates powers between State and Federal authorities in United States waters and established a register of wrecks).

⁹ Lyndell V. Prott and P. J. O'Keefe, "Final report on legal protection of the underwater cultural heritage," *The Underwater Cultural Heritage*, Council of Europe, 1978, appendix II, p. 45.

¹⁰ See footnote 6 above.

¹¹ *United States Code Congressional and Administrative News*, 99th Congress, Second Session, 1986, vol. 2, p. 2082.

¹² *United States Code*, 1994 ed., vol. 24, title 43, para. 2101.

22. Moreover, there are few treaties. The known exceptions include:

(a) An agreement between Australia and the Netherlands which concerns old Dutch shipwrecks; and

(b) An agreement between Australia and Papua New Guinea on the Delimitation of Maritime Boundaries, 1978, article 9 of which confers jurisdiction over wrecks within the area of sea-bed jurisdiction, and obliges the Parties to consult over historic wrecks, but excludes military vessels of either Party wrecked after the date of the Agreement.

4. DISPOSAL OF RECOVERED VESSELS OR OBJECTS FOUND THEREIN

23. Assuming access to the site is lawful, does the "finder" acquire title? This raises various questions:

(a) Which Courts have jurisdiction to adjudicate disputes over title? (If coastal States were given this jurisdiction out to 200 miles, most cases would be covered. Most wrecks are found within this distance offshore, since, traditionally, the trade routes have followed the coasts and wrecks have occurred where weather or error has forced a vessel too close inshore); and

(b) Should certain States have prior, or preferential, rights to either prohibit sale, or purchase the wreck or its contents?

Jus cogens, by Mr. Andreas Jacovides

1. One of the topics proposed for inclusion in the Commission's programme of work is *jus cogens*, or peremptory norms of international law from which no State may derogate by agreement or otherwise. First incorporated into international law by the Vienna Convention on the Law of Treaties (hereafter referred to as the 1969 Vienna Convention) it has had a considerable historical background and was preceded by substantial preparatory work in the Commission and the Sixth Committee of the General Assembly.¹ Considerable material can also be found in the records of the Vienna Conference on the Law of Treaties² relative to articles 53, 64 and 66.

2. In the nearly quarter of a century since the Convention was adopted, no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status. While *jus cogens* has frequently been referred to in debates at the United Nations, including the Security Council, has been the subject of in-depth studies by scholars, has been raised in the proceedings of learned societies, has been alluded to by ICJ, is often referred to in debates and documents of the Com-

¹ See article by Mr. Jacovides, entitled "Treaties conflicting with peremptory norms of international law and the Zurich-London 'Agreements'" in the annex below.

² *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969* (Sales No. E.70.V.5), documents A/CONF. 39/11 and Add.1-2.

mission (particularly in relation to the current items of State responsibility and the draft Code of Crimes against the Peace and Security of Mankind), there exists no definitive statement of what peremptory norms are or where they may be found. It is frequently said, and correctly so, that the principle of the prohibition against the use of force in international relations contained in Article 2, paragraph 4, of the United Nations Charter is *jus cogens*.³ Undoubtedly, other principles and rules of international law exist for which the same status may be claimed. Evidently, there is a need to define the exact parameters of what comes under the rubric of *jus cogens* since the situation as it now stands is not conducive to the objectivity, transparency and predictability which should characterize a legal principle, especially one which has been solemnly accepted not only in the landmark 1969 Vienna Convention already mentioned, but also, identically, in the subsequent Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereafter called the 1986 Vienna Convention).

3. As it now stands, *jus cogens* can mean a great deal to some and very little to others. The selection of topics for inclusion in the Commission's long-term programme of work provides the opportunity for a highly qualified, authoritative body of experts (which can be credited with codifying the concept in the first place) to study the subject with a view to establishing which rules of interna-

³ See, for example, *Yearbook . . . 1992*, vol. II (Part Two), document A/47/10, para. 227.

tional law are indeed peremptory. On the basis of the Commission's findings, States would have the opportunity, through their representatives in the Sixth Committee and through written comments, to express their views, thereby carrying forward the process of giving exact meaning to *jus cogens* and filling the legal vacuum which surrounds the concept. It is therefore submitted that the topic merits a place in the Commission's long-term programme of work for the purpose of study and the preparation of a report. A proposal to this effect was submitted to the Sixth Committee of the General Assembly at its forty-sixth session and repeated at the forty-seventh session.⁴ What follows is an attempt to set out more analytically the issues involved in order to facilitate the consideration of this proposal by Mr. Derek Bowett and the other members of the Commission.

4. The concept of *jus cogens* raises a number of issues at the core of public international law.⁵ These may be organized under two basic headings: the effect of *jus cogens* on international jurisprudence; and, the nature of *jus cogens* itself. Existing doctrine on the subject speaks much more clearly to the first of these areas than to the second. The *jus cogens* regime created by the Vienna Convention on the Law of Treaties represents the modern validation of an important and well-established precept of traditional international law.⁶ It suggests that treaties may be invalidated not only by virtue of the conditions under which they are concluded, but also because they may offend overarching legal principles governing the international system. As a result, *jus cogens* impinges directly upon the customary freedom of States to enter into agreements as they see fit. Otherwise, validly concluded treaties may fall simply because they govern a particular object impermissibly under higher principles of international law.

5. According to the Vienna Conventions, peremptory norms necessarily void all subsequent, inconsistent treaties *ab initio*. In the event that they clash with pre-existing treaties, those treaties terminate and are voided from that moment onwards.⁷ The relevant provisions read as follows:

⁴ See "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session, prepared by the Secretariat (A/CN.4/L.469), para. 411 and statements by the representative of Cyprus (*Official Records of the General Assembly, Forty-sixth Session, Sixth Committee, 23rd meeting, paras. 71 to 90, and ibid., Forty-seventh Session, Sixth Committee, 21st meeting, paras. 82 to 96*).

⁵ For lengthy, comprehensive studies of the topic, see Sztucki, *Jus cogens and the Vienna Convention on the Law of Treaties* (Vienna, Springer-Verlag, 1974); Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (Amsterdam, North-Holland Publishing Company, 1976); Gómez Robledo, "Le *ius cogens* international: sa genèse, sa nature, ses fonctions", *Collected Courses . . . 1981-III*, p. 9; Hannikainen, *Peremptory Norms (jus cogens) in International Law* (Helsinki Lakimiesliiton Kustannus, 1988); and Stefan Kadelbach, *Zwingendes Völkerrecht* (Berlin, Duncker and Humblot, 1992).

⁶ See annex below for a brief summary of the legal and intellectual pedigree of *jus cogens*. For a more detailed survey of the contemporary development of the concept antecedent to the Vienna Convention, see also Erik Suy, "The concept of *jus cogens* in international law", Carnegie Endowment for International Peace, Conference on International Law, Lagonissi, Greece, 3-8 April 1966, *Papers and Proceedings*, vol. 2 (1967), pp. 26-49.

⁷ Neither the 1969 nor the 1986 Vienna Convention contemplates an *actio popularis* whereby third parties might attack the congruence of a given treaty with *jus cogens*. Rather, only the parties to the treaty in question obtain the right to challenge it on peremptory grounds. Dis-

Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[. . .]

Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.⁸

6. Because peremptory norms are, by definition, non-derogable, they may only be superseded by other, later norms of the same character. The restraints imposed by *jus cogens* on a State's treaty-making powers are therefore absolute. Furthermore, in identifying peremptory norms as an integral part of general international law, article 53 of the Vienna Conventions strongly suggests that *jus cogens* transcends the law of treaties and applies more broadly to the whole range of State practice.⁹ In short, the Vienna Conventions place *jus cogens* firmly at the conceptual pinnacle of international law.

7. As clear as they may be on the jurisprudential standing of *jus cogens*, the Vienna Conventions do not adequately address a second, more basic area of concern, namely the nature of peremptory norms. In its draft articles on the Law of Treaties, the Commission chose to leave the full content of *jus cogens* "to be worked out in State practice and in the jurisprudence of international tribunals."¹⁰ Regrettably, the expected elucidation has not been forthcoming.¹¹ Although the concept is solidly a part of international law, ICJ has to date avoided decisively grounding any of its decisions on a principle of *jus cogens*. Arguably waiting for further guidance, the Court has only sympathetically noted various assertions that certain norms may constitute *jus cogens* to support its conclusions on other grounds.¹² As to State practice, despite

spites between parties to a particular treaty over the compatibility of that treaty with a rule of *jus cogens* are to be settled first by negotiation, and failing that, by arbitration or adjudication (see common articles 65-66 of the two Conventions).

⁸ The same provisions appear verbatim in both the 1969 and 1986 Vienna Conventions.

⁹ See also article 29 of part 1 of the Commission's draft articles on State responsibility, which declares that States acting in violation of a peremptory norm of international law may not be released from responsibility (*Yearbook . . . 1980*, vol. II (Part Two), p. 33).

¹⁰ *Yearbook . . . 1963*, vol. II, p. 53, para. 3 of the commentary to art. 13 *in fine*.

¹¹ For an excellent, brief critique of the existing, unfocused state of *jus cogens* jurisprudence, see Anthony D'Amato, "It's a bird, it's a plane, it's *jus cogens*!" *Connecticut Journal of International Law*, vol. 6, No. 1 (1990), p. 1.

¹² In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, for example, ICJ invoked the frequently heard argument that the prohibition on the use of force contained in Article 2, paragraph 4, of the Charter of the

near-unanimous support for *jus cogens* in the international community, the prediction by one delegate to the Vienna Conference that "what might be *jus cogens* for one State would not necessarily be *jus cogens* for another" has in large part proved to be correct.¹³

8. Among the most central, unanswered questions regarding *jus cogens* are: by what means does a norm of international law rise to the level of *jus cogens*? How may one distinguish such a norm from other more ordinary principles of international law? How may one peremptory norm come to replace another? What are the possible candidates for *jus cogens* today? All in all, the remarkable lack of certainty prevailing over these and other issues has precluded the effective utilization of *jus cogens* in contemporary international jurisprudence. As the birthplace of *jus cogens* in codified international law, the Commission, in conjunction with the Sixth Committee, offers an excellent and highly qualified forum in which to clarify these ambiguities authoritatively.¹⁴

9. At the forefront of the uncertainty are the related matters of how ordinary legal norms reach peremptory status and what qualities set them apart from the balance of international law. The commentaries to the Commission's 1963 draft articles on the law of treaties provide little guidance.¹⁵ Nonetheless, from the remarks of Sir Humphrey Waldock at the Vienna Conference and the text of the Vienna Convention itself, the germ of a test may be extracted. In Sir Humphrey's words, the Commission "based its approach to the question of *jus cogens* on posi-

tive law much more than on natural law."¹⁶ To this end, article 53 implies a consensual requirement of acceptance and recognition by "the international community of States as a whole" before a candidate norm may actually become *jus cogens*. What remains unclear in this formulation, however, is the precise shape this consensus must take and whether it has the power to impose obligations *erga omnes* on dissenting States.

10. The phrase "the international community of States as a whole" has, in practice, generally been interpreted to mean something less than absolute unanimity. In 1976, for example, the Commission suggested that acceptance and recognition "by all the essential components of the international community" was sufficient to elevate the breach of an obligation to the level of an international crime.¹⁷ Under this formula, the dissent of one State or even a small group of States, no matter how powerful, could not block the formation of a new peremptory norm. Similarly, and more to the point, the Chairman of the Drafting Committee at the Vienna Conference, Mr. Mustafa K. Yasseen, stated that "[t]here was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so . . .".¹⁸

11. Others, by contrast, have argued that to allow majorities to bind dissenting States would conflict with already well-established principles of international law.¹⁹ The French representative to the Vienna Conference expressed the view that if consensus was "interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result would be to create an international source of law subject to no control and lacking all responsibility."²⁰ This claim finds support in both judicial doctrine and State practice. The *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* opinion of ICJ maintains, for example, that in international law, there are no rules, other than such rules as may be accepted by the States concerned.²¹ Furthermore, an

United Nations represents *jus cogens* to support its contention that the same principle exists under customary law (*I.C.J. Reports 1986*, p. 100, para. 190; see Christenson, "The World Court and *jus cogens*", in "Appraisals of the ICJ's decision: *United States v. Nicaragua (Merits)*", *AJIL*, vol. 81, No. 1 (1987), p. 93). To be sure, individual justices of the Court have on occasion made bolder statements in support of *jus cogens* in their separate or dissenting opinions, but these cannot be said to speak for the Court as a whole. See Sztucki, *op. cit.*, pp. 12-22 and Ian M. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 209-215.

¹³ *Official Records of the United Nations Conference on the Law of Treaties, First Session* (see footnote 2 above), p. 305, para. 64.

¹⁴ The Commission introduced *jus cogens* to codified international law in article 15 of Sir Hersch Lauterpacht's first report on the law of treaties (*Yearbook . . . 1953*, vol. II, pp. 154-156, document A/CN.4/63). For a discussion of the genesis and evolution of *jus cogens* in the Commission, see Nageswar Rao, "*Jus cogens* and the Vienna Convention on the Law of Treaties", *The Indian Journal of International Law*, vol. 14 (1974), p. 362 and Egon Schwelb, "Some aspects of international *jus cogens* as formulated by the International Law Commission", *AJIL*, vol. 61 (1967), p. 946.

The language of *jus cogens* continues to pervade the work of the Commission even today. Article 19 of part I of the draft articles on State responsibility, for example, describes international crimes in terms of the breach of an obligation "essential for the protection of fundamental interests of the international community" (para. 2) (*Yearbook . . . 1980*, vol. II (Part Two), p. 32). During the discussions on the draft Code of Offences against the Peace and Security of Mankind, one member of the Commission suggested framing the proposed universality of the Code by saying that "an offence against the peace and security of mankind was a breach of rules recognized by the international community as a whole, from which no State could derogate" (*Yearbook . . . 1987*, vol. I, 1993rd meeting, para. 39).

¹⁵ According to paragraph 2 of the commentary to draft article 13, for example, there is no generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens* (*Yearbook . . . 1963*, vol. II, p. 52).

¹⁶ *Official Records of the United Nations Conference on the Law of Treaties, First Session* (see footnote 2 above), p. 327.

¹⁷ *Yearbook . . . 1976*, vol. II (Part Two), p. 119, para. (61) of the commentary to article 19. Roberto Ago expressed a similar view with respect to *jus cogens* in "Droit des traités à la lumière de la Convention de Vienne", *Recueil des cours . . . 1971-III*, pp. 296 et seq., especially p. 323.

¹⁸ *Official Records of the United Nations Conference on the Law of Treaties, First Session* (see footnote 2 above), p. 472.

¹⁹ Perhaps the seminal article in this regard is Georg Schwarzenberger, "International *jus cogens*?" *Texas Law Review*, vol. 43 (1965), p. 455.

²⁰ *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (see footnote 2 above), p. 94, para. 17. See also Michel Virally, "Réflexions sur le *jus cogens*", *AFDI*, vol. 12 (1966), p. 5.

²¹ *I.C.J. Reports 1986*, p. 135 (see also footnote 12 above). It is important to note that while ICJ has on occasion referred to *jus cogens* abstractly, it has cautiously declined to invoke the concept as a dispositive ground for any of its decisions or to identify authoritatively possible candidates for peremptory status. By contrast, in 1965, the German Supreme Constitutional Court specifically endorsed *jus cogens* and offered its own definition of peremptory norms as

" . . . such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance

attempt by many developing States in the General Assembly and at the United Nations Conference on the Law of the Sea to elevate the concept of "the common heritage of mankind" to peremptory status failed after a small group of primarily Western nations refused to endorse the proposal.²² The representative of the United States expressed the view that "[t]he United States could not accept the suggestion that, without its consent, other States would be able, by resolutions or statements, to deny or alter its rights under international law."²³ In the end, no compelling resolution of these two conflicting approaches to the question of consensus has yet emerged and the topic remains controversial.²⁴ The question of how one peremptory norm may replace another has also raised considerable debate. As *jus cogens*, by its very nature, prohibits countervailing State practice, any attempt to alter the existing peremptory normative order may entail violations of international law. This will especially be the case where *jus cogens* arises by way of international custom. A commonly proposed solution to this conundrum involves creating and substituting peremptory norms only through the mechanism of general international treaties or conventions.²⁵ These instruments would, of course, be subject to the requirement of broad consensus mentioned above and should also contain a clear expression of the international community's intent to modify existing peremptory law. Anything short of such a decisive statement might encounter serious doctrinal and practical difficulties.

12. A final principal area of uncertainty surrounds the identification of candidates for *jus cogens* status. In its

(Footnote 21 continued.)

of which can be required by all members of the international community." (*Entscheidung des Bundesverfassungsgerichts*, vol. 18, 1965, p. 449).

See also, Stefan A. Riesenfeld, "Jus dispositivum and jus cogens in international law: in the light of a recent decision of the German Supreme Constitutional Court", Editorial Comment, AJIL, vol. 60, No. 3 (1966), p. 511. In the United States, Federal courts in the Ninth Circuit and the District of Columbia have confirmed the presence and relevance of *jus cogens* in international law: *Trajano v. Marcos* (*Federal Reporter, Second Series*, vol. 978, p. 493 (United States Court of Appeals, Ninth Circuit, 1992), p. 493; *Siderman de Blake v. The Republic of Argentina* (*ibid.*, vol. 965, esp. p. 717; *Committee of United States Citizens Living in Nicaragua v. Reagan*, *ibid.*, vol. 859 (United States Court of Appeals, District of Columbia Circuit, 1988), pp. 929 et seq., especially p. 940.

²² Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (General Assembly resolution 2749 (XXV)). Chile proposed at the Conference on the Law of the Sea to introduce a draft article into the Convention attesting to the peremptory nature of the common heritage principle. See also Gennady M. Danilenko, "International *jus cogens*: issues of law-making", *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 42 et seq., especially, p. 59; see also Antonio Gómez Robledo, *loc. cit.*

²³ *Official Records of the Third United Nations Conference on the Law of the Sea, Seventh Session, Geneva, 28 March-19 May 1978 and Resumed Seventh Session, New York, 21 August-15 September 1978*, vol. IX (Sales No. E.79.V.3), p. 104, para. 27 *in fine*.

²⁴ Danilenko, *loc. cit.*, p. 64. Related to the debate over consensus is also the question of whether *jus cogens* may arise at a regional or sub-global level. Although the Vienna Conventions apparently contemplate only broad-based peremptory norms, the fact that the possible regional evolution of international custom has been recognized has led some to suggest a similar process for *jus cogens*. Certainly nothing in the Conventions explicitly precludes such a mechanism.

²⁵ See, for example, the Commission's commentary to draft article 13 on the law of treaties (*Yearbook . . . 1963*, vol. II, p. 54).

commentary to the draft articles on the law of treaties, the Commission stated that

It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.²⁶

The Commission declined at the time to endorse any specific examples of *jus cogens* out of fear that such a list might prejudice the consideration of other potential peremptory norms and deflect attention of the Commission from the draft articles before it.²⁷ It did, however, suggest possible examples, including a prohibition on the use of force; a prohibition on acts constituting international crimes; and proscriptions against slavery, genocide and piracy.²⁸ Among other broadly supported possibilities are the obligation to settle disputes peacefully and the international principle prohibiting torture.²⁹ Indeed, because *jus cogens* offers a powerful vehicle for the transformation of contemporary international law, some have suggested the incorporation into the concept of principles as diverse as the "Brezhnev doctrine" and the right to life.³⁰ Clearly, some distinctions must be drawn. The further proliferation of competing norms will only contribute to the confusion surrounding *jus cogens* and may sap the concept of its credibility, elegance and power. Alternatively, and highly preferably, the elucidation and crystallization of *jus cogens* would mark a substantial step forward in the progressive development of an already integral and well-established segment of international law. It is submitted that the Commission, in combination with the Sixth Committee, is uniquely suited to this task.

13. Reproduced as an annex to this outline is the text of a paper submitted by the writer to the Dag Hammarskjöld Seminar on the Law of Treaties, held at Uppsala, Sweden, from 16 June to 16 July 1966. This paper, including the footnotes, is reproduced in the form and language in which it was submitted by the author.

²⁶ *Yearbook . . . 1966*, vol. II, p. 248, para. (2) of the commentary to art. 50.

²⁷ *Ibid.*, para. 3.

²⁸ *Ibid.* Some of the other more serious contenders are considered in Schwelb, *loc. cit.*, and Hannikainen, *op. cit.*

²⁹ Mr. Gaetano Arangio-Ruiz recently discussed peremptory norms in his third and fourth reports on State responsibility (*Yearbook . . . 1991*, vol. II (Part One); p. 1, document A/CN.4/440 and Add.1, paras. 118-122; and *Yearbook . . . 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3, paras. 89-96, respectively). He reached the conclusion that the prohibitions against the use of force and against massive violations of human rights both raised questions of *jus cogens*. In draft article 14, para. 1 (b) (iii) appearing in his fourth report, he also proposed to prohibit countermeasures "contrary to a peremptory norm of general international law". A line of recently decided cases in United States Federal courts has recognized that the international prohibition against torture is a norm having the character of *jus cogens*: *Trajano v. Marcos*, *Siderman de Blake v. The Republic of Argentina* and *Committee of United States Citizens Living in Nicaragua v. Reagan* (see footnote 21 above).

³⁰ Grigory Tunkin, *Theory of International Law*, (Cambridge, Mass., Harvard University Press, 1974), p. 444 and Karen Parker and Lyn Beth Neylon, "Jus cogens: compelling the law of human rights", *Hastings International and Comparative Law Review*, vol. 12, No. 2 (1989), p. 411. In the context of international environmental law, the Special Representative of the National Commission for the Environment of Uruguay recently argued that the principles of conduct, responsibility and compensation arising from the Stockholm Declaration and reaffirmed in the Rio Declaration are true criteria of *jus cogens* valid *erga omnes* (*Official Records of the General Assembly, Forty-seventh Session, Plenary meetings*, 57th meeting).

ANNEX

**Treaties Conflicting with Peremptory Norms of
International Law and the Zurich-London "Agreements"**
by Andreas J. Jacovides

The purpose of the present paper is to consider the question whether international law recognizes the existence within its legal order of rules having the character of *jus cogens* i.e. rules from which the law does not permit any derogation by agreement between the parties *inter se* as distinct from *jus dispositivum* i.e. rules which the parties may freely regulate by such agreement.¹ This inquiry will touch upon such material as is available in the writings of scholars, the pronouncements of international tribunals and international practice, with particular emphasis on the work of the International Law Commission on the subject and the views expressed thereon by the representatives of States, both in the Sixth (Legal) Committee of the United Nations General Assembly and through written comments of Governments.

Certain considerations and reflections will be put forward regarding the theoretical justification for the existence of the *jus cogens* doctrine, its effect upon the law of treaties generally and the means for determining whether a given rule does or does not merit the description of *jus cogens* at a given time . . .

[. . .]

Historical background and recent developments

It may be readily accepted that the general rule of the law of treaties is that States are competent, by agreement between themselves, to conclude treaties on any subject whatsoever and thus regulate their relations with each other at discretion.

From a very early stage of the development of international law, however, this sweeping character of this rule did not remain unchallenged. As early as the middle of the eighteenth century, eminent writers such as Christian Wolff² and Emeric Vattel³ were distinguishing between the necessary law, which nations cannot alter by agreement, and the voluntary law created by the will of the parties. Likewise, A. W. Heffter⁴ declared, a century later, that treaties were void if their object was physically or morally impossible and by moral impossibility he understood that the object of the treaty was contrary to the ethics of the World.

In more recent times opinion among writers was more divided. Nineteenth century positivism had a significant effect and it was widely accepted that international law did not impose any restrictions upon the freedom of States to conclude any treaty irrespective of its object. Modern writers who, with various degrees of emphasis, have shared this view include such prominent scholars as Charles Rousseau,⁵ Gaetano Morelli,⁶ Paul Guggenheim⁷ and G. Schwarzenberger.⁸

On the other hand, certain recent developments in international law, such as the conclusion of the Kellogg-Briand Pact of 1928 and the decisions of the Nuremberg and Tokyo tribunals and even more important, such fundamental landmarks in the direction of organized international society as the Covenant of the League of Nations and the Charter of the United Nations, have served to reverse this trend. Another such factor

is the recent transformation in the composition of the society of nations through the emergence of a considerable number of new States which put their own imprint on the process of developing international law. All these factors have had a decisive effect in reviving and reinforcing the notion that, besides *jus dispositivum* rules which can be departed from by agreement, there exist certain rules and principles of general international law having the character of *jus cogens* from which the parties cannot derogate by agreement between themselves.

It has been persuasively argued⁹ that the very fact of the existence of norms determining which persons are endowed with the capacity to act in international law, what intrinsic and extrinsic conditions must be fulfilled so that an international treaty may come into existence, what juridical consequences are attached to the conclusion of an international treaty, militates against accepting the view that the whole international law system is dependent on the agreement of the wills of States.

These rules of *jus cogens* do not exist in order to satisfy the needs of individual States but in order to serve the higher interests of the international community as a whole, and the ultimate justification for their existence is that they rest upon the common expression of the conscience of the international community.

Various terms have been used to describe this notion and to explain the basis upon which it rests. Lauterpacht, referring to the Covenant of the League of Nations, wrote in 1936 that ". . . the substance of its law differs so radically from other international conventions in its scope and significance as a purposeful instrument in the process of political integration of mankind as to deserve the designation of a 'higher law' . . .".¹⁰ McNair writing in 1930 and referring both to the Covenant and to the Kellogg-Briand Pact, says¹¹ that these instruments created "a kind of public law transcending in kind and not merely in degree the ordinary agreements between States". These views, expressed in the inter-war years, would have equal, if not greater, validity in relation to the United Nations Charter. The terms "international public policy" and "international public order" (*ordre public*) have also been used to underscore the notion that these rules of *jus cogens* or peremptory norms are firmly based upon the conscience of mankind, that they represent some higher social needs and that they are the minimum of rules of conduct necessary to make orderly international relations possible.

Writers who have shared and promoted a position in favour of the existence of *jus cogens* include, in addition to Lauterpacht¹² and McNair¹³ such eminent jurists as Balladore Pallieri,¹⁴ Kelsen¹⁵ and Tunkin.¹⁶ The eminent Austrian international jurist Verdross¹⁷ deserves a particular place among these writers. It now appears to be the general trend, even among those who previously held different views, with the notable exception of Schwarzenberger, to accept the notion of *jus cogens*.¹⁸

The issue of *jus cogens* received scant attention before international tribunals. The instances quoted where the matter was touched upon are not directly on point. These are the celebrated individual opinion of Judge Anzilotti in the *Austro-German Customs Union* case¹⁹ (where he questioned whether there is not a contradiction in the fact of obliging a State to live and of putting it at the same time into a situation which renders its life extremely difficult—and see below, on the principle of sovereign equality) and of the dissenting opinion of Judge Schucking in the *Oscar Chinn* case,²⁰ where he stressed that the Court would never apply a convention the contents of which were contrary to *bonos mores*. In its Advisory Opinion concerning *Reservations to the Genocide Convention*²¹ the Court, referring to the Genocide Convention,

¹ For bibliography, see generally Wright, 2., *Conflicts between international law and treaties*, AJIL, vol. 2 (1917), pp. 566-579; Lauterpacht, H., *The Covenant as the "Higher Law"*, BYIL, 1936, pp. 54-65; Jenks, C. W., *The conflict of law-making treaties*, BYIL, 1953, pp. 401-453; Verdross, A. Von, *Forbidden Treaties in international law*, AJIL, vol. 31 (1937), pp. 571-577; Verdross, A. Von, *Jus dispositivum and Jus cogens in international law*, AJIL, vol. 60 (1966), pp. 55-63; Schwarzenberger, G., "International *jus cogens*", *Texas Law Review*, March, 1965, pp. 455-478; Suy, E., "Le *jus cogens* en droit international public", *Conference de droit international*, Lagonissi (Greece), 3-8 April 1966; Murty, B. S., *Jus cogens in international law*, International Law Conference, Lagonissi (Greece), 3-8 April 1966.

² Wolff, *Jus Gentium*, paras. 5 and 25 (1764).

³ Vattel, *Le droit des Gens*, Introduction, paras. 9 and 27 (1758).

⁴ A. W. Heffter, *Das Europäische Völkerrecht der Gegenwart*, 156 (4th ed., 1861).

⁵ Rousseau, *Principes du droit international public*, 340-341 (1944).

⁶ Morelli, *Nozioni di Diritto Internazionale* 37 (3rd ed., 1951).

⁷ Guggenheim, *Traité de droit international public*, 57 (1953)—but see footnote (19).

⁸ Schwarzenberger, *International Law*, 352-3, 425-7 (1957) and op. cit. footnote (1).

⁹ Verdross, op. cit. footnote (1).

¹⁰ Lauterpacht, op. cit., footnote 1.

¹¹ McNair, "The functions and differing legal character of treaties", BYIL 11 (1930), 112.

¹² See also Oppenheim-Lauterpacht, 8th edition (1955), p. 896 to the effect that "immoral obligations cannot be the object of an international treaty".

¹³ See also McNair, *Law of Treaties*, 213-4 (1961).

¹⁴ Balladore Pallieri, *Diritto internazionale pubblico*, 282 (8th ed., 1962).

¹⁵ Kelsen, *Principles of international law*, 89, 323, 344 (1952).

¹⁶ Tunkin, *Das Völkerrecht der Gegenwart*, 95-96 (1963).

¹⁷ Verdross, op. cit. footnote (1).

¹⁸ Suy, op. cit. footnote (1), p. 55.

¹⁹ *P.C.I.J., Series A/B*, No. 41.

²⁰ *P.C.I.J., Series A/B*, No. 63, p. 149.

²¹ *I.C.J. Reports*, 1951, 23.

"adopted for a purely humanitarian and civilizing purpose", commented that "the contracting States do not have any interest of their own: they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention".²²

The work of the International Law Commission and issues arising therefrom

The process of the acceptance of the *jus cogens* doctrine as part of contemporary international law was further promoted through the work of successive Special Rapporteurs of the International Law Commission on the law of treaties and culminated during the fifteenth session of the Commission in 1963. It will be recalled that the Commission, after extensive discussion of the subject²³ and after fully considering the various aspects of the text submitted by its latest Special Rapporteur, Sir Humphrey Waldock,²⁴ reached the unanimous conclusion that:

"A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". (Draft Article 37).²⁵

The Commission also took the further step, which was only the logical corollary of its adoption of the draft Article cited above, of adopting a further draft Article, 45,²⁶ covering the case of the emergence of a new peremptory norm of general international law, through either custom or a general multilateral treaty, and its effect upon treaties:

"1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in Article 37 is established and the treaty conflicts with that norm.

"2. Under the conditions specified in Article 46,²⁷ if only certain clauses of the treaty are in conflict with the new norm those clauses alone shall become void."²⁸

The close study of the records of the Commission's debate of this matter,²⁹ the commentary accompanying the text,³⁰ the records of the debate in the Sixth (Legal) Committee of the General Assembly on the Commission's Report,³¹ the comments of Governments³² regarding draft Article 37, as well as the Special Rapporteur's comments as set out in his Fifth Report,³³ furnishes a wealth of evidence to demonstrate that the principle as stated in the draft Article meets with general approval, if not with complete unanimity.³⁴

The examination of these records also reveals the significant role which the new States which came into existence subsequently to the Second World War, as well as the East European States,³⁵ played in helping establish the existence of this rule, although the contribution of the Latin American as well as of several Western European States is in no way underestimated. On the whole, it may be said that it is particu-

larly the smaller and weaker States which have a greater interest in the recognition of the existence and the strengthening of a public order placing checks upon an unlimited freedom of contract, as opposed to a situation which, under the respectable guise of the unlimited freedom of contract, exposes them to the real danger of unequal and inequitable treaties under which the stronger State would, in the nature of things, take the lion's share.³⁶

The rule which finds expression in draft Article 37 corresponds to the rule in municipal systems of law³⁷ to the effect that an agreement to commit a crime or one which is otherwise contrary to public policy is null and void and cannot be construed as conferring any rights upon the parties to it (*ex injuria non oritur jus*). The recognition on the part of the Commission of the existence of the equivalent rule in public international law constitutes a most constructive contribution by the Commission in pursuance of its mandate not only to codify but also to further the progressive development of international law. As was epigrammatically put by Dr. El Erian, in the course of the subsequent debate in the Sixth Committee of the General Assembly, "the recognition of the notion . . . marked a transition from classical international law to the modern law of the United Nations".

The Commission has been criticized for its formulation of draft Articles 37 and 45 on two grounds. Firstly, that they involve the creation of a new ground on which treaty obligations can be denied; and secondly, that they would furnish to third States the right to discuss the legal validity of agreements to which they are not parties and which normally would not be their concern. It is argued that particularly the former ground creates the great danger that, since the rules of *jus cogens* cannot be precisely identified and stated, the recognition of their existence enables every State wishing to denounce a treaty, to put forward a plea of nullity alleging the repugnance of such a treaty with *jus cogens*.

While this danger cannot be denied and the principle of *jus cogens* can indeed be abused, it is believed by the present writer that it can, and should, be minimized if not completely eliminated through as exact a delimitation of the rules of international law falling within the category of *jus cogens* as possible (see post) rather than by ignoring the existence of such rules altogether. In this respect the analogy with the equivalent municipal law rule is instructive: No one denies the existence in municipal law of rules of public policy even though these, too, are not always clearly and exactly defined or definable. It may of course be retorted that in the case of municipal law systems, whenever there arises a doubt as to whether in a given case such a rule does or does not apply, the matter can always be referred to and be settled by a competent tribunal.

There may indeed be a lot to be said in favour of making the determination as to whether a given situation is or is not covered by a rule of *jus cogens*, especially when the plea of nullity is contested by one of the parties, subject to the decision of an impartial tribunal. In his Report to the Commission, Lauterpacht phrased the relevant Article as follows:

"A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."³⁸

Likewise, Verdross³⁹ had suggested that all disputes concerning the interpretation and application of a norm having the character of *jus cogens* must be submitted to arbitration.

It is axiomatic that if the rule of law among nations is to acquire its full meaning, the jurisdiction of an International Court (whether in its present or other form) ought to be universal and the means should be provided whereby its decisions would be enforced. International institutions, however, cannot be raised from the cooperative to the organic level until we have a society of States which is far more closely bound together than are the States of today. In the present imperfect stage of development of the international society, with the Court's jurisdiction dependent on the consent of the individual States and suffering from a variety of other inhibiting factors, it would, it is believed, be plainly

²² For an extensive collection of material from the international jurisprudence, including references to individual and dissenting opinion, on the subject see Suy, *op. cit.* footnote No. (1), pp. 76-84.

²³ *Yearbook . . . 1963*, vol. I, pp. 62-78.

²⁴ A/CN.4/156.

²⁵ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509)*, p. 11.

²⁶ *Op. cit.*, footnote 26, p. 23.

²⁷ *Op. cit.*, footnote 23, p. 26.

²⁸ As is pointed out by the Special Rapporteur in the course of the debate in the ILC, the nineteenth century conventions for regulating the slave-trade were valid when drawn up but subsequently became void by the development of a new rule of international law prohibiting the slave-trade altogether.

²⁹ *Op. cit.*, footnote 23.

³⁰ *Op. cit.*, footnote 25.

³¹ *Official Records of the General Assembly, Eighteenth Session, Report of the ILC (item 69)*.

³² A/CN.4/175 and Addenda.

³³ A/CN.4/183 and Add. I.

³⁴ While comments on the part of Governments were favourable, with several shades of enthusiasm, only the Government of Luxembourg was openly negative to the notion, while the Government of Turkey took also a negative but more guarded approach.

³⁵ Both of these categories of States are characterized by their own approach to international law. For a Western view of these approaches see e.g. Higgins, *Conflicts of Interest*, London, 1965, and Lissytzin, *International Law Today and Tomorrow*, New York, 1965.

³⁶ In the course of the discussion in the ILC on draft article 37 the distinguished Spanish jurist Dr. de Luna observed: "The contractual conception of international law, which did not recognize *jus cogens*, belonged to the time when international law had been only a law for the Great Powers. But modern international law has become universalized and socialized."

³⁷ A rule which may undeniably be described as a general principle of law recognized by civilized nations within the meaning of Article 38 of the Statute of ICJ.

³⁸ *Yearbook . . . 1953*, vol. II, p. 154.

³⁹ *Op. cit.*, footnote I.

unrealistic to tie the principle *jus cogens* to adjudication by the International Court and the International Law Commission acted in accordance with the hard facts of the international life of today.

The absence of compulsory adjudication, however, does not mean that international law in general, or its *jus cogens* in particular, lacks binding legal force. Moreover, there exist a number of other means for the peaceful settlement of disputes between States including, in addition to negotiation, conciliation, mediation and arbitration, recourse to the Security Council and the General Assembly of the United Nations. In particular, Article 14 of the Charter, which empowers the General Assembly to make recommendations for the peaceful adjustment of any situation regardless of origin, is certainly sufficiently broad to enable the General Assembly to pronounce itself upon disputes between Member States involving the inconsistency of treaty provisions with rules of *jus cogens*,⁴⁰ especially if such disputes are basically political in nature.

As for the second ground of criticism, viz. the possibility for third States to concern themselves with situations to which they were not parties, it may be said that this may have been well-founded in the past. However, it must be accepted that in an interdependent world intended to be regulated in a number of respects by such a fundamental instrument as the Charter of the United Nations, it would be anachronistic to claim that third States should have no voice when patent illegalities are perpetrated against one or more of the members of the society of nations.

Turning now to the question of what effect the conflict of a *jus cogens* rule has upon a treaty, the members of the Commission were unanimous in their view that the treaty becomes null and void *ab initio*, rather than simply voidable at the instance of one or more of the parties. The legal consequences of this view are far-reaching for "the consequence of voidance *ab initio* was simply that there was no treaty".⁴¹ Likewise, Verdross⁴² takes the view that the formal voidance of immoral contracts is unnecessary and that the burdened State has the right simply to refuse the fulfilment of such an obligation. It would therefore, appear that, at least according to these views, and in the absence of any provision in the Article for third party determination, such treaties as conflict with *jus cogens* can simply be taken as non-existent i.e. as not requiring any further act declaring such treaty to be not binding.⁴³

The Commission, after considering the possibility of severance of the offending provisions from the rest of the treaty, under the conditions laid down in Article 46 of the Draft, took the view of the majority of its members who considered that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid and the sanction of nullity should extend to the whole transaction.

By contrast, in the case of a new peremptory norm emerging (Article 45, *supra*) the effect of the rule is not to render the treaty provision in question void *ab initio* but to invalidate it only from the date when the new rule of *jus cogens* was established i.e. to forbid further performance. Likewise, the Commission took the view that, under the conditions provided in Draft Article 46, severance is permitted in the case of Draft Article 45, with the result that provisions not affected by the emergence of the *jus cogens* rule in question would be regarded as still valid.

⁴⁰ Indeed General Assembly resolution 2077 XX, on the question of Cyprus, furnishes a good illustration of the point. And see the statement of Mr. Paredes who, in the course of the debate in the International Law Commission on the more specific rule of a treaty imposed upon a State by the threat or use of force in violation of the principles of the Charter and consequently in violation of the relevant *jus cogens* rule, stated that, in the absence of compulsory international adjudication, "the only remedy would be . . . that the victim of aggression should be able to appear before the United Nations Security Council and declare the treaty void because of vitiation", *Yearbook . . . 1963*, vol. I, p. 61.

⁴¹ Rosenne, *op. cit.*, footnote 40, p. 55.

⁴² *Op. cit.*, footnote 1.

⁴³ This might indeed in some cases be too drastic a remedy and it might, when the illegality is disputed, strengthen the argument that the doctrine is subject to abuse. One might wonder whether, on the analogy of null marriages, it would not be appropriate for a formal act to take place in order to "take it off the book". In that case, however, it would seem that it would be for the party contesting the plea of nullity and relying on the treaty in question to prove its legality.

The relationship between Article 103 of the Charter and Article 37 of the International Law Commission's draft

The interesting question which arises in this connection is the relationship between the effect of Article 103⁴⁴ of the Charter of the United Nations and Article 37 (and 45) of the International Law Commission's draft. Reference to the preparatory work regarding Article 103 shows that the Article does not provide for the automatic abrogation of treaties conflicting with the Charter, but rather requires that obligations under the Charter shall prevail.⁴⁵

In the course of the discussion of the International Law Commission's draft by the Sixth Committee of the General Assembly many representatives pointed out that Article 103, by proclaiming that obligations under the Charter prevailed over obligations under any other international agreement, had aided greatly in creating the *jus cogens* rule. Yet, as various representatives stated, its logical consequences had not been recognized, and it was that gap which the International Law Commission had filled by stating that an international treaty was void if it conflicted with a peremptory norm of international law.⁴⁶ The matter occupied again the attention of the Commission when, in its commentary on draft Article 63, it recognized the primacy of the rule in Article 103, in the context of the relative priority of incompatible treaty obligations. As the Special Rapporteur pointed out, however, while the Commission appreciated that there may be certain areas of overlap in the application of the *jus cogens* provisions of Articles 37 and 45 and of Article 103 of the Charter because certain provisions of the Charter, notably those of Article 2(4), are of a *jus cogens* character, it nevertheless considered the invalidity of a treaty under Articles 37 and 45 of the draft Articles, by reason of a conflict with a rule of the *jus cogens*, to be a distinct and independent question.⁴⁷ In other words, while Article 103 refers to *priority* or conflicting obligations, draft Articles 37 and 45 refer to *invalidity* of obligations—yet they may, and do, overlap in certain areas. While the writer shares the view of Sir Humphrey Waldock that not all rules contained in the Charter are necessarily peremptory norms and, conversely, there are peremptory norms that are not contained in the Charter, it is believed that the area of overlap is considerably greater than merely the principle contained in Article 2(4) of the Charter (see post).

The question of what rules of international law fall within the category of peremptory norms

While it appears that the principle of the existence of peremptory norms from which no derogation by treaty is permitted, has won overwhelming approval both within and outside the International Law Commission, the question of what specific rules of international law fit under this description, in other words, what is the exact juridical content of this principle, is considerably less clear.

The International Law Commission was unable to arrive at any generally recognized criterion by which to identify a general rule of international law as having the character of *jus cogens*. Certain examples were suggested by some of the members of the Commission "of the most obvious and best settled rules of *jus cogens*" in order to indicate the general nature and scope of the rule, and indeed some of these had originally appeared in the body of the draft Article as presented by the Special Rapporteur. These included, in addition to the case of the threat or use of force contrary to the principles of the Charter (a subject to which we shall return, see post), a treaty contemplating the performance of any act criminal under international law; a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate; treaties violating human rights; treaties violating the right to

⁴⁴ Which provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

⁴⁵ The Committee on Legal Problems, Committee 2, decided that "it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof. It has been deemed preferable to have the rule depend upon and be linked with the case of a conflict between the two categories of obligations. In such a case the obligations of the Charter would be pre-empted and would exclude any other"—Report of the Rapporteur of Committee IV/2, United Nations document 933, IV/2/42, United Nations Conference on International Organizations, 12 June 1945.

⁴⁶ *Official Records of the General Assembly, Eighteenth Session*, agenda item 69, document A/5601, para. 18.

⁴⁷ A/CN.4/183/Add.1, pp. 23-24.

self-determination.⁴⁸ Some members of the Commission⁴⁹ stressed that the examples given should include unequal treaties.

In the end, however, the Commission, bearing in mind the comparatively recent emergence of these rules and the rapid development of international law, decided against including any specific examples and of leaving "the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals". The Commission reached this conclusion (a) because it thought that to include certain examples and not others might lead to a misunderstanding regarding the position of other cases not expressly mentioned; and (b) because it feared that, if it were to draw up, even on a selective basis, a list of the rules meriting the description of *jus cogens*, it might find itself engaged in a prolonged study of matters which did not fall within the ambit of the law of treaties. It may well be that the Commission, in the particular circumstances of its work, acted wisely in adopting this cautious approach. While the first reason given is not a very convincing one (it would always be possible to furnish an illustrative list of examples, thereby giving concrete expression to the principle generally stated in the draft Article, and to stress that this is not an exhaustive list) the second reason, which in any case is connected with the first, presents a much more real problem. As was pointed out in the course of the Commission's debate,⁵⁰ the problem, reduced to its simplest terms, was how to define illegality in international law and this, in view of the widely divergent political theories and conflicting interests involved, is indeed a formidable task⁵¹ if the unanimity which prevailed in the adoption of the principle was to be preserved. The danger of opening a Pandora's box of disagreements and the consequent weakening of the very principle which was so painstakingly reached by unanimity is only too clearly visible to be ignored.

At the same time the impression should not be permitted to be created that the notion of *jus cogens* is merely a philosophical or theoretical idea devoid of any real meaning. Nor can the suggestion be entertained that the principle so clearly formulated by the Commission means all things to all people but has no practical significance in present day international law. The almost unanimous reception of the principle by the representatives of Governments⁵² militates against any such cynical evaluation of the Commission's work on this subject—an evaluation which offends the legitimate expectations of the vast majority of the members of the international community and outrages the social conscience of mankind upon which, in the last analysis, the notion of *jus cogens* ultimately rests.

It is therefore to be regretted that the difficulties which confronted the Commission prevented it from going the full way and from spelling out the content of the principle it enunciated, thereby completing the pro-

cess which it had so admirably initiated and advanced. The door is left open to the danger on the one hand of too broad a definition of what constitutes *jus cogens* with the consequent risk of abuse and stretching the principle to the point of breaking and, on the other hand, to too narrow or restrictive a definition thereby robbing the principle of any real meaning and negating its effect.

The question arises whether there exists no other body within the machinery of the organized international society of today, which might usefully undertake the task of the point where the International Law Commission left it. One such possible forum which comes readily to mind is the Sixth (Legal) Committee of the General Assembly. If one bears in mind that *jus cogens* is formed through the expression of the collective conscience of the community of nations there might be a lot to recommend to the Sixth Committee—where, unlike the International Law Commission, all Member States are represented—acting possibly through a special committee, whereon States would be represented by jurists, to undertake the task of defining what rules of general international law constitute peremptory norms for the purpose of the *jus cogens* doctrine. Undoubtedly the Committee would be faced by the same real difficulties as the Commission was. Likewise any resolution, or declaration, that it might be able to arrive at by the requisite majority might be open to the objection that it did not itself constitute a source of law and was not binding. Nonetheless any such resolution, especially a unanimous or near-unanimous one though not in itself a source of law, might be taken as confirming the existing law on the subject and would in any case carry considerable weight as the expression of the general opinion of States.⁵³

Another possibility might be offered by the proposed Conference of Plenipotentiaries to be convened in 1968 in order to adopt a multilateral convention on the Law of Treaties.

Quite independently, however, of these possibilities there is no doubt that in the light of the principle unanimously adopted by the Commission and overwhelmingly approved by States and by international jurists, there exists considerable material upon which to base the conclusion that there exist today a considerable number of rules of general international law which have a legitimate claim to be regarded as peremptory norms (*jus cogens*). Indeed several were mentioned in the Commission's discussion and are referred to above.⁵⁴ The present writer shares the view of Mr. Rosenne who stated in the course of the International Law Commission's discussion⁵⁵ that "there existed elements which made it possible to determine with a reasonable degree of accuracy whether a given rule constituted *jus cogens*".

⁴⁸ Op. cit., footnote 25.

⁴⁹ Mr. Lachs and Mr. Tunkin, op. cit., footnote 23.

⁵⁰ Mr. Amado, op. cit. Footnote 23.

⁵¹ As the efforts to define aggression and, more recently, the current efforts in the Sixth Committee and its Special Committee to arrive at an agreed formulation of the principles of international law governing friendly relations and cooperation in accordance with the Charter of the United Nations, illustrate.

⁵² Op. cit., footnotes 31 and 32.

⁵³ See the statements of Mr. Yasseen and Mr. Barztoš, also shared by Mr. Waldock, on the effect of General Assembly resolution as expressing rules of *jus cogens* (op. cit., footnote 23).

⁵⁴ It is sometimes stated (e.g. Verdross, op. cit., footnote 1), that treaties encroaching upon the rights of third States are contrary to *jus cogens*. It appears the better view, now recognized also by Verdross, that this falls properly under the *pacta tertiis nec nocent nec prosunt* rule. While these treaties are illegal if the third State does not give its consent, in the ordinary case it would not be contrary to *jus cogens*.

⁵⁵ Op. cit., footnote (24).

State succession and its impact on the nationality of natural and legal persons and State succession in respect of membership of international organizations, by Mr. Vaclav Mikulka

INTRODUCTION: HISTORICAL REVIEW OF THE WORK OF THE COMMISSION ON THE TOPIC OF STATE SUCCESSION

1. At its first session in 1949, the Commission listed the topic "Succession of States and Governments" among the 14 topics selected for codification. The topic was later divided into three :

- (a) Succession in respect of treaties;
- (b) Succession in respect of rights and duties resulting from sources other than treaties; and

(c) Succession in respect of membership of international organizations.

2. Questions falling under the first heading, studied by the Commission from 1967 to 1974, were resolved by the adoption in 1978 of the Vienna Convention on Succession of States in respect of Treaties.

3. In view of its breadth and complexity, under the second heading the topic was narrowed down to the economic aspects of succession, namely to succession in

respect of State property, archives and debts. This was studied by the Commission from 1968 to 1981 and led to the adoption in 1983 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

4. A study of the third topic has never been undertaken by the Commission.

1. STATESUCCESSIONANDITSIMPACTONTHE NATIONALITY OF NATURAL AND LEGAL PERSONS

5. The problem of the nationality of natural and legal persons was part of the second heading of the topic of State succession as originally proposed by the Commission. Some preliminary comments on it were made in the Commission during the debate on the first report by the Special Rapporteur at the twentieth session of the Commission.¹ Nevertheless, nationality was not included among the issues coming under the narrowed heading.

(a) Nationality laws of successor States

6. According to the prevailing opinion, State succession does not result in an automatic change of nationality. It is the prerogative of a successor State to make its own determination as to whom it claims as its nationals, and to indicate how nationality is acquired.

7. In this connection, reference is made to the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, article 1 of which provides that:

It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

8. Also of relevance to this issue is the 1928 Code of Private International Law (Bustamante Code),² article 13 of which states:

In collective naturalizations, in case of the independence of a State, the law of the acquiring or new State shall apply, if it has established in the territory an effective sovereignty which has been recognized by the State trying the issue, and in the absence thereof that the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference.

Article 20 states that:

Change of nationality of corporations, foundations, associations and partnerships, except in cases of change of territorial sovereignty should be subject to the conditions required by their old law and the new.

In case of change in the territorial sovereignty, owing to independence, the rule established in Article 13 for collective naturalizations shall apply.

In addition, there are a number of publications relevant to this issue.³

¹ See *Yearbook* . . . 1968, vol. II, pp. 114-115, document A/CN.4/204, and document A/7209/Rev. 1, pp. 220-221, paras. 73 and 78.

² League of Nations, *Treaty Series*, vol. LXXXVI, p. 111.

³ See R. Graupner, *Nationality and State Succession, Transactions*, 1946; Hans Kelsen, "Théorie générale du droit international public", *Recueil des cours* . . . 1932-IV, vol. 42, pp. 314 and 325-327; Paul Weis, *Nationality and Statelessness in International Law*, 2nd ed. (Germantown, Md., Sijthoff-Noordhoff, 1979), p. 242; and Lucius Caflisch, "La nationalité des sociétés commerciales en droit international privée", *Annuaire suisse de droit international*, vol. XXIV (1967), p. 155.

9. The legislative competence of the successor State must be exercised within the limitations imposed by general international law as well as international treaties. These limitations have different characteristics and are derived from:

(a) The principle of effective nationality, according to which, for nationality to be acknowledged by other States, there must be a real and effective link, a genuine connection, between the State and the individual concerned;⁴ and

(b) The protection of human rights which makes questionable the techniques leading to the statelessness or any kind of discrimination. In this regard, mention should be made of article 15, paragraph 2, of the Universal Declaration of Human Rights, where it is stated that

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Mention should also be made of article 9 of the United Nations Convention on Reduction of Statelessness, prohibiting the deprivation of nationality on racial, ethnic, religious or political grounds.

(b) International treaties concerning nationality in cases of State succession

(i) Criteria for the *ipso facto* acquisition of nationality

10. There were many cases in which the problem of criteria and other conditions for the acquisition of nationality of a successor State was solved by an international treaty, mainly on the basis of the criterion of the domicile or habitual residence. Examples are to be found in articles 4 and 6 of the Versailles Treaty between the Allied and Associated Powers and Poland, and in some other treaties.⁵

(ii) The loss of the predecessor's nationality

11. The peace treaties following the First World War contained nationality provisions that were similar to the Versailles Treaty. At the same time, they provided for the recognition by the conquered States of a new nationality acquired *ipso facto* by their former nationals under the laws of the successor State and for the consequent loss of their allegiance to their country of origin.⁶

12. According to other instruments, the transfer of the territory does not necessarily result in the automatic acquisition of a new nationality and the loss of the original nationality. A case in point is article 4 of the Convention on Nationality. This position, defended by some authors, is rejected by others.⁷

⁴ See *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 22-23. See also the debates in the Commission on elimination and reduction of statelessness, *Yearbook* . . . 1953, vol. I, 212th, 213th, 217th and 220th meetings.

⁵ "Laws concerning nationality", United Nations, *Legislative Series* (ST/LEG/SER.B/4), pp. 590 et seq.

⁶ *Ibid.*, pp. 586-589.

⁷ See Eric Castren, "Aspects récents de la succession d'États", *Recueil des cours* . . . , 1951-I, vol. 78, p. 380 et seq., especially p. 487.

(iii) The right of option

13. The right of option was provided for in an important number of international treaties, including several of those mentioned above or in instruments related thereto. In exceptional cases, this right was granted for a considerable period of time during which the affected individuals enjoyed a kind of dual nationality. In this regard, see the Evian Declaration (Algeria-France) of 19 March 1962.

14. For the majority of authors the right of option can be deduced only from a treaty. Nevertheless, some authors tend to assert the existence of an independent right of option as an attribute of the principle of self-determination.⁸

(c) Problems arising in the recent State practice

15. After the Second World War, the practice of States which became independent while remaining within the British Commonwealth, was to base the automatic acquisition of nationality on the technique of combining the *jus soli* and *jus sanguinis* criteria, supplemented in a few instances by the residence criterion. For those affected by the automatic acquisition of nationality, no option was provided. This practice had the advantage of avoiding disputes over nationality by reducing the possibilities of dual nationality and, at the same time, minimizing the possibility of statelessness.

16. The French system of acquisition of nationality did not have the same effect. The new States drew largely on the techniques of the French 1945 *Code de la nationalité*, which did not always fit the situation of a newly independent State. Moreover, as each State chose to test for "genuine links" according to its own particular inclinations, various nationality laws overlapped or left lacunae, thus favouring dual nationality or statelessness.⁹

17. Dismemberment of the Soviet Union gives rise to a number of problems as far as the nationality laws of different new States are concerned. The refusal of certain republics which re-established their independence after 1990 to grant nationality to the ethnic Russian population settled there during several decades of large-scale population migration between different republics of the former Union has created uncertainty in the legal status of hundreds of thousands of individuals.¹⁰

18. The situation could be even worse in some new States born on former Yugoslav territory where the population is ethnically mixed, and the armed conflict is accompanied by "ethnic cleansing".

19. In Czechoslovakia, which is going through the process of dissolution, the problem could be easier due to the

⁸ See Joseph L. Kunz, "L'option de nationalité", *Recueil des cours* . . . , 1930-I, vol. 31, pp. 109 et seq. and "Nationality and option clauses in the Italian peace treaty of 1947", Editorial Comment, AJIL, vol. 41, No. 3, 1947, pp. 622 et seq.

⁹ See Karl Zemanek, "State Succession after decolonization", *Recueil des cours* . . . , 1965-III, vol. 116, pp. 181 et seq., especially pp. 272-277.

¹⁰ See George Ginsburgs, "From the 1990 law on the citizenship of the USSR to the citizenship laws of the successor republics (part 1)", *Review of Central and East European Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, vol. 18, No. 1 (1992), p. 1.

existence of separate Czech and Slovak citizenships since 1969, linking each Czechoslovak national to one of the two constituent republics, and thanks to a quite liberal policy allowing for change of citizenship together with change of the habitual residence.

20. The transition of Hong Kong from British to Chinese rule as of 1 July 1997 represents another problem concerning the status of the inhabitants.¹¹

21. The recent tendency to accentuate ethnic origin when determining the criterion for granting the new State's nationality to its inhabitants, and to ignore the importance of the domicile criterion, is an alarming sign. This approach not only favours statelessness, but in many respects is questionable on grounds of fundamental human rights standards.

(d) The principle of continuous nationality

22. The rule of the continuity of nationality is a part of the regime of diplomatic protection. According to this rule, it is necessary that from the time of the occurrence of the injury until the making of the award, the person on whose behalf the claim is made must uninterruptedly hold the nationality of the State bringing the claim forward. The essence of the rule is to prevent individuals from choosing a powerful protecting State by changing nationality.

23. No clear answer is provided either by practice or scholarship to the question of whether the rule has a place in cases of involuntary changes brought about by State succession. There are good reasons to believe that in the case of State succession the rule may be modified.

24. In this connection, reference is made to the *Barcelona Traction, Light and Power Company, Limited* case,¹² and to the *Panevezys-Saldutiskis Railway* case.¹³ Reference is also made to the *Pablo Najera* case, where it is stated:

*Dans le cas de changements collectifs de nationalité en vertu d'un titre de succession d'États, la situation juridique doit être appréciée d'une manière beaucoup moins rigide que ne le fait généralement la pratique arbitrale dans les hypothèses normales de changement individuel de nationalité par le fait volontaire de l'intéressé.*¹⁴

(e) The possible outcome of the work

25. The comprehensive examination of State practice should reveal whether a set of principles concerning

¹¹ See Roda Mushkat, "The transition from British to Chinese rule in Hong Kong: a discussion of the salient international legal issues", *Denver Journal of International Law and Policy*, vol. 14, No. 2 and 3 (1986), p. 171 and Christine Chua, "The Sino-British agreement and nationality: Hong Kong's future in the hands of the People's Republic of China", *UCLA Pacific Basin Law Journal*, vol. 8, No. 1 (1990), p. 163.

¹² *I.C.J. Reports 1970*, p. 3.

¹³ *P.C.I.J., Series A/B, No. 76*, p. 4. See also *Annuaire de l'Institut de droit international, 1931*, vol. 36, No. II, pp. 201-212, *ibid.*, vol. 37, pp. 479-529 and *ibid.*, vol. 51, No. II, p. 261; and Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international* (Paris, Presses universitaires de France, 1990), pp. 19-30 and 111-118.

¹⁴ United Nations, *Reports of International Arbitral Awards*, vol. V (Sales No. 1952.V.3), p. 488.

nationality in cases of State succession could be identified.

26. The clear statement of minimum standard criteria for *ex lege* acquisition of nationality could provide useful guidelines to legislators of new States that are in the process of drafting laws in the matter.

27. It could also facilitate the role of third States as far as the application of international treaties between them and a successor State is concerned. By virtue of the customary rules of international law, a large number of treaty rights and obligations are automatically binding on the successor State. The application of many such treaties directly concerns individuals, or more precisely nationals of the States parties. Sometimes there is a need for the application of these treaties even before the nationality law is adopted by the successor State. Thus a "preliminary" determination of the nationality of individuals or moral persons residing in the territory where the change of sovereignty occurred becomes the precondition for the continued application of the treaties in question.

28. The possible outcome of the work of the Commission on this subject could be a study in the form of a report or a draft declaration to be adopted by the General Assembly. The drafting of a convention, on the other hand, might face the risk of the same kind of problems the Commission faced during the work on the previous State succession topics (such as lengthy codification work, the problem of applying the convention to new States which are not parties to it, and the like).

2. STATE SUCCESSION IN RESPECT OF MEMBERSHIP OF INTERNATIONAL ORGANIZATIONS

29. The last of the three headings on the topic of State succession entitled "Succession in respect of membership of international organizations" has never been studied by the Commission. However, the secretariat did prepare a memorandum on the problem of succession of States in relation to membership in the United Nations and submitted it to the Commission in 1962.¹⁵ There were only a few significant cases at that time and the memorandum focused on the admission of Pakistan to the United Nations in 1947, the formation of the United Arab Republic in 1958, Syria's leaving that union in 1961 and the admission of Mali and Senegal in 1960.

30. The legal rules applicable to States coming into existence through division of a State Member of the United Nations were formulated by the Sixth Committee, during the second session of the General Assembly.¹⁶

31. Recently, there were several new cases of State succession in which the problem of membership in international organizations, or rather problems derived from the predecessor State's membership emerged. While in the case of the unification of Tanzania and Zanzibar, of Yemen or Germany, these problems went virtually un-

noticed by the international community, they were discussed in connection with the dismemberment of the Soviet Union and Yugoslavia. They are acute again as a result of the dissolution of Czechoslovakia.

32. The problem of the relationship between the States concerned and the international organizations in the case of State succession has several aspects:

(a) The membership of a successor State in an international organization;

(b) The impact of the territorial changes on the membership of a predecessor State in an international organization in cases where the predecessor continues to exist after the change;

(c) The division between successors, or the predecessor and successor(s), of the rights or obligations resulting from the predecessor State's membership in the organization;

(d) The status of the military and other observers, as well as national units of a predecessor State taking part in peacekeeping operations, etc.; and

(e) The validity of certificates, licences, etc., issued to the nationals of a predecessor State on the basis of its membership in the organization.

(a) *The membership of a successor State in an international organization*

33. The prevailing opinion is that membership of international organizations is a "personal" right to which, in principle, succession is not possible. According to this view, new States which emerge from territorial changes must acquire membership on their own behalf, if they so desire.

34. Nevertheless, there were considerable differences in the practice depending on the character of the territorial change. For example, unions formed from former member States automatically became members of those international organizations in which their component parts were members before the merger. The number of these cases, nonetheless, does not affirmatively establish whether the membership of all component parts or just one of them is required.

35. International organizations with less rigid membership requirements, like the Universal Postal Union in Bern, the Paris Union or the Hague Conference on Private International Law, do permit succession even in cases where States are born from the dissolution of a former member State or through secession. For pragmatic reasons, succession in respect of membership in the United Nations was permitted after the dissolution of the United Arab Republic.¹⁷

¹⁷ See *Yearbook . . . 1962* (see footnote 15 above); Zemanek, *loc. cit.*, pp. 244-252; and the note by the Permanent Bureau of the Hague Conference on Private International Law, doc. L.C.A. No. 38 (92) of 23 September 1992, which states, *inter alia*:

" . . . the Republic of Slovenia having participated in prior sessions both within the framework of the Serbo-Croat-Slovene State (Fifth and Sixth sessions) and as part of the Socialist Federal Republic of Yugoslavia, a country which was itself admitted as a successor

(Continued on next page)

¹⁵ *Yearbook . . . 1962*, vol. II, p. 101, document A/CN.4/149 and Add. 1.

¹⁶ *Ibid.*, see also *Official Records of the General Assembly, Second Session, First Committee*, document A/C.1/212, annex 14 (g), pp. 582-583.

36. Some international organizations provided for the membership or associate membership of former dependencies possessing international personality. As the personality of the new State was identical with that of the former dependency, the former membership or associate membership remained unaffected. Although there was no automatic upgrading to full membership, the organizations concerned nevertheless worked out pragmatic solutions for a smooth transition in order to avoid an automatic lapse of associate membership upon accession to independence.¹⁸

(b) *The impact of the territorial changes on the membership of a predecessor State*

37. The member State from which the new State has seceded or the member State which is joined by another State or territory retains its membership by virtue of the identity of its legal personality, although the rights and obligations deriving from its membership may change.

38. Several questions connected with it, however, remain unanswered. They concern:

(a) The criteria for determining the identity of the legal personality of the member State, i.e. the status of the predecessor State;

(b) The possibility for the organization to deny, under certain conditions, the predecessor State's right automatically to continue its membership in the organization itself or in its subsidiary bodies with full representation;

(c) The legal effects of an agreement between the predecessor State and successor State or States concerning the continuation of membership in international organizations;

(d) The obligation of the predecessor State to issue new credentials to its representatives in the organization (see, for example, the case of India's membership in the United Nations after the secession of Pakistan); and

(e) The right of the predecessor State to maintain a special status within the organization (see, for example, the seat for the Russian Federation in the Security Council), etc.

39. In this connection, reference is made to a number of United Nations documents.¹⁹

(Footnote 17 continued)

member of the Conference to the Serbo-Croat-Slovene State... falls within the coverage of the first paragraph of Article 2 of the Statute... Nonetheless, it is possible that some States Members of the Conference do not automatically share this point of view and think that Slovenia falls within the framework of Article 2, paragraph 2, and thus ought to be subject to the procedure for admission..."

¹⁸ See resolution WHA14.45, World Health Organization, Fourteenth World Health Assembly, *Official Records*, New Delhi, 7-24 February 1961, No. 110, Part I, p. 19 and Food and Agriculture (FAO) Report of the 10th Session of the Conference, 31 October-20 November 1959 (FAO C59/Report), pp. 266-268.

¹⁹ See General Assembly resolution 47/1 concerning the membership of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations and its participation in the work of the General Assembly, and the letter of the Legal Counsel of the United Nations, dated 29 September 1992, concerning this issue (*Official Records of the General Assembly, Forty-seventh Session, Annexes*, agenda item 8, document A/47/485).

(c) *The division between successors or the predecessor and successor States of the rights and obligations resulting from the predecessor's membership in the organization*

40. The rights and obligations resulting from membership in the organization have, in principle, a "personal" character which lapses with the membership itself (or remains entirely with the predecessor State which continues to be a member State of the organization), as for example the right to participate in meetings, to vote, and so on. Nevertheless, some rights and obligations deriving from the predecessor State's membership are different in nature and, in principle, could be shared by the successor States or the predecessor and successor States. While this sharing of the rights and obligations can be envisaged in a situation where successor States join the organization as new members, it cannot be expected where the successor States decide not to join.

41. The following are examples of such rights or obligations:

(a) The arrears of the predecessor's contributions to the organization's budget or to other funds;

(b) The contributions by the predecessor to the funds of the organization in the form of credits or advances (e.g. United Nations Working Capital Fund) or non-reversible deposits (e.g. the entry fee under art. XXVIII of the Convention establishing an International Organization of Legal Metrology (1955));

(c) Shares in the property of the organization; and

(d) Projects in progress where the predecessor State is a beneficiary of or contributor to the project.

(d) *The status of military units and military or other observers taking part in peacekeeping operations, etc.*

42. The interaction between international organizations and their member States is becoming more all-embracing and includes various types of involvement by the member States in activities undertaken by the organization. An unexpected termination of the membership status resulting from State succession on the part of a State providing personnel for an observer or other mission or a unit for a peacekeeping operation may give rise to problems concerning:

(a) The admissibility of the continued participation of the personnel (unit) in the mission (operation); and

(b) The responsibility for the command and financing of the unit.

See also Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan of 6 August 1947, document A/C.6/161, *Official Records of the General Assembly, Second Session, Sixth Committee*, Annex 6c, pp. 308-310; or Alma Ata Declaration of 21 December 1991 between 11 republics of the former Soviet Union concerning the continuation of the membership of the Russian Federation in the international organizations in which the Soviet Union was previously a member (A/47/60-S/23329, annex II); and the United Nations Press Release PM/473, 12 August 1974, concerning the submission of new credentials of the representative of India in the Security Council and the Economic and Social Council: *Yearbook*... 1962, p. 102 (see footnote 15 above).

(e) *The validity of certificates, licences, etc., issued or required by the international organizations*

43. There are different categories of certificates, licences and other documents issued or required by the specialized agencies or other international organizations in respect of nationals of their member States participating in specific activities, such as civil aviation, maritime navigation, and so forth. The validity of these documents vis-à-vis third States depends on the membership of the State in the international organization. There is a need to find pragmatic solutions which could reduce the negative impact of even a short interruption of the State's membership in the international organization on account of State succession.

3. POSSIBLE OUTCOME OF THE WORK

44. The analysis by the Commission of the practice of international organizations concerning the consequences

of State succession on the relationship between those organizations and the States concerned could lead to the drafting of a report containing general outlines of solutions to various categories of problems which in many respects are common to a large number of organizations.

45. Such a report could per se have a unifying effect on the practice of international organizations. It could contain some recommendations which international organizations could take into account not only when drafting or amending their respective instruments or rules and regulations but also when seeking to solve any specific case.

46. This matter is not appropriate for codification in the form of a universal convention. Harmonization efforts are limited by the specific characteristics of each international organization as reflected in its constitution, other basic instrument or in its rules and regulations.

The law concerning international migrations, by Mr. Guillaume Pambou-Tchivounda

1. The subject of migration would at first glance seem to obey a logic that excludes law. Migration is inherent in the life of species (plant, animal, human); it is their "natural" means of survival, whatever the kingdom to which they belong.

2. Between migration and law, there is as it were a relationship of precedence, of chronology, which marks the assertion of the former as a specific phenomenon before the potential, and therefore subsequent, application of the latter to it becomes possible. The mutual exclusiveness of the two is thereby rendered less absolute. Migration, particularly human migration, whether it takes place within or beyond the natural confines of States, is a social phenomenon. It therefore falls within the operational scope of the law. The propensity of the legal phenomenon to subsume the migratory phenomenon thus appears as natural as the latter's vitality, which constantly impels it to free itself from the domain of law.

3. The pairing is as old as the hills. The oldest international treaty, concluded between the Pharaoh Ramses II and the King of the Hittites—the text of which is still graven on the walls of Karnak in Thebes—shows that 4,000 years ago, migratory movements were already governed by international agreements, that the conditions to which migrant workers were subject, in time of peace as in time of war, were the subject of regulation. The topic of population migration between sovereign, independent communities and its relationship with the law is a truly ancient one.

4. The contemporary age has in no way changed the structure of these relationships. Yesterday, international migration involved the political and legal orders of sovereign communities. Today it involves the order of the State and, as a corollary, that of those entities that owe their existence to the will of States.

5. The competence *ratione personae* of the State is exercised every time that, owing to a (chance) incident, the applicable rule has to be determined: that of the State of origin, of the State of transit, or of the receiving State. International migration law thus has its historical setting: it is first strongly national in content before assuming an international dimension, particularly through its application in litigation or concerted approaches to its formulation. The periods of freedom or restriction of international migration that have punctuated the development of law-making on the subject from the sixteenth century to our own time illustrate the important place occupied by States, in that those who choose, or are compelled, to "migrate" are, at the outset, nationals of a State. They will fall within the competence *ratione personae* of the receiving State, sometimes by passing in transit through the territory of a third State.

6. Only very recently has international law, particularly treaty law, come to include the regulatory framework for international migration.

7. There are many factors which have influenced this outcome. Everywhere, the State has progressively established itself as the exclusive framework for determining the identity of populations without, however, managing to keep them firmly settled. The technological revolution, through the development of means of mass transport (by air, land and sea), has brought men once separated from each other by great distances increasingly closer together. State poverty, the product of unequal development on the planetary scale, has compelled many individuals from the southern hemisphere to emigrate to the North in the hope of finding their happiness there. In terms of the initial motivation, there is no real difference between such South-North migration in search of a better life and the mass migrations from Europe to the New World and Australasia in the nineteenth century. State violence will impel sizeable population masses out through loopholes

the length of the boundary walls. The survival of the species points up the element of fiction in all State power: it explains the universal dimension the refugee phenomenon has acquired today. The advent of first-generation international organizations has contributed to the production of a body of norms, based on humanitarian concerns (for refugees from Europe) and social concerns (by laying the foundations for the legal status of migrant workers), which international resettlement organizations, wherever they may have been established (Europe, Africa, the Americas), will perfect and develop.

8. The legal framework for international migration therefore exists, but the geopolitics of migrations do not have the appearance of a completed construct.

9. The framework lacks conceptual homogeneity with regard to its subject matter. The term "migration" does not appear once in the Charter of the United Nations, though it was adopted well after international migrations had begun to occur and the practice of the law on the subject was sufficiently established. Before the nineteenth century, there was no universally recognized international definition of the term "migrant". After the First World War it was to national legislation that the International Labour Office had to turn to in order to extract a definition of immigration and emigration. The migratory phenomenon as a whole cannot be considered without reference to a recommendation of the 1922 International Labour Conference which covers the phenomena of emigration, immigration, repatriation, and the transit of emigrants upon leaving and returning.

10. However, international migration law does not offer a general concept of the phenomenon to which it applies. Its scope of application is fragmented. It involves spontaneous migration, legally organized or authorized migration, forced or imposed migration, political migration, economic migration, seasonal migration, annual or multi-annual migration, continental migration and transoceanic migration.

11. Moreover, the disputed issue of whether migration problems are a domestic or an international concern has not been resolved. Undeniably, some of them involve countries of emigration only (nationality, passport, health), while others involve countries of immigration only (entry, exit, naturalization of migrants): these are domestic concerns. There are, however, questions that are international in scope, such as transit and transmigration; applicability of national legislation in foreign territory; problems specific to citizens already living in foreign territory as refugees, or who have been expelled or are stateless; and aliens working outside their countries but usually intending to return.

12. This fragmentation of the issue of international migrations necessarily calls for an overhaul of the applicable regime from a unified, global perspective. From the standpoint of how it would be enacted, this regime needs to be harmonized. International coordination structures would guarantee its effective implementation.

13. Treaties, general principles, relevant national legislation or court decisions concerning international migration law have been compiled in two volumes by Richard

Plender.¹ The second volume, which expands on the first, not only catalogues national and international jurisprudence, but also legislation of States, and treaties and other international instruments from 1793 to 1986. These two works form a basic reference to this topic.

14. Since the reprinting of these two volumes, a number of national or international texts have appeared:

(a) *Treaties*

Franco-Spanish agreement of 8 January 1988 concerning clandestine immigration;

Agreement between the Government of the Kingdom of Spain and the Government of the French Republic concerning admission of illegal aliens at border posts;

Convention on the determination of the State responsible for reviewing an application for exile presented in one of the States members of the European Community, signed in Dublin on 15 June 1990;

Convention implementing the Schengen Agreement of 4 June 1985 concerning the gradual elimination of common border controls, signed on 19 June 1990;

Treaty on European Union (Maastricht Treaty), signed on 7 February 1992.

(b) *National legislation*

United States Immigration Act of 6 November 1986 (entered into force on 5 May 1987);²

"Measures" aimed at limiting the number of asylum-seekers in the Federal Republic of Germany adopted by the (West German) Parliament on 13 November 1986;³

Italian law of 27 January 1987 fixing the "norms regarding placement and treatment of workers who are not from a member State of the Community and against clandestine immigration".

(c) *Court decisions*

Constitutional Council (France) decision of 25 June 1991 concerning the law authorizing the adoption of the convention implementing the Schengen Agreement;

Court of Justice of the European Communities, 9 July 1987 (joint cases 281/85, 283-285/85 and 287/85).

(d) *Miscellaneous*

Report of the Committee on Legal Affairs of the European Parliament, adopted on 23 February

¹ *Basic Documents on International Migration Law and International Migration Law, Second edition*, Richard Plender, ed., Dordrecht, Martinus Nijhoff Publishers, 1988.

² *United States Statutes at Large*, vol. 100, 1986, Part 4, Law No. 99-603, p. 3359.

³ See *Verhandlungen des Deutschen Bundestages*, vol. 140, summary records of Bundestag meetings for the period from 12 November to 11 December 1986.

1987, on the limitations to be imposed on the exercise of the right of asylum.

15. A body of literature exists on this topic.⁴

16. Whether it culminates in a study, a report or a draft convention, the inclusion of the item "International

⁴ (a) *Books*: Pierre Georges, *Les migrations internationales* (Paris, Presses Universitaires de France, 1976); Guy S. Goodwin-Gill, *International Law and the Movements of Persons between States* (Oxford, Clarendon Press, 1978); and Richard Plender (see footnote 1 above).

(b) *Studies*: Jorge Balán, *Las migraciones internacionales en el Cono Sur* (Geneva, CIM, 1985); Ramiro Cardona, *Migraciones internacionales de los países del Pacto Andino* (Geneva, CIM, 1985); Suzy Castor, *Migración y relaciones internacionales (El caso Haitiano-Dominicano)*, Santo Domingo, Universidad Autónoma de Santo Domingo, vol. DXXII, 1987; Nicole Catala, *Communauté économique européenne, juriste droit international* (1990), Fasc. 611, Nos. 9 to 12; Julien Condé, *Les migrations internationales Sud-Nord* (Paris, OECD, 1986), vols. 1 and 2, and *Les migrations africaines dans la Communauté européenne* (Paris, OECD, 1992); Raymond Sarraute, "Réfugié", *Répertoire de droit international: Encyclopédie Juridique*, vol. II, p. 728; Eberhard Jahn, "Intergovernmental Committee for Migration", *Encyclopedia of Public International Law*, vol. 5, 1983, p. 41; and "Migration Movements", *ibid.*, vol. 8 (1985), p. 377.

(c) *Courses*: Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", *Recueil des cours... 1927-III*, vol. 18, p. 442; Stélio Sefériadès, "L'échange des populations", *Recueil des cours... 1928-IV*, vol. 24, p. 307; and Louis Varlez, "Les migrations internationales et leur réglementation", *Recueil des cours... 1927-V*, vol. 20, p. 165.

(d) *Collections*: Migrazoni, *Affari sociali internazionali*, Milan, 19th year, Nos. 1 and 4, 1991; "XII^e congrès de l'Institut international de droit d'expression française sur les mouvements de population", *Revue juridique et politique, indépendance et coopération*, 34th year, No. 1, January-March 1980; "Movimenti migratori: un problema globale", *Plitica internazionale*, 19th year, No. 5, September-October 1991; "La Migration", *Revue internationale des sciences sociales*, UNESCO, vol. XXXVI, No. 3, 1985; "Les migrations internationales au Moyen-Orient", *Revue tiers-monde*, vol. XXVI, No. 104, October-December 1985; and "Les travailleurs étrangers et le droit international", *Société française pour le droit international*, Paris, Pedone, 1979.

(e) *Articles*: A. A. Afolayan, "Immigration and Expulsion of ECOWAS Aliens in Nigeria", *International Migration Review* (New York), vol. 22, No. 1, 1988, p. 4; Reginald Appleyard, "Migration and Development: Myths and Reality", *ibid.*, vol. 23, No. 3, 1989, p. 486; Hans Arnold, "The 'century of refugees'—A European century?", *Aussenpolitik* (Hamburg), vol. 42, No. 3 (1991), p. 271; Maurice Bertrand, "Menaces: entre l'imaginaire et le réel", *Le trimestre du monde* (Paris), No. 1 (1991), p. 93; V. Dovonon, "L'OIT, l'ONU et les migrations: Coopération ou conflit de compétence?", *Revue de droit international et de droit comparé*, Brussels, vol. 66, No. 1 (1989), p. 24; Dennis Gallagher, "The evolution of the international refugee system", *International Migration Review*, vol. 23, No. 3, p. 579; Jean-Pierre Gomané, "La palette des périls", *Défense nationale* (Paris), vol. 43 (1987), p. 77; Jean-Pierre Hocké, "Réfugiés et migration: de la dérive européenne à l'urgence d'une action en accord avec les valeurs proclamées", *Cadmos* (Paris), 13th year, No. 50, 1990, p. 88; Rainer Hofmann, "Refugee law in Africa", *Law and State* (Tubingen), vol. 39 (1989), p. 79; Charles Leben, "La circulation internationale des personnes et le droit international", *Annales de la faculté de droit et de sciences politique de Clermont-Ferrand* (Paris), vol. 15, No. 1, 1978, p. 629; Donatella Luca, "La notion de 'solution' au problème des réfugiés", *Revue de droit international, de sciences diplomatiques et politiques* (Geneva), vol. 65, No. 1, 1987, p. 1; David A. Martin, "Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy", *International Migration Review*, vol. 23, No. 3, 1989, p. 547; Richard Perruchoud, "L'Organisation internationale pour les migrations", *Annuaire française de droit international*, vol. XXXIII (1987), p. 513; Gérard Prunier, "La communauté indienne d'Ouganda, des origines à l'expulsion", *Le mois en Afrique* (Paris), 16th year, 1981, p. 61; Larbi Talha, "La migration des travailleurs entre le Maghreb et l'Europe", *Revue française d'études méditerranéennes*, 1975, p. 65; and Lovemore M. Zinyama, "International migrations to and from Zimbabwe and the influence of political

migration law" in the Commission's programme of work should not meet with any major objection. The Commission's task of submitting specific studies or reports to the General Assembly is, however, not as well known to the public—even the specialized public—as its task of drafting conventions.

17. There is nevertheless one misunderstanding that needs to be cleared up. Regardless of any formal particularities it may have, the work of the Commission is always the end-product of lengthy studies. The method of work is one thing; its principle is immutable. The nature of the final results, which is determined by the interest the subject matter generates at a given moment and therefore by a decision of the Commission itself, is another matter entirely.

18. Reports and draft articles are not two unrelated species. There are topics and subtopics on which the Commission has submitted final reports. Others, by contrast, have gone beyond that stage to attain the status of draft articles. Without necessarily pursuing the same objective (to inform and codify), a draft convention cannot be prepared within the framework of the Commission without a report, and, in that context, special rapporteurs work for an extended period, over the long term, unlike rapporteurs whose mandate is limited in time. From this standpoint, this "outline" or "summary" on the topic of international migration law belongs very much in the report genre, which clearly distinguishes it from that of the draft convention.

19. Lastly, regardless of their purpose (and because of it), the formal structure of these two genres is not the same. Any type of report may be written on international migration law, but not just any draft convention.

20. There might be hesitation in embarking on the preparation of draft articles on international migration law, considering that it is a topic governed by international law on which, therefore, specific regulations already exist: there would be no need for progressive development or codification.

21. Yet, there is no general legal concept of international migration. The development of the topic of international migration has taken place somewhere between international humanitarian law and international social law. The implementation of the rules defined by these two disciplines has remained narrowly subordinate to the authority of various national policies, unilaterally defined by States in the light of their own approach to the migration phenomenon, even when they claim to accept the primacy of international law because they belong to resettlement organizations. These are generally closed-door policies which affect the rights of other States and individuals; rights for general protection mechanisms need to be defined. A concept of international migration that would win the support of States and international organizations

changes on population movements, 1965-1987", *International Migration Review*, vol. 24, No. 4, 1990, p. 748.

(f) *Reports*: "Trends and Characteristics of International Migration since 1950", *Demographic Studies No. 64* (United Nations publication, Sales No. E.78.XIII.5) (ST/ESA/SER.A/64); and United Nations, "Conclusions on the International Protection of Refugees", Geneva, 1991.

seems to be a prerequisite for designing such mechanisms and ensuring their effectiveness.

22. The formulation of a general concept implies the drafting of a general convention on the principles and rules applicable to international population movements. The result would be to lessen the monopoly of the High Commissioner for Refugees in this area. The association of non-governmental organizations such as the ICRC and the IOM with this undertaking would not only enhance their role as the principal interlocutors of States, but would also give added impetus to their institutionalization. The effect of the legal and institutional fragmentation of international migration law would thereby be diminished, as the objective of the convention would be to replace that law by a regime with a more unifying effect established in the light of current trends in international migratory movements. The need to adapt the traditional rules to new kinds of problems should therefore determine the overall thrust of United Nations policy designed to win States' acceptance of a common regime of rules applicable to population movements.

23. The replacement of the concept of "migration" by that of population movements arises from a concern to grasp the reality of the phenomenon in all its diversity. The phenomenon has changed. How can the laws applicable to it be allowed to lag behind the movement itself? A general draft convention on the law applicable to international population movements would therefore be in keeping with this need to update, which responds to three sets of interests: those of States, those of individuals and those of the international community.

24. The advent of a new world order of international migrations would find in the emerging new global order a

reference point going well beyond traditional idealism or abstraction. Direct, but orderly, experimentation must accompany and sustain the worldwide conversion to democratic ideology, which delegitimizes what may appear to be the illegality of the right of intervention. It is this same spirit of solidarity, raised to the level of a principle, that, serving as justification for the intervention of one Government or State in the domestic affairs of another, would also justify the migration of a given segment of the population from one country to another without fear of not being admitted if only for a short time. The role of the law would then be to prevent arbitrary exclusions and provide legislative protection for transit corridors, residence and—why not?—arrival. It would be seen that prevention rhymes with protection, the protection advocated by the literature (Bertrand, Hocké, Perruchoud) for migratory movements, which is, after all, the whole objective.

25. But to be realistic, a legal policy for international migration must be effectively supervised; control mechanisms must therefore be established. This is a necessity that stems from (or is linked to) the need to define institutional channels for managing migratory movements, from channels of assistance or financing to channels for settlement, reintegration or return. Restructuring the role of States (rights and obligations), involving existing regional organizations (for advisory services and assistance), identifying the partners participating in the implementation of programmes to oversee migratory movements, particularly at the international level: a whole system of assigning and coordinating the missions and roles that would complement the preventive machinery, according to an integrated concept, in the same legal instrument.

The law and practice relating to reservations to treaties, by Mr. Alain Pellet

1. The proposal to include in the long-term programme of work of the Commission the topic "The legal effects to be given to reservations and objections to reservations to multilateral conventions" was made at the forty-sixth session of the General Assembly, during the consideration by the Sixth Committee of the report of the Commission.¹ It was taken up by the Working Group on the long-term programme of work established by the Planning Group, which placed the topic "The law and practice relating to reservations to treaties" on the short list of topics which could be appropriate for study by the Commission.²

2. The Working Group had indicated that this topic "could be appropriate for a speedy incorporation into the Commission's agenda and might form the subject of an instrument of codification". The Planning Group, "while not disagreeing with that conclusion, decided not to make any recommendation at [that] stage and to revert to the

matter after the prospects offered by other topics [had] been assessed".³

1. PREVIOUS WORK BY THE COMMISSION

3. On several occasions, the Commission was called upon to consider the question of reservations to treaties. It first did so during the preparation of the draft articles on the Law of Treaties, which would become the source for the Vienna Convention on the Law of Treaties, articles 19 to 23 of which are devoted to reservations.⁴

³ *Ibid.*, para. 23.

⁴ See, especially, *Yearbook . . . 1951*, vol. II, pp. 1 to 17, document A/CN.4/41, report by Mr. James L. Brierly; *Yearbook . . . 1953*, pp. 90 to 162, document A/CN.4/63, report by Mr. H. Lauterpacht; *Yearbook . . . 1962*, vol. II, p. 31, document A/CN.4/144, first report by Sir Humphrey Waldock, especially pp. 59-69, articles 17-19 of the draft articles on the law of treaties and relevant commentary and pp. 73-80 and appendix ("Historical summary of the question of reservations to multilateral conventions"); *Yearbook . . . 1965*, vol. II, p. 1, document A/CN.4/177 and Add. 1 and 2 (fourth report by Sir Humphrey Waldock), especially pp. 15-16 (para. 1 (f): "Reservations") and 45-56 (chap. III); *ibid.*, pp. 79 to 114, document A/5687, report of the

¹ See topical summary by the Secretariat of the debates in the Sixth Committee of the General Assembly at its forty-sixth session (A/CN.4/L.469), para. 422.

² Report of the Planning Group (A/CN.4/L.473/Rev. 1), para. 21.

4. After some hesitation, the text of these articles was reproduced, virtually word for word and with the same numbering, by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.⁵

5. The question of reservations is also the subject of article 20 of the Vienna Convention on Succession of States in Respect of Treaties.⁶

2. THE MAIN PROBLEMS RAISED BY THE TOPIC THROUGH PRACTICE AND DOCTRINE

6. As Mr. Lauterpacht noted in his first report on the law of treaties:

the subject of reservations to multilateral treaties is one of unusual—in fact baffling—complexity and it would serve no useful purpose to simplify artificially an inherently complex problem.⁷

7. Articles 19 to 23 of the Vienna Convention on the Law of Treaties, which

are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the regime of multilateral conventions,

could rightly be commended.⁸

8. Nevertheless, as the Commission noted, following Reuter,

[e]ven in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the [1969] Vienna Convention may not have eliminated all these difficulties.

9. In general, authors share this view, and emphasize that the three relevant Vienna Conventions (see para-

graphs 3 to 5 above) have allowed major uncertainties to persist with regard to the legal regime applicable to reservations. Moreover, such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations.

10. The very abundance of literature devoted to reservations to treaties testifies to the fact that doctrine is consistently confusing with regard to problems which are highly technical and extremely complex, but of exceptional practical importance. As José Maria Ruda emphasized:

The question of reservations to multilateral treaties has been one of the most controversial subjects in contemporary international law.¹⁰

11. There is hardly any need to recall, in this connection, the abundance of articles devoted to reservations in works dealing with the law of treaties as a whole, and even in treaties and manuals on general international law.¹¹ To

¹⁰ "Reservations to Treaties", *Recueil des cours... 1975-III*, vol. 146, p. 95.

¹¹ See, especially, and only as examples of some of the standard works on the law of treaties: Suzanne Bastid, *Les traités dans la vie internationale*, Paris, Economica, 1985, pp. 71-77; Taslim O. Elias, *The Modern Law of Treaties*, Leiden, A. W. Sijthoff, 1974, pp. 27-36; Lord McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp. 158-177; Paul Reuter, *Introduction to the Law of Treaties*, London and New York, Pinter Publishers, 1989; and Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester, England, Manchester University Press, 1973, pp. 40-50 (second edition, 1984, cited above).

Since the adoption of the 1969 Vienna Convention on the Law of Treaties, new, well-researched and thorough works have been added to the classic monographs dealing with reservations. Among the studies published prior to 1969, see, especially: D. R. Anderson, "Reservations to Multilateral Conventions: A Re-examination", *The International and Comparative Law Quarterly* (London), vol. 13 (1964), p. 450; William W. Bishop, Jr., "Reservations to Treaties", *Recueil des cours...*, vol. 103 (1961-II), p. 245; Gerald Fitzmaurice, "Reservations to multilateral conventions", *The International and Comparative Law Quarterly*, vol. 2 (1953), p. 1; Kaye Holloway, *Les réserves dans les traités internationaux* (Paris, Librairie Générale de Droit et de Jurisprudence, 1958); Dietrich Kappeler, *Les réserves dans les traités internationaux*, Basel, Verlag für Recht und Gesellschaft, 1958; H. W. Malkin, "Reservations to multilateral conventions", *BYBIL*, vol. VII (1926), p. 141; Luis A. Podesta Costa, "Les réserves dans les traités internationaux", *Revue de droit international*, 1938, No. 1, pp. 1-52; Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties: Comments on articles 16 and 17 of the ILC's 1966 draft articles on the law of treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 463; and Edoardo Vitta, *Le riserve nei trattati* (Turin, G. Giappichelli, 1957).

Among the monographs published following the adoption of the 1969 Vienna Convention, see especially: Derek W. Bowett, "Reservations to non-restricted multilateral treaties", *BYBIL*, vol. XLVIII (1976-1977), p. 67; Mohammed Ahsen Chaudri, "Reservations to Multilateral Treaties", *De Lege Pactorum: Essays in Honor of Robert Renbert Wilson*, Durham, North Carolina, Duke University Press, 1970, p. 40; Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, vol. 10, No. 2 (1989), p. 362; John K. Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", *AJIL*, vol. 74, No. 1, 1980, p. 372; V. F. Gubin, "Reservations in International Law" (in Russian), *Pravovedenie*, No. 5 (1972), p. 84; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (Amsterdam, North-Holland Publishing Company, 1988); Imbert, op. cit. (see footnote 4 above); Jean K. Koh, "Reservations to multilateral treaties: How international legal doctrine reflects world vision", *Harvard International Law Journal*, vol. 23, No. 1, 1982, p. 71; Rolf Kühner, *Vorbehalte zu multilateralen Völkerrechtlichen Verträgen*, Berlin, Springer-Verlag, 1986; Rafael Nieto Navia, "Las reservas a los tratados multilaterales en la Convención de Viena de 1969", *Rev. Universitas* (Bogotá), June 1974, pp. 283; Joseph Nisot, "Les réserves aux traités et la Convention de Vienne du 23 mai

(Continued on next page)

Secretary-General on depositary practice in relation to reservations; and *Yearbook... 1966*, vol. II, p. 183, document A/6309/Rev.1, report of the Commission on the work of the second part of the seventeenth session, especially p. 204, para. 11 of the commentary on article 2 (former article 1) and pp. 218-226 (section 2: Reservations to multilateral treaties).

For a fuller listing of relevant works, see "Guide to the draft articles on the law of Treaties adopted by the International Law Commission at its eighteenth session (1966)", (A/C.6/376), pp. 72-80; Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, pp. 489-492; and Shabtai Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention*, Leiden, A. W. Sijthoff, 1970, pp. 182-187.

⁵ See especially, *Yearbook... 1975*, vol. II, Fourth Report by Mr. Paul Reuter, pp. 35-39; *Yearbook... 1977*, vol. II (Part Two), Report of the Commission to the General Assembly, pp. 105-116; *Yearbook... 1981*, vol. II (Part One), Tenth Report by Mr. Paul Reuter, pp. 55-64; *ibid.*, vol. II (Part Two), Report of the Commission to the General Assembly, pp. 135-140; and *Yearbook... 1982*, vol. II (Part Two), Report of the Commission to the General Assembly, pp. 32-37.

⁶ See, especially, *Yearbook... 1970*, vol. II, p. 27, document A/CN.4/224 and Add. 1, the third report by Sir Humphrey Waldock, especially pp. 46-52; *Yearbook... 1972*, vol. II, Report of the Commission to the General Assembly, pp. 260-265; *Yearbook... 1974*, vol. II (Part One), first report of Sir Francis Vallat, especially pp. 50-55; and *ibid.*, Report of the Commission to the General Assembly, pp. 222-227.

⁷ *Yearbook... 1953*, vol. II, p. 90, A/CN.4/63, especially p. 124.

⁸ Fourth Report by Mr. Paul Reuter on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook... 1975*, vol. II, p. 36.

⁹ *Yearbook... 1982*, vol. II (Part Two), p. 32, para. (1) of the commentary on section 2.

this already long, and yet quite incomplete list, should be added the large number of monographs devoted to the study of national practice in the area of reservations, to reservations to a particular convention or a particular type of treaty, or to some specific issues. Some of these works will be mentioned below.

12. Within the necessarily limited framework of this submission, it would be impossible to provide an exhaustive overview of the issues raised by the legal regime applicable to reservations. Almost all that can be done is to make an incomplete list of them, starting necessarily, with the Vienna Conventions of 1978, 1986 and, especially, 1969.¹²

13. For purposes of convenience—but in a somewhat artificial manner—the issues relating to: (a) the very existence of these conventions; (b) their ambiguities; and (c) their lacunae will be dealt with successively.

(a) *Problems raised by the inclusion of provisions regarding reservations in the Vienna Conventions on the Law of Treaties*

14. With the passage of time, the issue of whether the rules regarding reservations laid down in the 1969 Convention are an aspect of codification or of progressive development has become largely obsolete. On the other hand, there is no question that articles 19 to 23 broke new ground—at times considerably in the view of some—particularly by instituting an actual “presumption in favour of reservations.”¹³ But, on the other hand, in so doing these provisions have consolidated or “crystallized” earlier trends that were well under way.¹⁴

However, in the 20 years [and more] that have elapsed since the Vienna Convention was opened for signature, the rules regarding reservations stated in that Treaty have come to be seen as basically wise and to have introduced desirable certainty.¹⁵

Such consolidation—a partial one (see sections 16 and 17 above)—was prompted by several factors, especially:

(a) The rules reflected the conditions of international society at the time they were adopted;

(b) They were part of a general tendency to make multilateral conventions more flexible and more open;

(c) They were, moreover, adopted almost unanimously at the Vienna Conference;

(Footnote 11 continued)

1969”, RGDIP, vol. 77, 1973, No. 1, p. 200; Ernesto J. Rey Caro, “Las reservas de la Convención de Viena de 1969 sobre el derecho de los tratados”, *Revista de derecho internacional y ciencias diplomáticas* (Rosario) (1972), p. 168; Ruda, loc. cit. (footnote 10 above); and Renata Szafarz, “Reservations to Multilateral Treaties”, *Polish Yearbook of International Law*, vol. 2, 1970, p. 239.

¹² See Karl Zemanek, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, *Études de droit international en l’honneur du Juge Manfred Lachs*, The Hague, Martinus Nijhoff Publishers, 1984, p. 323.

¹³ Imbert, op. cit. (see footnote 4 above), p. 87; see especially article 20, para. 5, and art. 21, para. 3.

¹⁴ See, for example, R. R. Baxter, “Treaties and custom”, *Recueil des cours . . . 1970-I*, vol. 129, p. 48.

¹⁵ Edwards, Jr., loc. cit. (see footnote 11 above), p. 365.

(d) And included again in the 1986 Convention.

15. These considerations have led States to respect these provisions in the main, whether or not they ratified the Convention,¹⁶ and even if, like France, they did not sign it, they have led international courts and arbitrators to perceive in the provisions the expression of customary rules. In this connection, reference is made to the decision of the Franco-British Court of Arbitration of 30 June 1977 in the case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (hereinafter referred to as the *Mer d'Iroise* case).¹⁷

16. This conclusion can, however, be maintained only with certain reservations:

(a) The formulations of the courts are not without some ambiguity:

(i) In the *Mer d'Iroise* case, the Court of Arbitration refers to the definition of a reservation in art. 2, paragraph 1 (d), of the 1969 Vienna Convention, pointing out that it is accepted by both parties (paragraph 55 of the decision), and seems rather to be making a correlation between the rules of general international law and those laid down in article 21, paragraph 3, of the Convention than to be taking a general position on the value of the Convention as codification (see paragraph 61 of the decision);

(ii) In the *Temeltasch* case, the European Commission of Human Rights considers that the Convention “primarily lays down rules that exist in customary law and is essentially in the nature of a codification.”¹⁸

(b) Regardless of the fact that there are lacunae in the Convention on sometimes important points and that it could not foresee rules applicable to problems that did not arise at the time of its elaboration, it served as a point of departure for new practices that at the present time are not,

¹⁶ See, in the case of the United Kingdom, the statements of Sir Ian Sinclair and, in the case of the United States of America, those of Robert E. Dalton in *American Society of International Law—Proceedings of the 78th Annual Meeting* (1984), pp. 273-274 and p. 278, respectively.

¹⁷ United Nations, *Collection of Arbitral Judgements*, vol. XVIII (Sales No.: E/F.80.V.7), pp. 73 et seq., especially paras. 37, 38, 58-66 and *International Law Reports*, vol. 54 (1979), pp. 35-36 and 44-45. Cf. Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume Uni de la Grande Bretagne et de l’Irlande du Nord”, AFDI, vol. XXIV (1978), p. 29; A. E. Boyle, “The law of treaties and the Anglo-French continental shelf arbitration”, *The International and Comparative Law Quarterly* (London), vol. 29 (1980), p. 498; and Giorgio Gaja, “Unruly Treaty Reservations” in *Le droit international à l’heure de sa codification: Etudes en l’honneur de Roberto Ago*, Milan, Drott. A. Giuffrè, 1987, vol. I, p. 307.

¹⁸ Decision of 12 October 1981, European Commission of Human Rights, *Decisions and Reports*, vol. 26, No. 9116/80, p. 217, para. 68. Cf. Imbert, “Les réserves à la Convention européenne des droits de l’homme devant la Commission de Strasbourg (affaire Temeltasch)”, RGDIP, vol. 87, No. 3, 1983, p. 580 and *The International and Comparative Law Quarterly*, 1984, vol. 33 (Part Three), p. 558.

or not fully, followed with any consistency.¹⁹ As one author has written,

[c]alm has been introduced by the Vienna Convention on the Law of Treaties . . . However, the Vienna Convention—perhaps the most successful international effort at codification ever undertaken—has not frozen the law. Rather, the rules in the Convention structure its future development.²⁰

(c) Lastly and most importantly, State practice on certain points, or the practice of some States, contradicts the very terms of the Convention of 1969. In this regard, see, especially, Giorgio Gaja, “Unruly treaty reservations”,²¹ wherein the author examines successively, giving examples, the practices relating to:

- (i) Reservations subsequent to ratification²² (contrary to the provisions of article 2, paragraph 1 (d), and article 19 of the Convention);
- (ii) The disregard that States have shown for the provisions of article 19 concerning inadmissible reservations,²³ although it is true that the wording of this provision is ambiguous;
- (iii) The non-observance of the suspensive condition represented by the one-year time period before a State can become a party to the Convention as provided in article 20, paragraph 5;²⁴ and
- (iv) The effect of objections to reservations²⁵ although, here again, the provisions of article 20, paragraph 4, seem particularly ambiguous.

17. The weight of these arguments varies. Nevertheless, they suggest a prudent approach and bar the conclusion that the rules applicable to reservations are absolutely clear-cut even on the points addressed by the Convention of 1969; the Convention of 1986, in connection with which the practice seems virtually non-existent.

(b) *The ambiguities of the provisions regarding reservations in the Vienna Conventions of 1969, 1978 and 1986*

Definition and scope of the reservations

18. Satisfactory in so far as it goes, the same definition of a reservation to be found in the Convention of 1969 (article 2, paragraph 1 (d)), the Convention of 1978 (article 2, paragraph 1 (j)) and the Convention of 1986 (article 2, paragraph 1 (d)), has omissions causing uncertainties that can often be very awkward. The first point left in

the dark, while more irritating in theory than important in practice, concerns the possibility of formulating reservations to bilateral treaties. The problem arises nevertheless, given the amendment by the Vienna Conference of the title of Part II, section 2, of the 1969 Convention (“Reservations” in place of “Reservations to multilateral treaties”); the ambiguity of the *travaux préparatoires*;²⁶ and the view of some authors who accept the fact that “reservations may come into play in theory” for bilateral treaties.²⁷

19. Of much greater practical concern is the distinction between reservations on the one hand and, on the other, the “interpretative declarations” that States seem to resort to with increasing frequency and on which the Conventions are silent.²⁸

20. The conclusion to be drawn from recent judgements is that summaries must be set aside on this point and that an “interpretative declaration” must be taken to be a true reservation if it fulfils the definition given in the Conventions. In this connection, reference is made to the arbitral decision of 30 June 1977 in the *Mer d'Iroise* case²⁹ (para. 55 of the decision); the report of the European Commission of Human Rights on the *Temeltasch* case³⁰ (para. 73); and the judgement of the European Court of Human Rights in the *Belilos* case of 29 April 1988,³¹ or the decision of 8 November 1989 of the United Nations Human Rights Committee in the case of *T. K. et M.K. v. France*.³² But these decisions also testify to the fact that it is extremely difficult to make a distinction between “qualified interpretative declarations” and “mere interpretative declarations.”³³ Furthermore, the legal effects of the latter remain unclear.

Determination of the validity of reservations

21. It is probably on this point that the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions is most obvious. This ambiguity stems from both the vague wording of article 19 and the lack of precision, to say the least, of the mechanism for assessing the validity of reservations provided for—or not provided for—by the Conventions.

22. As Reuter noted,

... if the treaty is silent, the only prohibited reservations are those which would be incompatible with its ‘object and purpose’, a concept again used by the Vienna Convention, although its interpretation remains as uncertain as when it first appeared in the Court’s Advisory Opinion of 1951.³⁴

¹⁹ See the position of the Secretary-General of the United Nations concerning the period during which States have the possibility of lodging reservations:

“The Secretary-General does not believe that he has any authority, in the absence of new instructions from the General Assembly, to adjust his practice to Vienna Convention rules which would be contrary to his present instructions.”

United Nations, *Juridical Yearbook*, 1975, p. 204 and *ibid.*, 1981, p. 150.

²⁰ Edwards, Jr., *loc. cit.* (see footnote 17 above), p. 405.

²¹ *Loc. cit.* (footnote 17 above), *passim*, pp. 307-330.

²² *Ibid.*, pp. 310-313.

²³ *Ibid.*, pp. 313-320.

²⁴ *Ibid.*, pp. 320-324.

²⁵ *Ibid.*, pp. 324-329.

²⁶ See Edwards, Jr., *loc. cit.* (see footnote 11 above), pp. 402-405.

²⁷ See the fourth report of Mr. Paul Reuter (footnote 5 above), p. 36.

²⁸ See, especially, D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL*, vol. XLIX (1978), p. 155.

²⁹ See footnote 17 above.

³⁰ See footnote 18 above.

³¹ *European Court of Human Rights, Judgements and Decisions*, Series A, vol. 132, paras. 40-49 (Cf. Gérard Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, *RGDIP*, vol. 93, No. 2, 1989, p. 273).

³² *CCPR/C/37/D/220/1987*, annex.

³³ McRae, *loc. cit.* (see footnote 28 above), p. 160.

³⁴ *Op. cit.* (see footnote 11 above), p. 63.

23. These uncertainties are not dispelled, on the contrary, they are intensified by article 20, paragraph 2, which reintroduces the criterion of the object and purpose of the treaty with respect to multilateral treaties and seems to imply a *contrario* that "a reservation running counter to the object and purpose of a treaty may be authorized if it is accepted by all the parties."³⁵ Moreover, the very definition of these multilateral treaties is still extremely ill-defined.³⁶

24. These ambiguities would be a minor problem if, as the various Special Rapporteurs of the Commission had proposed, the Conventions had defined the manner in which the compatibility of a reservation with the rules to which it relates was to be judged. This was not the case.³⁷ The Conventions leave each individual State to assess, insofar as it is concerned, the validity of a reservation, whether it is the author of the reservation or whether the reservation is by another State party to the treaty. Furthermore, article 20, paragraph 4 (b) shows that, except in the very rare cases where a State has made an objection by stating that it did not intend to be bound in respect of the reserving State, the treaty enters into force between the two States concerned. The fact that this provision introduced by the Vienna Conference of 25 April 1969 runs counter to the draft of the Commission and, consequently, to the rest of the text that resulted from the draft³⁸ cannot be denied.

25. Be that as it may, the criteria for the validity of reservations set out in article 19 seem, under these circumstances, to be "a mere doctrinal assertion."³⁹ Such criteria amount to more than a doctrinal assertion only if an international court is competent to assess the validity of the reservation. In this connection, reference is made to the judgements of the European Court of Human Rights in the *Belilos* case⁴⁰ (paras. 50-60), the *Weber* case of 22 May 1990⁴¹ and the report of the European Commission of Human Rights of March 1991 on the *Chrysostomos et al.* case.⁴²

Regime for objections to reservations

26. The underlying philosophy of the regime for objections to reservations adopted in 1969 and used again in 1986 is clear: it is to allow maximum flexibility; but, the

³⁵ *Ibid.*

³⁶ See Imbert, *op. cit.* (see footnote 4 above), pp. 109-120 and, also, Jacques Dehaussy, "Le problème de la classification des traités et le projet de convention établi par la Commission du droit international des Nations Unies", *Recueil d'études de droit international en hommage à Paul Guggenheim*, Geneva, Institut universitaire des hautes études internationales, 1968, p. 305.

³⁷ See Imbert, *op. cit.* (see footnote 4 above), p. 93.

³⁸ See Zemanek, *loc. cit.* (see footnote 12 above), pp. 329-333.

³⁹ See especially Ruda, *loc. cit.*, p. 390. See also Edwards, Jr., *loc. cit.* (see footnote 10 above). See also Gaja, *loc. cit.* (see footnote 17 above), pp. 313-320; Imbert, *op. cit.* (see footnote 4 above), pp. 134-137; Reuter, *op. cit.* (see footnote 11 above), p. 74.

⁴⁰ See footnote 31 above.

⁴¹ *European Court of Human Rights, Judgements and Decisions*, Series A, vol. 177, paras. 36-38.

⁴² European Commission of Human Rights, *Decisions and Reports*, (March 1991), *Revue universelle des droits de l'homme*, vol. 3, No. 3, 1991, p. 193.

regime is far from well defined and practice has brought its serious ambiguities to light.

27. The first of these ambiguities relates to the substantive scope of the objections. At the very least, an objection carries the consequence that "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."⁴³ However, it is not always easy to determine "the extent of the reservation" and difficult problems have arisen in this regard (particularly concerning objections to reservations made by a State to article 66 of the Vienna Convention and the effects of such reservations on the applicability of articles 53 and 64 between the States concerned).⁴⁴

28. The interpretation of the 1969 and 1986 Conventions is just as difficult with regard to the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose. The solutions provided by practice are dubious, and doctrine provides diverse answers.⁴⁵

29. As a rule, however, States base their objections on the inadmissible nature of the reservations that they challenge. Here again, however, practice is inconsistent and there are divergent opinions. Some hold that reservations prohibited by the treaty nullify ratification, the State is therefore not party to the treaty and the objection is of a purely declaratory nature.⁴⁶ The prevailing doctrine, however, runs counter to this view and considers that article 21, paragraph 3, of the Vienna Convention makes no distinction between admissible and non-admissible reservations so that, somewhat paradoxically, "a simple objection (. . .) carries a value which is comparable only to that of an interpretative declaration."⁴⁷ The Court of Arbitration seems to have reached a similar decision in the case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (*Mer d'Irlande* case,⁴⁸ para. 61 of the judgement).

(c) *Lacunae in the provisions regarding reservations in the Vienna Conventions of 1969, 1978 and 1986*

Effect of reservations on the entry into force of a treaty

30. This important and widely debated question has been the source of serious difficulties for the depositary and has not been answered in the relevant conventions. The practice followed in this area by the Secretary-General in his capacity as depositary, which was

⁴³ Article 21, para. 3, of the 1969 Vienna Convention.

⁴⁴ See Charles de Visscher, "Une réserve de la République arabe de Syrie à la Convention de Vienne (1969) sur les traités", *Revue belge de droit international*, vol. VIII (1972-2), p. 416. Also see Edwards, Jr., *loc. cit.* (see footnote 11 above), p. 325 and Imbert, *op. cit.* (see footnote 4 above), pp. 265-267.

⁴⁵ Compare, for example, Bowett, *loc. cit.* (see footnote 11 above), pp. 86-87 and Zemanek, *loc. cit.* (see footnote 12 above), pp. 333-336.

⁴⁶ See Bowett, *loc. cit.* (see footnote 11 above), pp. 83-84.

⁴⁷ Reuter, *op. cit.* (see footnote 11 above), p. 75. Similarly, see Gaja, *loc. cit.* (footnote 17 above), p. 327; Koh, *loc. cit.* (*ibid.*), pp. 102-103; Nisot, *loc. cit.* (*ibid.*), p. 203; Ruda, *loc. cit.* (footnote 10 above), pp. 199-200; Sinclair, *op. cit.* (footnote 11 above), pp. 76-77; and Zemanek, *loc. cit.* (footnote 12 above), pp. 76-77.

⁴⁸ See footnote 17 above.

amended in 1975,⁴⁹ has been the object of rather harsh doctrinal criticism.⁵⁰

31. In addition, in an opinion given in 1982, the Inter-American Court of Human Rights expressed the view that a treaty came into force in respect of a State on the date of deposit of the instrument of ratification or accession, whether or not the State had formulated a reservation.⁵¹ This position was accepted in some circles,⁵² but other authors doubted whether it was compatible with article 20, paragraphs 4 and 5, of the Vienna Convention.⁵³ There are also grounds for asking whether the solution adopted by the Court reflects the specific nature of the Inter-American Convention rather than any general considerations (see paras. 58-63 below).

Problems connected with the specific object of certain treaties

32. Because of their general nature, the main codification conventions neglect, quite legitimately, the particular problems deriving from the specific object and nature of certain categories of treaty. Nevertheless, these problems occur very frequently in certain areas, particularly in connection with constituent instruments of international organizations on the one hand, and, on the other, treaties relating to human rights and, more generally, treaties which directly establish individual rights.

(i) Reservations to constituent instruments of international organizations

33. Although the conventions of 1969 and 1986 are not totally silent on this point, article 20, paragraph 3, is far from resolving all the problems which can and do arise:

(a) The concept of a constituent instrument is not an unequivocal one and it might be asked whether the rule set out in article 20, paragraph 3, applies to any normative provisions such instruments may include;

(b) Does this rule include interpretative declarations and, if so, who determines their exact nature (see paras. 18 to 20 above)?

(c) What body is competent to accept reservations of this kind?

⁴⁹ Cf. *Repertory of Practice of United Nations Organs, Supplement No. 5*, vol. V, covering the period 1 January 1970 to 31 December 1978, article 102, p. 162.

⁵⁰ See Imbert, *op. cit.*, pp. 277-282 and "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités—Réflexions sur la pratique suivie par le Secrétaire-général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *Annuaire français de droit international*, vol. XXVI (1980), p. 524. See also Henry H. Han, "The U. N. Secretary-General's treaty depositary function: Legal implications", *Brooklyn Journal of International Law*, vol. 14, No. 3 (1988), pp. 562-565.

⁵¹ Advisory Opinion OC-2/82 of 24 September 1982, *Inter-American Court of Human Rights Judgments and Opinions*, Series A, No. 2; see also *International Law Reports*, vol. 67 (1984), p. 559; and *ILM*, vol. 22 (No. 1), p. 37.

⁵² See Rosenne, *Developments in the Law of Treaties, 1945-1986*, Cambridge University Press, 1989, pp. 435-436.

⁵³ See, especially, Edwards, Jr., *loc. cit.* (see footnote 11 above), p. 401, or Gaja, *loc. cit.* (see footnote 17 above), pp. 321-322.

(d) What is the exact scope of such acceptance? In particular, are the other Member States bound by it and thus prevented from objecting to the reservation?⁵⁴

(ii) Reservations to human rights treaties

34. Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity,⁵⁵ a concept difficult to transpose to the field of human rights, or indeed to other fields.⁵⁶ As they are intended to apply without discrimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-à-vis citizens of the reserving State.

35. More so than other treaties, human rights treaties comprise monitoring mechanisms and the question arises as to whether these bodies are competent to assess the validity of reservations. The European Commission of Human Rights and the European Court of Human Rights have recognized their own competence in this area, because of the "objective obligations" deriving from the Convention on the Protection of Human Rights and Fundamental Freedoms.⁵⁷

36. This gives rise to a third problem, namely, what effect does a reservation which has been declared invalid have on the participation in a treaty by the reserving State? In the *Belilos* case, the European Court of Human Rights took the view that the reserving State remained, without question, a party to the Convention (para. 60).⁵⁸

37. The specific nature of the problems raised by reservations to treaties concerning human rights and humanitarian questions is also clearly apparent in the provisions of the relevant treaties, which have often been subject to differing interpretations.

38. There is an abundance of literature on this subject.⁵⁹

⁵⁴ On all these points, see especially: Imbert, *op. cit.* (see footnote 4 above), pp. 120-134 and Maurice H. Mendelson, "Reservations to the constitutions of international organizations", *BYBIL*, vol. XLV (1971), p. 137.

⁵⁵ Cf. *Certain Norwegian Loans, Judgment, I.C.J. Reports, 1957*, p. 24.

⁵⁶ See Imbert, *op. cit.* (see footnote 4 above), pp. 250-260.

⁵⁷ See the report of the European Commission on Human Rights in the *Temeltasch* case (note 18 above), paras. 63-65 and, less clearly, the above-mentioned judgments of the Court in the *Belilos* case (footnote 31 above), para. 50, and the *Weber* case (footnote 41 above), para. 37.

⁵⁸ See also the report of the European Commission on Human Rights in the *Chrysostomos* case (see footnote 42 above).

⁵⁹ See, especially: Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme*, Bari, Levante, 1974, p. 301; I. Cameron and F. Horn, "Reservations to the European Convention on Human Rights: The *Belilos* Case", *German Yearbook of International Law*, Berlin, vol. 33 (1990), p. 9; Antonio Cassese, "A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)", *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, Institut universitaire des hautes études internationales, 1968), p. 266 (see also Cassese, "Una nuova clausola sulle riserve", *Rivista di diritto internazionale*, vol. L, p. 584 and "Su alcune 'riserve' alla Convenzione sui diritti politici della donna", 1968, p. 294); Cohen-Jonathan, *loc. cit.* (see footnote 31 above); Alberto Colella, "Les

Reservations, codification treaties and customary rules

39. Curiously, the Conventions of 1969 and 1986 do not deal with the question of reservations to codification conventions or, to be more precise, clauses.

40. Opposing arguments can be put forward on this question. A reservation definitely cannot have any effect on States not parties to the codification treaty in respect of which the reserving State remains bound by the customary rule. This applies even more so to the signatory States to the treaty and this is generally the interpretation placed on the Judgment of ICJ of 20 February 1969 in the *North Sea Continental Shelf* cases.⁶⁰ However, it has been pointed out that this rule, which would be an additional criterion for non-validity of reservations under article 19, is debatable with regard to the intention of the parties to the Convention⁶¹ and creates a regrettable confusion between *jus cogens* and *jus dispositivum*.⁶²

Problems arising from certain specific treaty approaches

41. Because they were required to confine themselves to a very general level, the drafters of the Vienna Convention could not take account of certain specific treaty approaches, some of which developed rapidly from 1969 onwards. Two examples will suffice.

(i) Reservations and additional protocols

42. When an additional protocol supplements an existing convention, one of these instruments may contain a reservation clause and the other may not, or they may both contain such clauses, but the clauses may be incompatible. The situation is relatively rare, but does occur.⁶³ In

(Footnote 59 continued)

réserves à la Convention de Genève (28 juillet 1951) et au Protocole de New York (31 janvier 1967) sur le statut des réfugiés", AFDI, vol. XXXV (1989), p. 446; Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", *Virginia Journal of International Law*, vol. 30, No. 3 (1990), p. 643; J. A. Frowein, "Reservations to the European Convention on Human Rights", *Protection des droits de l'homme: La dimension européenne, Mélanges en l'honneur de Gérard Wiarda* (Carl Heyman, Cologne, 1988), p. 193; Imbert, "La question des réserves et les conventions en matière de droits de l'homme", *Actes du cinquième colloque international sur la Convention européenne des droits de l'homme* (Frankfurt, 9-12 April 1980), Paris, Pédone, 1982, p. 97, and "Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (*affaire Temeltasch*)", (see footnote 18 above); S. Marcus-Helmon, "L'article 64 de la Convention de Rome ou Les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, vol. XLV, p. 9; Claude Pilloud, "Les réserves aux Conventions de Genève de 1949", *Revue internationale de la Croix-rouge*, 1957, No. 464, p. 409; *ibid.*, 1965, No. 559, p. 315, 1976, No. 685, p. 195 and No. 687, p. 131; and Isidoro Ruiz Moreno, "Reservations to treaties relating to human rights", ILA, *Report of the Fifty-fourth Congress*, The Hague, 23-29 August 1970, p. 642 (debate, pp. 596-625, resolution, p. XIV).

⁶⁰ *Judgment, I.C.J. Reports, 1969*, pp. 3 et seq., especially pp. 38-39, para. 63.

⁶¹ Reuter, *op. cit.* (see footnote 11 above), p. 82.

⁶² On this difficult problem, see especially Gérard Teboul, "Remarques sur les réserves aux conventions de codification", RGDIP, vol. 86, No. 4, 1982, p. 679.

⁶³ Cf. the Convention of 1951 relating to the Status of Refugees, article 42, para. 1 and the Protocol of 1967, article VII, as well as the 1961 Single Convention on Narcotic Drugs and the Protocol of 1972, raising extremely tricky problems (see Imbert, *op. cit.* (see footnote 4 above), pp. 213-214, or Colella, *loc. cit.* (footnote 59 above), pp. 451-452).

addition, when ratifying a protocol (or accepting an optional clause), a State may be tempted to formulate a belated reservation to the basic treaty.⁶⁴

(ii) Reservations and the bilateralization approach

43. This approach, frequently taken in conventions relating to private international law, enables States parties to choose their partners and even to establish exceptional arrangements with them. Although used somewhat warily in the past (see article XXXV, paragraph 1, General Agreement on Tariffs and Trade), the system spread rapidly in the 1970s in particular. Compare articles 21 and 23 of the Hague Convention on the Recognition and Execution of Foreign Judgements in Civil and Commercial Matters, of 1 February 1971, and article 34 of the Convention on the Limitation Period in the International Sale of Goods, of 14 June 1971. This flexible approach emerged as a "rival" to the reservations approach, but it also posed specific problems concerning the reservations *stricto sensu* which could be formulated concerning these conventions.⁶⁵

Problems unresolved by the Convention of 1978 on Succession of States in respect of Treaties

44. Article 20 of the Convention of 23 August 1978 scarcely deals with, and even less resolves, potential problems concerning reservations in the case of succession of States.

45. First, it should be noted that the article is contained in Part III of the Convention, which deals with "newly independent States"; it therefore applies in the case of the decolonization or dissolution of States, whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely. It is true that, in the first instance, "treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates" (article 15 (a)). It is equally true that the extension of treaties of the successor State to the territory (article 15 (b)) appears to entail necessarily the automatic extension of reservations which the latter was able to formulate. Persisting problems with regard to "newly independent States formed from two or more territories" are no fewer; on this assumption, articles 16 to 29 (and hence article 20) undoubtedly apply in principle pursuant to article 30, paragraph 1; but, what if the new State fails to denounce any incompatible reservations at the time when the succession is notified? The same problem occurs in the case of the uniting of States, in respect of which the Convention contains no applicable provisions concerning reservations.

⁶⁴ Cf. Cohen-Jonathan, *loc. cit.* (see footnote 31 above), pp. 311-313; Cohen-Jonathan and Jean-Paul Jacque, "Activités de la Commission européenne des droits de l'homme", AFDI, vol. XXXVII (1991), p. 562; or Claudio Zanghi, "La déclaration de la Turquie relative à l'article 25 de la Convention européenne des droits de l'homme", *Revue générale de droit international public*, vol. 93, No. 1 (1989), p. 69.

⁶⁵ On this question, see Imbert, *op. cit.* (see footnote 4 above), pp. 199-201 and, particularly, Ferenc Majoros, "Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *Journal du droit international*, vol. 101, No. 1 (1974), p. 73.

46. Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State, and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Nonetheless, this may seem logical if it is recognized that, in maintaining a former reservation, the new State is exercising an inherent right and is not acting as if it has the rights of the predecessor State.⁶⁶

47. Lastly, and this constitutes a serious lacuna, article 20 makes no reference whatsoever to succession concerning objections to reservations, while the initial proposals of Sir Humphrey Waldock dealt with this point without the reasons for this omission being clear.⁶⁷

3. CONCLUSIONS

48. The discussions of the Sixth Committee during the forty-sixth and forty-seventh sessions of the General Assembly bring to light the criteria which, in the view of Member States, should guide the Commission in drawing up its future work programme. Four criteria can be elicited, namely, the subject or subjects to be considered should:

- (a) Meet a need of the international community;
- (b) Have reasonable chances of being successfully completed;
- (c) Be completed within a specific period of a few years; and
- (d) Fall within the competence of the Commission and its members.⁶⁸

(a) *Meet a need of the international community*

49. It would clearly be presumptuous for the Commission to affirm that the subject discussed in this submission meets a need of the international community without first obtaining the opinion of the Sixth Committee, particularly since it is a matter of irrelevance that the initiative to suggest it was taken, not by the Commission, but by representatives of Member States of the Sixth Committee (see paras. 1 and 2 above). However, cataloguing the ambiguities and omissions of the existing codification texts (see paras. 18 to 47 above) scarcely leaves any doubt as to the fact that the rules hitherto formulated are incomplete. Moreover, their adoption has given rise to new problems (see paras. 14 to 17 above).

50. Undoubtedly, as doctrine has underlined,⁶⁹ States have not abused their largely recognized right to make reservations, and the fairly numerous incidents arising in

⁶⁶ See Marco G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Fribourg, Editions universitaires, 1969, pp. 345-346.

⁶⁷ See Imbert, op. cit. (footnote 4 above), pp. 318-322.

⁶⁸ See topical summaries prepared by the Secretariat of the discussions held in the Sixth Committee on the consideration of the Commission's report during the forty-sixth and forty-seventh sessions of the General Assembly (A/CN.4/L.469, paras. 398-402, and A/CN.4/446, paras. 302-303).

⁶⁹ See specifically, Colella, loc. cit. (see footnote 59 above), p. 475 and Imbert, op. cit. (footnote 4 above), pp. 324-339.

that connection have therefore only rarely degenerated into real disputes. It nonetheless remains that great uncertainty continues to surround the legal regime governing reservations, and there is reason to believe that difficulties may arise increasingly in the near future, particularly concerning the rules applicable in the case of succession of States, which are particularly incomplete (see footnotes 44 to 47 above).

(b) *Have reasonable chances of being successfully completed*

51. It would seem that a codification exercise of any kind (see paras. 67-69 below) would have a more than reasonable chance of being successfully concluded.

52. Certainly, as technical as a subject may seem, it is never politically neutral; and, there is no denying that the rules of partial codification so far adopted in these areas have been inspired by eminently political considerations.

53. Although the international political context has undergone quite profound changes since the 1960s, it is still probably neither useful nor desirable to call the principles laid down at that time into question (see paras. 58 to 63 below). However, it is reasonable to think that in the new international climate it will be possible to make them more meaningful and precise, in a calmer setting which is more conducive to work on codification and progressive development.

(c) *Be completed within a specific period of a few years*

54. For the same reasons, such work must be completed within a specific period of time.

55. It does not seem unrealistic to think that the Commission would be in a position to adopt an initial set of draft articles, or a first draft to serve as a "guide" (see paras. 67-69 below), within three or four years of the subject being included on its agenda and the appointment of a Special Rapporteur:

(a) During the first year, the Commission could prepare a preliminary report, listing outstanding problems more comprehensively than this submission and setting forth its general views on the question. At the same time, the Secretariat could be given the task of updating the information contained in the Commission's 1965 report on the work of the first part of its seventeenth session,⁷⁰

(b) The second and third years could be devoted to the presentation by the Special Rapporteur of one or two draft texts on codification and progressive development and to their discussion by the Commission;

(c) If the Commission decided to refer them to the Drafting Committee, the latter could possibly review them as from the end of its session corresponding to the second year, and in any case during the third year, although it may mean that no final text is proposed until during the fourth year; and

⁷⁰ *Yearbook . . . 1965*, vol. II, pp. 155 et seq., document A/6009, especially chap. II.

(d) The Commission could discuss and adopt the draft on first reading during the fourth year and transmit it to the General Assembly.

(d) *Fall within the competence of the Commission and its members*

56. Lastly, there seems little doubt that the subject in question falls squarely within the competence of the Commission and its members.

57. Codification of treaty law is probably the area of the Commission's work in which the most progress has been made. Initial lacunae (treaties of international organizations, the most-favoured-nation clause and succession of States in respect of treaties) have largely been or are being filled in as a result of codification of the rules applying to State responsibility (see article 73 of the Convention of 1969 and article 39 of the Convention of 1978). By undertaking to complete the codification and progressive development of rules applying to reservations, the Commission would be completing a task of which it has acquitted itself well. (However, the question of the effects of the outbreak of hostilities between States (*ibid.*) would remain to be addressed.)

58. Codified rules on the subject of reservations, although fragmented and incomplete, nevertheless exist. If the Commission decides to consider the issue of reservations in depth, as would appear to be desirable, it must take account of this situation, which is not entirely new. Whether what is at issue is the succession of States in respect of matters other than treaties, international liability for injurious consequences arising out of acts not prohibited by international law, or treaties concluded between States and international organizations, the Commission has not opened up new ground with respect to codification.

59. However, the situation we are dealing with is somewhat exceptional because there are already some provisions on the very subject matter that is to be codified.

60. To the extent that the Commission's intention is first of all to eliminate lacunae, no substantive problems arise: it is a matter merely of adding to existing texts, not of modifying them. However, it is necessary to consider what form those additions should take: additional protocols to previously adopted conventions, or a consolidated text that incorporates relevant existing provisions and adds new rules.

61. Ambiguities in previously codified rules are numerous and represent a serious problem in some cases. They present more of a challenge than lacunae because it could prove difficult to clarify the provisions in question without changing their wording. Nevertheless, the suggested approach for eliminating lacunae could be taken to ambiguities.

62. The above also applies if the intention is to modify existing provisions. However, a decision cannot be made to modify an existing provision purely on technical grounds. It is true that when the rules adopted in 1969, 1973 and 1986 were implemented, some defects came to light, and it would probably be rash to maintain that they have all been so strengthened as to become indisputable

rules of customary law. In another respect, however, their adoption does provide a balance between partially conflicting (political) positions. While one could argue that the world has changed since 1969 and therefore the problem of reservations is less of a "burning issue" than it once was, calling this compromise into question needlessly could stir up old quarrels. The author of the present submission would be very reluctant to adopt a strategy he regards as especially "gratuitous", since—whatever their (minor) defects—where they exist, the relevant codified rules are generally satisfactory and provide the necessary flexibility, thus meeting a goal that all States support, as far as can be judged.

63. Without prejudice to the response from the members of the Sixth Committee, it would seem desirable for the Commission, should it decide to include the question of reservations in its programme of work, to limit itself to the task of eliminating lacunae and removing ambiguities in existing rules without modifying the rules, or at least without calling into question the principles upon which they are based.

64. The Working Group and the Planning Group have selected "The law and practice relating to reservations to treaties" as the title for the topic to be considered. This title seems rather academic, and it prejudices the outcome of the Commission's work on this topic. Of necessity, the outcome will be either a "study" or a "report" because, while "the law" lends itself to codification, this is not so in the case of "practice", which might reveal customary rules or lead to the progressive development of the law, but which is not itself subject to codification.

65. For other reasons, the proposal made in the Sixth Committee to study "The legal effects to be given to reservations and objections to reservations to multilateral conventions" is not entirely satisfactory. While the effects of reservations and objections remain one of the great unknown quantities in the reservations regime, there are other lacunae and ambiguities in this area, and it would be unfortunate not to take this opportunity to attempt to correct that situation. In addition, the word "conventions" is not in keeping with the Commission's usage; and, there is a question, though secondary, as to whether reservations to bilateral treaties are to be contemplated or not.

66. Therefore, it seems sensible to choose as neutral and comprehensive a title as possible, at least provisionally, and then adjust it later on if it appears advisable to limit the scope of the study. A possible title would be: "Reservations to treaties".

67. As indicated above (see footnotes 58 to 63), this process could lead to the adoption either of draft protocols to existing conventions, or of consolidated draft articles, combining various provisions from the Conventions and of the new codified rules, intended to complete and clarify the provisions; it would then be for the General Assembly to decide what should become of the draft. There is a rather strong argument in favour of one or the other of these solutions: treaty rules do in fact exist, and it might seem valid to continue along the same lines and consolidate the treaty reservations regime.

68. However, whether one sees this exercise as codification or as the progressive development of international

law—in fact, both codification and progressive development are involved—there is no provision in the Statute⁷¹ of the Commission placing it under the obligation to present the results of its work in the form of draft articles. They may also be presented in the form of a detailed study or even as a commentary on existing provisions and could be a sort of “guide to the practice of States and international organizations” which would have the authority of a document formally adopted by the Commission. This method, which would prevent “zigzagging” between existing provisions and make it possible to overcome smoothly the problems mentioned above (*ibid.*), would also present clear advantages.

69. Whatever the case may be, and contrary to what is sometimes required, it does not appear absolutely necessary to reach a final decision on this point at the current stage; it would be satisfactory if the Commission were to reach a decision on the basis of a more complete presentation of the issues which could be the subject of an initial report by the Special Rapporteur (see paras. 54 and 55 above) and a topic for discussion in the Sixth Committee.

⁷¹ On this point as on many others, the Statute is fairly obscure and contradictory.

Extraterritorial application of national legislation, by Mr. Pemmaraju Sreenivasa Rao

1. National legislation is sought to be given extraterritorial jurisdiction in different contexts. For example:

(a) To exercise jurisdiction over nationals wherever they are;¹

(b) To protect a State against treason, terrorism, drug trafficking and other offences affecting its power and security;²

¹ Civil law countries exercise jurisdiction over their nationals for offences committed even while they were abroad. *Public Prosecutor v. Antoni*, *International Law Reports*, vol. 32 (1966), p. 140. For a mention of the statutory provisions of some countries like France and Germany, see Louis Henkin et al., *International Law: Cases and Materials* (St. Paul, Minnesota, West Publishing Co. 1980), p. 445.

Among the common law countries: (a) section 4 of the Indian Penal Code. See *Pheroze Jehangir v. Roshanlal*, *Bombay Law Reports* 225, vol. 66 (1964); *Central Bank of India Ltd. v. Ram Narain*, *International Law Reports*, 1954, p. 92; (b) U.K. law also allows such jurisdiction in select cases: treason, homicide, bigamy, perjury, breaches under Official Secrets Act, etc.

The United States of America exercises extraterritorial jurisdiction in a wide variety of cases: treason, tax, unauthorized attempts to influence a foreign government, violation of U.S. laws on restrictive trade practices, failure to answer subpoenas issued to attend a court as a witness (*Blackmer v. United States*, *United States Reports*, vol. 284, p. 421; for offences committed outside territorial sea on the high seas (*Skiriotos v. Florida*, *ibid.*, vol. 313, p. 69; *U.S. v. Bowman*, *ibid.*, vol. 260, p. 94; and *Steele v. Bulova Watch Co.*, *ibid.*, vol. 343, p. 962 and other cases), see Henkin, Pugh, Schachter and Smit, *op. cit.*, pp. 445-447. See also Georges René Delaume, “Jurisdiction over crimes committed abroad: French and American law”, *George Washington Law Review*, vol. 21 (1952), p. 173.

² For a brief discussion of this aspect, see Geoff Gilbert, “Aspects of Extradition Law”, *International Studies in Human Rights* (Dordrecht,

70. To recapitulate, the author believes that:

(a) The topic “Reservations to treaties” is particularly appropriate for a study by the Commission and fully meets the criteria which emerged during the discussions in the Sixth Committee with a view to identifying a topic for inclusion in the Commission’s future programme of work;

(b) There is no need at this stage to decide what form such a study should take—draft protocols to existing conventions, a consolidated draft convention, or an analytical reference guide to law and practice relating to reservations for use by States and international organizations;

(c) Whatever form is chosen, the codified rules in the 1969, 1978 and 1986 Conventions should not be called into question or modified, but consolidated and made more specific.

71. A study, still very basic, of the question of reservations would fully embody the initial idea of the Working Group, which in its report to the Planning Group concluded that this topic “could be appropriate for a speedy incorporation into the Commission’s agenda.” However, I reserve my position on the Working Group’s second proposal—that this topic might “form the subject of an instrument of codification”—if it is to be construed as referring to a set of draft articles designed from the outset to lead to another convention.

(c) To protect and regulate activities affecting its wealth, resources and other economic interests;³

(d) To secure rights of human persons.⁴

2. Exercise of extraterritorial jurisdiction is considered to be inevitable and even desirable because of:

(a) Interdependence of the international community which necessitates extension of State’s legislative jurisdiction beyond its borders to regulate transnational activities

The Netherlands, Martinus Nijhoff Publishers, 1991), pp. 43-45. See also *Joyce v. Director, The Law Reports, House of Lords, Judicial Committee of the Privy Council and Peerage Cases*, 1946, p. 347. Also see Lotika Sarkar, “The proper law of crime in international law”, *The International and Comparative Law Quarterly*, vol. 11 (1962), p. 446.

³ See D. W. Bowett, “Jurisdiction: Changing patterns of authority over activities and resources”, *BYBIL*, vol. LIII (1982), p. 1.

⁴ The passive personality principle allowed a State to assume jurisdiction for offences committed against its nationals. For example, see the *Lotus* case (decision of 7 September 1927, Judgment No. 9, *PCIJ, Series A*, in which Turkey assumed jurisdiction over a French captain; the *Cutting* case (1886) in which Mexico assumed jurisdiction over a U. S. national (J. Dumas, “La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d’étrangers”, *Recueil des Cours . . . 1931-II*, Paris, Sirey, 1932, vol. 36, pp. 189 and 190). Both France and the United States have their own versions of law and practice assuming similar jurisdiction now (for France, see Code de procédure pénale, 1975, art. 689, sect. 1). For United States practice, see for discussion of the case of Fawaz Yunis, a Lebanese national, in Andreas F. Lowenfeld, “U.S. law enforcement abroad: The Constitution and international law”, *AJIL*, vol. 83, No. 4 (1989), p. 880.

which have a profound effect on or of concern to the State;⁵

(b) The desirability to avoid safe havens for criminals;⁶

(c) The need to regulate and control activities of entities with agencies spread in different parts of the world, but connected or linked to a common source or headquarters or objectives criss-crossing several jurisdictions with no single jurisdiction being effective to control the enterprise;⁷

(d) The imperatives of international cooperation to give full effect to bilateral or multilateral obligations.⁸

3. Claims and counter-claims as to the acceptability or reasonableness of exercise of extraterritorial jurisdiction are centred around:

(a) The nature of jurisdiction: civil or criminal;⁹

(b) The type of jurisdiction: legislative, adjudicatory of enforcement.¹⁰

4. The issues or claims or counter-claims have arisen invoking:¹¹

(a) Principles concerning jurisdiction;

(b) Sovereignty and non-interference;

⁵ Even in 1935, in "Jurisdiction with Respect to Crime", AJIL, vol. 29, Supplement 3, Part II (1935), p. 435, it was recognized that with the increasing facility of communication and transportation, the opportunities for committing crimes whose constituent elements take place in more than one State have grown apace; and to meet these conditions, it suggested that the territorial principle was expanded to include the subjective and objective territorial principles of jurisdiction.

⁶ See the recent case of the United Kingdom Privy Council in *Liang-siriprasert v. United States*, *The Law Reports 1991, Appeal Cases*, p. 225.

⁷ Literature on the problems posed by the multinational corporations or enterprises is vast. See *Transnational Corporations: A Select Bibliography* (ST/LIB/SER.B/17) (United Nations publication, Sales No. E/F.75.I.5); and the 1976 OECD declaration, *International Investment and Multinational Enterprises: The OECD Guidelines for Multinational Enterprises*, OECD, 1986. For draft guidelines on transnational corporations, see Cynthia Day Wallace, *Legal Control of the Multinational Enterprise: National Regulatory Techniques and the Prospects for International Controls* (The Hague, Martinus Nijhoff Publishers, 1982).

For a discussion of the various legal issues of relevance to extraterritoriality involving the parent corporation and its subsidiaries, see F. A. Mann, "The doctrine of international jurisdiction revisited after twenty years", *Recueil des cours . . . 1984-III*, vol. 186, pp. 9 et seq., especially pp. 56-66.

⁸ Assumption of extraterritorial jurisdiction is an essential feature of modern-day bilateral and multilateral conventions on extradition, prevention of hijacking, civil aviation offences and protection of diplomatic persons. A State also is required to assume extraterritorial jurisdiction in pursuance of its obligation towards the international community as a whole, obligations known as obligations *erga omnes*. The exercise of such jurisdiction is valid and accepted, according to ICJ, in respect of offences involving acts of aggression, genocide, and principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination. The Court also held that some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of universal or quasi-universal character. See *The Barcelona Traction, Light and Power Company, Limited, second phase, Judgment* (I.C.J. Reports 1970, p. 32).

(c) Genuine or substantial link between the State and the activity regulated;

(d) Public policy, national interest;

(e) Lack of agreed prohibitions restricting States right to extend its jurisdiction;

(f) Reciprocity; retaliation; and

(g) Promotion of respect for law.

5. On the policy level, several issues arise:

(a) How far and within what limits should a State exercise its jurisdiction over a foreigner for conduct outside its territory when the foreigner is subject to the jurisdiction of the State of nationality or some other State in respect of the same conduct?¹²

(b) Should a State have the same authority and control over activities of a foreigner in areas over the sea beyond its coastal zone—the territorial sea, contiguous zone, economic zone, continental shelf and high seas—as it has within its territory?¹³

⁹ Brownlie does not believe that there exists any real distinction between civil and criminal jurisdiction in this regard: see *Principles of Public International Law*, 4th ed., Oxford, Clarendon Press, 1990, chap. XIV, p. 299. However, see R. Y. Jennings, "Extraterritorial Jurisdiction and the United States antitrust laws", BYBIL, vol. XXXIII (1957) p. 146, where the author distinguishes the elementary cases of direct physical injury, such as homicide, from other cases where only an element of alleged remote consequential damage was involved (as for example in the antitrust cases) and argued that while, in the former case, extraterritorial exercise of criminal jurisdiction is permissible, in the latter case to apply the formula of "effects" would be, according to him, "to enter upon a slippery slope", virtually endorsing unlimited extraterritorial jurisdiction of a State. See also "Extraterritorial application of restrictive trade legislation: Jurisdiction and international law" in *Report of the Fifty-first Conference, Tokyo, 1964*, London, 1965, pp. 304 et seq.

¹⁰ Many writers discuss problems on extraterritoriality treating the three different types of jurisdiction separately. See Mann, loc. cit. (see footnote 7 above). Brownlie also does not agree with this distinction (op. cit., footnote 9 above, p. 310).

¹¹ M. Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction*, The Hague, Martinus Nijhoff Publishers, 1946; Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des cours . . . 1964-I*, vol. III, p. 1; M. Akehurst, "Jurisdiction in international law", BYBIL, 1972-1973, vol. XLVI, p. 145; A. F. Lowenfeld, "Public law in the international arena: Conflict of laws, international law, and some suggestions for their interaction", *Recueil des cours . . . 1979-II*, p. 311; M. S. McDougal, "Jurisdiction", in R. B. Lillich and J. N. Moore, eds., *Readings in International Law from the Naval War College Review 1947-1977, U.S. Naval War College International Law Studies*, Newport, R.I., vol. 62 (1980), p. 634; A. V. Lowe, "The problems of extraterritorial jurisdiction: Economic sovereignty and the search for a solution", *The International and Comparative Law Quarterly*, vol. 34 (Part 4), (1985), p. 724 and Douglas E. Rosenthal, "Jurisdictional conflicts between sovereign nations", *The International Lawyer*, vol. 19, No. 2, 1985, p. 487.

¹² For a discussion of issues in this regard, see P. M. Roth, "Reasonable extraterritoriality: Correcting the 'balance of interest'", *The International and Comparative Law Quarterly*, vol. 41 (Part 2), (1992), p. 245.

¹³ See L. Oppenheim, *International Law: A Treatise*, 8th edition, London, Longmans, Green, vol. I, sects. 141, 202, 203, 205, and 287-298. See, for a discussion of policy issues concerning jurisdiction over the maritime areas, McDougal and Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, London, Yale University Press, 1986 and P. Sreenivasa Rao, *The Public Order of Ocean Resources: A Critique of the Contemporary Law of the Sea*, Cambridge, Mass., The MIT Press, 1975.

(c) Should the nature of jurisdiction a State exercises over maritime areas be strictly limited to the type of authority it enjoys over such areas or zones under international law or could its jurisdictional exercise be regarded as reasonable and hence permissible, in the absence of any outweighing competing claim?¹⁴

(d) Could a State exercise its authority and power over rivers, canals and other resources within its territorial jurisdiction on the basis of sovereignty it enjoys over them without regard for the adverse effects for other States, particularly in the case of rivers and canals flowing through more than one State?¹⁵

(e) Conversely, could a State so affected or likely to be affected prescribe through its national legislation certain standards of behaviour for other States and their nationals and seek to enforce the same through its judicial and executive organs?¹⁶

(f) What should be the limits for exercise of jurisdiction on the basis of the principles of "effects", "passive personality", or "active personality"?¹⁷

(g) What factors should govern to resolve conflicts in jurisdiction, for example: when conduct prescribed by one State is prohibited by another?¹⁸

(h) Can uniform policies be prescribed to control extraterritorial effects of national legislation?¹⁹

(i) What should be the proper role of international law in dealing with conflicts in jurisdiction involving essentially the private or personal rights of individuals as opposed to public interests of a State? In other words, what is the proper relationship between principles of pub-

lic and private international law on the one hand and international and municipal (or national) law on the other?²⁰

(j) Can "self-help" by a State, or its officials, or its agents, be justified in enforcing national law and policies in the fact of opposition, lack of cooperation, or lack of an expeditious response from foreign States, or to overcome inevitable or inherent delays in processing requests through diplomatic, administrative and judicial organs of such States?²¹

(k) What kind of remedies are or should be available in case of abuse of exercise of jurisdiction by a State?²²

6. These issues or policy considerations are the subject matter of national legislation of several States—the United States of America, European States, criminal laws of States and the European Community; some multilateral conventions and declarations of the United Nations; and case law of the international courts and national tribunals.²³

7. The doctrine concerning extraterritorial application of national legislation is not well settled. There are no uniform or universally settled principles in this regard. Interpretation and application of the same is essentially left to the courts in individual cases and they vary depending upon the field or issue at hand.

8. The basic principle, however, is that all national legislations are, prima facie, territorial in character.²⁴ While the Permanent Court in the *Lotus* case recognized this principle, it also held that several States did approve extraterritorial effect being given to their national laws, and that such a policy and practice were not prohibited by international law.²⁵ This view of the Permanent Court appears to have provided the basis for Justice Learned Hand in the *Alcoa* case wherein the Court held valid extension of the U.S. Sherman Act over activities by foreigners outside the U.S., but having effects or consequences within the United States.²⁶

9. The test of effect also provided the basis for the United States and other countries to extend the reach of their laws over activities affecting their interests (including the interests of their nationals). This position is sup-

¹⁴ See, for example, N. M. Hunning, "Pirate broadcasting in European waters", *The International and Comparative Law Quarterly*, vol. 14, 1965, p. 410; and P. Sreenivasa Rao, "The Seabed Arms Control Treaty: A study in the contemporary law of the military uses of the seas", *Journal of Maritime Law and Commerce*, vol. 4, No. 1, 1972, p. 67.

¹⁵ See the work of the Commission on regulation of law concerning non-navigable uses of international watercourses.

¹⁶ See J. L. Briery, *The Law of Nations*, 6th ed., C. H. Waldock, ed., Oxford, Clarendon Press, 1963.

¹⁷ "Extraterritorial effects of administrative, judicial and legislative acts", *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1987, vol. 10 (1987), pp. 155 et seq., especially pp. 158-161.

¹⁸ For an interesting exchange of views between Judge Wilkey, who decided the case *Laker Airways Limited v. Sabena, Belgian World Airlines*, *Federal Reporter, Second Series*, vol. 731, *United States Court of Appeals, District of Columbia Circuit*, p. 909, and Messrs. Lowenfeld and Henkins, all connected with drafting section 403 of the *Restatement of the Law (Second): The Foreign Relations Law of the United States*, which provides for balancing of national interests and reasonableness as a test for assuming jurisdiction by U.S. courts when another State also has jurisdiction over the subject matter resulting in concurrent and/or conflicting jurisdiction, see H. G. Maier, "Resolving extraterritorial conflicts or 'There and back again'", *Virginia Journal of International Law*, vol. 25, No. 1 (1984), p. 7.

¹⁹ Mann, see loc. cit. (see footnote 7 above), pp. 26-31.

²⁰ See O. Schachter, *International Law in Theory and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 256-257; Brownlie (see footnote 9 above), pp. 306-307. Mann, "The doctrine of jurisdiction in international law" (see footnote 11 above), pp. 17-22 and "The doctrine of international jurisdiction revisited after twenty years" (footnote 7 above), pp. 31-32. H. G. Maier, "Extraterritorial jurisdiction at a crossroads: Intersection between public and private international law", *AJIL*, vol. 76, No. 2, 1982, p. 280.

²¹ See the U. S. Congressional discussion on this point, in Andreas F. Lowenfeld, "U. S. law enforcement abroad: The Constitution and international law, continued", *AJIL*, vol. 84, No. 2 (1990), pp. 484-488.

²² See the work of the Commission on State Responsibility.

²³ For a collection of legal materials in this regard, see Alan V. Lowe, *Extraterritorial Jurisdiction*, Cambridge, Grotius Publications Limited, 1983.

²⁴ *American Banana Company v. United Fruit Company*, *United States Reports*, vol. 213, *Cases adjudged in the Supreme Court*, 1909, p. 347.

²⁵ See footnote 4 above.

²⁶ See *United States of America v. Aluminium Company of America et al.* (*Federal Reporter, Second Series*, vol. 148, 1945, p. 416) where Justice Learned Hand observed that: "it is settled law . . . that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends."

See also *Continental Ore Co. et al. v. Union Carbide and Carbon Corp. et al.* (*United States Reports*, 1962, vol. 370, p. 690) and *United States v. Watchmakers of Switzerland Information Centre (Federal Supplement 1955*, vol. 133, *United States District Court of New York*, p. 40).

ported on the basis of the principle of the objective territoriality which is viewed as an extension of the territoriality principle.

10. Even though the application of the principle of objective territoriality is seen as generally acceptable,²⁷ particularly in the case where physical injury is involved,²⁸ there is disagreement as to the conditions under which the application of the test of effects could be held as reasonable. Indeed, in several fields—bankruptcy,²⁹ antitrust,³⁰ shipping,³¹ taxation,³² nationality,³³

²⁷ See Mahomed K. Nawaz, "Criminal Jurisdiction and International Law", *The Indian Year Book of International Affairs* (Madras), 1952, p. 210, where the author discussed extraterritorial application of the Indian Penal Code of 1860 which largely remains the law even today, and analyses the other principles, including the objective territoriality principle with reference to Indian cases (*Emperor v. Chotalal and Wheeler v. Emperor* (ibid., p. 214)). See also *Mobarik Ali Ahmed v. State of Bombay, All India Reporter*, 1957; *R. v. Baxter, The All England Law Reports*, 1971, vol. 2, p. 359; *Secretary of State for Trade vs. Markus*, ibid., 1975, vol. 1, p. 958. See also C. Blakesley, "United States jurisdiction over extraterritorial crime", *Journal of Criminal Law and Criminology*, vol. 73, 4th part (1982), p. 1109 and K. Dam, "Extraterritoriality, conflicts of jurisdiction", *American Society of International Law, Proceedings of the 77th Annual Meeting*, Washington, D.C., 14-16 April 1983, p. 370.

²⁸ Jennings, loc. cit. (see footnote 9 above).

²⁹ See *The Barcelona Traction, Light and Power Company, Limited case* (see footnote 8 above).

³⁰ K. M. Messen, "Antitrust jurisdiction under customary international law", *AJIL*, vol. 78, No. 4 (1984), p. 783.

³¹ Mann, "The doctrine of international jurisdiction revisited after twenty years" (see footnote 7 above), pp. 21-94; *Mogul Steamship Company, Limited v. McGregor Gow & Company, The Law Report House of Lords, Judicial Committee of the Privy Council and Peerage Cases*, 1892, p. 25, dealing with United Kingdom law on shipping conferences. However, this position is not agreed to by the United States in certain cases resulting in 1981 in a number of shipping lines, including a German and English one being heavily fined. See *BYBIL*, vol. L (1979), p. 352 and ibid., vol. LII (1981), p. 459. Also see, in this connection, the note addressed by a group of 13 States to the United States rejecting its right to impose its laws on events and activities taking place, wholly or largely, within the territories of other States (ibid., vol. XLIX, 1978, p. 386). According to Mann, shipping conferences are a pre-eminent example of the working of "effect doctrine" (p. 92).

³² See section 7 of the German law; section 482 of the U.S. Internal Revenue Code; section 80 of the English Finance Act, 1984, which permit, subject to various conditions, the apportionment of subsidiaries' profits among its shareholders and the imposition of tax upon them. See also section 38 of United Kingdom Finance Act, 1973, in conjunction with section 12 of the Capital Gains Tax Act, 1979, under which gains of oil companies outside the United Kingdom are treated as gains carried on in the United Kingdom through a branch or agency. See also Friedrich K. Juenger, "Conflict of Laws: A Critique of Interest Analysis", *American Journal of Comparative Law*, vol. 32, No. 1 (1984).

³³ See *The Antelope case (Reports of Cases Argued and Adjudged in the Supreme Court of the United States)*, vol. X, 1825, p. 66, in which Chief Justice Marshall held that a U.S. Court lacked jurisdiction over a foreign vessel accused of engaging in the prohibited slave trade, "however abhorrent this traffic may be", thus rejecting extraterritorial application of U.S. laws over a foreign ship, hence nationalities. However, see *U.S. v. La Jeune Eugénie (Federal Cases, Circuit Court, District of Massachusetts)*, 1822, vol. 26, p. 832, where Justice Story held that the slave trade violated the Law of Nations and, therefore, fell within the jurisdiction of an American court. See also *Foley Bros. Inc. v. Filardo (United States Reports)*, vol. 336, 1949, p. 281 where the Court held that the eight-hour workday law did not apply to an American citizen working abroad on a contract between the U.S. Government and a private contractor. See for a discussion of these cases and other aspects, Note: "Constructing the State extraterritorially: Jurisdictional discourse, the national interest, and transnational norms", *Harvard Law Review*, vol. 103, No. 6, 1990, pp. 1273 et seq., especially pp. 1288-1289.

discovery,³⁴ recognition of foreign acts³⁵—application of the text of effect or assertion of jurisdiction by a State on the basis of national interest provoked controversy. The United States, Germany and the European Economic Community, among others, support assumption of jurisdiction on the basis of the principle of effects in the anti-trust field.³⁶ This was opposed by the United Kingdom and several other countries.³⁷ Japan opposed the United States attempts to extend its laws to regulate shipping conferences taking place essentially outside the United States.³⁸ The United Kingdom and several other countries have also passed blocking national legislation, denying recognition to United States law.³⁹ They also adopted the "clawback remedy" under which a certain class of defendants in the foreign proceedings are given the right to reclaim in the United Kingdom courts that part of the foreign judgement awarding triple or multiple damages which exceeds the normal compensation.⁴⁰

11. Given this set of conflicts, attempts were made to define reasonable exercise of extraterritorial jurisdiction by States. It was suggested that, for assertion of extraterritorial jurisdiction, the effect within the territory should be substantial and the direct and foreseeable result of activity abroad.⁴¹ In another case, it was suggested that there should be a substantial and genuine or bona fide link for such jurisdiction to be reasonable.⁴² Courts also attempted balancing of national interest as a guide to justify jurisdiction in this regard.⁴³ The American Law Institute's *Restatement* indicated a set of factors to judge reasonableness of exercise of extraterritorial jurisdiction in case of counter-claims for jurisdiction on the basis of the principle of territoriality or nationality.⁴⁴ Several other factors like vital national interests, considerations of

³⁴ Roth, loc. cit. (see footnote 12 above), pp. 249-250. See also "Australia: Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976", in Lowe, op. cit. (footnote 23 above), p. 79.

³⁵ Oppenheim, op. cit. (see footnote 13 above), chap. IV, p. 371. See also *Banco Nacional de Cuba v. Sabbatino, Receiver (United States Reports)*, vol. 376, 1964, p. 398.

³⁶ Roth, loc. cit. (see footnote 12 above), pp. 245-249, 260-265.

³⁷ Brownlie, op. cit. (see footnote 9 above), pp. 311-314.

³⁸ See Lowe, op. cit. (see footnote 23 above), p. 121.

³⁹ See documents reproduced in Lowe, Part 2, pp. 79 et seq., op. cit. and Bowett, loc. cit. (footnote 3 above), pp. 22-24.

⁴⁰ Roth, loc. cit. (footnote 12 above), p. 252. See also *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. (The All England Law Reports)*, vol. 2, 1952, p. 780, where a United Kingdom court prevented Imperial Chemical Industries from parting with any of the patents which it had contracted to license to British Nylon Spinners as a retaliation to the decree issued by a U.S. court in *United States v. ICI*. In the *Westinghouse Electric Corporation Uranium Contract Litigation* (ILM, vol. 17, No. 1, 1978, p. 38) (2 December 1977), the House of Lords refused compliance with letters rogatory issued out of a U.S. decree court on the ground that English courts should not cooperate in investigations based on the extraterritorial obligation of United States antitrust laws.

⁴¹ *Restatement of the Law (Second): The Foreign Relations Law of the United States*, The American Law Institute, St. Paul, Minn., 1987.

⁴² Brownlie, op. cit. (footnote 9 above), p. 310.

⁴³ For a critical analysis, see K. Brewster, *Antitrust and American Business Abroad*, New York, McGraw-Hill, 1958 (suggesting the concept of "jurisdictional rule of reason") and Bowett, loc. cit. (see footnote 3 above), pp. 18-22.

⁴⁴ *Restatement of the Law (Third): The Foreign Relations Law of the United States*, vol. 2, The American Law Institute, St. Paul, Minn., 1987.

foreign policy or relations, international law or comity, limits of judicial power, reciprocity, hardship to the individual involved, control exercised by parent body over subsidiaries were also taken as relevant for judging reasonableness of the exercise of extraterritorial jurisdiction.⁴⁵

12. States have also entered into formal or informal agreements to coordinate their policies, promote their cooperation and institutionalize responses governing exercise of extraterritorial jurisdiction. But most of these efforts had limited focus and others remained largely persuasive.⁴⁶

13. Courts expressed their inability in some cases to deal with, evaluate and reconcile conflicting national interests.⁴⁷ States warned that such matters could not be left to domestic forums which, in the final analysis, could only be guided by their national laws and interests.⁴⁸ In view of this, it was felt that there is a strong case to codify and develop international law concerning the exercise of the extraterritorial jurisdiction by a State.⁴⁹

14. Urgency concerning the matter of extraterritorial jurisdiction is highlighted by certain recent events involv-

⁴⁵ *Mannington Mills Inc. v. Congoleum Corporation*, *Federal Reporter, Second Series*, vol. 595, 1979, p. 1287; see *Timberlane Lumber Co. v. Bank of America*, *ibid.*, vol. 597, 1977, p. 549. However, in the case concerning the Westinghouse uranium contract (see footnote 40 above), the U.S. court moved away from consideration of Comity, the weighing of the interest of the foreign State, and narrowing the enquiry to three factors: the complexity of the action, the seriousness of the charges and the recalcitrance of the foreign defendant. For the European Economic Community strictures against the U.S. Government for breaching of international law and failure to apply the balancing of interest test in connection with the supply of materials for the Soviet pipeline, see *ILM*, vol. 21, No. 4, 1982, p. 891.

Under United States practice, in addition to the right given to foreign States to intervene in cases involving conflict of national interest through the *amicus curiae* briefs, they have also the right to sue under U.S. antitrust laws. See *Pfizer Inc. et al. v. Government of India et al.*, *ILM*, vol. 17, No. 1, 1978, p. 93.

See also section 418 (2) of the *Restatement of the Law (Second)*, establishing U.S. jurisdiction over corporations organized under the laws of the foreign State that are substantially owned and controlled by nationals of the U.S. See Mann (footnote 7 above), chap. III.

⁴⁶ See Mann, *ibid.*, vol. 186 and Lowe, *op. cit.* (footnote 23 above). Mention may also be made of various international conventions or treaties relating to terrorism and extradition, drug-trafficking and avoidance of double taxation,

⁴⁷ *Laker Airways Limited v. Sabena, Belgian World Airlines* (see footnote 18 above). See also *Argentine Republic v. Amerasia Shipping Corp. and Others* (*International Law Reports*, vol. 81, 1990, p. 658): faced with Congressional silence regarding extraterritorial application of laws, courts invoke the presumption against extraterritoriality. See *Harvard Law Review* (footnote 33 above), pp. 1279 and 1280, footnote 43.

⁴⁸ For the views of the United Kingdom, see the note of 23 June 1982, *BYBIL*, vol. LIII (1982), p. 433. See also *Satya v. Teja Singh* (*All Indian Reports*, 1975), where the Supreme Court of India said that every case which comes before an Indian Court must be decided in accordance with Indian law. Any recognition given to a foreign law because of certain foreign elements being present in the case is conditional according to the court on its conformity with Indian public policy. Referring to the U.S. State Department's position urging judicial restraint by the U.S. courts in the assertion of extraterritorial jurisdiction (see American Society of International Law, *Proceedings of the 71st Annual Meeting*, San Francisco, Calif., 21-23 April 1977, pp. 214 et seq.). Bowett argues that such an approach would not yield satisfactory results and will not be sufficient. See, for the various reasons given, Bowett, *loc. cit.* (footnote 3 above), pp. 21-22.

⁴⁹ See Mann, *loc. cit.* (footnote 7 above) and Roth, *loc. cit.* (footnote 12 above).

ing abduction of persons from foreign jurisdiction to put them on trial before U.S. courts for offences connected with terrorism and drug-trafficking.⁵⁰ Such forcible and illegal abductions were condemned by several States as violation of their sovereignty and national laws and human rights. A proposal is now made by several countries requesting the United Nations General Assembly to consider submission of the legal cases involved for an advisory opinion of ICJ.⁵¹

15. Issues concerning the extraterritorial jurisdiction have also acquired prominence and require a comprehensive and conceptual response given to (a) the activities of States in outer space and over celestial bodies, maritime zones, Antarctica; (b) their concern to control terrorism, drug-trafficking, transnational movement of persons and operation of multinational enterprises; (c) demands for development involving claims for transfer or sale of technology without restricting the rights of the recipient States to trade freely in products or services, thus acquired with third parties;⁵² and (d) the need for States to seek security, independence and enjoy their sovereignty. Problems concerning extraterritorial jurisdiction may also have to be considered in the context of global interdependence, transnational and environmental injuries, management of international rivers, preservation of the environment and biodiversity, checking population growth and eradication of poverty. The various principles of jurisdiction—the principle of universality, the principles of active and passive nationality and the principle of effect—have elements of extraterritorial application of national laws. These need to be analysed and consolidated as an exception to the basic principle of jurisdiction, the principle of territoriality.

16. In view of the above, it appears quite clear that a study by the Commission of the subject of the extraterri-

⁵⁰ For documents and judicial resolutions on the *Alvarez Machain* case involving the United States of America and Mexico (*International Legal Materials*, Washington, D.C., vol. 31, No. 4, July 1992, pp. 900 et seq.), see *Limits to National Jurisdiction* (1992); on illegality of abductions, see Lowenfeld, *loc. cit.* (footnote 21 above).

⁵¹ See the request in a letter dated 13 November 1992 from representatives of several Latin American countries, Portugal and Spain addressed to the Secretary-General of the United Nations, in document A/47/249, Add. 1 and Corr. 1.

⁵² See the problems created in connection with the United States embargo on sending goods or technology to the Soviet Union to be used in building a natural gas pipeline between the Soviet Union and Europe. H. E. Moyer and L. A. Mabry, "Export controls as instruments of foreign policy" in *Law and Policy in International Business*, vol. 15 (1983), p. 1; see also Mann, *loc. cit.* (see footnote 7 above), pp. 60-63.

There is no consistency in the U.S. position, even on embargoes and boycotts. See *USA v. Betchel Corporation* (District Court of the Northern District of California, Stipulation and Final Judgement, in *ILM*, vol. 16, No. 1, 1977, p. 95), restraining parties from applying the Arab boycott against Israel within the United States of America. Contrast this with the U.S. enforcement of trade embargoes against China, Cuba and the Soviet bloc asserting extraterritorial reach for its Foreign Assets Control Regulations and its Export Control Act of 1949. See P. H. Silverstone, "Export Control Act of 1949: Extraterritorial enforcement", *University of Pennsylvania Law Review*, vol. 107 (1959), p. 331 and "International Boycotts and Embargoes", *American Society of International Law* (see footnote 48 above), pp. 170-182.

On the inequity of universalizing the sanctions contained in the United States Super 301 Law and the system of cross-retaliation being proposed in the context of the Uruguay Round of negotiations, see B. S. Chimni, "Political economy of the Uruguay Round of negotiations: A perspective", *International Studies*, vol. 29, No. 2 (1992) pp. 156-158.

torial application of national laws would be important and timely. There is an ample body of State practice, case law, national statutes and international treaties and a variety of critical scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions. To commence with, the Commission need not commit itself for the development of a Convention on the subject. Even a model law or a compilation of guiding principles could contribute towards codification and progressive development of law in this important area of international law. Such a study, further, could complement the efforts of the Commission in the codification and progressive develop-

ment of law in other areas such as the responsibility of States, liability for transnational injury, a draft code of crimes and establishment of an international criminal jurisdiction.

17. Finally, a study on the subject of extraterritorial jurisdiction could provide an opportunity to examine the relationship and the limits of public and private international law on the one hand and international law and municipal law on the other.⁵³

⁵³ See Sir Anthony Mason, "The relationship between international law and national law, and its application in national courts", *Commonwealth Law Bulletin*, London, vol. 18, No. 2 (1992), p. 750.

The law of (confined) international groundwaters, by Mr. Alberto Szekely

1. Of the earth's fixed and invariable volume of water, which amounts to about 1.4 billion cubic kilometres, approximately 97.3 per cent is ocean salt water. Only the remaining 2.7 per cent is fresh water. Of all fresh water available on the planet, 77.2 per cent is found in the polar ice caps and glaciers. The rest of the world's fresh water reserve is divided between groundwater (22.4 per cent), lakes and rivers (0.36 per cent) and water in the gaseous state, present mainly in the atmosphere (0.04 per cent). Many of the underground aquifers of the world are located in a transboundary fashion.

2. If nearly 47 per cent of the world's land area (excluding Antarctica) falls within approximately 165 transboundary river and lake basins, the figure for transboundary underground aquifers is even higher, reaching nearly 60 per cent in Africa and in Latin America.

3. Large transboundary aquifers in the different continents, such as the North-eastern African aquifer underlying the Libyan Arab Jamahiriya, Egypt, Chad and Sudan, the European aquifer underlying the many territories of the riparian States of the Rhine, and those in the Arabian peninsula across the boundaries of Saudi Arabia, Bahrain, Qatar, the United Arab Emirates and Jordan, amply show that groundwater, like surface water, often ignores political boundaries and lie in geological structures that straddle by themselves international borders or feed, or are fed by, international rivers and lakes.

4. Alarming demands on groundwater resources in the world are steadily increasing, not in small measure as a result of the exploding rates of population growth, industrial and agricultural development, and especially in border areas where, due to increased international trade and economic exchanges, proliferating human settlements and demographic concentrations are also on the rise.¹ In many locations, shortages or the quality of surface waters have caused users to expand the utilization of groundwater, the frequent result being the overpumping of aquifers, with the consequent deterioration of water quality, even the drying up of wells, thus creating all the necessary ingredients for potential conflict. As in the case of the

Middle East, where almost all of the water in its river systems are already being used (including the Nile, Jordan and Tigris-Euphrates Rivers), in many other border areas of the world severe shortages will occur, combined with a deterioration of water quality, all of it leading to increased pressures on those rivers' interconnected aquifers, and on transfrontier aquifers not significantly related to surface supplies. Such a situation may only be exacerbated by the impact of global warming.

5. Even independently from all that has been said to this point, the exploitation of groundwater and the preservation of its quality have already become the single most pressing concern of border communities. This is particularly true in the vast arid regions of the world, where abuses or contamination of transboundary aquifers are reaching crisis proportions. Many transboundary deposits are being rapidly and uncontrollably depleted because withdrawals exceed recharge, and many are being rendered useless as a result of contamination. To all of the above concerns, add the often irreversible destruction and the threat of severe diminution of aquifer recharge from improper land-use activities, or of long-lasting pollution from direct or indirect discharges into groundwaters of highly toxic wastes and substances, and the impact of droughts and floods, which traditionally lead to disasters affecting or caused by surface waters, an impact which is often mitigated by resort to vulnerable underground supplies, themselves threatened by infiltration of contaminated flood waters.

6. Water being the most critical and vital natural resource for human survival, potential or actual conflict over access to it or to secure the preservation of its quality cannot be conducive to harmonious international development or to the maintenance of international peace and security; thus the need for an international legal regime in this matter.

7. Various important actors in the international community, both governmental and non-governmental, and most particularly within the United Nations system, increasingly aware of and concerned with the potential dangers to international peace and to the well-being of humankind deriving from rising threats to the world's underground water supplies, have already pronounced themselves on the matter and sounded the voice of alarm. That has been

¹ See the 1968 analysis of world demographic trends in *World Population Prospects 1965-2000, As assessed in 1968* (ST/SOA/Series A/53) (United Nations publication, Sales No. 72.XIII.4).

the case with the 1965 Inter-American Specialized Conference on Renewable Natural Resources, held in Mar del Plata, the 1977 Mar del Plata United Nations Water Conference,² the United Nations Interregional Meeting of International River Organizations, held in Dakar in 1981,³ and the Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, organized by the United Nations Economic Commission for Africa and held in Addis Ababa in October of 1988,⁴ which recommended that Governments recognize the interdependence and diversity of the components of the hydrological cycle, including, *inter alia*, underground water and the water-atmosphere interface.

8. The International Conference on Water and the Environment, held in Dublin in January of 1992,⁵ stressed the grave threats and potential for conflict stemming from the shortage and abuse of fresh water and, recognizing the great importance of these natural resources for the future of mankind, called for the negotiation of agreements and principles regarding the use, preservation and protection of transboundary groundwater basins.⁶

9. The Governing Council of the United Nations Environment Programme has also recognized the need for special attention to be given to activities relating to the management of these transboundary resources.⁷

10. The water chapter of Agenda 21 contains an impressive emphasis and concern on the importance of groundwater, including transboundary aquifers, and calls on all countries to establish principles and institutional arrangements for their adequate use and protection.⁸

11. In international law, there are only general rules that apply, *inter alia*, but not specifically, to transboundary aquifers. That is why the United Nations Water Conference recommended that

[i]n the absence of bilateral or multilateral agreements, Member States continue to apply generally accepted principles of international law in the use, development and management of shared [*sic*] water resources.⁹

² See E/CONF.70/CBP/1.

³ See *Experiences in the Development and Management of International River and Lake Basins*, Proceedings of the Interregional Meeting of International River Organizations, Dakar, 5-14 May 1981, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.82.II.A.17).

⁴ *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)

⁵ See Dublin Declaration on Water and Sustainable Development (*International Conference on Water and Development—Development for the 21st Century*, Dublin, 26-31 January 1992 (A/CONF.151/PC/112, annex I), as well as the seventh item in its Programme of Action (ibid., annex II, pp. 47 et seq.).

⁶ See paras. 4.12 and 4.13, and 7.6 of the Conference report (ibid., annex II).

⁷ See the report of the Governing Council in *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 25 (A/44/25)*, particularly p. 101, decision 15/1.

⁸ A/CONF.151/26/Rev.1 (Vol. 1) (United Nations publication, Sales No. E.93.I.8), pp. 6 et seq.; see, for instance, sections 18.25 (d), 18.37 and 18.39 (a), pp. 283, 287 and 288.

⁹ *Report of the United Nations Conference on Water, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), Part One, chap. I, recommendation 93 (b).

12. As international law has evolved on matters regarding the use and conservation of national, international or transboundary natural resources in general, and even of water resources in particular, the respective principles and rules apply generally to transboundary aquifers simply because they constitute natural water resources divided by national boundaries.

13. Thus, specific multilateral international legal instruments may already contain some general references, provisions and even principles, as part of their rules, applicable to groundwaters (albeit not necessarily and specifically *transboundary* groundwaters), such as the European Water Charter,¹⁰ or the African Convention on the Conservation of Nature and Natural Resources, or the 1984 Declaration of Principles on the Rational Use of Water adopted by the Economic Commission for Europe (Decision C XXXIX),¹¹ some directives of the Council of the European Communities, or of the Economic Commission for Europe's Declaration of Policy on the Prevention and Control of Water Pollution of 1980. An ECE Committee approved in 1985 a set of principles more directly to the point, including seawater invasion of coastal aquifers, artificial recharge, heat storage in water tables, disposal of wastewater, pollution due to mining and farming and radioactive pollution.¹² The ECE adopted in 1987 Principles Regarding Cooperation in the Field of Transboundary Waters, expressing its awareness that prevention and control of transboundary pollution in groundwater aquifers, as well as the prevention of floods, are important and urgent tasks whose effective accomplishment can only be ensured by enhanced cooperation among the countries concerned.¹³ The Principles delve in some detail into recommended terms of agreements, water quality objectives and criteria, institutional arrangements, functions of institutional bodies, pollution, monitoring and data processing, warning and alarm systems and other matters.

14. Obviously, the most advanced official legislative project which would apply more specifically to transboundary groundwaters, would be the Commission draft rules on the Non-Navigational Uses of International Watercourses,¹⁴ which excludes a very important part of the world's transboundary aquifers, namely, those labelled by the previous Special Rapporteur as "unrelated/confined" groundwater, that is, those aquifers not directly connected, or not "constituting by virtue of their relationship a unitary whole" with an international surface watercourse "flowing into a common terminus."¹⁵

15. There are basically no precedents in international jurisprudence in this field, even when some more or less related cases may be found, apart from the even further removed ones such as the *Lake Lanoux* case,¹⁶ as the 1927

¹⁰ Adopted on 6 May 1968 by the Council of Europe.

¹¹ See *Annual Report of the Economic Commission for Europe, 24 April 1983-14 April 1984, Official Records of the Economic and Social Council, 1984, Supplement No. 13*, vol. I (E/1984/23-E/ECE/I083), chap. IV.

¹² WATER/GE.1/R.66, annex.

¹³ See E/ECE/(42)/L.19, decision I (42) of 1987.

¹⁴ For the text provisionally adopted by the Commission on first reading, see *Yearbook . . . 1991*, vol. II, Part 2, pp. 66-70.

¹⁵ The quoted terms are taken directly from the draft articles.

¹⁶ United Nations, *Collection of Arbitral Judgements*, vol. XII (Sales No.: 63.V.3), p. 281.

Award of the Reich State Tribunal in a case involving transboundary groundwaters seeping from the Danube (*Württemberg and Prussia v. Land in Baden*).¹⁷

16. That does not mean that there is no international practice on the matter in the record. Much to the contrary, a vast array of bilateral agreements can be identified that in one way or another deal with transboundary groundwaters (and sometimes even with concrete aquifers).¹⁸

¹⁷ *Strietsache des Landes Württemberg und des Landes Preussen gegen das Land Baden, betreffend die Donauversinkung*, Staatsgerichtshof (Germany), 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen*, (Berlin), vol. 116, appendix, pp. 18 et seq.

¹⁸ See, for example, the Definitive Boundary Treaty between France and Spain of 27 August 1785; the Treaty concerning the Frontiers between the Netherlands and Hanover of 2 July 1824; the Procès-verbal of demarcation between France and Neufchatel of 4 November 1824; the Convention between Italy and Switzerland for the Settlement of the Disputed Frontier between Lombardy and the Canton of Ticino of 5 October 1861; the Treaty between Austria and Bavaria concerning the regime of the frontier line and other territorial relations between Bohemia and Bavaria of 24 June 1862; the Spain-Portugal boundary treaty of 29 September 1864; the Agreement between the Governments of Great Britain and France with regard to the Somali Coast of 2 and 9 February 1888; the Treaty between Switzerland and Austro-Hungary for the regulation of the Rhine from the confluence of the Rhine, upstream, to the point downstream where the river flows into the Lake of Constance, of 30 December 1892; the Exchange of notes between France and the United Kingdom relating to the Gold Coast-French Sudan boundary of 8 April 1904; the Agreement relative to Frontier Delimitation between Persia and Turkey of 21 December 1913; the Provisions relating to the common frontier between Belgium and Germany of 6 November 1922; the Protocol between France and Great Britain defining the boundary between French Equatorial Africa and the Anglo-Egyptian Sudan; the Agreement between Egypt and Italy fixing the frontier between Cyrenaica and Egypt (on the Ramla Wells) of 6 December 1925; the Exchange of notes constituting an Agreement between the British and Italian Governments respecting the regulation of the utilization of the waters of the River Gash of 12 and 15 June 1925; the Treaty between France and Germany regarding the delimitation of the frontier of 14 August 1925; the Convention between the Governments of the Union of Soviet Socialist Republics and Persia regarding the mutual use of frontier rivers and waters of 20 February 1926; the Agreement between Belgium and Germany concerning the common frontier of 7 November 1929; the Treaty of peace, friendship and arbitration between the Dominican Republic and the Republic of Haiti of 20 February 1929; the Agreement between Persia and Turkey on the fixing of the frontier of 23 February 1932; the Agreement between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and Ruanda-Urundi of 22 November 1934; the Agreement between the Austrian Federal Government and the Bavarian State concerning the diversion of water in the Rissbach, Dürrach and Walchen districts of 16 October 1950; the State Treaty between the Grand Duchy of Luxembourg and the *Land* Rhineland-Palatinate in the Federal Republic of Germany concerning the construction of a hydroelectric power plant on the Sauer of 25 April 1950; the Protocol between Albania and Yugoslavia regulating the use of the waters at their common frontier of 1953; the Agreement between the Hashemite Kingdom of Jordan and the Republic of Syria concerning the utilization of the Yarmuk waters of 4 June 1953; the Agreement between the Federal People's Republic of Yugoslavia and the People's Republic of Albania concerning water-economy questions of 5 December 1956; the Convention between the Federal Republic of Germany and France on the regulation of the upper course of the Rhine between Basel and Strasbourg of 27 October 1956; the Agreement between the Government of the Federal People's Republic of Yugoslavia and the Government of the People's Republic of Hungary concerning water-economy questions of 8 August 1955; the Agreement between the Italian Republic and the Federal People's Republic of Yugoslavia concerning the supply of water to the Commune of Gorizia of 18 July 1957; the Minutes of the meetings of the delegations of the Government of the People's Republic of Yugoslavia and the Kingdom of Greece from 26 August to 1 September 1957 concerning hydro-electric studies of the drainage area of Lake Dojran of 1 September 1957; the Convention between the Grand Duchy of Luxembourg and the *Land* Rhineland-Palatinate in the Federal Republic of Germany,

17. The doctrine on the matter has basically inspired, aside from a respectable body of published specialized literature, two very advanced academic efforts to codify and progressively develop the international law of transboundary groundwaters.

18. On the one hand, the 1986 International Law Association Seoul Rules on International Groundwaters¹⁹ (which followed the Association's 1966 Helsinki Rules on the Uses of the Waters of International Rivers²⁰), and the much more advanced and complete 1987 Bellagio Draft Treaty on Transboundary Groundwaters,²¹ elaborated by a team of international water and environmental law experts in the International Transboundary Resources Center of the University of New Mexico Law School. The Draft evolved as a revision of a previous "Ixtapa Draft" published in 1985.²²

19. The Ixtapa Draft and its revision in the Bellagio Draft, have already been thoroughly reviewed, widely quoted and increasingly invoked in the specialized literature and in several international bodies, events and reports, including in several sessions of the International Law Association, in a special Panel Session of the Sixth Congress of the International Water Resources Association held in Ottawa in May 1988, in the Doman Colloquium on the Law of International Watercourses held at the University of Colorado School of Law at Boulder in October 1991, in the Tri-National Working Conference and the

concerning the construction of hydro-electric power installations on the Our of 10 July 1958; the Agreement between the Government of the Federal People's Republic of Yugoslavia and the Government of the People's Republic of Bulgaria concerning water-economy questions of 4 April 1958; the Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters of 21 March 1958; the Convention between France and Switzerland on the protection of Lake Léman waters against pollution of 16 November 1962; the Agreement between Poland and the Union of Soviet Socialist Republics concerning the use of water resources in frontier waters of 17 July 1964; the Convention between the French Republic and Federal Republic of Germany concerning development of the Rhine between Strasbourg/Kehl and Lauterburg/Neuburgweier of 4 July 1969; the Agreement between Finland and Sweden concerning frontier rivers of 15 December 1971; the Agreement of 1973 (Minute 242) of the International Boundary and Waters Commission (Mexico-United States of America) concerning the salinity problems of the Colorado River; the Agreement between the German Democratic Republic and Czechoslovakia of 1974; the Agreement between France and Switzerland on intervention by the agencies responsible for combating accidental pollution of the waters by hydrocarbons or other substances capable of altering the waters, and recognized as such under the Franco-Swiss Convention of 16 November 1962 concerning the protection of the waters of Lake Léman against pollution; the 1978 Agreement between Canada and the United States of America on Great Lakes water quality of 22 November 1978; and the Agreement between Austria and Czechoslovakia to settle certain issues of common interest concerning nuclear installations of 18 November 1982.

¹⁹ ILA, *Report of the Sixty-second Conference, Seoul, 1986*, London, 1987, pp. 238 et seq.

²⁰ Helsinki Rules on the Uses of Waters of International Rivers, adopted by the International Law Association in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966*, London, 1967, pp. 484 et seq., reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405.

²¹ R. D. Hayton and A. E. Utton, "Transboundary groundwaters: The Bellagio Draft Treaty," *Natural Resources Journal*, vol. 29, No. 3 (1989), p. 663.

²² A. B. Rodgers and A. E. Atton, "The Ixtapa Draft Agreement relating to the use of transboundary groundwaters", *Natural Resources Journal*, Albuquerque, N. M., vol. 25, No. 3 (1985), p. 713.

International Workshop on the North American Experience in Managing International River Systems, held respectively in Gasparilla Island in April 1991 and also in Bellagio in December 1992.

20. The advantage of the degree of detail and precision of the Bellagio Draft is that it would save considerable time and research effort for the Commission, and help it on its way to a draft convention and to prepare its own draft rules, by taking advantage of this basic working document, one which enjoys already wide international prestige.

21. The greatest contribution which can be derived from the Bellagio Draft is that it already identifies the issues involved in the international law of transboundary

groundwater resources, and proposes concrete and advanced provisions for each of the issues with authoritative support in the form of substantive comments. It includes a good number of important definitions, and it proposes provisions for the general purposes of the draft articles: for the creation of an institutional mechanism, its enforcement and oversight responsibilities, as well as for the establishment and maintenance of a database, water quality protection, the creation of transboundary groundwater conservation areas, principles and criteria for the adoption of comprehensive management plans, public health emergencies, planned depletion of an aquifer, transboundary transfers, planning for drought, inquiry in the public interest, the regime of existing rights and obligations, and for the accommodation of differences and for the resolution of disputes.

The global commons, by Mr. Christian Tomuschat

1. One of the themes considered for inclusion in the Commission's programme of work is the "global commons". The purpose of the present paper is to devote some reflections to the question of whether that theme is suitable as subject of a study and possibly further work of codification and/or progressive development of law.

1. THE CONCEPT OF THE GLOBAL COMMONS

2. The global commons has become a widely used formula in recent years. Notwithstanding its frequent appearance even in legal documents, its scope and meaning leave much room for doubt. A binding legal definition does not exist. If our understanding is correct, two different categories of things are normally thought of when a person speaks of the global commons.

3. On the one hand, reference is made to areas or spaces not subject to national jurisdiction. In this sense, the global commons comprises the territories that do not belong to any State, in the first place, Antarctica and the high seas, as well as the spaces above and below the sea level beyond the areas of national jurisdiction, including the sea floor together with the subsoil thereof, and the celestial space including the Moon, the other planets and the stars, to the extent that they are in any way subject to human domination.

4. On the other hand, the global commons can also be understood as encompassing additionally those environmental resources that resist total domination by man, namely air and water, as well as the global weather and climate resulting from the interaction of air, water and topographical conditions with the sun. In an even wider sense, the global commons would include the wealth of the earth's fauna and flora, irrespective of their territorial location.

5. It would appear obvious at first glance that it is not easy to lump together all these disparate elements. On the other hand, it is a matter of common knowledge that some of these elements at least are already regulated by international instruments. Thus, as a first step, it should be exam-

ined if and to what extent the different elements of the global commons are subject to specific rules under treaties in force or about to come into force. We shall leave aside, for the time being, the general rules of customary law which have evolved over the last decades, since customary law always presents a certain degree of fluidity. The existence of customary law should, therefore, not impede a possible effort at innovation by codification and progressive development.

2. TREATIES APPLICABLE TO THE GLOBAL COMMONS

(a) *Areas or spaces making up the global commons*

6. As far as the *world's oceans* are concerned, it is well known that their regime has been regulated in a comprehensive fashion by the United Nations Convention on the Law of the Sea. Going much beyond the rather rudimentary rules that are contained in the Geneva Convention on the High Seas, the United Nations Law of the Sea Convention devotes an entire chapter (Part XII) to the preservation and protection of the marine environment. Its basic proposition is enshrined in article 192, according to which "States have the obligation to protect and preserve the marine environment". The following provisions elaborate in greater detail on that rule.

7. As far as "the Area" is concerned, i.e. the sea bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (art. 1, para. 1), specific measures to be taken by the Seabed Authority are provided for (article 145). It would certainly be difficult to improve on this regime in a general instrument covering the global commons in their totality. In any event, any such attempt would mean amending the Convention at a stage when it has not yet entered into force.

8. The United Nations Convention is not the only instrument governing activities related to the world's oceans. Many treaties have been concluded under the auspices of the IMO. They cover such subjects as oil spills and dumping of waste, including nuclear waste. The Treaty Banning Nuclear Weapon Tests in the Atmos-

phere, in Outer Space and Under Water prohibits all nuclear tests under water. Although there may exist some lacunae here and there, the main environmental threats are thus subject to legal regulation.

9. It also should be mentioned that there exist many regional treaties whose main objective is to prevent pollution of the seas from land-based sources.

10. Concerning *Antarctica*, 1991 saw the conclusion of a Protocol on Environmental Protection to the Antarctic Treaty. It would make little sense to come up with proposals for the modification of the regime provided for in that Protocol.

11. *Outer Space* was subjected to legal regulation in 1967 through the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. The Treaty does not directly deal with issues relating to the environment, although one may take the view that the prohibitions contained in article IV (1), which essentially aim at banning nuclear or other weapons of mass destruction, have at the same time beneficial effects for the global commons. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies goes one step further in providing in article 7 that “[i]n exploring and using the Moon, States Parties shall take measures to prevent the disruption of the balance of its environment”. However, until now no practical problems have emerged which would require further protective steps.

(b) *Environmental resources*

12. It is a truism to state that air cannot be kept within national boundaries. According to patterns whose main elements are well known today, air floats around the globe. Thus, any interference with the original purity of air has repercussions somewhere else. However, international regulation cannot go so far as to endeavour to establish a legal regime for any human activity affecting the quality of air, since there is almost no such activity which does not, to a greater or lesser degree, have an impact on air conditions. Therefore, restrictive criteria have been observed in practice. First, international regulation has focused on air pollution of a clearly perceivable international character. Second, efforts to curb air pollution have quite naturally concentrated on factors exceeding a certain level of gravity. The most prominent example of a treaty aiming at combating air pollution is the Convention on Long-Range Transboundary Air Pollution. However, this instrument with its three additional protocols is confined to the European region. It emerged from preparatory work accomplished within the Economic Commission for Europe. To date, no other region of the globe has followed suit. Nor does there exist a binding international instrument at the worldwide level.

13. Water has qualities similar to those of air. It is in movement through evaporation and successive rainfall. Thus, water cannot be kept confined forever by one nation, except perhaps for certain stocks of groundwater which, if untapped, may remain unchanged for centuries. On the other hand, water is a largely more stable resource than air, since evaporation as well as the flow of rivers are

rather slow processes which can to some extent be controlled by man. It is for these reasons that legal regulation has never targeted water as such, but has instead attempted to establish rules for its different forms of appearance in rivers, lakes, the seas and the oceans. As the debate in the Commission on the law of the non-navigational uses of international rivers has shown, States view the water of rivers running through their territories rather as a resource subject to national sovereignty, although recognizing that some international commitments must restrict its use. In any event, the notion of a shared resource—among the riparians of an international river system—was not even accepted by the Commission.

14. According to scientific research, the ozone layer has a particular importance inasmuch as it prevents life-threatening ultraviolet radiation from reaching the earth's surface. In that regard, the international community has taken action by adopting the Vienna Convention for the Protection of the Ozone Layer, which was subsequently supplemented by the Montreal Protocol on Substances that Deplete the Ozone Layer, which for its part was amended in 1990. Here, again, little remains to be done. In any event, one cannot hope to improve on that regime in a general instrument covering the global commons as a whole.

15. Lastly, mention should be made of the recent United Nations Framework Convention on Climate Change. As indicated by its title, the Convention deals in a specific manner with all of the issues related to the world climate. To be sure, no more than a general framework is set. However, it should be kept in mind that in any event an instrument purporting to regulate the global commons in their entirety would have to be confined to laying down fairly broad principles. By its very nature, it would not have the potential of going into details.

16. Summing up, one is entitled to state that at the present juncture an extended network of legal rules protecting the global commons already exists. It can hardly be maintained that these rules are fully satisfactory. Nor is it difficult to draw attention to gaps and lacunae here and there which also characterize the overall picture. On the other hand, the potential for innovative strides ahead is obviously rather limited. In the important fields, where major environmental threats can be perceived, the existing instruments go into much more detail than a set of principles or rules on the global commons could ever do.

17. An entirely new chapter would be opened if one took the view that the fauna and flora of the globe, whatever their territorial location, were also to be considered as part and parcel of the global commons. Obviously, such a conception would hurt many traditionally held views on national sovereignty. However, at a regional level many treaties exist which seek to protect wildlife as well as plants threatened with extinction. At the Rio Summit in June 1992, the Convention on Biological Diversity was also adopted. Here, again, the outer limits of what is internationally acceptable seem to have been reached for the time being.

3. MAINDIFFICULTIES OF A PROJECT FOR THE PROTECTION OF THE GLOBAL COMMONS

18. The preceding observations have already given some indication of the difficulties a project on the global commons would have to grapple with.

19. All the treaties in force are of a specific nature. They either establish a general regime for one separate element of the global commons (e.g. Antarctica, the high seas, outer space), or they attempt to counteract a specific environmental threat (e.g. air pollution). Thus, it was possible to adapt the regime concerned to the specificities of the subject matter at stake, drafting rules to be applied directly, not needing to be elaborated upon and concretized through different legislative stages. If the Commission attempted to draft rules for all of the global commons with their widely divergent features, the rules would have to be set at such a high level of abstractness that one could hardly hope to make any progress in comparison to the Stockholm Declaration on the Human Environment¹ or the recent Rio Declaration on Environment and Development.²

20. If the general orientation is to establish a legal regime for the global commons as a whole, this essentially comes down to enjoining States to take precautionary measures so that activities carried out in their territories do not harm resources that condition the existence of mankind. Such a regime, however, cannot be distinguished from a regime for the protection of the territorial integrity of other States. This is particularly obvious in the case of air pollution. Most of the pollution negatively affecting the oceans reaches them from the skies. In order to keep the marine environment intact, therefore, it is necessary to reduce sources of air pollution based on land, that is to say in territories under national jurisdiction. These same sources of pollution, however, also harm neighbouring States. What is needed, therefore, is one regime of air pol-

¹ *Report of the United Nations Conference on the Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. 1.

² *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions Adopted by the Conference*, resolution 1, annex I.

lution whose parameters are determined by taking into account, at the same time, the harm potentially caused to the global commons as well as the injury which may be inflicted on other States. It would be extremely artificial, if not impossible, to draw up different rules on prevention according to the identity of the potential victim objects. Responsibility is a different matter altogether. In that regard, the classical rules provide no answers, presupposing, as they do, a bilateral relationship between an author State and a victim State.

21. A last difficulty stems from the fact that the Commission has the well-known topic "Injurious consequences arising out of acts not prohibited by international law" on its agenda. According to the decisions taken at the forty-fourth session,³ the work on this topic is to be carried out first of all by studying the relevant aspects of prevention. As was pointed out above, prevention is a unitary concept, designed to avoid harmful effects from arising, wherever their location. By including in its programme the global commons as a new topic, the Commission would therefore necessarily duplicate the work already begun under "Injurious consequences..." It would seem infinitely preferable to bear in mind the need of the global commons for protection in establishing a code of duties of prevention. Any other decision would inevitably lead to interminable and sterile debates about the delimitation of the two topics.

4. CONCLUSIONS

22. It is not advisable to include a topic entitled "The global commons" in the long-term programme of work of the Commission.

23. The concerns underlying the suggestion for the inclusion of such a topic in the Commission's programme of work can, to a large extent, be taken care of in developing appropriate rules of prevention within the framework of the topic "Injurious consequences arising out of acts not prohibited by international law". It would certainly be wise to change the title of that topic in due course in order to make its new orientation plainly visible.

³ *Yearbook . . . 1992*, vol. 2 (Part Two), paras. 343-349.

Rights and duties of States for the protection of the human environment, by Mr. Chusei Yamada

1. GENERAL IDEAS

1. The conclusions of the Siena Forum on International Law of the Environment, which was held in April 1990 at Siena, Italy, properly pointed out that, since the Stockholm Declaration on the Human Environment,¹ international environmental law has seen many important

¹ *Report of the United Nations Conference on the Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. 1.

developments. Its present situation is characterized by an abundance of conventions and other international instruments, which cover many fields and constitute an impressive network of rights and obligations of States. They should be considered a successful achievement of contemporary international law.

2. The existing network of obligations in international conventions leaves, however, certain gaps. Certain fields—in particular those related to global concerns—are

not yet fully covered. Implementation of conventions, both domestic and international, is not always satisfactory.

3. The "sector by sector" approach, adopted in the conclusion of conventions, often dictated by the need to respond to specific requirements, involves the risk of losing sight of the need for an integrated approach to the prevention of pollution and the continuing deterioration of the environment.

4. Customary law in the field of protection of the environment is at an early stage of development. The development of general principles in the form of a convention for filling the gaps of conventions and for insuring the protection of the commons, therefore, would be a challenging but important task for the Commission.

5. It may be recalled in this connection that the "Survey of international law",² prepared by the Secretariat for the Commission to select a list of topics to be included in its long-term programme of work, devoted a chapter for the law relating to the environment in order to draw attention of the Commission to the progressive development of international law in this area.

6. It is proposed that the title of the item would be "Rights and duties of States for the protection of environment" instead of "Human environment". When the title was proposed during the last session of the Commission, I had in mind the Stockholm Declaration on the Human Environment, but to restrict the scope of the item to the human environment would limit too much the effectiveness and usefulness of the outcome in the light of the recent conceptual developments in the field of environment.

2. DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

7. A brief overview of the historical development of international environmental law would give us a useful indication on what we should do in this field.

8. The characteristics of traditional environmental problems, which have been a subject of international law since the pre-war period, are that they normally arose between two neighbouring nations, in which the identification of the polluter(s) and the victim(s) was relatively easy, and that the dispute between the affected and the affecting State(s) in their bilateral relationships was the kind which could be resolved through the application of the principle of good neighbourliness. A typical example of this type of dispute was the *Trail Smelter* arbitration,³ which was settled in 1941.

9. The rules of international law of this kind are based on the premise of sovereign equality of territorial States in which the State is expected to exercise due diligence over the economic activities within its territory so that they will not cause any harm to other States; *sic utere tuo ut alienum non laedas*.

² See *Yearbook . . . 1971*, vol. II (Part Two), p. 1, document A/CN.4/245.

³ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.

10. The characteristic of this type of international environmental law is that it is primarily aimed at balanced coordination of exclusive territorial sovereignty of States and, therefore, is not necessarily aimed at the global environmental protection.

11. When environmental degradation, at a later stage, came to cover not only the injury to neighbouring States but also the widespread damage to wider areas, a certain tendency for modification of the applicable rules of international law was witnessed.

12. In the conventions dealing with damages caused by ocean pollution and ultra-hazardous activities such as nuclear or space activities, the principle of responsibility for risk (which is to impose absolute liability of a certain level to those who create risk to the society) has come to be introduced, apart from the traditional principle of responsibility based on negligence.

13. However, there is no general convention stipulating the rights and duties of States as regards ultra-hazardous activities except for those conventions on specific activities, and the contents of the rights and duties therein prescribed are not comprehensive.

14. With the drastic expansion of the economy and the explosive increase of population in recent years, global problems such as destruction of the ozone layer and climate change have come to be embraced as important topics of international law.

15. The characteristics of global environmental problems such as climate change, destruction of the ozone layer, biodiversity and tropical forests are that they cause gradual but widespread and long-lasting harm to the environment as a combined result of various activities in various countries.

16. These problems, as the common concerns of mankind, give rise to a totally new question as to the rights and duties of States, which goes far beyond the traditional relationship of reciprocal obligations of States, and which would take the form of "erga omnes obligations" or "general obligations" in its contents, nature and the method of implementation.

17. From this point of view, the principle of the general obligation of States for the protection of the environment itself created by a number of environmental conventions has great significance as a basic principle of international law (the principle, for example, is embodied in art. 2, para. 1, of the Convention for the Protection of the Ozone Layer).

3. THE FORM OF AN INSTRUMENT TO BE DRAFTED

18. As a form of the instrument in the field of environment, it would be appropriate to consider the possibility of drafting an umbrella convention which prescribes general rights and duties of States, going beyond the individuality of specific areas and particular aspects of the environment. Development of rules of international law which are common to all current and future environmental problems might make it possible to fill gaps left by the existing individual conventions, and to keep under some degree of control of international law newly arising environmental

problems. It would help avoid leaving any lacunae of applicable rules even in the absence of the relevant conventions. It would promote, at the same time, the early identification of potential environmental problems, and the establishment of more concrete provisions under specific conventions. Needless to say, the purpose of this umbrella convention is not to substitute for individual conventions, but to promote more effective protection of the environment. The convention under consideration would prescribe common rules which cut across the existing conventions; further details are expected to be complemented by individual conventions on specific subjects.

4. POSSIBLE STRUCTURE OF GENERAL RIGHTS AND DUTIES OF STATES FOR THE PROTECTION OF ENVIRONMENT

19. In view of the historical development of international law and the current situations facing the international community as stated in paras. 7 to 17 above, the following might be considered as a possible outline of the general rights and duties of States in this field.

I. General Principles

- A. Use of terms (definition of terms such as "environment", "pollution", "harm", "injury", "damage" and "risk" to the environment, etc.)
- B. Legal implication of "general obligations" of States vis-à-vis international community
- C. The principle of responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment
- D. Relatively new principles
 1. The concept of "sustainable development"—inter-generational equity
 2. Common but differentiated responsibilities for the interests of all mankind—consideration of special situations of developing countries
 3. Harmonization of environmental and trade policies

II. Substantive and procedural rules

- A. Basic principles
 1. Responsibility in neighbourly relations
 2. Liability pertaining to high-risk activities
 3. Applicability of polluters-pay principle
 4. Protection of global environment as a whole
- B. International cooperation (exchange of information, consultations, environmental assessments, etc.)
- C. Principles on distribution of responsibility and liability

1. Responsibility arising from negligence
2. The principle of strict or absolute liability
3. Liability to ensure remedies (e.g. liability of a parent company and/or a State of a parent company concerning activities of subsidiaries harmful to the environment)

D. Procedure for the settlement of disputes

1. International procedure for the settlement of disputes
 - (a) Arbitration and/or ruling by competent international organizations
 - (b) The question of jurisdiction of ICJ concerning environmental disputes
 - (c) Admissibility of *actio popularis* in the field of global environmental disputes
2. Domestic procedure for the settlement of disputes—equal access of non-residents to domestic courts

III. Measures for the implementation of obligations

- A. Classification of obligations by their nature and their relationships with the methods of implementation
- B. Direct implementation measures
 1. Implementation by international organizations, establishment of rules within the framework of international organizations, opt-out system, pledge and review system, etc.
 2. Implementation through domestic laws—including questions of the principles concerning jurisdiction of States, and the extraterritorial effect of the unilateral domestic measures of a State
 3. The question of linkage between framework conventions and the implementing protocols
- C. Indirect implementation measures
- D. Disincentive measures
 1. Observation of the fulfilment of obligations on the international level
 2. Measures taken by international society towards a State having committed certain acts harmful to the environment
 - (a) Imposition of fines and taxes
 - (b) Economic sanctions including trade restrictions and suspension of aid
 - (c) Other measures
- E. Incentive measures
 1. Transfer of funds and technology, tax incentives

2. International mechanism for financial burden sharing
3. Establishment of liability insurance mechanisms.

5. FUTURE PERSPECTIVES ON THE WORK OF THE COMMISSION UNDER THIS ITEM

20. The author is aware that the above list is quite an ambitious one. The Commission will decide in due course which sub-topics should be considered on a priority basis.

21. It is necessary to ensure that the convention in question be compatible and harmonized with other topics related to environmental problems (especially the draft articles on State responsibility and international liability for the consequences of activities not prohibited by international law, and the draft code of crimes against the peace and security of mankind), works which are currently being undertaken by the Commission.

22. Considering that the instrument under this item is proposed to be a comprehensive umbrella convention, some topics listed in point 4 above could be a duplication of the contents of ongoing work of the Commission, which naturally we should avoid.

CHECKLIST OF DOCUMENTS OF THE FORTY-FIFTH SESSION

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/445	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook . . . 1993</i> , vol. II (Part Two), chap. I, para. 11.
A/CN.4/446	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-seventh session of the General Assembly	Mimeographed.
A/CN.4/447 and Add.1-3	The law of the non-navigational uses of international watercourses: Comments and observations received from Governments	Reproduced in the present volume.
A/CN.4/448 and Add.1	Draft Code of Crimes against the Peace and Security of Mankind: Comments and observations received from Governments	<i>Idem.</i>
A/CN.4/449 [and Corr.1]	Eleventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem.</i>
A/CN.4/450	Ninth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem.</i>
A/CN.4/451	First report on the law of the non-navigational uses of international watercourses, by Mr. Robert Rosentock, Special Rapporteur	<i>Idem.</i>
A/CN.4/452 and Add.1-3	Comments of Governments on the report of the Working Group on the question of an international criminal jurisdiction	<i>Idem.</i>
A/CN.4/453 and Add.1-3	Fifth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem.</i>
A/CN.4/454	Outlines prepared by members of the Commission on selected topics of international law	<i>Idem.</i>
A/CN.4/L.479	Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.480 and Add.1	Draft articles on State responsibility. Titles and texts of articles adopted by the Drafting Committee : Part 2	Text reproduced in <i>Yearbook . . . 1993</i> , vol. I, summary record of the 2318th meeting (para. 3)
A/CN.4/L.481 [and Corr.1]	Draft report of the International Law Commission on the work of its forty-fifth session: chapter I (Organization of the session)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10)</i> . The final text appears in <i>Yearbook . . . 1993</i> , vol. II (Part Two).
A/CN.4/L.482 [and Corr.1] and Add.1 [and Corr.1] and Add.1/Rev.1	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.483	<i>Idem</i> : chapter III (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>

<i>Documents</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.484 [and Corr.1] and Add.1-7	<i>Idem</i> : chapter IV (State responsibility)	<i>Idem</i> .
A/CN.4/L.485	<i>Idem</i> : chapter V (the law of the non-navigational uses of international watercourses)	<i>Idem</i> .
A/CN.4/L.486 [and Corr.1]	<i>Idem</i> . chapter VI (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.487	International liability for injurious consequences arising out of acts not prohibited by international law. Titles and texts of articles adopted by the Drafting Committee: articles 1, 2, 11, 12 and 14	Text reproduced in <i>Yearbook . . . 1983</i> , vol. I, summary record of the 2318th meeting (para. 58).
A/CN.4/L.488 and Add.1 [and Corr.1 and 2], 2, 3 and 4 [and Corr.1]	Report of the Working Group on a draft statute for an international criminal court	Mimeographed.
A/CN.4/L.489	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts of articles adopted by the Drafting Committee on second reading: articles 1-6 and 8-10	Text reproduced in <i>Yearbook . . . 1993</i> , vol. I, summary record of the 2322nd meeting (para. 5).
A/CN.4/L.490 and Add.1	Revised report of the Working Group on a draft statute for international criminal court	Reproduced in <i>Yearbook . . . 1993</i> , vol. II (Part Two), document A/48/10, annex.
A/CN.4/SR.2295-A/CN.4/SR.2327	Provisional summary records of the 2295th to 2327th meetings	Mimeographed. The final text appears in <i>Yearbook . . . 1993</i> , vol. I.

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