REPORT OF THE INTERNATIONAL LAW COMMISSION on the work of its fortieth session

9 May–29 July 1988

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTY-THIRD SESSION

SUPPLEMENT No. 10 (A/43/10)

UNITED NATIONS

304 P.

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NOTE

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

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook . . . 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 1988*.

[Original: Arabic/Chinese/English/
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[19 August 1988]

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CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its fortieth session at its permanent seat at the United Nations Office at Geneva, from 9 May to 29 July 1988. The session was opened by the Chairman of the thirty-ninth session, Mr. Stephen C. McCaffrey.

A. Membership

2. The Commission consists of the following members:

Prince Bola Adesumbo AJIBOLA (Nigeria)

Mr. Husain AL-BAHARNA (Bahrain)

Mr. Awn AL-KHASAWNEH (Jordan)

Mr. Riyadh AL-QAYSI (Iraq)

Mr. Gaetano ARANGIO-RUIZ (Italy)

Mr. Julio BARBOZA (Argentina)

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

Mr. John Alan BEESLEY (Canada)

Mr. Mohamed BENNOUNA (Morocco)

Mr. Boutros BOUTROS-GHALI (Egypt)

Mr. Carlos CALERO-RODRIGUES (Brazil)

Mr. Leonardo DIAZ-GONZALEZ (Venezuela)

Mr. Gudmundur EIRIKSSON (Iceland)

Mr. Laurel B. FRANCIS (Jamaica)

Mr. Bernhard GRAEFRATH (German Democratic Republic)

Mr. Francis Mahon HAYES (Ireland)

Mr. Jorge E. ILLUECA (Panama)

Mr. Andreas J. JACOVIDES (Cyprus)

Mr. Abdul G. KOROMA (Sierra Leone)

Mr. Ahmed MAHIOU (Algeria)

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

Mr. Frank X. NJENGA (Kenya)

Mr. Motoo OGISO (Japan)

Mr. Stanislaw PAWLAK (Poland)

Mr. Pemmaraju SREENIVASA RAO (India)

Mr. Edilbert RAZAFINDRALAMBO (Madagascar)

Mr. Paul REUTER (France)

Mr. Emmanuel J. ROUCOUNAS (Greece)

Mr. César SEPULVEDA-GUTIERREZ (Mexico)

Mr. Jiuyong SHI (China)

Mr. Luis SOLARI TUDELA (Peru)

Mr. Doudou THIAM (Senegal)

Mr. Christian TOMUSCHAT (Federal Republic of Germany)

Mr. Alexander YANKOV (Bulgaria)

B. Officers

3. At its 2042nd meeting on 9 May 1988, the Commission elected the following officers:

Chairman:	Mr. Leonardo Díaz-González
First Vice-Chairman:	Mr. Bernhard Graefrath
Second Vice-Chairman:	Mr. Ahmed Mahiou
Chairman of the Drafting Committee:	Mr. Christian Tomuschat
Rapporteur:	Mr. Jiuyong Shi

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2044th meeting on 11 May 1988, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Bernhard Graefrath (Chairman),

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

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

Prince Bola Adesumbo Ajibola, Mr. Riyadh Al-Qaysi, Mr. Julio Barbosa, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. Ahmed Mahiou, Mr. Stephen C. McCaffrey, Mr. Frank X. Njenga, Mr. Jiuyong Shi, Mr. Luis Solari Tudela, Mr. Doudou Thiam and Mr. Alexander Yankov. The Group was not restricted and other members of the Commission attended its meetings.

C. Drafting Committee

5. At its 2043rd meeting, on 10 May 1988, the Commission appointed a Drafting Committee which was composed of the following members: Mr. Awn Al-Khasawneh, Mr. Juri G. Barsegov, Mr. Mohamed Bennouna, Mr. Carlos Calero-Rodrigues, Mr. Francis Mahon Hayes, Mr. Abdul G. Koroma, Mr. Motoo Ogiso, Mr. Stanislaw Pawlak, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Paul Reuter, Mr. Emmanuel J. Roucounas, Mr. César Sepulveda-Gutierres, Mr. Jiuyong Shi and Mr. Christian Tomuschat.

D. Secretariat

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

E. Agenda

7. At its 2044th meeting, on 11 May 1988, the Commission adopted an agenda for its fortieth session, consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Jurisdictional immunities of States and their property.
4. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
5. Draft Code of Crimes against the Peace and Security of Mankind.

6. The law of the non-navigational uses of international watercourses.

7. International liability for injurious consequences arising out of acts not prohibited by international law.

8. Relations between States and international organizations (second part of the topic).

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

10. Co-operation with other bodies.

11. Date and place of the forty-first session.

12. Other business.

8. The Commission did not consider item 8 "Relations between States and international organizations (second part of the topic)"; it took note of the intention of the Special Rapporteur to submit a report at the next session of the Commission. The Commission held 54 public meetings (2042nd to 2095th) and, in addition, the Drafting Committee of the Commission held 41 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 5 meetings.

F. General description of the work of the Commission at its fortieth session

9. The Commission devoted seven meetings to the consideration of the topic "International liability for injurious consequences arising out of acts not prohibited by international law". 3/ The discussions were held on the basis of the fourth report (A/CN.4/413 and Corr.1 (English only) and Corr.2 (French only)) submitted by the Special Rapporteur, Mr. Julio Barboza, which contained in particular 10 draft articles respectively entitled "Scope of the present articles", "Use of terms", "Attribution", "Relationship between the present articles and other international agreements", "Absence of effect upon other rules of international law", "Freedom of action and the limits thereto", "Co-operation", "Participation", "Prevention" and "Reparation". At the conclusion of its discussions, the Commission referred all 10 draft articles to the Drafting Committee.

3/ The topic was examined at the 2044th, 2045th, 2047th to 2049th, 2074th and 2075th meetings held between 11 and 19 May and on 6 and 7 July 1988.

10. The Commission devoted 14 meetings to the topic "The law of the non-navigational uses of international watercourses". 4/ The discussions were held on the basis of the fourth report (A/CN.4/412, A/CN.4/412/Add.1 and Corr.1 and A/CN.4/412/Add.2 and Corr.1 to 3) submitted by the Special Rapporteur, Mr. Stephen C. McCaffrey, which contained in particular four draft articles respectively entitled "Exchange of data and information", "Pollution of international watercourse[s] [systems]", "Protection of the environment of international watercourse[s] [systems]" and "Pollution on environmental emergencies". At the conclusion of its discussion, the Commission referred all four draft articles to the Drafting Committee. The Commission furthermore provisionally adopted on the recommendation of the Drafting Committee, 14 new articles on the topic, with commentaries thereto, namely article 8 "Obligation not to cause appreciable harm", article 9 "General obligation to co-operate", article 10 "Regular exchange of data and information", article 11 "Information concerning planned measures", article 12 "Notification concerning planned measures with possible adverse effects", article 13 "Period for reply to notification", article 14 "Obligations of the notifying State during the period for reply", article 15 "Reply to notification", article 16 "Absence of reply to notification", article 17 "Consultations and negotiations concerning planned measures", article 18 "Procedures in the absence of notification", article 19 "Urgent implementation of planned measures", article 20 "Data and information vital to national defence and security" and article 21 "Indirect procedures".

11. The Commission devoted 13 meetings to the consideration of the topic "Draft Code of Crimes against the Peace and Security of Mankind". 5/ The discussions were held on the basis of the sixth report (A/CN.4/411 and Corr.1 and 2) submitted by the Special Rapporteur, Mr. Doudou Thiam, which contained

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4/ The topic was examined at the 2050th to 2052nd, 2062nd to 2073rd and 2076th meetings held between 24 and 27 May, between 15 and 28 June 1988 and on 8 July.

5/ The topic was examined at the 2053rd to 2061st and 2082nd to 2085th meetings, held on 31 May, between 1 and 14 June and between 20 and 22 July 1988.

in particular a draft article entitled "Acts constituting crimes against peace". At the conclusion of its discussions, the Commission referred the draft article in question to the Drafting Committee. The Commission futhermore provisionally adopted, on the recommendation of the Drafting Committee, six new articles on the topic, with commentaries thereto, namely article 4 "Obligation to try or extradite", article 7 "Non bis in idem", article 8 "Non-retroactivity", article 10 "Responsibility of the superior", article 11 "Official position and criminal responsibility" and article 12 "Aggression".

12. The Commission devoted five meetings to the consideration of the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". 6/ The discussions were held on the basis of the eighth report (A/CN.4/417 and Corr.1 and 2) submitted by the Special Rapporteur, Mr. Alexander Yankov, which contained an analytical survey of the comments and observations submitted by Governments on the draft articles provisionally adopted on first reading by the Commission at its thirty-eighth session, as well as revised texts proposed by the Special Rapporteur for consideration by the Commission on the second reading of the draft articles. At the conclusion of its discussions, the Commission referred to the Drafting Committee all the draft articles, including the texts revised by the Special Rapporteur.

13. The Commission devoted one meeting to the topic "Jurisdictional immunities of States and their property". It heard a presentation by the Special Rapporteur, Mr. Motoo Ogiso, of his preliminary report (A/CN.4/415 and Corr.1), which contained an analytical survey of the comments and observations submitted by Governments on the draft articles provisionally adopted on first reading by the Commission at its thirty-eighth session, as well as revised

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6/ The topic was examined at the 2076th to 2080th meetings, held between 8 and 15 July 1988.

texts proposed by the Special Rapporteur for consideration by the Commission on the second reading of the draft articles. 7/ The preliminary report was not discussed by the Commission for lack of time.

14. The Commission devoted two meetings to the topic "State responsibility". It heard a presentation by the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, of his preliminary report (A/CN.4/416 and Corr.1 (English only) and 2 and A/CN.4/416/Add.1 and Corr.1 (English only) and 2) which contained in particular two draft articles respectively entitled "Cessation of an internationally wrongful act of a continuing character" and "Restitution in kind". 8/ The preliminary report was not discussed by the Commission for lack of time.

15. Matters relating to the programme, procedures and working methods of the Commission and its documentation were mostly discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant observations and recommendations of the Commission are to be found in Chapter VIII of the report which also deals with co-operation with other bodies and with certain administrative and other matters.

7/ The preliminary report was introduced at the 2081st meeting, held on 19 July 1988.

8/ The preliminary report was introduced at the 2081st and 2082nd meetings held on 19 and 20 July 1988. The Commission also had before it in connection with this topic comments and observations received from one Government on Chapters I to V of Part I of the draft articles on State responsibility.

CHAPTER II

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

A. Introduction

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

17. The Commission, from its thirty-second to its thirty-sixth session in 1984, received and considered five reports from the Special Rapporteur. 9/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

18. The Commission, at its thirty-sixth session, in 1984, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 10/ and a study prepared by the

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

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

Secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 11/

19. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur following the death of Mr. Quentin-Baxter. The Commission received two reports from the Special Rapporteur, a preliminary report 12/ and a second report (A/CN.4/402 and Corr.1, Corr.2 (English only), Corr.3 (Spanish only) and Corr.4) at its thirty-seventh and thirty-eighth sessions, respectively.

20. At the thirty-ninth session, in 1987, the Special Rapporteur submitted a third report (A/CN.4/405 and Corr.1 (English only) and Corr.2 (English and French only)) in which he introduced six draft articles, broadly corresponding to section 1 of the schematic outline. The report also discussed some issues important to the approach to the topic. At the end of the debate in the Commission on this topic, the Special Rapporteur drew the following conclusions:

> "(a) The International Law Commission must endeavour to fulfil the mandate of the General Assembly on this topic by regulating activities which have or may have transboundary physical consequences adversely affecting persons or things;
>
> (b) The draft articles on this topic should not discourage the development of science and technology, for they are essential for the improvement of conditions of life in our national communities;
>
> (c) The topic deals with both prevention and reparation. The régime of prevention must be linked to reparation to preserve the unity of the topic and enhance its usefulness;
>
> (d) Certain general principles should apply in this area, in particular:
>
> (i) Every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States;

. . .

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

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

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

(iii) The innocent victim of injurious transboundary effects should not be left to bear loss." 13/

B. Consideration of the topic at the present session

21. At the present session, the Commission considered the Special Rapporteur's fourth report (A/CN.4/413 and Corr.1 (English only) and Corr.2 (French only)), at its 2044th, 2045th, 2047th to 2049th, 2074th and 2075th meetings.

22. In his fourth report, the Special Rapporteur submitted the following 10 draft articles in 2 chapters (Chapter I. General provisions, and Chapter II. Principles) as follows:

"Chapter I

GENERAL PROVISIONS

"Article 1

Scope of the present articles

The present articles shall apply with respect to activities carried out under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State, when such activities create an appreciable risk of causing transboundary injury.

"Article 2

Use of terms

For the purposes of the present articles:

(a) 'Risk' means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary injury throughout the process.

13/ See Report of the International Law Commission on the work of its thirty-ninth session, Official Records of the General Assembly, Forty-second session, Supplement No. 10 (A/42/10) p. 115, para. 194.

'Appreciable risk' means the risk which may be identified through a simple examination of the activity and the substances involved;

(b) 'Activities involving risk' means the activities referred to in article 1;

(c) 'Transboundary injury' means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in spheres where another State exercises jurisdiction under international law, is appreciably detrimental to persons or objects, or to the use or enjoyment of areas, whether or not the States concerned have a common border;

(d) 'State of origin' means the State which exercises the jurisdiction or the control referred to in article 1;

(e) 'Affected State' means the State under whose jurisdiction persons or objects, or the use or enjoyment of areas, are or may be affected.

"Article 3

Attribution

The State of origin shall have the obligations imposed on it by the present articles, provided that it knew or had means of knowing that an activity involving risk was being, or was about to be, carried out in areas under its jurisdiction or control.

"Article 4

Relationship between the present articles and other international agreements

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

"Article 5

Absence of effect upon other rules of international law

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

"Chapter II

PRINCIPLES

"Article 6

Freedom of action and the limits thereto

States are free to carry out or permit in their territory any human activity considered appropriate. However, with regard to activities involving risk, that freedom must be compatible with the protection of the rights emanating from the sovereignty of other States.

"Article 7

Co-operation

States shall co-operate in good faith in preventing or minimizing the risk of transboundary injury or, if injury has occurred, in minimizing its effects both in affected States and in States of origin.

In accordance with the above provision, the duty to co-operate applies to States of origin in relation to affected States, and vice versa.

"Article 8

Participation

By virtue of this duty to co-operate, States of origin shall permit participation under the present articles by States likely to be affected, so that they might jointly consider the nature of the activity and its potential risks, and determine whether a régime needs to be jointly developed in this area.

"Article 9

Prevention

States of origin shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no régime has been established.

"Article 10

Reparation

To the extent compatible with the provisions of the present articles, injury caused by an activity involving risk must not affect the innocent victim alone. In such cases, there must be reparation for the

appreciable injury suffered, the question of reparation being settled by negotiation between the parties and in accordance with the criteria laid down in the present articles."

1. General considerations

23. Introducing his report, the Special Rapporteur pointed out that the general debate on this topic was in fact over, and it was time to concentrate on specific articles. He referred to two issues remaining from the debate of the last session which merited attention. The first issue was whether the draft articles should include a list of activities covered by the topic, and the second whether activities causing pollution should be brought within the scope of the articles. The first issue, he believed, raised some concern on the grounds that such a list would quickly become obsolete owing to the rapid pace of technological progress. Besides, the danger arising from activities was relative, it depended on many factors of time, space and conduct. For example, an activity which was dangerous in certain circumstances, was not dangerous in other circumstances; i.e. a chemical plant might be dangerous if placed near a border, or if the prevalent winds of the zone carried its fumes to a neighbouring State, etc., and innocuous in other circumstances. It was hardly feasible to draw a list of activities which would have any practical usefulness. Instead he had recommended some criteria by which activities involving risk could be identified.

24. The Special Rapporteur referred to the modest object of the draft articles on this topic; namely to obligate States involved in the conduct of activities involving risk of extraterritorial harm, to inform the other State which may be affected and to take preventive measures. If damage occurred, no specified level of compensation was prescribed in the articles; instead there was an obligation to negotiate in good faith with a view to making reparation for harm caused, taking into account factors such as those set out in sections 6 and 7 of the schematic outline. 14/ He believed, that there was at present a gap in international law about what principles governed the relations between States regarding such activities involving risk, so far as

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14/ Yearbook ... 1982, vol. II (Part Two), p. 85.

prevention and compensation were concerned. The purpose of the draft articles was, therefore, to fill that gap. The Special Rapporteur stressed that this was the topic of the future and therefore required creativity and foresight on the part of the Commission.

25. As to activities causing pollution, the Special Rapporteur said that creeping pollution, i.e. pollution which had cumulative effects so that only after a certain period of time their appreciable harm appeared, posed two problems. The first was whether pollution which caused appreciable harm was prohibited in general international law. The second was to prove which State among several States was the State of origin. If the answer to the first issue was positive, activities causing pollution might very well not be considered as part of this topic since the breach of a prohibition was wrongful, and therefore those activities might not be considered "not prohibited" by international law. There existed treaty régimes prohibiting some of such activities. It seemed clear that general international law was not indifferent to this type of appreciable harm, and there were some principles such as "sic utere tuo" which could apply to this kind of activity. But the Special Rapporteur wondered if the Commission would accept that at an operative level such prohibition existed in international law. He, therefore, felt that it would be prudent to assume that such activities were part and parcel of the topic.

26. As to the problem of identifying the State of origin from among several States, the Special Rapporteur believed this should not discourage the Commission from dealing with continuous pollution. It was better, in his view, to have a régime of responsibility than to have no juridical structure or concepts to protect the affected State. Moreover, the issues of evidence and proof were more relevant to reparation, and reparation was not the primary concern in such cases, where a régime such as that contemplated in the topic did not allow the harm to go too far. Instead of obtaining reparation for the harm it would perhaps be better for the affected State to have the situation examined through the procedures provided for in the articles so as to reach, with the polluting States, agreements to eliminate or reduce the pollution. Proof was important to reparation in case of accidents suddenly causing a great amount of pollution. However, such cases did not pose any serious

difficulties for establishing causal relationship. He therefore recommended that the Commission adopt a view that would not exclude activities causing pollution from this topic.

27. The Special Rapporteur reminded the Commission that the topic had been considered by the Commission in the past several years, and its potential had been thoroughly explored. He believed that the time had come to make some hard choices and to decide how to limit the topic, since that alone would make the Commission begin to see the draft articles at an operative level and within a workable system.

28. Some members observed that the Special Rapporteur had proposed that the scope of the topic be limited to activities involving appreciable risk, excluding those situations where appreciable harm occurred although the risk of harm had not been considered appreciable or foreseeable. They, however, were of the view that while the concept of risk may play an important role with regard to prevention, it would limit the topic unduly to base the entire régime of liability on appreciability of risk. In the opinion of some other members, the elimination of risk from the chain leading to liability undermined the concept.

29. For some members, the apparent characterization of the topic by the Special Rapporteur as progressive development of international law was a useful one. In their view such an approach paved the way for a consensus since it precluded any argument as to whether or not the rules and principles drafted by the Commission on the topic already formed part of the existing law, something which, according to those members, many States would be unable to accept.

30. Some members considered that the statement of the Special Rapporteur to the effect that there is no norm in general international law under which there must be compensation for every harm was of fundamental importance and opened prospects for the development of international law in this field through the formation of new rules.

31. Some members favoured the attempts by the Special Rapporteur of not adopting the principle of strict liability in an automatic fashion which would not allow for any flexibility. Thus under such an approach there would not be liability for every transboundary harm. While they viewed this premise as a

correct one, they were not sure that the proposed criteria were clear enough to define the necessary threshold between compensable harm and negligible harm.

32. Many members agreed with the Special Rapporteur that the draft articles should serve as an incentive to States to conclude agreements establishing specific régimes to regulate activities in order to minimise potential damage. A view was expressed that this purpose did not, however, exclude drawing up a list of dangerous activities. It was stated that many international instruments used lists of toxic and dangerous materials to define their scope clearly, and the inevitable defects in such lists were cured by means of a periodic review procedure. Such lists, it was remarked, could also be useful to determine necessary preventive measures. For many members, however, the decision of the Special Rapporteur not to draw a list was sound. They found it impractical in a convention of a general nature to list specific activities or things, since such a list would never be exhaustive. Due to the rapid progress in technology, it would almost always be out of date. The Special Rapporteur's approach of providing criteria to identify such activities was considered preferable. In this connection, however, it was pointed out that the Special Rapporteur should not attempt, as he had indicated in paragraph 7 of his report, to provide "the most complete definition possible of the activities" covered by the topic. That approach appeared to some members to be inappropriate, since the concept around which the whole subject turned was harm. Thus the Commission was to focus its work on determining the legal effects of the harmful consequences arising out of acts not prohibited by international law.

33. The Special Rapporteur's reference in paragraph 9 of his report, namely whether or not activities causing pollution with transboundary appreciable harm were prohibited by international law, became the subject of some discussion in the Commission. Some members agreed with the Special Rapporteur's conclusion that this topic should cover such activities when causing transboundary harm, on the assumption that there was no certainty that such activities were prohibited by international law. This approach for them was without prejudice to the fact that there were several treaty régimes which prohibited a number of such activities. Some members expressed the view that this type of activities was prohibited by international law and that such a

conclusion could be based on the general principles of law, treaties, pronouncements of international organizations, etc. For those members, a presumption by the Commission that activities causing pollution were not prohibited by international law was not judicious. In view of a number of conventions on this area, such a presumption on the part of the Commission seemed to deny at the outset the existence of any customary law in this area. Such an approach was, in their opinion, to be avoided.

34. Some other members wondered whether the question was even necessary or appropriate in the context of this topic. It would perhaps be more advisable, it was suggested, to consider whether there were instances of transfrontier pollution which might be the ground for a standard of liability higher than normal, namely strict liability rather than liability based on fault. For example, if a State was about to conduct an activity with potential transboundary harm, it was under an obligation of due diligence, i.e. it would have to take certain preventive measures. If the harm, nevertheless, occurred that State was liable. Under this topic if the State of origin did not take the required precautions, then the issue would come under State responsibility for wrongful acts. With this approach, there was no need, it was suggested, to decide whether activities causing pollution were or were not prohibited by international law.

35. It was also stated that the cumulative pollution of the atmosphere from innumerable sources was a difficult problem to deal with. Such problems could best be resolved globally by multilateral agreements. In this connection it was suggested that perhaps the burden of proof in cases of multiple sources of pollution should be shifted from the injured party to the defendants. In such cases, it would be sufficient for the injured party to establish the causal relationship between the harm it suffered and the activities as a whole, as opposed to any single one of them. It would then be up to the defendants to sort out among themselves how compensation should be divided between them.

36. Some members furthermore expressed the view that in dealing with the subject of liability, the Commission should not develop it only as an instrument for punishment. It should be promoted as a framework for prevention and international management of activities relevant to a new ethic of development for transfer of science and technology. Incentives such as

insurance, international emergency relief, rehabilitation, aid and assistance also appeared to be very pertinent to be developed in this topic.

37. The Special Rapporteur stated that he believed that a discussion on whether the topic was based on progressive development or codification of international law was unnecessary and, so far as he could tell, would serve no useful purpose. Instead he would like to draw the attention of the Commission to the fact that any meaningful development of the topic had to rely on sound judgement, common sense, co-operation and concerted efforts on the part of the Commission to reduce the gap between different policy preferences. As to whether activities causing pollution were or were not wrongful, he stated that he only intended to be pragmatic. With regard to activities which produced appreciable harm through pollution, he stated that, in the light of the debate on the matter, such activities would, in his opinion, fall within the scope of the subject.

2. Consideration of the draft articles

CHAPTER I. General provisions

Article 1. Scope of the draft articles

38. Introducing article 1, the Special Rapporteur pointed out that the basic situation contemplated under the topic was essentially territorial: activities occurring in the territory of one State which produced harm in the territory of another State. But not all activities under this topic were territorially based. Activities involving risk could be carried out outside the territory of the State of origin. For example, such activities could occur on ships or space vehicles, which could not be regarded as State "territory", but were within its jurisdiction. There were still other situations where the term territory was unhelpful, such as the situation of a foreign ship in the territorial sea of another State. The term territory, in his view, was much too limited to encompass all the activities under the topic. A better term, the Special Rapporteur explained, was "jurisdiction": the exercise of jurisdiction by a State under international law over activities involving risk. The requirements of taking preventive measures or making reparations could only be expected from a State which, under international law, exercised jurisdiction over an activity. The term "jurisdiction" overcame, he believed, the limits inherent in the concept of

territory and would include all activities covered by the topic. But the term "jurisdiction" by itself would be insufficient to describe all the activities under the topic. There were situations where a State exercised de facto jurisdiction, jurisdiction not recognised under international law, such as the de facto jurisdiction of South Africa over Namibia or any other unlawful occupation of a territory. Such de facto unlawful jurisdiction did not and should not exempt the State from harmful consequences of activities carried out under that de facto jurisdiction. To include that situation the concept of "effective control" of the State should be used. The Special Rapporteur stated that he believed the formula he proposed in article 1 provided workable criteria for determining the scope of the articles on the topic.

39. Also in connection with article 1, the Special Rapporteur stated that he had introduced the concept of "risk" as a criterion limiting the types of activities covered under the topic. In his view, any activity causing transboundary harm had to have an element of appreciable risk associated with it. Otherwise, that activity would not lie within the scope of this topic. The introduction of this new element better clarified the obligation of taking preventive measures to remove or reduce the harm. The Special Rapporteur stated that "risk" must be appreciable, meaning that risk must be identifiable by virtue of the physical characteristics of the thing or activity; its appreciation must be related to the nature of the risk involved in the activity rather than to specific features of the activity and such a risk must be determined objectively and not be dependent on the point of view of one State. With the introduction of the concept of risk, the Special Rapporteur felt it was no longer necessary to talk about "activities" which caused or might cause "transboundary harm". For if an activity created appreciable risk it would be covered by the topic. Thus, if any reference to activities which caused transboundary harm was to be included, it should be associated with activity creating appreciable risk. He further stated that the concept of "situation" had not been included in article 1, since some were critical of it. "Situation" had been formerly used as an intermediate concept between the origin of a causal chain in a State and its final effects in another State; i.e. a certain activity in a State produced some results which only after accumulation started producing transboundary harm. That accumulation was

referred to in a former article as "situation" which caused or might cause transboundary harm. Strictly speaking, however, that intermediate concept was not necessary, since with or without it the causal chain led back to the State of origin. The other reason for including it had been to cover cases in which the activities concerned could not be described as dangerous in themselves, but nevertheless created a dangerous situation, such as, for example the construction of a dam which could upset hydrological conditions, affect the rainfall, etc. He was not certain that the concept of situation would still be useful.

40. Many members of the Commission pointed out that a number of important issues were connected with article 1. This article was of utmost importance since it created the framework within which the topic could develop.

41. The article, it was observed, limited the activities to those involving appreciable risk. For some members, risk was a useful addition to the approach, for, in their view, the concept of risk provided a solid foundation for drafting articles on specific aspects of the topic. For these members, liability based on risk presented some definite advantages. The notion of risk made it possible to pinpoint the topic and its limits within the broad field of liability and gave a greater unity and coherence to the topic. It also introduced, in their view, a clearer line of demarcation between this topic and responsibility for wrongful acts. Harm, it was suggested, was common to both topics. Thus, in order to determine the conditions governing reparation, the origin of harm was important. If the source lay in wrongfulness, the injured State had to prove the existence of wrongfulness. If the source lay in risk, the injured State simply had to prove that there was a causal link between the source and the harm. Finally, risk, in their view, went to the heart of the topic, for it pointed to the main source of transboundary harm, namely dangerous activities or things.

42. It was also stated that the concept of risk provided a more logical basis for reparation. In the view of some members, there was a solid basis in international law for attribution of liability based on risk. One of the fundamental principles of relations between States was good neighbourliness, a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and which underlay the Declaration on Principles of

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. 15/ The principle of good neighbourliness, they believed, went beyond mere geographical proximity and had larger implications. An example was said to be found in the recent arbitral award of 17 July 1986 in the Gulf of Saint Lawrence case. 16/ It was admitted that there were some difficulties in the concept of risk, such as for example how to deal with hidden risk. Perhaps that kind of activity, it was said, could be kept outside the topic.

43. One member was of the opinion that the concept of "risk" should not be introduced into this topic in any form and preferred the concepts of "injury" or "harm".

44. Some other members of the Commission, while not rejecting the introduction of the concept of risk disagreed with its place as the predominant concept in the topic. The concept of risk, in their view, could play an important role with regard to prevention. For, after all, preventive measures could reasonably be expected to be taken if certain risks were associated with an activity. This concept, however, should not be extended, they believed, to liability. A régime of liability could not be based on risk. And if it were, it would offer extremely limited possibilities for reparation. Hence the whole principle of the protection of the innocent victim would be radically modified, since such victims can only be compensated for their loss which was caused by activities involving risk. The fact, however, remained that those victims were still innocent, when their loss was caused by an activity of another State with no visible or appreciable risk. It would be unfair to expect the victims in such cases to bear the loss alone.

45. Some members pointed out that the concept of risk was ambiguous. Even with the criteria that the Special Rapporteur had introduced, the concept suffered from imprecision. It left out, for example, the activities in the conduct of which no appreciable risk could be identified, but in relation to

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15/ General Assembly resolution 2625 (XXV), Annex.

16/ United Nations, Reports of International Arbitral Awards, vol. XIX (forthcoming), para. 27.

which it was known that if an accident occurred, the results would be catastrophic. For example, the manufacturing of certain chemicals or the building of dams, although low risk activities in themselves, could cause appreciable harm in case of an accident. In their view, therefore, it would be a mistake to limit the topic to the assessment of risk. These members pointed out that the law was never indifferent to the occurrence of harm when it infringed the rights of other States, citing the Trail Smelter, 17/ Corfu Channel 18/ and Lac Lanoux 19/ cases, Principle 21 of the Stockholm Declaration, and Part XII of the Law of the Sea Convention. However, one member expressed the view that legal principles governing activities such as operation of nuclear installations, which might cause extensive damage in case of accident, although risk was low, should be left to specific agreements providing for a special régime covering such activities, separately from the general principles under the present topic.

46. It was also suggested that the topic could take a different approach: it could focus, at its core, with activities creating an appreciable risk of transboundary harm, but could also deal separately with other activities causing transboundary harm. Thus the principles of prevention, co-operation and notification would be confined to activities creating risk. The guidelines for negotiating reparation would differ for the two categories. The title could change to accommodate these changes. It could, for example, read "Draft articles on international liability for transboundary harm" and all draft articles could be amended accordingly.

47. One member pointed out that activities involving risk meant not any kind of risk but an exceptional risk and capable of producing harm or injury. Risk would exist whatever its degree. The obligation under the draft would

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17/ United Nations, Reports of International Arbitral Awards, vol. III, p. 1905.

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

19/ United Nations, Reports of International Arbitral Awards, vol. XII, p. 52.

therefore be to co-operate with the States concerned in order to set up appropriate machinery to regulate matters pertaining to harm caused by the consequences of an exceptionally dangerous activity.

48. It was also suggested that the Commission should not be overly concerned by the demarcation line between this topic and those of State responsibility and the non-navigational uses of international watercourses. International law relating to different subjects was a unity as a concept in itself. Regardless of how topics were defined, they would have overlapping principles and rules. What mattered, in the view of these members was to harmonise the overlapping parts of the different topics. Therefore, for them, the usefulness of the concept of risk should be determined only as to whether or not it contributed to the elaboration of the topic and not because it provided a better demarcation line between this topic and the other two topics. One member observed that the risk to be taken into consideration was related to the potential appreciable harm corresponding to it. There was therefore no need to qualify the risk.

49. The Special Rapporteur, responding to the comments, pointed out that it seemed to him that there were two different views within the Commission as to whether or not the activities under this topic should be limited to those involving appreciable risk. Some preferred to limit the topic to activities involving appreciable risk. Many others felt that the criterion of risk should be limited to the obligation of prevention and that the articles should deal with all activities causing transboundary harm. This was an issue, he believed, that the Commission would have to decide.

50. The Special Rapporteur admitted that the concept of risk as defined in article 2 (a) did not seem to properly include activities with low risk but with the potential of great harm. So far as he was concerned, such activities should be included in the topic and accordingly necessary modifications would be introduced in article 2 for that purpose.

51. It was observed by some members that article 1 on the scope of the draft articles, excluded the possibility of dealing with liability for harm beyond the jurisdiction or control of any State, harm to the common areas of the high seas, outer space, ozone layer, etc. In their view, in the light of the continuous deterioration of the human environment, such a limitation was

unfortunate. The topic should have, they believed, included the whole of the human environment. In this context, the Special Rapporteur reminded the Commission that the liability topic regulated certain types of State activities with consequences attached to them. The topic contemplated that States would have to take preventive measures, consult with potentially affected States and make reparation in case of harm. All those obligations presupposed an identifiable State of origin, affected State and identifiable harm. The framework of the topic did not seem to be appropriate for dealing with harm to the human environment as a whole, when there were many States of origin and virtually the whole community of mankind was affected. The mechanisms envisaged in the topic did not lend themselves to deal with those types of activity. The liability topic, the Special Rapporteur stated, dealt with the human environment only to the extent that the criteria mentioned in article 1 on scope were satisfied.

52. As for the deletion of the word "situation" from the scope of the article, some members considered it an improvement. For them the word "situation" was unclear. They found it preferable to limit the topic to activities. Others urged the Special Rapporteur to consider reinstating the word "situation", because the combination of activities and situation was much more comprehensive than the concept of activities. The problem was that not everything with potential transboundary harm could be correctly identified as activity. In addition, the result of combined activities created a dangerous situation with potential transboundary harm. Such cases could not be identified as activities and at the same time there were no reasonable grounds to exclude them from the topic.

53. The Special Rapporteur stated that perhaps, in the light of the comments, it would be useful to bring back the concept of "situation", and it was worth reconsidering its place in the topic. The difficulty, however, still remained as to finding a precise definition of this concept.

54. Some members welcomed the deletion of physical consequences from the scope of article 1. Such a deletion would permit to encompass in this topic activities other than the physical use of the environment such as economic issues, etc. Many others felt that precisely for the same reason, the requirement that the activity have physical consequences in another State

should be brought back. In their view, however, it was not clear at all whether the Special Rapporteur intended to remove that requirement from article 1, for in article 2 (c) he had introduced it in the definition of "transboundary injury".

55. The Special Rapporteur stated that as he had explained in his previous reports, he believed that the activities under this topic should be limited to those with physical consequences. This was an important criterion for keeping the topic manageable. He admitted that other activities, lacking physical consequences but having extraterritorial effects, were also important in international relations, but suggested that they be considered in another context. The Special Rapporteur agreed that reference to physical consequences in paragraph (c) of article 2 was not sufficiently clear and that that term should be reintroduced in article 1.

56. In relation to the expressions "jurisdiction" and "control", different views were expressed. Some members favoured the deletion of "territory". They agreed with the Special Rapporteur that "territory" was far too narrow a concept to be helpful in delimiting the scope of the topic. It was a much better approach to refer to activities under the jurisdiction or control of a State. This approach would allow the topic to deal effectively with activities involving risk conducted outside the territory of a State. The expressions "jurisdiction" or "control" were also used extensively in the 1982 United Nations Convention on the Law of the Sea and other instruments such as the 1972 Convention on the Prevention of the Marine Pollution by Dumping Wastes 20/ and that would provide an additional incentive for their use in this draft.

57. Some members, however, while agreeing that "territory" alone was too narrow, felt that the expressions "jurisdiction" or "control" were unclear. They were uncertain how jurisdiction or control over an activity, for example, of a multinational company licensed in one State, having shareholders in another State and operating in several other States could be determined. States were now sometimes seen to claim and enforce extraterritorial

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20/ Cmnd. 6486.

jurisdiction over foreign companies simply because they manufactured under licence or used certain technology. For them it was unclear whether a State claiming to have jurisdiction in such cases could or should be held liable in the event of an accident which caused transboundary harm. It was suggested that it was easy to refer to national jurisdiction so long as the State was being asked to protect some interest by adopting laws, regulations or other measures. But it was a different matter when the question was to determine who was liable for activities which, in one way or another, fell under that jurisdiction.

58. Some members wondered whether the clause "vested in it by international law" after the words "jurisdiction of a State" was necessary. A view was expressed to the effect that acts performed by a State within the confines of its territory were carried out, not on the basis of any jurisdiction vested in it by international law, but on the basis of its sovereignty. The reference to jurisdiction in international law, according to this view, could be construed as a delimitation of the frontiers of national jurisdiction between States, but had nothing to do with an assessment of the lawfulness of the activity, unless it was directly covered by an international convention. Also, those members were not certain if jurisdiction was intended to be over the activities themselves, or over the activities "in spheres where another State exercises jurisdiction" as was stated in article 2 (c), for there were different scopes of application in the two cases.

59. It was suggested that the term "control" should be defined more clearly. The question was asked whether control included political, economic, legal, or some other kind of control; and whether it applied to control over a territory or an activity, or whether control was de facto or de jure. Many multinational corporations operating in developing countries were, it was observed, outside the effective control of those countries, some of which did not have adequate financial or technical means to monitor the activities in question.

60. The Special Rapporteur, responding to the above comments, stated that he was still convinced that the concepts of jurisdiction and control were more appropriate for the definition of the scope of the articles than that of territory. He recalled that activities under the topic might occur in areas

which were not the territory of a State, adding that it would be unfortunate to exclude all these activities which could produce transboundary harm from the topic simply because they did not fit the territorial requirement. He said that the terms "territory" or "territorial rights" as used in international law consisted of two important legal components: the jurisdictional component and the ownership or the title component. The jurisdictional component of territorial rights referred to the jurisdictional capacity of the State over certain activities or events. The right to ownership or title over certain resources, the other component of territorial rights, was irrelevant to the question of responsibility for the consequences of certain activities or events. The Special Rapporteur remarked that in the present context, the distinction between the above components of territory was important, as the topic was only concerned with the jurisdiction of a State. He emphasised that, in international law, the rights and obligations of States were not only determined by their sovereign rights to a territory, but also by their competence to make and apply the law, their jurisdictional competence over certain activities or events. He stated that a close look at the three important cases relevant to this topic, namely the Island of Palmas, 21/ the Corfu Channel 22/ and the Trail Smelter 23/ cases would indicate that the obligation of States to bear responsibility or liability was based on their jurisdictional competence. He referred to the four Geneva Conventions on the Law of the Sea, as well as to the 1982 United Nations Convention on the Law of the Sea which covered many jurisdictional capacities of the flag State. The Special Rapporteur explained that in the areas of mixed jurisdiction where two or more States were entitled under international law, to exercise jurisdiction, liability would be attributed to the State which was entitled to exercise jurisdiction over the activity or the event that led to transboundary harm.

21/ See United Nations, Reports of International Arbitral Awards, vol. II, pp. 838-839.

22/ I.C.J. Reports, 1949, p. 22.

23/ United Nations, Reports of International Arbitral Awards, vol. III, p. 1965.

61. The Special Rapporteur reminded the Commission that jurisdictional questions were complex and that sometimes they constituted the core of a dispute. He did not believe that unilateral extension of jurisdiction by States, to which some members of the Commission had referred, would create any obstacle to the utility of this concept to the topic. He felt that the qualifying words "jurisdiction of a State as vested in it by international law" was sufficient to separate the concept of jurisdiction under this topic from unilateral extensions of jurisdiction by States, not all of which were recognised under international law. He agreed that jurisdiction had a multitude of meanings but under this topic jurisdiction included the competence to make law and apply it to certain activities or events. As the three cases he had mentioned earlier indicated, the existence of both of these jurisdictional competences was necessary for establishing liability of a State. If a State could demonstrate that it had effectively been ousted by another State from the exercise of its jurisdiction, it would then be outside the scope of the topic. To fill that gap, the Special Rapporteur said, the concept of control had to be used. He explained that while jurisdiction was a legal concept, control was a factual determination. Control, he said, had all the properties of jurisdiction, except that it was not recognised as jurisdiction in international law. Even though "control" was a factual determination, international law specified those facts which were to be deemed relevant. The Special Rapporteur pointed out that the notion of control had been used by the International Court of Justice in the Namibia 24/ case and had been given a legal content. Accordingly, "control" imported both the ouster of jurisdiction and the unavailability of any other remedy because the State with legitimate claims to jurisdiction could not effectively gain jurisdiction. This understanding of control was necessary, in the view of the

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

Special Rapporteur, in order to fill the vacuum created in situations where a jurisdictional State, either voluntarily or by implicit behaviour, allowed the exercise of effective control of another State in its territory or for acts within its jurisdiction. For these reasons, the Special Rapporteur said that in his view the concepts of jurisdiction and control were appropriate for the delimitation of the scope of the topic.

Article 2. Use of terms

62. The Special Rapporteur stated that the purpose of article 2 was to define the meaning of the terms employed in the various articles so far submitted. As the work progressed it might become necessary to introduce further definitions. In paragraphs (a) and (b), he attempted to provide a comprehensive definition of a dangerous activity, instead of providing a list of such activities. Most, if not all, known dangers arose from the use of dangerous things; cosas peligrosas in Spanish or choses dangereuses in French. This concept, as he had explained before, was essentially relative: it depended on the intrinsic properties of the things concerned (e.g. dynamite, nuclear materials), the place in which they were used (near the border), the environment in which they were used (air, water, etc.) and the way in which they were used (e.g. oil transported in great quantities by large tankers). The risk element constituted one of the most essential features of liability. Paragraph (a) limited the risk to "appreciable risk" meaning that it had to be greater than a normal risk. It had to be visible to the professional eye. Hidden risk did not lie within the scope of the draft articles, unless it was known to exist because of some circumstance: for instance, if it became evident at a later stage by causing some transboundary damage. The purpose of the proposed wording was to protect the freedom of the State of origin. The Special Rapporteur stated that the proposed definition was in conformity with Principle 21 of the Stockholm Declaration. 25/ It introduced a "threshold" which, even though it could not be measured with precision, was nevertheless useful. 26/

25/ A/CONF.48/14/Rev.1, chapter I.

26/ For other remarks on the concept of risk, see paragraphs 28 and 39 to 50 above.

63. The Special Rapporteur stated that the concept of transboundary harm in paragraph (c) had two parts: the transboundary element and the harm. In the light of his earlier explanation of article 1, the transboundary element must be understood in terms of jurisdictional limits, and not always territorial boundaries. Consequently, an activity and its effects must take place in different jurisdictions. As for the term "injury" in English, he was not certain if it was an adequate translation of the original Spanish "daño", which was a neutral term describing anything detrimental to persons or property. Until it was decided whether "harm" or "injury" was a better translation of Spanish "daño", either one of these terms, wherever it appeared in his report should be understood to mean anything detrimental to person or property. His position was that not all types of harm had to be compensated and that only harm which was appreciable and arose from an activity creating appreciable risk should be compensable. Thus anyone who created risk by conducting an activity must assume certain obligations, and it was precisely because of the risk created - which was greater than normal - that a priori he assumed the general obligation to provide compensation for any appreciable harm which might occur. Thus the obligation to provide compensation arose not merely because injury had occurred, but because it corresponded to a certain general anticipation that it was going to occur. Other paragraphs in article 2, the Special Rapporteur felt, were self-explanatory.

64. It was suggested by many members of the Commission that this article should at any event be reviewed again after the articles were drafted to make sure that the definition of terms corresponded to the way those terms were used in the context of the articles. It might also be necessary to include additional terms in article 2.

65. There were, however, some queries about the article as presently drafted. It was asked, for example, whether the word "environment" in subparagraph (a) referred to the environment of the State of origin, and whether the term "appreciable risk" was indeed an objective criterion. The definition of the term "activities involving risk" in subparagraph (b) seemed, according to one view, tautologous for it referred back to article 1. Thus in relation to this subparagraph, it was stated that if natural events were not

to be covered, it would be necessary to specify that the risks envisaged were those directly or indirectly caused by man, including the risks resulting from man's failure to take action. As to subparagraph (c), a suggestion was made to replace "appreciably detrimental" by the previous wording "transboundary loss or injury". A question was also raised as to whether the words "spheres where another State exercises jurisdiction" in this subparagraph meant something different from activities under the jurisdiction of a State as used in article 1.

66. Some of the queries about the terms "risk", "jurisdiction" or "control" which were raised in the context of article 1 were also referred to in the context of this article. It was furthermore suggested by some that perhaps the word "harm" was preferable to "injury". "Harm" was a factual description of some value deprivation, while "injury" carried a legal meaning which made it more appropriate in the context of responsibility for wrongful acts.

67. The Special Rapporteur stated that he had no objection to the English translation of "daño" as "harm". He only drew the attention of the Commission to the title of the topic which referred to "injurious" consequences of acts. He also pointed out that the translation of some of the Spanish terms into English did not quite reflect their legal meaning. He felt that the Drafting Committee should reconsider the appropriate translation of some Spanish terms into other languages in the light of the comments made in the plenary.

Article 3. Attribution

68. The Special Rapporteur pointed out that there were two issues involved in attribution. One was whether the harm was caused by an activity taking place under the jurisdiction or effective control of a State. The other was whether the State knew or had means of knowing that such activities were being conducted under its jurisdiction or effective control. For the first, it was sufficient to establish a causal relationship. In the opinion of the Special Rapporteur, there was no difference in that regard, namely the factual attribution of consequences to certain acts, between the field of responsibility for wrongful acts and that of this topic. Such a causal relationship between the activity and the harm caused was unaffected by the requirement of knowledge. The requirements of this article were fulfilled,

the Special Rapporteur stated, when the causal relationship between the activity and the harm was accompanied by the knowledge of the State of origin that such activity was being carried out under its jurisdiction or effective control. This requirement, the Special Rapporteur felt, was useful in taking into account the interest of some developing countries which might not have technical means of monitoring activities within their territories. Since the mechanisms of these draft articles should be balanced and easily operative, this article was drafted with the understanding that there was a presumption in favour of the affected State that the State of origin knew or had means of knowing. That presumption could be rebutted by the State of origin if it showed evidence to the contrary. In other words, the burden of proof to the contrary was shifted to the State of origin.

69. Some members agreed with the Special Rapporteur that no State may be held liable for harm from activities of which it had no knowledge. However, in the context of this topic, most activities would occur within the territory of a State, and a State normally had knowledge of what was happening on its territory. The article should be drafted so as to more clearly reflect the intention of the Special Rapporteur, namely that the burden of proof was shifted to the State of origin to prove that it did not know or had no means of knowledge. It was also possible to use a negative formula to express that the State was not bound by the obligation in question if it could establish "that it did not know or could not have known" that the activity was being carried out. The article could also be redrafted to read "The State of origin shall not have the obligations imposed on it with respect to an activity referred to in article 1 unless it knew or had means of knowing that the activity was being, or was about to be, carried out in areas under its jurisdiction or control".

70. In this connection, a view was also expressed that the Commission should focus on the liability of a multinational corporation without attempting to view it through the prism of State jurisdiction. It was further suggested that such a concept of liability should be proportional to the effective control of the State or other entities operating within each jurisdiction; and more importantly to the means at their disposal to prevent, minimize or reduce harm.

71. It was, on the other hand, pointed out that the condition contained in the article as drafted, a proviso which related to the special position of the developing countries, might in fact detract in part from the effectiveness of the principle whereby the innocent victim must not be left to bear loss alone. Accordingly, it was said that the proviso should be deleted or altered so that the burden of proof, as the Special Rapporteur indicated, lay with the State of origin to prove that it did not know, or had no means of knowing. It was noted that the State of origin, like the affected State, could well be a developing State.

72. Some members of the Commission thought that attribution appeared from the Special Rapporteur's report to be based primarily on territoriality. Accordingly, the characteristic features of an "act of the State" did not come into play in the case of transboundary harm. Hence both the activities undertaken by the State itself and those carried out by persons under its jurisdiction fell within the scope of the article. Thus, in their view, article 3 properly confirmed the notion of liability based on causality.

73. As for "causality", it was suggested that additional clarification would be useful. It was necessary to state whether causality was legal or factual. The requirement of legal causality or "proximate cause" set the limit on liability, since it required a sufficiently close link between the activity and harm. The Special Rapporteur, however, seemed to rely on "cause in fact" which required only an uninterrupted chain of causal links between the conduct and the harm. The notion of causal liability, therefore, had to be clarified. In this respect a view was expressed that in the consideration of the relationship between risk and harm, force majeure had not received sufficient attention. According to this view, the presence of force majeure in connection with activities involving risk from which harm ensued maintained the lawful character of those activities. Further thought should therefore be given to this issue.

74. It was also suggested that perhaps the title of the article should be changed since "attribution" was used in the context of State responsibility with different meanings and requirements. There was a suggestion to change the title to read "Basis of obligations under the present articles" or something similar to that.

75. The Special Rapporteur stated that in his view causality under this topic did not essentially differ from causality under responsibility for wrongful acts. The dividing line between the two subjects in the field of attribution began where an act was to be ascribed to a State, namely, the characterisation of an act as an act of State. Under this topic, it was not the activity that was attributed to a State, rather, it was the consequences of the activity. In accordance with article 3, the Special Rapporteur stated, the State of origin must have had knowledge or means of knowledge about the existence of the activity being conducted under its jurisdiction or control.

76. The Special Rapporteur explained that the purpose of article 3 was to take into account the interests of some developing countries with vast territories and insufficient financial and administrative abilities for monitoring what was going on in some parts of their territory. The article also intended to conform to the jurisprudence that a State could not reasonably be expected to know everything that was happening on its territory, under its jurisdiction or control. However, these goals should also be consistent as some members remarked, with the principle that the innocent victim should not be left alone to bear loss. A look at the map of the globe showed that there were more developing States located within close proximity of developing States than of developed States. There was, therefore, a greater likelihood that activities within developing States might harm another developing State, with the result that the intended protection of the developing States could only be extended up to a certain limit beyond which their very own interests might be prejudiced. Those were the reasons, the Special Rapporteur stated, for maintaining the presumption that a State had knowledge, or means of knowing, that an activity involvi[illegible] risk was being, or was about to be carried out in places under its jurisdiction or control. Perhaps, he said, this presumption should be more explicitly stated in the article.

Article 4. Relationship between the present articles and other international agreements

77. This article, the Special Rapporteur stated, was self-explanatory. It had also been introduced in earlier reports. It was intended to make explicit that the draft articles were not intended to override any specific agreements

that States may wish to conclude regarding the activities covered by this topic. The application of these articles would, therefore, be subject to those other international agreements.

78. For many members of the Commission, this article did not raise any difficulty since it was in the nature of a saving clause and reflected provisions in many other international agreements. Some members, however, were not entirely satisfied with it, and believed that the article required additional reflection. It was pointed out that if the word "situation" was dropped from article 1, it should also be deleted in this article. There was also a query about the meaning of the words "subject to that other international agreement".

Article 5. Absence of effect upon other rules of international law

79. As for article 5, the Special Rapporteur remarked that this article had also been introduced in previous reports and that the purpose was again to clarify the areas of ambiguity to the extent possible. This article was intended to allow for the application of other rules of international law to the activities also covered under this topic. The article, of course, stated the obvious, but it seemed to have given a certain additional clarity to the approach. He had therefore decided to maintain it.

80. Some members observed that the wording of article 5 was vague but agreed that the principle was fundamental. The purpose of the article was to leave room for situations where harm could be caused by acts not otherwise covered by State responsibility. However, as drafted, it weakened the principle of liability. A suggestion was made that the article could be amended to read "The present articles are without prejudice to the operation of any other rule of international law establishing responsibility for transboundary harm resulting from a wrongful act or omission".

CHAPTER II. Principles

81. The Special Rapporteur stated that it was essential to have a set of principles for the topic, and that the Commission did not need to worry whether those principles should be regarded as a reflection of general international law or as a part of the progressive development of that law. Therefore he would be particularly grateful if the members of the Commission

would focus their comments on whether or not the principles were applicable to the topic. He reminded the Commission that, at some level, this topic was breaking new ground and would have to proceed by trial and error. He added that in drafting the articles on principles, he had followed the guidance that he had received from the Commission the previous year, as well as principle 21 of the Stockholm Declaration.

82. There was general agreement that the principles identified by the Special Rapporteur in paragraph 86 of his fourth report were relevant to the topic and were acceptable in their general outline. Those principles were as follows:

> "(1) The draft articles must ensure each State as much freedom of choice within its territory as is compatible with the rights and interests of other States;
>
> (2) The protection of such rights and interests requires the adoption of measures of prevention and, if injury nevertheless occurs, measures of reparation;
>
> (3) In so far as may be consistent with those two principles, the innocent victim should not be left to bear his loss or injury."

Some members felt that while it was easy to agree on the principles at a general level of abstraction, it would be more difficult to gather consensus on specific rules of implementation. Some members asked whether the Special Rapporteur intended to supplement the few articles on general principles with other provisions indicating how they should be applied. The Special Rapporteur replied that he intended to elaborate on those articles in other provisions which would appear in subsequent chapters.

Article 6. Freedom of action and limits thereto

83. The first principle, the Special Rapporteur stated, was taken from principle 21 of the Stockholm Declaration. It expressed both the freedom of action of a State within its jurisdiction and the limits thereto. This principle intended to maintain a reasonable balance, supported by jurisprudence and common sense, between the interests of the State conducting activities and those States which may be at risk of receiving injuries from those activities. The Special Rapporteur stated that he preferred in this article to refer to the protection of "rights" rather than of "interests" of States. In his opinion the notion of "interest" was not sufficiently clear.

It seemed to him that "interest" was merely something which a State wanted to protect because it might represent a gain or an advantage for the State, or because its destruction might cause a loss or disadvantage, but which did not have legal protection. When legal protection was extended to an "interest" then, the Special Rapporteur stated, it would become a "right". In his opinion while rights should be accorded legal protection, "interests" should be left subject only to the moral constraints, or constraints derived from international courtesy.

84. Many members of the Commission agreed that article 6 embodied an important principle namely the freedom of States to conduct activities within their territories or areas under their jurisdiction. This principle, based on territorial sovereignty of States, should, in their view, be stated more explicitly. The principle, it was suggested, could be expressed even more concisely by stressing the idea often repeated since the beginning of the consideration of this topic, that the articles were aimed not at prohibiting the activities mentioned therein but at regulating them by means of prevention and reparation. As a matter of drafting, it was suggested to delete the first sentence of the article since it was redundant. That sentence also appeared to some members to contain a reservation, inasmuch as it only mentioned activities "involving risk". The remark was made that such a reservation, if it was intended to be a reservation, was inappropriate when applied to the very general legal principle whereby a State's freedom ended where another State's rights began, and that the exercise of any activity must be compatible with the "protection of the rights" of other States. It was therefore suggested that the qualification "with regard to activities involving risk" be deleted.

85. It was also remarked that three elements should be considered in the context of the article. The first was the freedom of States, based on the principle of sovereignty, to conduct activities, an element which the first sentence of article 6 attempted to cover. The second was the prohibition of activities which inevitably inflicted "appreciable" harm on other States. On that point, the second sentence of article 6 should also introduce the principle of territorial integrity. Thus it would be necessary to specify

that no State had the right knowingly and wilfully to inflict on its neighbours the burden of the waste it generated. The third element was that activities which involved risks but were socially useful if they were responsibly controlled, must be tolerated.

86. Some members agreed with the Special Rapporteur that it was better not to include the word "interests" in the articles, since it was vague and would create uncertainty as to the meaning of the articles. It was also suggested that article 6 should reflect more clearly principles 21 and 22 of the Stockholm Declaration, even though those principles were of a declaratory nature.

Article 7. Co-operation

87. The Special Rapporteur explained that he had introduced an article on the principle of co-operation because it was one of the foundations for the provisions of the draft articles relating to notification, exchange of information and the taking of preventive measures. He felt that although "co-operation" was perhaps not the only basis of the aforementioned obligations, it was, at least, one of the bases. In view of the pattern of introduction of modern technology to human civilization, any meaningful prevention of harmful by-products of certain activities would have to be based on co-operation among all States. Unilateral measures were insufficient, by themselves, to provide adequate protection. If transboundary harm occurred, however, justice and equity demanded reparation, even though co-operation would often be necessary for the assistance to the State of origin in mitigating the harmful effects. The words "States shall co-operate in good faith" in this article, he said, were intended to accommodate the concern, expressed during last year's discussion, that States should avoid acts which constituted attempts to take advantage, because of international rivalries or any other reason, of accidents such as those envisaged in the context of this topic. Nor did he wish to imply that assistance provided under the rules on co-operation should be free of charge in all cases.

88. Some members found article 7 useful since it defined the content of co-operation. Co-operation, according to a view, was an indispensable component of any measures designed to protect the vital interests of mankind.

However, they felt that the words "both in affected States and in States of origin" should be deleted, for the article in its present form also appeared to cover activities having harmful effects only in the State of origin. The second paragraph, it was furthermore suggested, could be deleted, since it was obvious that, where there was co-operation, at least two parties were involved and, in the case in point, those parties could only be the affected State and the State of origin. Some members supported the statement in the Special Rapporteur's report to the effect that account should also be taken of the rights and interests of the State of origin which bore the main burden both as regards prevention and in the case of the event itself. The remark was also made that taking into account in this way the rights and interests of the State of origin was one of the principal elements of the whole concept of liability for transboundary harm resulting from acts not prohibited by international law.

89. Some members suggested that the principle of co-operation in article 7 could be more specifically drafted to include the obligation of notification, consultations and prevention as did the articles of the law of the non-navigational uses of international watercourses. Through these procedures, it would be possible to identify activities involving risk and to adopt by agreement the necessary preventive measures. A view was also expressed that in drafting this article it should be remembered that the topic concerned not co-operation, but liability and prevention and that it was therefore inadvisable to put too much emphasis on co-operation.

Article 8. Participation

90. The Special Rapporteur stated that, in his opinion, the principle of participation was complementary to the principle of co-operation set out in article 7. Hence, the State of origin should permit participation by States exposed to a potential risk in choosing means of prevention. Such participation would cover the procedural steps for prevention. The purpose of the article was to allow the potentially affected State to assess more accurately the risk to which it might be exposed and play a more effective role in preventing the risk. The Special Rapporteur noted that it was important to have some sanctions attached to non-compliance with these

obligations. He believed that it would perhaps be useful to relate non-compliance with procedural obligations to the extent and the type of reparation of injuries as set out in section 6 of the Schematic outline.

91. In the opinion of many members of the Commission, article 8 obviously dealt with co-operation but with a specific form of it. The duty of participation related to consultation machinery which was already implicit in article 7 on co-operation. Besides, the modalities of such co-operation would have to be the subject of specific provisions. Therefore in view of article 7, article 8 seemed unnecessary. Article 8 could therefore be conveniently dropped without loss to the draft. But if the idea in article 8 was to be retained, it could be included in a reformulated version of article 7.

Article 9. Prevention

92. The concept of prevention, the Special Rapporteur remarked, had taken a considerable part of the Commission's debates. In his view, an article on this issue was essential and could be drafted with three possibilities in mind: namely, (a) prevention might be linked exclusively to reparation, (b) there could be "autonomous" obligations of prevention, i.e. obligations not connected with the eventual harm and its reparation, and (c) the draft might embody only norms of prevention, as had been suggested by a few members. In the first case, it was clear that the preventive effect, under a régime of liability for risk, was achieved through the conditions imposed by the régime with respect to reparation: the dissuasion would come from the knowledge that all harm had, in principle, to be compensated for. The shortcoming of this approach was that the other State, the potentially affected State, would not be able to take any action to compel the State of origin to take preventive measures before harm occurred. There were also some difficulties with the second possibility, namely, placing obligations of prevention and reparation on an equal footing. It was remarked that this option would bring the subject within the scope of responsibility for wrongful acts, since, if the State of origin did not comply with the prevention obligations, it would be committing a wrongful act. Thus, apart from the conceptual difficulties just mentioned such preventive obligations might

superimpose unnecessary limits on the freedom of States at such early stages of initiating an activity. In view of the above, the Special Rapporteur felt that, if the Commission agreed, an article on prevention with some linkage to the occurrence of harm would be useful.

93. Some members found the principle of prevention vital to the topic. It was observed that the 1982 United Nations Convention on the Law of the Sea offered many examples of provisions which referred to recognized international standards of prevention, whether in international treaties, in the resolutions and findings of international bodies, or in recommended practices. The same approach could perhaps be used for this draft. Prevention, it was stated, must not be left entirely to the discretion of the State of origin; it must be related to more objective standards. It was pointed out that prevention should not be limited to activities involving risks, but extend to all activities resulting in transboundary harm. It was also said that the inclusion of the word "reasonable" before the words "preventive measures" tended to weaken the force of the preventive measures and it would therefore be preferable to retain only the first part of the sentence, which clearly established the obligation to prevent or minimize harm.

94. It was pointed out that the obligation of prevention had two aspects. One aspect related to mechanisms and procedures and the other to substance. The obligation of prevention in its procedural aspects included a number of practical steps: assessment of the possible transboundary effects of the activity contemplated; prevention on the part of the State of origin, to ward off accidents; consultation of those States likely to be affected by the activity; participation by those States in the preventive action, and so forth. These procedures should enable the potentially affected States to protect themselves against the risk involved in an activity. The obligation of prevention in its substance implied that, whether or not there was prior agreement among States threatened by the harmful effects of the activity undertaken, the State of origin had to take the necessary safety measures, for example by adopting laws and regulations and ensuring their application. The remark was made that it would be easier to deal with these two issues if they formed the subject of a few general articles, as had been done in the

Convention on the Law of the Sea with regard to the protection of the environment. However, the Commission ought to be able to indicate more precisely what preventive measures the State of origin must take. If appreciable transboundary effects did result, the liability of the State of origin would not be the same depending on whether it had complied with its obligation of prevention or not. If it had taken the necessary precautions, that fact could be a circumstance in assessing its obligation to make reparation; if it had not done so, that might be considered as an aggravating circumstance.

95. While some members felt that violation of preventive obligations should entail State responsibility, some others felt that such violation should give rise to no cause of action. It was also suggested that violation of preventive obligations could be taken into account at the reparation stage, as an element which would lead to a higher measure of reparation.

Article 10. Reparation

96. The Special Rapporteur explained that the principle of reparation would prevail in case there was no agreed régime between the State of origin and the affected State. In such a case, the régime set out in the draft articles would, of course, apply. The innocent victim, as had been stated at the previous session, should not be left to bear alone the harm suffered as a result of an activity involving risk carried out by another State. By reference to the word alone, he meant to underline the particular characteristic of liability under these articles, namely that a victim might have to bear some loss. Harm here was not assessed only in its individual physical dimensions. It was assessed also in relation to certain factors which would be enumerated. This assessment of harm was another difference between this topic and that of State responsibility. For the activities dealt with in the present context were not prohibited and the preventive measures might impose a heavy financial burden on the State of origin, a factor which should not be ignored in the assessment of pecuniary damages. The Special Rapporteur also stated that the concept of reparation was broader than that of compensation. Reparation was intended to include other remedies, in addition to pecuniary damages, that the States concerned might prefer to choose.

97. Many members agreed that the concept of reparation was broader than that of compensation and should therefore be retained. Some members found no valid reason to limit the scope of reparation by specifying that the harm must be "caused by an activity involving risk" and that the reparation must be settled "in accordance with the criteria laid down in the present articles". There had also been in the past examples of compensation being given ex gratia for harm caused by lawful activities, on the basis of what one might call moral obligation. It was that obligation that had to be transformed into a legal obligation. Therefore, in the opinion of those members of the Commission, the draft articles on this topic should specify in what cases and what circumstances the obligation to make reparation arose, regardless of risk.

98. A view was on the other hand expressed that an article on reparation would serve no useful purpose. Even though the principle of strict liability was advanced by some States involved in certain activities, this was done only in accordance with a pre-existing treaty in which strict liability was accepted by the contracting parties. If the Special Rapporteur none the less intended to introduce the application of strict liability as a general principle of international law, he was likely to encounter the resistance of a great many Governments. Even the Convention on Civil Liability for Nuclear Damage had so far been ratified by only 10 States, none of them nuclear Powers. Instead, the question of strict liability could be examined later only in the context of activities involving a low risk but capable of causing large-scale harm.

99. Some members considered the Special Rapporteur's approach to reparation realistic since harm must be assessed in addition to actual loss itself, in relation to a number of other factors. But that approach, while justified in the case of two economically equal States, would not work when that equality was absent. A better approach was perhaps to take as a general principle the obligation for full reparation of harm and then introduce the exceptions to the general rule.

100. It was pointed out that article 10 might make a distinction between the case where harm occurred despite preventive measures taken by the State of origin and the case where the State of origin failed to take any preventive

measures. In the latter situation, it would perhaps be possible to prove negligence. However, in the former, it would be difficult to establish whether the State of origin had taken all reasonable preventive measures or whether it had exercised due diligence. It was unclear whether there was an autonomous or objective standard to determine compliance with preventive measures or due diligence or whether such determination was left entirely at the discretion of the State of origin. This issue, in the opinion of some members, would require additional clarification.

101. After the conclusion of the debate, the Commission, at its 2075th meeting, referred to the Drafting Committee draft articles 1 to 10 together with the comments made by the members of the Commission regarding specific aspects of the articles.

C. Points on which comments are invited

102. The Commission would welcome the views of Governments either in the Sixth Committee or in written form in particular on the role which risk and harm should play in the topic (see paragraphs 28 and 39 to 50 above).

CHAPTER III

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction 27/

103. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report on legal problems relating to the non-navigational uses of international watercourses prepared by the Secretariat. 28/ At that session, the Commission adopted the report of a Sub-Committee set up on the topic during the same session and appointed Mr. Richard D. Kearney as Special Rapporteur for the topic.

104. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States 29/ to a questionnaire 30/ which had been formulated by the Sub-Committee and circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur. 31/ The Commission's consideration of the topic at that session

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

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

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

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

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

led to general agreement that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. 32/

105. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel, Special Rapporteur, to succeed Mr. Kearney, who had not stood for re-election to the Commission. The Special Rapporteur, Mr. Schwebel, at the thirty-first session of the Commission in 1979 presented his first report. 33/

106. The Special Rapporteur submitted a second report containing six draft articles at the Commission's thirty-second session in 1980. 34/ At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted the following six draft articles: article 1 (Scope of the present articles); article 2 (System States); article 3 (System agreements); article 4 (Parties to the negotiation and conclusion of system agreements); article 5 (Use of the waters which constitute a shared natural resource); and article X (Relationship between the present articles and other treaties in force). 35/

107. As further recommended by the Drafting Committee, the Commission, at its thirty-second session in 1980, accepted a provisional working hypothesis as to what was meant by the term "international watercourse system". The hypothesis was contained in a note which read as follows:

> "A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and ground water constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

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

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

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

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

An 'international watercourse system' is a watercourse system, components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse."

108. Following the resignation from the Commission of the Special Rapporteur, Mr. Schwebel, upon his election to the International Court of Justice in 1981, the Commission appointed Mr. Jens Evensen, Special Rapporteur, for the topic at its thirty-fourth session in 1982. Also at that session the third report 36/ of the former Special Rapporteur, Mr. Schwebel, was circulated.

109. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by the Special Rapporteur, Mr. Evensen. 37/ It contained a tentative draft convention, the purpose of which was to serve as a basis of discussion, consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the term "international watercourse system" and that of an international watercourse system as a shared natural resource.

110. At the thirty-sixth session, in 1984, the Commission had before it the second report submitted by the Special Rapporteur. 38/ It contained a revised draft of a convention consisting of 41 draft articles arranged in

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

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

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

six chapters. The Commission focused its discussion on draft articles 1 to 9 39/ and questions related thereto. The Commission decided to refer to the Drafting Committee draft articles 1 to 9, for consideration in the light of the debate. 40/ Due to lack of time, the Drafting Committee was unable to consider those articles at the 1984 through 1986 sessions.

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

112. The Special Rapporteur submitted a preliminary report to the Commission at that session, 41/ which reviewed the Commission's work on the topic to date and indicated his preliminary views as to the general lines along which the Commission's work on the topic could proceed. The Special Rapporteur's recommendations in relation to further work on the topic were: first, that draft articles 1 to 9 which had been referred to the Drafting Committee in 1984, and which the Drafting Committee had been unable to consider at the 1985 session, be taken up by the Committee at the 1986 session and not be subject

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39/ Those nine articles were as follows: Chapter I. Introductory articles: article 1 (Explanation (definition) of the term "international watercourse" as applied by the present (draft) convention); article 2 (Scope of the present articles); article 3 (Watercourse States); article 4 (Watercourse agreements); article 5 (Parties to the negotiation and conclusion of watercourse agreements); Chapter II. General principles, rights and duties of watercourse States: article 6 (General principles concerning the sharing of the waters of an international watercourse); article 7 (Equitable sharing in the uses of the waters of an international watercourse); article 8 (Determination of reasonable and equitable use); article 9 (Prohibition against activities with regard to an international watercourse causing appreciable harm to other watercourse States). Ibid.

40/ It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its 1980 session (see para. 107, above), the text of articles 1 to 5 and X provisionally adopted by the Commission at the same session as well as the text of articles 1 to 9 proposed by the Special Rapporteur in his first report.

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

to another general debate in plenary session; and second that the Special Rapporteur follow the general organizational structure provided by the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic. There was general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed.

113. At the thirty-eighth session, in 1986, the Commission had before it the second report on the topic submitted by the Special Rapporteur (A/CN.4/399 and Adds.1 and 2). In that report the Special Rapporteur, after reviewing the status of the Commission's work on the topic, provided a statement of his views on articles 1 to 9 as proposed by the previous Special Rapporteur, 42/ as well as a review of the legal authority supporting those views. The report also contained a set of five draft articles concerning procedural rules applicable in cases involving proposed new uses. 43/

114. At the thirty-ninth session in 1987, the Commission had before it the third report on the topic submitted by the Special Rapporteur (A/CN.4/406 and Corr.1, A/CN.4/406/Add.1 and Corr.1 and A/CN.4/406/Add.2 and Corr.1).

115. In his third report, the Special Rapporteur briefly reviewed the status of the work on the topic (Chapter I), set forth general considerations on procedural rules relating to the utilization of international watercourses (Chapter II), proposed six draft articles concerning general principles of co-operation and notification (Chapter III) 44/ and introduced the sub-topic of the general exchange of data and information (Chapter IV).

42/ See note 39, above.

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

44/ Those six articles were as follows: article 10 (General obligation to co-operate); article 11 (Notification concerning proposed uses); article 12 (Period for reply to notification); article 13 (Reply to notification: consultation and negotiation concerning proposed uses); article 14 (Effect of failure to comply with articles 11 to 13); article 15 (Proposed uses of utmost urgency).

116. The Special Rapporteur suggested that the draft articles to be included in Chapter III of the draft, which he had suggested be entitled "General principles of co-operation, notification and provision for data and information", fell into two categories. The first, consisting only of article 10, covered the obligation to co-operate. The second category, comprising draft articles 11 to 15, set out rules on notification and consultation concerning proposed uses, which could best be considered together. These draft articles were later referred to the Drafting Committee for consideration in the light of the discussion and summing up by the Special Rapporteur. 45/

117. At the same session, the Commission, after having considered the report of the Drafting Committee on the draft articles referred to it on this topic, approved the method followed by the Committee with regard to article 1 and the question of the term "system" and provisionally adopted articles 2 (Scope of the present articles), 3 (Watercourse States), 4 ([Watercourse] [System] agreements), 5 (Parties to a [watercourse] [system] agreement), 6 (Equitable and reasonable utilization and participation) and 7 (Factors relevant to equitable and reasonable utilization). 46/ The draft articles which were adopted at that session are based upon articles 2 to 8 referred to the Drafting Committee at the 1984 session of the Commission, as well as articles 1 to 5 provisionally adopted by the Commission in 1980 (see para. 106 above). For lack of time, the Drafting Committee was unable to complete its consideration of article 9 (Prohibition against activities with regard to an international watercourse causing appreciable harm to other watercourse States) proposed by the previous Special Rapporteur and referred to the

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45/ For a brief description of major trends of the debate in the Commission on those articles, including the conclusions drawn by the Special Rapporteur following the debate, see Official Records of the General Assembly, Forty-second Session, Supplement No. 10 (A/42/10, paras. 93-116).

46/ The texts of these draft articles are set out in paragraph 189 below.

Committee in 1984, nor was it able to take up articles 10 to 15 referred to the Committee at that session. Thus the Drafting Committee remained seised of articles 9 to 15.

B. Consideration of the topic at the present session

118. At the present session the Commission had before it the fourth report on the topic submitted by the Special Rapporteur (A/CN.4/412, A/CN.4/412/Add.1 and Corr.1 and A/CN.4/412/Add.2 and Corrs.1 to 3).

119. The fourth report contained three chapters: Chapter I, Status of work on the topic and plan for future work; Chapter II, Exchange of data and information; and Chapter III, Environmental protection, pollution and related matters.

120. In Chapter I, the Special Rapporteur provided the following tentative outline for the treatment of the topic as a whole: Part I (Introduction) would consist of articles 1 to 5; Part II (General principles) would contain articles 6 and 7, and the former articles 9 and 10, to be renumbered 8 and 9. He proposed to include that last article among the general principles, in accordance with the views expressed at the previous session. Part III (New uses and changes in existing uses) would contain articles 11 to 15, which would be renumbered 10 to 14. Part IV would consist of a single article, dealing with the exchange of data and information. Part V would deal with environmental protection, pollution and related matters, Part VI with water-related hazards and dangers and Part VII with the relationship between non-navigational and navigational uses.

121. Under the heading of "Other matters", the outline contained a list of subjects which, in the view of the Special Rapporteur, would more appropriately be dealt with in annexes to the draft, due to its nature as a framework instrument. The Special Rapporteur suggested, however, that the Commission might wish to cover some of these subjects in the draft articles themselves.

122. The Special Rapporteur also proposed a schedule for dealing with the remaining material, subject to any decision the Commission might make concerning the substantive coverage of the topic and the Commission's overall programme of work, including the possibility of staggering of the consideration of topics. He planned to submit one report each year, however,

even if its consideration were deferred, so as to maintain a regular flow of material and to avoid submitting too extensive a report in any one year.

123. All members who addressed the issue approved of the outline and schedule as the basis of further work on the topic.

124. The Commission, at the present session, considered the fourth report of the Special Rapporteur at its 2050th to 2052nd, 2062nd to 2069th and at its 2076th meetings. The first set of meetings was devoted to the sub-topic of exchange of data and information, while the second set was devoted to environmental protection, pollution and related matters.

125. With regard to the sub-topic of exchange of data and information, the Special Rapporteur noted that this subject had been introduced in his third report (A/CN.4/406/Add.1), but the Commission had been able to consider it only briefly at the previous session. The sub-topic had also been discussed earlier, at the 1980 session, when the Commission had referred to the Drafting Committee an article proposed by the then Special Rapporteur, entitled "Collection and exchange of information". The Committee, however, had been unable to consider the article for lack of time.

126. The Special Rapporteur stressed that the regular exchange of data and information was an issue that was distinct from that of notification of planned uses and new uses of an international watercourse. The latter question had been dealt with in his previous report and formed the subject of articles 11 to 15. The text which he had proposed as article 15 [16] (hereinafter referred to as article 15), 47/ dealt with the regular and

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47/ The text of article 15 [16] proposed by the Special Rapporteur reads as follows:

Article 15 [16]

Regular exchange of data and information

1. In order to ensure the equitable and reasonable utilization of an international watercourse [system], and to attain optimal utilization thereof, watercourse States shall co-operate in the regular exchange of reasonably available data and information concerning the physical characteristics of the watercourse, including that of a hydrological, meteorological and

ongoing form of exchange of information, not with ad hoc notification of plans for new uses. The bedrock of the sub-topic concerning the regular exchange of data and information was the general obligation of co-operation between States for the purpose of achieving reasonable and equitable utilisation of a watercourse.

127. Introducing draft article 15 in his fourth report, the Special Rapporteur observed that that article could also have been placed immediately after article 10 (to be renumbered 9), dealing with the obligation to co-operate, so as to be included in Part II on general principles. With particular reference to paragraph 4 of article 15, which dealt with conditions or incidents that posed a threat to the watercourse or to other watercourse States, the Special Rapporteur stated that the obligation to warn could equally be dealt with in a separate article on water-related hazards, dangers and emergencies, to appear in a later part of the draft.

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hydrogeological nature, and concerning present and planned uses thereof, unless no watercourse State is presently using or planning to use the international watercourse [system].

2. If a watercourse State is requested to provide data or information that is not reasonably available, it shall use its best efforts, in a spirit of co-operation, to comply with the request but may condition its compliance upon payment by the requesting watercourse State or other entity of the reasonable cost of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where necessary, to process data and information in a manner which facilitates its co-operative utilization by the other watercourse States to which it is disseminated.

4. Watercourse States shall inform other potentially affected watercourse States, as rapidly and fully as possible, of any condition or incident, or immediate threat thereof, affecting the international watercourse [system] that could result in a loss of human life, failure of a hydraulic work or other calamity in the other watercourse States.

5. A watercourse State is not obligated to provide other watercourse States with data or information that is vital to its national defence or security, but shall co-operate in good faith with the other watercourse States with a view to informing them as fully as possible under the circumstances concerning the general subjects to which the withheld material relates, or finding another mutually satisfactory solution.

128. As indicated above, the Commission devoted its 2050th to 2052nd meetings to a consideration of the first part of the Special Rapporteur's report containing Part IV of the draft on the exchange of data and information. At its 2052nd meeting, the Commission decided to refer article 15 to the Drafting Committee for consideration in the light of the discussion and the summing-up by the Special Rapporteur. This article was provisionally adopted at the current session on the recommendation of the Drafting Committee and now takes the form of articles 10 and 20.

129. At the 2062nd meeting of the Commission, the Special Rapporteur introduced the second part of his report, dealing with environmental protection, pollution and related matters (document A/CN.4/412/Add.1 and Corr.1, and A/CN.4/412/Add.2 and Corrs.1 and 2). The first of these two documents (document A/CN.4/412/Add.1 and Corr.1) contained background material and authorities on environmental protection, pollution and related matters. In his treatment of this sub-topic, the Special Rapporteur had conducted a survey of a number of authorities - international agreements, reports and studies prepared by intergovernmental and international non-governmental organizations, studies by individual experts and decisions of international courts and tribunals and other instances of State practice. This survey, the Special Rapporteur explained, illustrated the long-standing concern of States about the pollution of international watercourses and showed that modern agreements recognised the intimate relationship between nature and humanity by providing for measures to safeguard the natural environment and ensure sustainable development.

130. The second of these two documents (document A/CN.4/412/Add.2 and Corrs.1 to 3) contained three articles proposed by the Special Rapporteur - article 16 [17] (hereinafter referred to as article 16) set out the basic obligations of States with regard to pollution; article 17 [18] (hereinafter referred to as article 17) dealt with environmental protection and article 18 [19] (hereinafter referred to as article 18) concerned pollution or environmental emergencies. With respect to the latter article, the Special Rapporteur suggested that it not be discussed extensively at the current session, since a new, comprehensive article on water-related hazards and dangers would be submitted in a report to the forty-first session.

131. On the proposal of the Special Rapporteur, the Commission first discussed draft article 16 and then proceeded to take up draft articles 17 and 18.

132. With regard to the discussions held at the present session on articles 16, 17, and article 18, the following paragraphs attempt to set out briefly the main trends of the debate on those articles, including the conclusions drawn by the Special Rapporteur following the debate. 48/

133. Concerning the general question of environmental protection and pollution control, most members who spoke on this sub-topic recognised its great importance and contemporary relevance. It was noted that fresh water was becoming scarce world wide, while at the same time pollution of watercourses was on the increase. It was also pointed out that pollution of international watercourses was primarily responsible for the pollution of the marine environment. Over 80 per cent of marine pollution came from land-based sources, and out of this, about 90 per cent was carried by watercourses, especially in semi-enclosed and enclosed seas.

134. As to the desirability or justification of having a separate part in the draft devoted solely to the question of environmental protection and the pollution of international watercourses, some members who addressed the question stated that they did not see the need or desirability of a separate part devoted solely to this sub-topic. It was considered that treatment of this matter in a separate part of the draft was likely to raise problems of implementation by States. Since various provisions of the draft dealt with the rights and obligations of States with regard to the non-navigational uses of international watercourses - including the right to use the international watercourse in an equitable and reasonable manner (article 6), the obligation not to cause appreciable harm (article 8, formerly article 9) and the obligation to co-operate and to exchange data and information (articles 9 to

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48/ It should be noted that the summary records of the 2062nd to 2069th and 2076th meetings contain an extensive reflection of the views expressed during the debate, including remarks of a general character, and comments made on the prior work of the Commission on the topic and previous reports of the Special Rapporteur.

14, formerly articles 10 to 15), it was felt that the obligations relating to environmental protection and pollution control ..ould best be treated as an integral part of those other rights and duties of States enumerated in different parts of the draft. According to another view, it was essential that a link be provided between the provisions on pollution and the environment and the other parts of the draft which already refer more specifically to this question, in particular the articles just mentioned.

135. Most members who addressed the question, however, favoured treatment of this sub-topic in a separate part of the draft, in view of its importance. It was considered that to follow any other approach, such as that of integrating the provisions on the subject into the other draft articles or sections of the draft, would dilute the importance attached to dealing with this dangerous phenomenon. Moreover, it was pointed out, pollution of international watercourses was likely to go beyond the area of national jurisdiction and could also affect other States who were not necessarily watercourse States. Whereas the other parts of the draft dealt with the rights and duties of watercourse States, it was viewed as essential and indeed necessary to have a separate part in the draft dealing with environmental protection and the control of pollution so that the problem could be addressed in its entirety.

136. In this connection, a suggestion was made that articles should be formulated to deal specifically with the problem of the relationship between watercourse States and non-watercourse States in matters of environmental protection and pollution control. The Special Rapporteur reacted favourably to this suggestion. It was pointed out however that care should be taken not to exceed the scope of the Commission's mandate with regard to this topic. Attention was also drawn to the fact that the 1982 United Nations Convention on the Law of the Sea, considered by many to be one of the most important multilateral conventions in recent history, contained a separate part (Part XII) devoted entirely to the question of the protection and preservation on the marine environment. The Special Rapporteur considered all these suggestions merited careful consideration.

137. Regarding the scope of this sub-topic, most members who addressed the question expressed the view that since the Commission was engaged in the preparation of a framework agreement, it was preferable to keep the number of

articles on the sub-topic to a minimum reflecting general rules concerning the subject-matter. It would then be left up to States themselves to adopt more specific and detailed measures relating to the protection of the environment and the control of pollution of international watercourses. Some members, however, considered that the draft articles contained in Part V were too few and suggested the further elaboration of the sub-topic. In this connection, a suggestion was made that several paragraphs could be made into separate articles and that procedural rules could also be added, at least to draft article 16. Another suggestion was to reverse the order of articles 16 and 17 so that the more general provisions came first. A proposal was also made to change the title of Part V to "Protection of the environment of international watercourses".

Article 16 [17]

Protection of international watercourse[s] [systems]

138. In introducing article 16, 49/ the Special Rapporteur explained that paragraph 1 of the article contained a possible definition of pollution which,

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49/ The text of article 16 proposed by the Special Rapporteur reads as follows:

Article 16 [17]

Pollution of international watercourse[s] [systems]

1. As used in these draft articles, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct and which produces effects detrimental to human health or safety, to the use of the waters for any beneficial purpose or to the conservation or protection of the environment.

2. Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system].

3. At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving lists of substances or species, the introduction of which into the waters of the international watercourse [system] is to be prohibited, limited, investigated or monitored, as appropriate.

he noted, might ultimately be incorporated in an introductory article with other definitions. The definition concentrated on the notion of alteration in the composition or quality of waters that resulted from human conduct and produced harmful effects. Paragraph 2, the Special Rapporteur explained, was the core of the article and constituted a specific application of the "no harm" principle contained in draft article 8 (formerly article 9), which had been referred to the Drafting Committee in 1984. It did not prohibit all pollution, only that which caused appreciable harm. As explained in paragraph (4) of his comments on article 16, "appreciable harm" was harm that was significant - that was to say, not trivial or inconsequential - but was less than "substantial", in the sense of "considerable in size or amount". The term "harm" was used in its factual sense, to mean actual impairment of use, injury to health or property or a detrimental effect on the ecology of the watercourse. The word "harm" had been preferred to "injury", which had legal as well as factual connotations. The Special Rapporteur also noted that the obligation contained in paragraph 2 was one of due diligence to ensure that appreciable pollution harm was not caused to other watercourse States, and that strict liability was not, in his view, involved. Concerning paragraph 3 of draft article 16, the Special Rapporteur explained that the paragraph was intended to reflect the emphasis placed on hazardous or dangerous substances in most recent international agreements and the growing practice by States of preparing lists of substances whose introduction into the watercourse was to be banned, regulated or monitored.

139. Paragraph 1: In commenting on draft article 16, most members who spoke on the issue supported the idea mentioned by the Special Rapporteur of moving paragraph 1 of the draft article dealing with the definition of "pollution" to article 1 on the use of terms. Most members also expressed general support for the definition as presently drafted. Some members, however, were of the view that the definition was too broad, others thought that it was too restrictive, and one member considered a definition unnecessary.

140. The view was expressed by some members that in order to assure uniformity of law, the definition as found in article 1, paragraph 1 (4) of the 1982 United Nations Convention on the Law of the Sea should be closely followed in the present draft article.

141. Some members expressed the view that the definition, apart from making reference to the physical, chemical or biological alteration of the composition or quality of the waters, should also refer to the introduction or withdrawal of substances or energy from the waters. Other members thought that reference to the alteration of the waters was broad enough to cover extraction from, as well as introduction of material into, the watercourse.

142. One member considered that the definition should be broad enough so as to cover situations where continuous accumulations of small quantities of chemical substances in fish and shellfish would in the long run produce detrimental effects to human health, since paragraph 1 of this article refers only to the composition and the quality of waters and not to living resources. In the opinion of another member, such a situation was already covered in the existing definition.

143. Concern was expressed by one member over the use of the language "results directly or indirectly from human conduct". In his view, that would not be in line with the traditional causation requirements in the law of State responsibility. The Special Rapporteur noted in his summing up, however, that the same problem was raised by the definition in the 1982 United Nations Convention on the Law of the Sea which referred to the "introduction by man, directly or indirectly, of substances or energy into the marine environment ...". He would not however be opposed to examining possible alternatives with a view to finding suitable solutions to that problem.

144. A suggestion was made that the word "well-being" should be used in place of "safety" and that an express reference should also be made to "reduction of amenities" as had been done in the definition in the 1982 United Nations Convention on the Law of the Sea. It was also considered important by some members to include in the definition pollution produced by new technologies and radioactive elements. The Special Rapporteur agreed that reference could perhaps be made to the introduction of "energy" to cover that particular point.

145. Some doubts were expressed on the use of the term "any beneficial purpose". It was felt that even polluted water could sometimes be used for, or serve, a beneficial purpose. It was proposed that perhaps an adaptation of

the definition in the 1982 United Nations Convention on the Law of the Sea, which referred to "hindrance to marine activities including fishing and other legitimate uses of the sea", could be used to avoid confusion.

146. The Special Rapporteur explained that the concept of "beneficial use" was well known nationally and internationally in the field of watercourse law; it was linked to the concept of equitable utilization. However he would not object to referring simply to "use of the waters".

147. One member proposed that the definition should also include reference to changes in the river bed and to the ecological balance that may be altered as a result of pollution of the watercourse. Another member wondered whether the present definition of pollution, as that which resulted from human conduct, was also meant to cover pollution that resulted from natural phenomena which was not a result of a human activity. As to the latter point, the Special Rapporteur stated that he had not intended that the definition cover the situation of pollution by natural phenomena.

148. Paragraph 2 of draft article 16 was viewed by most speakers as essential and necessary for the present draft. All States, it was said, had an interest not to pollute the waters of an international watercourse, if only because the ecosystem was indivisible. The rule contained in paragraph 2, prohibiting States from polluting international watercourses in a way that might cause appreciable harm to other watercourse States or to the ecology of the international watercourse, reflected the increasing interdependence of States and the interrelationship between international law on the one hand, and national law on the other. The rule was also thought to be well grounded in State practice as evidenced, for example, by the Trail Smelter 50/ and Lake Lanoux 51/ arbitrations and the Corfu Channel 52/ and the Gut Dam 53/

50/ See note 17 above.

51/ See note 19 above.

52/ See note 18 above.

53/ International Legal Materials, vol. VIII (1969), pp. 118-143.

cases; principles 21 and 22 of the Stockholm Declaration on the Human Environment; the 1982 United Nations Convention on the Law of the Sea (Part XII) and other multilateral agreements.

149. In this connection, some members considered the principle so important as to warrant its placement in a separate article. However, in the view of other members, the obligation not to cause appreciable pollution harm was to be viewed in the much wider context of the obligation to co-operate in the equitable utilization of international watercourses [systems]. International co-operation in reducing and eliminating pollution was, according to these members, the best solution in achieving that objective. In that connection, it was proposed that paragraph 2 could thus provide that "Watercourse States shall co-operate to prevent, reduce and control pollution of international watercourses [systems]". This approach was, however, not viewed favourably by other members who addressed this point, on the ground that a stricter obligation was needed. Indeed another view was that paragraph 2 should be moved into the part of the draft articles dealing with general principles, to be placed alongside the principle of equitable use as an important part of the no harm principle, with a cross-reference to Part V as regards implementation.

150. The discussion of paragraph 2 focused on several specific legal issues, including the following: the concept of appreciable harm; the question of reconciling the concept of appreciable pollution harm under paragraph 2 with that of detrimental effects under paragraph 1 of the draft article; the question of strict liability; the obligation of due diligence; and the issue of existing pollution versus new pollution. The following paragraphs contain a brief account of the discussion of each of those issues.

151. The concept of appreciable harm: Some speakers expressed support for the use of "appreciable harm" as the appropriate criterion for determining the threshold of unacceptable pollution of an international watercourse [system].

152. They found the explanation given by the Special Rapporteur to be sufficiently clear, firstly, as to the meaning of that term itself; and secondly, as to the fact that the concept was widely used in State practice in the field of international watercourses, in particular, in various agreements

on the subject. The concept, it was stated, provided a sufficiently clear and an objective general standard that was suitable for allocating responsibility for pollution.

153. In the view of these members, the rule contained in paragraph 2 did not prohibit pollution as such, but only placed an obligation on States not to cause appreciable pollution harm. To that extent therefore, it was said, the rule was also a reflection of contemporary international law. Moreover, it was stated, while no harm was negligible, the exigencies of interdependence and good neighbourliness made it necessary that some pollution be tolerated. It was difficult in a general framework instrument to be as precise as might be required. This was however a general principle, and it could be left to watercourse States to determine what levels of particular substances constituted appreciable harm.

154. Other members, however, expressed doubts as to the exact meaning of the term "appreciable harm". In their view, the criterion was rather imprecise and subjective in nature and an attempt to define the term only led to more confusion. Furthermore, according to them, such a criterion seemed unnecessarily rigid; States would find it difficult to enforce in national courts. Strict enforcement of such a standard, in their view, could also slow down industrial activity. It was proposed that a term such as "substantial" could provide a more objective and technical standard. Other members, however, considered that the use of "substantial" as a criterion would permit the introduction of considerably more pollution into the watercourse before legal injury could be said to have occurred. It was cautioned that care should be exercised not to give the impression that the standard being applied was an elastic one. The view was also expressed that the term "harm" was sufficient by itself and should not be qualified at all.

155. Some members, supporting the use of the term "appreciable harm", stated that there was a need for consistency among the various articles of the draft, notably article 8 (formerly article 9) on the obligation not to cause appreciable harm, as well as with the language used in other topics, such as liability for injurious consequences arising out of acts not prohibited by international law.

156. The Special Rapporteur noted in response that the idea, as stated in paragraph (4) of the comments to paragraph 2 of article 16 in his fourth report, was to use a term that was entirely factual, one that provided as factual and objective a standard as was possible in the circumstances. He agreed with those who wished to have an objective standard, but pointed out that in the absence of specific agreements on scientifically determined levels of permissible emissions, it was possible only to have a general standard that could come as close as possible to objectivity. Moreover, he said "appreciable harm" was the term that had been employed as the standard in draft article 8 (formerly article 9) on the obligation not to cause appreciable harm, and that the expression, or its equivalent, was found in a number of international agreements.

157. The question of reconciling the concept of appreciable harm under paragraph 2 with detrimental effects under paragraph 1 of draft article 16 [17]: A question was raised as to the relationship between the term "appreciable harm" under paragraph 2 and the expression "effects detrimental to human health or safety" in paragraph 1 of the draft article. A reservation was expressed as to the meaning of the term "effects detrimental to human health or safety", which was thought to be rather difficult to define. It was not quite clear whether paragraph 1 referred to situations which, though causing pollution, did not cause appreciable harm.

158. Some members however saw no inconsistency between the "appreciable" harm referred to in paragraph 2 and the "effects detrimental to human health or safety" in paragraph 1 of article 16. According to this view, "detrimental effects" might or might not rise to the level of "appreciable harm". Thus "pollution", as defined in paragraph 1, would not necessarily violate paragraph 2 of article 16; it was only when the pollution entailed detrimental effects that exceeded the threshhold of appreciable harm that it would be prohibited by article 16.

159. The Special Rapporteur noted that the same problem arose in other international instruments. For example, article 1, paragraph 1 (4) of the 1982 United Nations Convention on the Law of the Sea, in defining "pollution of the marine environment", refers to the introduction of "substances or energy" resulting in "deleterious effects", such as harm to marine life or

hasards to human health. But article 194, paragraph 2 of that Convention, requires States to take measures to ensure that their activities are so conducted as not to cause "damage by pollution to other States and their environment". In the view of the Special Rapporteur, the concept of "damage" by pollution could be compared to that of "harm" in draft article 16, and the relationship between "damage" and "deleterious effects" was similar to that between "appreciable harm" and "effects detrimental to human health or safety". The Special Rapporteur confirmed that the view described in the preceding paragraph conformed with his own understanding of the relationship between the two concepts, and said that he could also endorse a suggestion by one member that the detrimental effects which did not rise to the level of appreciable harm should be the subject of the "reasonable measures" of abatement under paragraph 1 of article 17.

160. The question of strict liability: Some members who addressed the issue stated that a State of origin that caused appreciable harm to another watercourse State should be strictly liable under paragraph 2 of article 16. Other members expressed the view that States could not accept that causing appreciable pollution harm to another watercourse State would result in strict liability. That principle, it was said, should be left for States to include in the watercourse agreements between them, if they so wished, under article 4 of the draft. Some members also stated that paragraph 2 as presently drafted gave the impression that the basis of responsibility for causing appreciable pollution harm was strict liability. But the Special Rapporteur noted that he had explained in paragraph (6) of his comments to draft article 16 that he had taken due diligence as the measure of the obligation, i.e. a wrongful act would only be committed when appreciable pollution harm to another watercourse State resulted from a watercourse State's failure to exercise due diligence to prevent such harm. In this connection, it was observed by some members that the proper understanding of the rule embodied in paragraph 2 was that a watercourse State could not act in such a way that the level of pollution that affected other watercourse States or the ecology of the international watercourse rose above the threshhold of appreciable harm. The responsibility which derived from violation of that obligation was responsibility for a

wrongful act. Such a prohibition, it was said, was however not within the field of strict liability, which by definition attached to acts not prohibited by international law. That distinction was the dividing line between the topic of State responsibility and that of liability for injurious consequences arising out of acts not prohibited by international law.

161. Paragraph 2 of draft article 16, it was further observed, imposed an obligation of result, that of preventing a certain event. It was noted that, according to article 21 of Part I of the draft on State responsibility, 54/ concerning obligations of result, a breach occurred when a State, through means it had selected, did not obtain the result required by the obligation. Article 23 of that draft 55/ provided that when the obligation of the State was to prevent the occurrence of a given event, that obligation was breached only if the State, through the means it had selected, did not achieve that result. Those articles, it was said, seemed to mean that there was no breach of the obligation if the result - to prevent a given event - was achieved. If, on the other hand, the State did not obtain the required result under article 23, it was then necessary to examine the means employed in order finally to determine the responsibility of that State. In that connection, some members found the explanation of the Special Rapporteur, that the State of origin must show that it had taken all measures at its disposal to prevent the harm - i.e., that it exercised due diligence - to be acceptable.

162. The Special Rapporteur observed that there was little, if any, evidence of State practice which recognized strict liability for water pollution damage which was non-accidental, or which did not result from a dangerous activity. In his view, the latter activities were matters which were properly dealt with under the topic of liability for injurious consequences arising out of acts not prohibited by international law. In order to make it clear that what was intended in paragraph 2 was responsibility for wrongfulness and not strict liability, the Special Rapporteur suggested that that paragraph might provide

54/ Yearbook ..., 1980, vol. II (Part Two), p. 32.

55/ Ibid.

that watercourse States shall [exercise due diligence] [take all measures necessary 56/] to prevent the pollution of an international watercourse [system] in such as manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system]. Alternatively, the paragraph could require that watercourse States take all measures necessary to ensure that activities under their jurisdiction or control be so conducted as not to cause appreciable harm by pollution to other watercourse States or to the ecology of the international watercourse [system]. 57/

163. The obligation of due diligence: Some speakers expressed the view that the obligation of due diligence as a standard for responsibility for causing appreciable pollution harm was not clearly defined. The concept of due diligence, it was observed, was rather too weak and subjective to be used as a standard for responsibility. In their view, it was necessary to set an international standard for determining responsibility, which should not be left to each watercourse State to determine, as would be the case if a due diligence standard were used. Moreover, it was pointed out, the use of that standard could also put too heavy a burden on a victim State since only the source State would have access to the means of proving whether or not it had exercised due diligence to prevent appreciable harm from being caused to another watercourse State. It was suggested in this connection that the burden of proving due diligence should be placed on the source State. Some members pointed out that the concept of due diligence was dangerous inasmuch as it made responsibility rest on wrongfulness rather than on risk and that States would be tempted to evade responsibility simply by trying to prove that they had complied with their obligation of due diligence. They furthermore pointed out that the problem of responsibility should not be dealt with in the framework of the topic under consideration but rather in the framework of liability for activities not prohibited by international law.

56/ This language was from article 194, paragraph 2, of the 1982 United Nations Convention the Law of the Sea.

57/ This language was patterned after article 194, paragraph 2, ibid.

164. In the view of some members, the duty of due diligence as the basis of responsibility would have been more readily acceptable had it been preceded by positive rules concerning co-operation. A State could then be held responsible if it failed to take the necessary measures to use the means at its disposal to prevent appreciable harm. In this connection, it was pointed out that the presumed behaviour of a so-called "civilized State" could not serve as the basis for the obligation of due diligence. The rule of due diligence, it was stated, should perhaps have been the consequence of the obligation imposed by draft article 17 [18] that dealt with the protection of the environment of international watercourse(s) [systems]. It was proposed in that connection that perhaps the model law prepared by the American Law Institute 58/ might be used.

165. Other members were of the view that for the purposes of a framework agreement on international watercourses, the concept of due diligence was the proper standard for determining liability for causing appreciable pollution harm. Moreover, it was stated, the concept of due diligence was well rooted in both tort law and the principles of State responsibility. States would thus find it sufficiently easy and practical to apply that concept in their national courts as a standard for determining responsibility for appreciable pollution harm. Furthermore, it was said, it was necessary to employ the concept of due diligence as a criterion in order to delineate the borderline between responsibility arising under the present topic and responsibility under the topic of liability for injurious consequences arising out of acts not prohibited by international law. Some members, however, considered that the concept of due diligence could be acceptable only if it were linked to levels of development of a State; for it was rather difficult to believe that every State could be expected to exercise the same level of diligence notwithstanding the amount of resources at its disposal.

58/ The rule is set out in document A/CN.4/412/Add.2, p.21.

166. The Special Rapporteur observed in his summing up that the obligation of due diligence could be traced to the Alabama arbitration of 1872 59/ between the United States and the United Kingdom, and has been applied in many cases involving the protection to be afforded by a State to foreign citizens within its territory. He observed that Max Huber, in the case of Damage suffered by British nationals in the Spanish zone of Morocco, stated that "it has been recognized that a State is required simply to exercise the degree of surveillance corresponding to the means at its disposal". 60/ He noted further that while no cases had been found that expressly applied the principle of due diligence in the context of transfrontier pollution, the principle was implicit in the Trail Smelter award and a number of commentators had concluded that the general standard of due diligence was the appropriate one in transfrontier cases. That standard, he said, was appropriate because it afforded a certain degree of flexibility and allowed a general rule of responsibility to be adapted to different situations, for example that of the level of development of a State concerned. In his view, the concept was also supported by State practice. A watercourse State would only be internationally responsible if appreciable pollution harm to another watercourse State occurred as a result of failure of the source State to exercise due diligence to prevent such harm. In other words, harm must be the result of a failure to fulfil the obligation of prevention. However, a mere failure to exercise due diligence without harm occurring to another watercourse State did not, in his view, engage responsibility. The obligation, as he had earlier stated, was one of result, not one of conduct.

167. As to the proposal to place the burden of proof on the source State, the Special Rapporteur agreed that due diligence was essentially a defence, an exculpating circumstance, and the burden of proving it should therefore lie

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59/ Reported in J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a party, pp. 572-573; 610-611; 612-613; 654-655 (1898).

60/ Reports of International Arbitral Awards, vol. II, p.644.

with the source State. He noted that this was, however, difficult to provide for in a framework instrument, especially without knowing whether such an instrument will contain dispute settlement machinery.

168. Finally, the Special Rapporteur noted that many of the questions that had been raised in connection with responsibility for appreciable harm and due diligence arose not because of difficulties with the present topic, but because of questions that were related to other topics, viz., State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. He agreed with other members that those issues were best left to be dealt with in the framework of other topics under consideration where they mainly belonged.

Article 17

Protection of the environment of international watercourse[s] [systems]

169. In his introduction of draft article 17, 61/ which concerned the protection of the environment of international watercourses, the Special Rapporteur stated that such protection was most effectively achieved through individual and joint régimes specifically designed for that purpose. Unlike previous Special Rapporteurs, however, he had not proposed that watercourse States be required to adopt such measures and régimes, in light of

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61/ The text of article 17 [18] proposed by the Special Rapporteur reads as follows:

Article 17 [18]

Protection of the environment of international watercourse[s] [systems]

1. Watercourse States shall, individually and in co-operation, take all reasonable measures to protect the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof, due to activities within their territories.

2. Watercourse States shall, individually or jointly and on an equitable basis, take all measures necessary, including preventive, corrective and control measures, to protect the marine environment, including estuarine areas and marine life, from any impairment, degradation or destruction, or serious danger thereof, occasioned through an international watercourse [system].

the fact that the draft would be a framework instrument. At the same time, he said that the Commission might wish to consider adding such a provision, to which he would not be opposed.

170. Regarding paragraph 2 of the present article, which addressed the important and increasingly serious problem of pollution of the marine environment through international watercourses, the Special Rapporteur observed that the obligation set out in that paragraph was separate from, and additional to, other obligations concerning pollution of international watercourses and protection of their environment.

171. All speakers on draft article 17 expressed support for the inclusion of a general obligation on the protection of the environment of international watercourses and of the marine environment from pollution. This general duty was said to be well grounded in State practice as was evidenced by various international agreements.

172. The question was however raised in this connection as to who could exercise a general right corresponding to the obligation of protection where the ecology of the international watercourse was concerned. In other words, it was asked, which State could be said to have been "injured" within the meaning of article 5 of Part 2 of the draft articles on State responsibility. 62/ It was observed that perhaps article 17 could be interpreted as meaning that any watercourse State which was a party to the articles would be an "injured State", even though it was not directly harmed, as in the case of harm to the environment of the watercourse outside its territory, or harm to the marine environment.

173. The Special Rapporteur stated that there was no intention to give an erga omnes effect to the obligation under article 17, but agreed that States parties to the articles might enjoy rights with regard to the environment of the watercourse or of the sea even though they had suffered no direct harm.

174. Some speakers suggested that since draft article 17 was focused on the general obligation of States not only not to pollute, but also to take all reasonable measures to protect the environment of the international

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62/ Yearbook ... 1985, vol. II (Part One), pp. 5-6.

watercourses and of the marine life, it should come before article 16 which dealt with a more specific obligation. It was also suggested that the title of the article should be changed to "Protection and preservation of the environment of international watercourses" and that paragraph 1 should refer to the obligation to "protect and preserve" the environment of international watercourses. A suggestion was also made that paragraph 2 be made a separate article. The Special Rapporteur said that he would not be opposed to such modifications.

175. Paragraph 1: It was suggested that paragraph 1 should be divided into two paragraphs, the first to deal generally with protection and preservation of the environment of international watercourses, and the second to deal specifically with protection against substances that are toxic, persistent and tend to be bio-accumulative in nature.

176. It was also suggested that the paragraph should include the obligation to "prevent, reduce and control" pollution of the environment of international watercourses. Some members thought that reference to the "ecology of the watercourse" was not clear enough and suggested that the broader concept of the "environment" was more appropriate as that also included "ecology". The Special Rapporteur suggested that the Commission might wish to consider including a definition of the term "environment of an international watercourse" in a future introductory article of the present draft so as to make clear that the ecology or the ecosystems of the international watercourses were also covered.

177. The view was expressed that the phrase "or serious danger thereof", which appears in both paragraphs, should further be analysed. It was considered that the obligation requiring a watercourse State to protect the environment of an international watercourse "from any impairment, degradation or destruction, or serious danger thereof" placed a "serious danger" of impairment, degradation or destruction on exactly the same plane as their actual occurrence. A watercourse State, it was stated, was thus required to take measures to prevent not only impairment, degradation or destruction, but also the creation of a "serious danger therof". That requirement, it was observed, placed a watercourse State in a very strange position: if it wished

to avoid responsibility, it would either have to take measures that totally prevented the creation of the "serious danger" or it would have to prohibit the activity in question altogether. The Special Rapporteur, while acknowledging this conceptual difficulty, noted that a similar problem could arise from the expression "results or is likely to result", which had been employed in a number of instruments, including the 1982 United Nations Convention on the Law of the Sea. 63/ In his view, the expression "serious danger" was actually more permissive of activities than "likely to result", since the likelihood would have to be very strong in order for there to be a "serious danger".

178. Paragraph 2: A suggestion was made that the obligation contained in paragraph 2 of the draft article should be to protect "and preserve" the marine environment, including the estuaries and mouths of rivers, from pollution. A proposal was also made that there should as far as possible be harmony between the provisions of paragraph 2 and the relevant provisions of the 1982 United Nations Convention on the Law of the Sea. Some speakers expressed the view that paragraph 2, as presently drafted, was much too broad. It could be read as also covering the marine environment within the jurisdiction of an affected watercourse State. That State, however, did not need the protection of article 17, because the part of the watercourse running through its territory would be polluted first and its marine environment only afterwards. Paragraph 2, it was said, would thus be establishing a protection for that State against itself, a course that would be extremely difficult. But paragraph 2 had a different purpose, namely, to protect the marine environment against pollution from a downstream riparian State whose section of the watercourse flowed into the sea.

179. A suggestion was made that paragraph 2 should be in two parts, the first setting out the general obligations and the second dealing with co-operation between watercourse States to fulfil this obligation, with equitable basis referred to only in the second part.

63/ United Nations Convention on the Law of the Sea, Article 1, paragraph 1 (4), defining "pollution of the marine environment".

Article 18

Pollution or environmental emergencies

180. Regarding draft article 18, 64/ which concerned pollution or environmental emergencies, the Special Rapporteur stated in his introductory remarks that the article addressed the kind of emergency situations that resulted from serious incidents, such as toxic chemical spill or the sudden spread of a water-borne disease. Paragraph 1 provided a definition, and paragraph 2 required the State within whose territory such an incident had occurred to notify all potentially affected watercourse States. He noted that there was ample precedent for that requirement, including relevant provisions of the 1982 United Nations Convention on the Law of the Sea and the Convention on early notification of a nuclear accident. 65/ Since watercourse States often established joint commissions or other competent international organizations, he said, provision for notification of such organisations had been made in paragraph 2 of the draft article.

64/ The text of article 18 proposed by the Special Rapporteur reads as follows:

Article 18 [19]

Pollution or environmental emergencies

1. As used in this article, "pollution or environmental emergency" means any situation affecting an international watercourse [system] which poses a serious and immediate threat to health, life, property or water resources.

2. If a condition or incident affecting an international watercourse [system] results in a pollution or environmental emergency, the watercourse State within whose territory the condition or incident has occurred shall forthwith notify all potentially affected watercourse States, as well as any competent international organization, of the emergency and provide them with all available data and information relevant to the emergency.

3. The watercourse State within whose territory the condition or incident has occurred shall take immediate action to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting therefrom.

65/ International Legal Materials, Vol. XXV.1370 (1986).

181. Most speakers expressed agreement to the inclusion of a comprehensive article, as the Special Rapporteur had suggested in his introductory remarks, which would deal with all kinds of emergencies, and not just those related to pollution.

182. A proposal was made by one member to change the title of the article to "Preventive measures in environmental emergencies".

183. Paragraph 1: A suggestion was made to move paragraph 1 of the draft article that dealt with the definition of the term "pollution or environmental emergency" to an article of the draft on the definition of terms. It was also proposed that the definition should refer to natural as well as man-made emergencies.

184. Paragraph 2: A suggestion was made that rather than limiting itself to notification, the obligation in paragraph 2 should be expanded to include the obligation of co-operation in minimising the harm caused by the emergency. The obligation to co-operate, it was added, should be spelt out in detail so as to include provision of information and the establishment of contingency measures to deal with the emergency. It was also suggested that paragraph 2 should be harmonised with the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, in particular, article 199 dealing with contingency plans against pollution. The reference to notification of an international organization, it was said, should be in the plural, as more than one international organization might need to be notified of the emergency.

185. Paragraph 3: A proposal was made that in place of the term "neutralise", a much broader term, such as "prevent, control and abate" pollution, should be used.

186. The Special Rapporteur, in his summing up, stated that he would take those proposals into account in formulating a more comprehensive article in the context of the sub-topic of "Water-related hazards and dangers" for submission to the Commission at a future session.

187. At the 2069th meeting the Commission decided to refer articles 16 and 17 to the Drafting Committee for consideration in the light of the discussion and the summing up by the Special Rapporteur. For lack of time, the Drafting

Committee was unable to consider these draft articles. Thus, the Drafting Committee remains seized of articles 16 and 17, which will be examined in the course of a future session.

188. At its 2070th to 2073rd meetings, the Commission considered the report of the Drafting Committee on the draft articles referred to it on this topic and provisionally adopted articles 8 to 21. These draft articles are based on articles 9 (Prohibition against activities with regard to an international watercourse causing appreciable harm to other watercourse States) proposed by the previous Special Rapporteur and referred to the Committee in 1984, 10 to 15 referred to the Committee in 1987 and 15 referred to the Committee at the present session. Draft articles 11 (Information concerning planned measures) and 21 (Indirect procedures) were presented as new articles by the Drafting Committee.

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

1. Texts of the draft articles provisionally adopted so far by the Commission

189. The texts of the draft articles provisionally adopted so far by the Commission are reproduced below:

PART I

INTRODUCTION

Article 1

[Use of terms] 66/

Article 2

Scope of the present articles

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

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

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

Article 3

Watercourse States

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

Article 4

[Watercourse] [System] agreements

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

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

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

Article 5

Parties to [watercourse] [system] agreements

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

2. A watercourse State whose use of an international watercourse [system] may be affected to an appreciable extent by the implementation of a proposed [watercourse] [system] agreement that applies only to a

part of the watercourse [system] or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

PART II

GENERAL PRINCIPLES

Article 6

Equitable and reasonable utilisation and participation

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

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

Article 7

Factors relevant to equitable and reasonable utilisation

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

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

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

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

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

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

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

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

Article 8 67/

Obligation not to cause appreciable harm

Watercourse States shall utilise an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.

Article 9 68/

General obligation to co-operate

Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimum utilisation and adequate protection of an international watercourse [system].

Article 10 69/

Regular exchange of data and information

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

67/ This article is based on article 9 as proposed by the previous Special Rapporteur in 1984.

68/ This article is based on article 10 as proposed by the previous Special Rapporteur in 1987.

69/ This article is based on article 15 [16] as proposed by the Special Rapporteur in 1988.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilisation by the other watercourse States to which it is communicated.

PART III

PLANNED MEASURES

Article 11

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

Article 12 70/

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13 71/

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

70/ This article is based on article 11 as proposed by the Special Rapporteur in 1987.

71/ This article is based on article 12 as proposed by the Special Rapporteur in 1987.

Article 14 72/

Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.

Article 15 73/

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding.

Article 16 74/

Absence of reply to notification

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

72/ *Ibid.*

73/ This article is based on article 13 as proposed by the Special Rapporteur in 1987.

74/ This article is based on article 14 as proposed by the Special Rapporteur in 1987.

Article 17 75/

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18 76/

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the States concerned shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

75/ This article is based on article 13 as proposed by the Special Rapporteur in 1987.

76/ This article is based on article 14 as proposed by the Special Rapporteur in 1987.

Article 19 77/

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

Article 20 78/

Data and information vital to national defence or security

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 21

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

77/ This article is based on article 15 as proposed by the Special Rapporteur in 1987.

78/ This article is based on article 15 [16] as proposed by the Special Rapporteur in 1988.

2. Texts of draft articles 8 to 21, with commentaries thereto, provisionally adopted by the Commission at its fortieth session

190. The text of draft articles 8 to 21, with commentaries thereto, provisionally adopted by the Commission at its fortieth session are reproduced below.

PART II

GENERAL PRINCIPLES

...

Article 8

Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.

Commentary 79/

(1) Article 8 sets forth the fundamental rule that a State utilizing an international watercourse [system] shall do so in a manner that does not cause appreciable harm to other watercourse States. This well-established rule is a specific application of the principle of the harmless use of territory, expressed in the maxim *sic utere tuo ut alienum non laedas*, which is itself a reflection of the sovereign equality of States. That is, the exclusive competence that a watercourse State enjoys within its territory is not to be exercised in such a way as to cause damage to other watercourse States. To cause such damage would be to interfere with the competence of those other watercourse States over matters within their territories.

(2) The obligation not to cause appreciable harm to other watercourse States is complementary to that of equitable utilization, embodied in article 6. 80/

79/ Certain members reserved their positions with regard to article 8 and the commentary thereto because it was not clear from the text of the article and the commentary whether article 8 was meant as a rule of State responsibility or liability.

80/ The text of article 6, as provisionally adopted in 1987, is set forth in paragraph 189, above.

A watercourse State's right to utilise an international watercourse [system] in an equitable and reasonable manner finds its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words - prima facie, at least - utilisation of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm.

(3) The Commission recognises, however, that in some instances the achievement of equitable and reasonable utilisation will depend upon the toleration by one or more watercourse States of a measure of harm. In these cases, the necessary accommodations would be arrived at through specific agreements. Thus, 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. In this general connection, it is worth recalling a portion of the commentary to article 6, adopted at the thirty-ninth session:

> "[W]here the quantity or quality of the water is such that all of the reasonable and beneficial uses of all watercourse States cannot be fully realised, what is termed a 'conflict of uses' results. In such a case, international practice recognises that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, and can best be achieved on the basis of specific watercourse agreements." 81/

(4) As is true of article 6, the fact that the present article refers only to "watercourse States" does not mean that the obligation extends only to utilisation of a watercourse by the State itself. Watercourse States are also obligated not to permit private activities operating in their territories to utilise the watercourse "in such a way as to cause appreciable harm to other watercourse States".

81/ Report of the International Law Commission on the work of its thirty-ninth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/42/10), p.73, para. (9) of commentary to article 6 (footnote omitted).

(5) Article 8 does not proscribe all harm, no matter how minor. It instead requires a State utilising an international watercourse [system] to do so in a manner that does not cause "appreciable" harm to other watercourse States. The term "appreciable" is also employed as a qualifying criterion in articles 4 and 5, provisionally adopted at the Commission's thirty-ninth session, and bears the same meaning in article 8 as in those articles. As explained in the commentary to article 4, the term "appreciable" embodies a factual standard. 82/ The harm must be capable of being established by objective evidence. There must be 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 State. "Appreciable" harm is, therefore, that which is not insignificant or barely detectable but is not necessarily "serious". The portions of the award in the Lake Lanoux arbitration discussed in the commentary to article 4 are pertinent here as well. 83/

(6) While international instruments may be found which purport to proscribe activities that cause any harm whatsoever to another watercourse State, 84/

82/ See ibid., pp.62-63, paras. (15) and (16) of the commentary to article 4.

83/ Ibid., para. (15).

84/ See e.g. the 1971 Convention between Ecuador and Peru which recognizes the right of each country to use the waters in its territory for its needs "provided that it causes no damage or injury to the other party" Ecuador, Registro Oficial (Quito), 2nd year, No. 385, 4 January 1972, p. 1. The 1909 Boundary Waters Treaty between the United States and Canada provides in its article IV that the waters "shall not be polluted on either side to the injury of health or property on the other", Legislative Texts and Treaty Provisions concerning the Utilisation of International Rivers for Other Purposes than Navigation (United Nations publication, Sales No. 63.V.4) (hereafter cited as "Legislative Texts"), Treaty No. 79, p. 260, art. IV, para. 2, summarized in Yearbook ... 1974, vol. II (Part Two), pp. 72 and 73, document A/5409, paras. 154 and 162. See also the exchanges of notes between the United Kingdom and Egypt of 1929 and 1952-53 (League of Nations, Treaty Series, vol. 207, p. 278), both of which refer to the avoidance of works entailing "any prejudice" to the interests of Egypt.

74st protect watercourse States only against harm that is of some significance. The qualifying terms vary, but the intent of the instruments that employ such terms seems to be to protect parties against material, or significant harm. "Substantial", "significant", "sensible" (in French and Spanish) and "appreciable" (especially in French) are the adjectives most frequently employed to modify the term "harm", or its equivalent. Although each of these expressions contains an element of subjectivity - and in some cases even ambiguity 85/ - the Commission has concluded that "appreciable" is the preferable term since, as among the various possibilities, it provides the most factual and objective standard.

(7) The expression "appreciable harm", or its functional equivalent, is employed as a standard in a number of international instruments. For example, article 35 of the 1975 Statute of the Uruguay River, 86/ adopted by Uruguay and Argentina, provides as follows:

> "The Parties undertake to adopt the necessary measures to ensure that the management of land and forests and the use of groundwater and of the river's tributaries do not effect an alteration such as to cause appreciable harm to the régime of the river or the quality of its waters." 87/

Other illustrations are the Act of Santiago of 26 June 1971 between Argentina and Chile, 88/ and the Act of Asuncion (Argentina, Bolivia, Brazil, Paraguay

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85/ The problem of precision in relation to a qualifying term is discussed in Annuaire de l'Institut de droit international, 1979, vol. 58, Part One, "La pollution des fleuves et des lacs et le droit international", pp.218, et passim.

86/ Actos internacionales Uruguay-Argentina, 1830-1980 (Montevideo, 1981), p.593.

87/ Ibid., p.600. The expression "appreciable harm" ("perjuicio sensible") is also employed, inter alia, in articles 7 and 11 of the Statute, which concern notification of planned works, as well as in article 32.

88/ Art. 4. (The text of the Act is reproduced in part in Yearbook ... 1974, vol. II (Part Two), p.324, document A/CN.4/274, para. 327.).

and Uruguay) of 3 June 1971, 89/ both of which use "perjuicio sensible"; the 1933 Convention regarding the Determination of the Frontier between Brasil and Uruguay which employs the expression "modificacion sensible y durable"; 90/ the 1891 Treaty between the United Kingdom and Italy, which refers to "ouvrage qui pourrait sensiblement modifier"; 91/ the 1905 Treaty between Norway and Sweden, which speaks of "entraves sensibles"; 92/ the 1931 agreement between Romania and Yugoslavia, which employs the expression "changement sensible du régime des eaux"; 93/ the 1972 Convention relative au statut du fleuve Sénégal, 94/ which uses the language "projet susceptible de modifier d'une manière sensible"; the 1964 Statute of the Lake Chad Basin, which speaks of "mesures susceptibles d'exercer une influence sensible"; 95/ and the 1963 Act regarding navigation and economic co-operation between the States of the Niger Basin, which refers to "any project likely to have an appreciable effect on certain features of the régime of the River". 96/ The word "sensible" in French and Spanish is ordinarily translated by "appreciable" in English.

89/ Resolution No. 25, para. 2 (ibid., p. 324, para. 326).

90/ Art. XX (League of Nations, Treaty Series, vol. CLXXXI, p.77).

91/ Art. III (G.Fr. de Martens, ed., Nouveau Recueil général de Traités, 2nd series (Göttingen, Dieterich, 1884), XVIII, p.738).

92/ Art. 2 (ibid., vol. XXXIV, p. 711).

93/ Art. 3 (League of Nations, Treaty Series, vol. CXXXV, p. 31).

94/ Treaties concerning the utilisation of international watercourses for other purposes than navigation: Africa, Natural Resources/Water Series No. 13, art. 4, at p.16.

95/ Art. 5 (Journal officiel de la République fédérale du Cameroun ..., 4th year, No. 18, p.1003).

96/ See note 94 above, art. 4, p. 7.

76) The principle embodied in article 8 is reflected in numerous international agreements. In addition to those to which reference has already been made, 97/ the following instruments may be cited for purposes of illustration. Article X of the Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano 98/ provides that if the parties should undertake the construction or alteration of any civil engineering works, they are to ensure the prevention of, inter alia, "any obstruction of or interference with the regulation of the lake or any damage to the bank belonging to the other State". The 1960 Indus Waters Treaty between India and Pakistan contains many relevant provisions. In paragraph 2 of article 4, for example, each party

> "agrees that any Non-Consumptive Use made by it shall be so made as not to materially change, on account of such use, the flow in any channel to the prejudice of the uses on that channel by the other Party under the provisions of this Treaty". 99/

And paragraph 3 of the same article provides:

> "Nothing in this Treaty shall be construed as having the effect of preventing either Party from undertaking schemes of drainage, river training, conservation of soil against erosion and dredging, or from removal of stones, gravel or sand from the beds of the Rivers: provided that
>
> (a) In executing any of the schemes mentioned above, each Party will avoid, as far as practicable, any material damage to the other Party ..." 100/

Article 14 of the Agreement of 29 December 1949 concerning the régime of the Norwegian-Soviet frontier and procedure for the settlement of frontier

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97/ See the agreements referred to in note 84 and para. (7), above.

98/ United Nations, Treaty Series, vol. 291, p.213.

99/ Legislative Texts and Treaty Provisions concerning the Utilisation of International Rivers for Other Purposes than Navigation (United Nations publication, Sales No. 63.V.4) (hereafter cited as "Legislative Texts"), Treaty No. 98, p.300, at p.304.

100/ Ibid.

disputes and incidents 101/ requires that the parties "ensure that the frontier waters are kept clean and are not artificially polluted or fouled in any way" and that they "take the necessary measures to prevent damage to the banks of frontier rivers and lakes". Pollution is also addressed in article IV of the 1909 Boundary Waters Treaty between Canada and the United States, which provides that the waters in question "shall not be polluted on either side to the injury of health or property on the other". 102/ The 1971 Convention between Ecuador and Peru, which concerns the Puyango-Tumbes and Catamayo-Chira river basins, recognizes the right of each country to use the waters in its territory for its needs, "provided that it causes no damage or injury to the other party". 103/ Article 17 of the 1944 Treaty between the United States and Mexico provides in part that each Government will "operate its storage dams in such manner, consistent with the normal operations of its hydraulic systems, as to avoid as far as feasible, material damage in the territory of the other". 104/ Pursuant to the 1969 Treaty of Brasilia, the Foreign Ministers of the five States of the Plata Basin 105/ adopted in 1971 the Act of Asuncion, containing Resolution No. 25, the Declaration of Asuncion on the use of international rivers. Paragraph 2 of the Declaration provides that,

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101/ United Nations, Treaty Series, vol. 83, p.291.

102/ Treaty of 1909 between Great Britain (for Canada) and the United States relating to boundary waters, and questions arising between the United States and Canada, Legislative Texts (note 99 above), Treaty No. 79, p.260, art. IV, para. 2, summarized in Yearbook ... 1974, vol. II (Part Two), pp.72 and 73, document A/5409, paras. 154 and 162.

103/ Ecuador, Registro Oficial (Quito), 2nd year, No. 385, 4 Jan. 1972, p.1.

104/ Treaty between the United States and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico, 3 Feb. 1944, and supplementary Protocol, 14 Nov. 1944, United Nations, Treaty Series, vol. 3, p.314, reproduced in Legislative Texts, note 99 above, Treaty No. 77, p.236, at p.250.

105/ Argentina, Bolivia, Brazil, Paraguay and Uruguay.

68th respect to successive international rivers, "each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin". 106/

(9) The principle expressed in article 8 is applied in a variety of agreements, many of which require that, before undertaking possibly harmful activities, parties obtain the approval of, or inform and consult with, other parties or a joint body. For example, Article 4 of the 1978 Convention relating to the status of the River Gambia 107/ requires the approval of the Contracting Parties prior to the implementation of "[a]ucun projet susceptible de modifier d'une manière sensible les caractéristiques du régime du fleuve, ses conditions de navigabilité, d'exploitation agricole ou industrielle, l'état sanitaire des eaux, les caractéristiques biologiques de sa faune ou de

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106/ Yearbook ... 1974, vol. II (Part Two), pp.322, 324, document A/CN.4/274, para. 326. See also the Act of Santiago concerning hydrologic basins, signed on 26 June 1971 by the Foreign Ministers of Argentina and Chile, representing their respective Governments, relevant paragraphs of which provide as follows:

> "1. The waters of rivers and lakes shall always be utilised in a fair and reasonable manner.
>
> 2. The Parties shall avoid polluting their river and lake systems in any manner and shall conserve the ecological resources of their common river basins in the areas within their respective jurisdictions.
>
> ...
>
> 4. Each Party shall recognise the other's right to utilise the waters of their common lakes and successive international rivers within its territory in accordance with its needs, provided that the other Party does not suffer any appreciable damage."

Ibid., p.324, para. 327.

107/ The 1978 Convention relating to the status of the River Gambia (Gambia, Guinea and Senegal) (text reproduced in Natural Resources/Water Series No. 13, (note 94 above), at p.39).

sa flore, [or] son plan d'eau". Similarly, the 1964 Convention relating to the development of the Chad Basin 108/ provides in article 5 that

> "Member States agree not to undertake in that part of the Basin falling within their jurisdiction any work in connection with the development of water resources or the soil likely to have a marked influence upon the system of the watercourses and levels of the Basin without adequate notice and prior consultations with the Commission ..."

Likewise, the 1960 Convention on the protection of Lake Constance from pollution provides in article 1 that the riparian States are to inform each other, in good time, of any contemplated utilisation of the water, "dont la réalisation pourrait porter atteinte aux intérêts d'un autre Etat riverain" in maintaining the salubrious condition of the water. 109/

(10) In addition, the rule expressed in article 8 is applied in many modern watercourse agreements whose chief purpose is to set standards for the prevention, reduction and control of pollution. Since the subtopic of environmental protection and pollution control is envisaged as the subject of a subsequent part of the draft articles, only some examples of agreements of this kind will be cited. An instrument which contains detailed provisions on general and specific water quality objectives is the 1978 Agreement between Canada and the United States on Great Lakes water quality. 110/ The 1976 Convention on the protection of the Rhine against chemical pollution 111/

108/ Convention and Statutes of 1964 relating to the development of the Chad Basin (Cameroon, Chad, Niger and Nigeria), Natural Resources/Water Series No. 13 (note 94 above), p.8.

109/ Article 1, paragraph 3 of the 1960 Convention on the protection of Lake Constance from pollution (Legislative Texts (note 99 above), Treaty No. 127), summarized in Yearbook ... 1974, vol. II (Part Two), document A/5409, para. 435.

110/ United States Government Printing Office, Treaties and Other International Acts Series (hereinafter referred to as "T.I.A.S."), No. 9257.

111/ United Nations, Treaty Series, vol. 1124, p. 375; International Legal Materials, vol. 16, p. 242 (1977). Parties are the European Economic Community (EEC), France, the Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland.

contains lists of substances whose discharge is to be subject to prior authorisation or to be reduced, depending on their dangerousness.

(11) More general provisions on the prevention of extra-territorial pollution harm - a specific application of the principle embodied in article 8 - are to be found in the 1982 United Nations Convention on the Law of the Sea. 112/ For example, article 194 of the Convention provides in part that "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment ..." Also relevant is article 300 of the Convention, entitled "Good faith and abuse of rights", which provides in part that parties are "to exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an abuse of right." 113/

(12) The rule laid down in article 8 has also been recognized in diplomatic exchanges. For example, an American official who participated in the negotiation of the 1909 Boundary Waters Treaty between the United States and Canada, made the following statements concerning boundary waters in a communication to the then American Secretary of State, Elihu Root:

> "'Absolute sovereignty carries with it the right of inviolability as to such territorial waters, and inviolability on each side imposes a co-extensive restraint upon the other, so that neither country is at liberty to so use its own waters as to injuriously affect the other.

112/ The 1982 United Nations Convention on the Law of the Sea, (United Nations publication, Sales No. 83.V.5).

113/ The principle of the harmless use of territory has been linked by many commentators with that of abuse of rights. For example, J.G. Starke describes as an important qualification to the absolute independence of States "the principle, corresponding possibly to the municipal law prohibition of 'abuse of rights', that a State should not permit the use of its territory for purposes injurious to the interests of other States." J.G. Starke, An Introduction to International Law, 5th ed. (London, Butterworths, 1963), p. 101.

"... The conclusion is justified that international law would recognise the right of either side to make any use of the waters on its side which did not interfere with the co-extensive rights of the other, and was not injurious to it ...'". 114/

(13) In a memorandum dated 26 May 1942 relating to the negotiations between the United States and Mexico concerning the Colorado River, the Legal Adviser to the United States Department of State reviewed existing treaties regarding international rivers and lakes. He stated that the review

"is by no means comprehensive but is believed to be sufficient to indicate the trend of thought concerning the adjustment of questions relating to the equitable distribution of the beneficial uses of such waters. No one of these agreements adopts the early theory advanced by Attorney General Harmon ... On the contrary, the rights of the subjacent States are specifically recognized and protected by these agreements." 115/

(14) In 1950, the Government of India, in response to reports of plans to construct a dam on the Karnafuli River in East Pakistan (since 1971, Bangladesh) which would result in the flooding of areas in the Indian State of Assam, stated that "the Government of India cannot obviously permit this and trusts that the Government of Pakistan will not embark on any works likely to submerge land situated in India". East Pakistan replied that construction of a dam which would flood land in India was not contemplated. 116/.

114/ As quoted in a United States Department of State memorandum, Griffin, "Legal Aspects of the Use of Systems of International Waters", 21 April 1958, United States Senate Document 118, 85th Congress, Second Session, at pp. 60-61.

115/ Memorandum of the Legal Adviser of the Department of State (G. Hackworth), 26 May 1942, quoted in M. Whiteman, Digest of International Law, vol. 3, p. 950.

116/ Exchange of notes of 13 February and 15 April 1950, as quoted in J. Lammers, Pollution of International Watercourses (Nijhoff, Boston, The Hague, 1984), at p. 311, citing M. Qadir, "Note on the Uses of the Waters of International Rivers," in Principles of Law Governing the Uses of International Rivers, resolution adopted by the International Law Association at its Conference held in August 1956 at Dubrovnik, Yugoslavia, together with Reports and Commentaries submitted to the Association, p. 12.

(15) In discussions between the same two countries concerning the barrage constructed by India on the Ganges River at Farakka, approximately 11 miles upstream from the Bangladesh border, India originally took the position that the Ganges was not an international, but "overwhelmingly" an Indian river. 117/ India nevertheless declared that it was "willing to discuss this matter with Pakistan to satisfy them that construction of the Farakka Barrage will not do any damage to Pakistan". 118/ And in subsequent debates before the Special Political Committee of the General Assembly, India not only ceased to deny the internationality of the Ganges, but stated its general position as follows:

> "When a river crossed more than one country, each country was entitled to an equitable share of the waters of that river. ... Those views did not conform to the Harmon Doctrine of absolute sovereignty of a riparian State over the waters within its territory, as had been implied in the statement by the representative of Bangladesh. India, for its part, had always subscribed to the view that each riparian State was entitled to a reasonable and equitable share of the waters of an international river." 119/

117/ Official Records of the General Assembly, Twenty-third Session, Plenary Meetings, 1682nd meeting, para. 177; and ibid., Thirty-first Session, Special Political Committee, 21st meeting, para. 15. See J. Lammers, ibid., at pp. 313 and 318, note 4. This position was based on the fact that 90 per cent of its length and 99 per cent of its catchment area were situated in that State.

118/ Ibid., Twenty-fourth Session, Plenary Meetings, 1776th meeting, para. 285, as quoted in J. Lammers, note 116 above, at p. 313.

119/ Ibid., Thirty-first Session, Special Political Committee, 21st meeting, para. 8, as quoted in J. Lammers, note 116 above, pp. 317 and 318. Pursuant to a joint statement adopted by consensus by both the Special Political Committee and the General Assembly, (see ibid., 27th meeting, para. 1, and ibid., Plenary Meetings, 80th meeting, paras. 134-142), the parties met for the purpose of working out a settlement and in fact reached agreement on an interim arrangement in the form of the Ganges Waters Treaty of 1977. (Text reproduced in International Legal Materials, vol. 17 (1978), p. 103 (entered into force for a period of five years on 5 November 1977)).

(16) In a dispute between Chile and Bolivia over the use of the Lauca River, 120/ Chile, the upstream State, recognised that Bolivia had "rights" in the waters and went on to state that the Montevideo Declaration of 1933, which proscribes alterations of watercourses that may prove injurious to other States, 121/ "may be considered as a codification of the generally accepted legal principles on this matter." 122/

(17) Similarly, the Government of France, in the Lake Lanoux arbitration, pointed to "the sovereignty in its own territory of a State desirous of carrying out hydro-electric developments", but at the same time recognised "the correlative duty not to injure the interests of a neighbouring State". 123/ France did not assert a "Harmon Doctrine" position, but argued that Spain's consent to the project in question was not required because restitution of the diverted water would result in there being no alteration of the water régime in Spain.

120/ Lipper reports that "the situation arose after Chile announced its intention to divert for agricultural purposes the waters of the Lauca which flow from Chile into Bolivia. In the ensuing disagreement, rioting and a severance of diplomatic relations by Bolivia resulted". He goes on to note that "despite the heat of the quarrel and the interests at stake, Chile did not assert the Harmon Doctrine." Lipper, "Equitable Utilisation" in A. Garretson, R. Hayton and C. Olmstead, eds., The Law of International Drainage Basins, p. 27 (Dobbs Ferry, N.Y., Oceana, 1967), (footnote omitted). See also the discussions of this controversy in J. Lammers, note 116 above, p. 290.

121/ Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, annex I, A.

122/ Statement of Mr. Sotomayor, Minister of Foreign Affairs of Chile, to the Council of the Organisation of American States, 19 April 1962, OEA/Ser.G/VI, p. 1 as quoted in Lipper, note 120 above, pp. 27-28.

123/ Lake Lanoux arbitration (France v. Spain), International Law Reports 1957, pp. 111 and 112. See also United Nations, Reports of International Arbitral Awards, vol. XII.

(18) Spain's position in the same arbitration was similarly moderate. According to the tribunal:

> "[T]he Spanish Government does not attribute an absolute meaning to respect for natural order, according to the counter-case ...: 'A State has the right to use unilaterally the part of a river which traverses it to the extent that this use is likely to cause on the territory of another State a limited harm only, a minimal inconvenience, which comes within the bounds of those that derive from good neighbourliness.'" 124/

(19) Finally, an early example of a lower riparian State's espousal of the principle of equitable allocation is to be found in a letter of 1862 from the Government of the Netherlands to the Dutch Ministers in Paris and London concerning the use of the River Meuse by Belgium and the Netherlands. The letter contains the following passage:

> "The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purposes of navigation or of irrigation." 125/

(20) The principle of the harmless use of territory has been recognized in a number of decisions of international courts and tribunals. A decision which dealt specifically with problems of the non-navigational uses of international

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124/ Ibid., p. 196, para. 1064.

125/ Letter of 30 May 1862 as translated and quoted in H. Smith, The Economic Uses of International Rivers, p. 217, (London, King, 1931), original text in the Algemeen Rijksarcheif, The Hague. A substantial portion of the letter, in the original Dutch, is quoted in H. Smith, pp. 217-221.

watercourses was the award of the tribunal in the Lake Lanoux arbitration. 126/ In the course of its decision, the tribunal made the following statement:

> "Thus, while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State, such a principle has no application to the present case, since it was agreed by the Tribunal ... that the French project did not alter the waters of the Carol." 127/

While this statement cannot, strictly speaking, be characterized as a "holding" of the case, since it was not necessary to the decision, it is none the less significant that the Tribunal did not appear to doubt the existence of the "rule" it contains. In any event, the Tribunal went on to declare, in language that was necessary to its decision, that "France may use its rights; it may not disregard Spanish interests. Spain may demand respect for its rights and consideration of its interests". 128/

(21) A case involving the obligation of a State to prevent the occurrence, in the territory of a neighbouring State, of injury resulting from an activity carried on in the territory of the former State is the Trail Smelter arbitration. 129/ In its second award, the tribunal declared that:

> "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

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126/ The Lake Lanoux arbitration, Reports of International Arbitral Awards, vol. XII, p. 52. For translations of the award, see Yearbook ... 1974, vol. II (Part Two), pp. 194-199, document A/5409, paras. 1055-1068; "Lake Lanoux Case", American Journal of International Law, vol. 53, pp. 156-171 (1959); and International Law Reports 1957, pp. 101-142. This arbitration is discussed in S. McCaffrey, second report (A/CN.4/399/Add.1), pp. 8-15, paras. 111-124.

127/ Yearbook ... 1974, vol. II (Part Two), p. 197, document A/5409, para. 1066.

128/ Ibid., at p. 198, para. 1068.

129/ United Nations, Reports of International Arbitral Awards, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905-1982, summarized and excerpted in Yearbook ... 1974, vol. II (Part Two), pp. 192-194, document A/5409, paras. 1049, et seq. This arbitration is discussed in the second and fourth reports of the Special Rapporteur, A/CN.4/399, paras. 125,

another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." 130/

The tribunal went on to impose upon the smelter a régime

"which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States ..." 131/

(22) The international judicial decision most frequently cited as bearing upon problems of transfrontier harm was rendered in 1949 by the International Court of Justice in the Corfu Channel case. 132/ The Court there held that Albania's knowledge that mines had been laid in its territorial waters gave rise to an obligation to notify ships operating in the area of the mines and to warn the ships of the resulting imminent danger. Such duties, according to the Court, are based, inter alia, on

"every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." 133/

A statement made by the sole arbitrator, Max Huber, in the Island of Palmas arbitration between the United States and the Netherlands, 134/ is to the same effect:

"Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in

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et seq., and A/CN.4/412/Add.1, para. 85. The case is referred to in the Commission's commentary to article 23 on State responsibility. Yearbook ... 1978, vol. II (Part Two), p. 84, n. 408.

130/ Ibid., at p. 1965.

131/ Ibid., pp. 1938-39 (emphasis added).

132/ Corfu Channel case (United Kingdom v. Albania), I.C.J. Reports 1949, p. 4. This case is discussed in S. McCaffrey, Second report (note 126 above), Add. 1, at p. 6, para. 108.

133/ Ibid., at p. 22.

134/ United Nations, Reports of International Arbitral Awards, vol. II, p. 829.

particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." 135/

(23) The principle underlying article 8 is also reflected in a number of instruments adopted by intergovernmental and international non-governmental organisations. 136/ The American States, at the Seventh Inter-American Conference in 1933, approved the Declaration of Montevideo concerning the industrial and agricultural use of international rivers, which contains the following relevant provisions:

"2. The States have the exclusive right to exploit, for industrial or agricultural purposes, the margin which is under their jurisdiction of the waters of international rivers. This right, however, is conditioned in its exercise upon the necessity of not injuring the equal right due to the neighbouring State on the margin under its jurisdiction.

135/ Ibid, p. 829.

136/ The following are examples of resolutions of international non-governmental organizations which reflect the principle underlying article 8; the resolution on "international regulations regarding the use of international watercourses" adopted by the Institute of International Law (ILI) at its Madrid session in 1911, Annuaire de l'Institut de droit international, Madrid session, April 1911 (Paris, 1911), vol. 24, pp. 365-367 (Regulations I and II, paras (2), (3) and (5); the resolution on "Utilisation of non-maritime international waters (except for navigation)", adopted by the ILI at its Salzburg session in 1961, Annuaire de l'Institut de droit international, 1961, pp. 381-384. (The text of the resolution is reproduced in Yearbook ... 1974, vol II (Part Two), p. 202, document A/5409, para. 1076 (Articles 2, 3 and 4)); the resolution on "The pollution of rivers and lakes and international law", adopted by the ILI at its Athens session in 1979, Institute of International Law, Annuaire de l'Institut de droit international, 1979, vol. 58, Part Two, p. 199 (Article II); the resolution entitled the "Helsinki rules on the uses of waters of international rivers", adopted by the International Law Association (ILA) at its fifty-second Conference at Helsinki in 1966, ILA, Report of the Fifty-second Conference, pp. 496-497 (article X, para. 1); the articles on the "Relationship between water, other natural resources and the environment", adopted by the ILA at its Belgrade Conference in 1980, ILA, Report of the Fifty-ninth Conference, Report of the Committee on International Water Resources Law, Part II (Article I); the articles adopted by the ILA at the same conference, on "Regulation of the flow of international watercourses", ibid., pp. 367-369 (Article 6); and the "Rules on water pollution in an international drainage basin", adopted by the ILA at its 1982 meeting in Montreal, ILA, Report of the Sixtieth Conference (Montreal, 1982), pp. 1-3, 13, 535, et seq. (Article 3).

In consequence, no State may, without the consent of the other riparian State, introduce into watercourses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State.

3. In the cases of damage referred to in the foregoing article, an agreement of the parties shall always be necessary. When damages capable of repair are concerned, the works may only be executed after adjustment of the incident regarding indemnity, reparation (or) compensation of the damages, in accordance with the procedure indicated below.

4. The same principles shall be applied to successive rivers as those established in articles 2 and 3, with regard to contiguous rivers." 137/

(24) Another provision relating generally to the duty to ensure that transboundary harm does not result from the utilisation of natural resources is Principle 21 of the Stockholm Declaration on the Human Environment, adopted by the United Nations Conference on the Human Environment on 16 June 1972. That Principle provides as follows:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." 138/

(25) Similarly, the Charter of Economic Rights and Duties of States, adopted by the General Assembly provides that "each State must co-operate on the basis

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137/ Note 121 above.

138/ Report of the United Nations Conference on the Human Environment (United Nations publication, Sales No. E.73.II.A.14), p. 325. The General Assembly, in resolution 2994 (XXVII) of 15 December 1972, on the United Nations Conference on the Human Environment (adopted by a vote of 112 in favour, none against and 10 abstentions), took note "with satisfaction" of the report of the Conference including the Declaration on the Human Environment. Language very similar to that employed in Principle 21 is found in Principle 1 of the Principles regarding co-operation in the field of transboundary waters, adopted at the forty-second session of the Economic Commission for Europe, document E/ECE/(42)/L.19 (30 April 1987).

of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others." 139/

(26) The foregoing survey of international agreements, diplomatic exchanges, decisions of international courts and tribunals and instruments adopted by intergovernmental and international non-governmental organisations indicates the broad recognition of the principle reflected in article 8. The general rule expressed in the article, together with those laid down in article 6, are applied and further developed in subsequent articles.

Article 9

General obligation to co-operate

Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimum utilisation and adequate protection of an international watercourse [system].

Commentary

(1) Article 9 lays down the general obligation of watercourse States to co-operate with each other in order to fulfil the obligations and attain the objectives set forth in the draft articles. Co-operation between watercourse States with regard to their utilisation of an international watercourse is an important basis for the attainment and maintenance of an equitable allocation of the uses and benefits of the watercourse, and for the smooth functioning of the procedural rules contained in Part III of the draft articles.

(2) The article indicates both the basis and the objectives of co-operation. With regard to the basis of co-operation, the article refers to the most fundamental principles upon which co-operation between watercourse States is founded. Other relevant principles include those of good faith and good neighbourliness. As to the objectives of co-operation, the Commission considered whether these should be set forth in some detail. It came to the

139/ General Assembly resolution 3281 (XXIX) of 12 December 1974.

conclusion that a general formulation would be more appropriate, especially in view of the wide diversity of international watercourses, the uses thereof, and the needs of watercourse States. This formulation, expressed in the phrase, "in order to attain optimum utilisation and adequate protection of an international watercourse [system]", is derived from the second sentence of paragraph 1 of article 6, provisionally adopted at the Commission's thirty-ninth session.

(3) A wide variety of international instruments calls for co-operation between the parties with regard to their utilisation of the relevant international watercourses. 140/ An example of an international agreement containing such an obligation is the 1964 Agreement concerning the use of water resources in frontier waters between Poland and the Soviet Union, 141/

140/ The Third report of the Special Rapporteur (A/CN.4/406 and Add. 1 and 2) contains a survey of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organisations, conferences and meetings, and studies by intergovernmental and non-governmental organisations relating to the principle of co-operation.

141/ United Nations, Treaty Series, vol. 552, p. 175; entered into force on 16 February 1965. Other examples of international watercourse agreements providing for co-operation between the parties include the following: the 1962 Convention concerning the protection of the waters of Lake Geneva against pollution, entered into force 1 November 1963. Summarised in Yearbook ... 1974, vol. II (Part Two), p 308, document A/CN.4/274, paras. 202 et seq., arts. 2-4; the 1983 Agreement between Mexico and the United States on Co-operation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Mexico, 14 August 1983, entered into force 16 February 1984, text reproduced in International Legal Materials, vol. 22, p. 1025, a framework agreement encompassing boundary water resources, especially art. 1 and Annex I; the Act regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad), 26 October 1963, entered into force on 1 February 1966, article 4, United Nations, Treaty Series, vol 587, p. 9, at p. 13, Yearbook ... 1974, vol. II (Part One), p. 289, document A/CN.4/274, para. 40; the Convention relative au statut du fleuve Sénégal, and the Convention portant création de l'Organisation pour la mise en valeur du fleuve Sénégal, both signed at Nouakchott 11 March 1972, reprinted in Treaties concerning the utilisation of international watercourses for other purposes than navigation: Africa, Natural Resources/Water Series No. 13, note 94 above, pp. 16 and 21,

which provides in its article 3 that the purpose of the Agreement is to ensure co-operation between the parties in economic, scientific and technical activities relating to the use of water resources in frontier waters. Articles 7 and 8 provide for co-operation with regard, inter alia, to water projects and the regular exchange of data and information.

(4) In addition to article 3 of the Charter of Economic Rights and Duties of States, to which reference has already been made, 142/ the importance of co-operation in relation to the utilisation of international watercourses and other common natural resources has been emphasised repeatedly in declarations and resolutions adopted by intergovernmental organisations, conferences and meetings. For example, the General Assembly addressed the subject in resolutions 2995 (XXVII) of 15 December 1972 on co-operation between States in the field of the environment, and 3129 (XXVIII) of 13 December 1973 on co-operation in the field of the environment concerning natural resources shared by two or more States. By way of illustration, the former provides that, "in exercising their sovereignty over natural resources, States must seek, through effective bilateral and multilateral co-operation or through regional machinery, to preserve and improve the environment". The subject of co-operation in the utilization of common water resources and in the field of environmental protection was also addressed by the 1972 Declaration of the

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respectively; the Convention and Statutes relating to the development of the Chad Basin, 22 May 1964, Statutes, art. 1, Yearbook ... 1974, vol. II (Part Two, p. 290, document A/CN.4/274, para. 53., art. 4; and the 1960 Indus Waters Treaty between India and Pakistan (note 99 above), arts. 7 and 8. More generally, article 197 of the 1982 United Nations Convention on the Law of the Sea (note 112 above), entitled "Co-operation on a global or regional basis", requires States to co-operate "in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention for the protection and preservation of the marine environment, taking into account characteristic regional features."

142/ See paragraph (25) of the commentary to article 8.

United Nations Conference on the Human Environment. Principle 24 of that Declaration provides as follows:

> "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States." 143/

The United Nations Water Conference held in 1977 at Mar del Plata produced a number of recommendations relating to regional and international co-operation with regard to the use and development of international watercourses. For example, recommendation 90 provides that co-operation between States in the case of international watercourses "in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, inter alia, in principle 21 of the Declaration of the United Nations Conference on the Human Environment." 144/ In 1987 the Economic Commission for Europe adopted a

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143/ Report of the United Nations Conference on the Human Environment, note 138 above, p. 5; see also recommendation 51 of the Action Plan for the Human Environment (ibid., p. 17), adopted at the same conference, which provides for co-operation specifically with reference to international watercourses.

144/ United Nations Water Conference Report, note 138 above, at p. 53. Principle 21 of the Stockholm Declaration, referred to in recommendation 90, is set forth in text accompanying note 138 above. See also recommendation 54, adopted at the same conference, ibid., at p. 51, and the resolutions adopted at that conference on technical co-operation among developing countries in the water sector, ibid., p. 76; River commissions, ibid., p. 77; and Institutional arrangements for international co-operation in the water sector, ibid., p. 78.

decision on Principles regarding co-operation in the field of transboundary waters, 145/ which provides in paragraph 2 as follows:

"Co-operation

2. Transboundary effects of natural phenomena and human activities on transboundary waters are best regulated by the concerted efforts of the countries immediately concerned. Therefore, co-operation should be established as practical as possible among riparian countries leading to a constant and comprehensive exchange of information, regular consultations and decisions concerning issues of mutual interest: objectives, standards and norms, monitoring, planning, research and development programmes and concrete measures, including the implementation and surveillance of such measures."

(5) The importance of co-operation between States in the use and development of international watercourses has also been recognized in numerous studies by intergovernmental and international non-governmental organizations. 146/ An instrument expressly recognizing the importance of co-operation between States to the effectiveness of procedural and other rules concerning international watercourses is the International Law Association's Rules on Water Pollution in an International Drainage Basin, adopted in 1982. Article 4 of the rules provides: "In order to give effect to the provisions of these Articles, States shall cooperate with the other States concerned." 147/ A forceful statement of the importance of co-operation concerning international water resources, owing to the physical properties of water, is found in principle XII of the European Water Charter, adopted in 1967 by the Committee of Ministers of the Council of Europe, which declares: "Water knows no

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145/ Note 138 above. The preamble to the Principles states as follows:

"The following Principles address only issues regarding control and prevention of transboundary water pollution, as well as flood management in transboundary waters, including general issues in this field."

146/ See generally the studies referred to and excerpted in Yearbook ... 1974, vol II (Part Two), pp. 199 et seq., document A/5409 and pp. 356 et seq., document A/CN.4/274.

147/ International Law Association, Report of the Sixtieth Conference held at Montreal, 29 August 1982 to 4 September 1982, p. 539 (1983).

frontiers; as a common resource it demands international co-operation." 148/ Finally, the resolution adopted by the Institute of International Law at its 1979 meeting in Athens provides in its article IV that:

> "In order to comply with the obligations set forth in articles II and III [on the prevention of water pollution], States shall in particular use the following means:
>
> ...
>
> (b) at international level, co-operation in good faith with the other States concerned." 149/

(6) In conclusion, co-operation between watercourse States is important to the equitable and reasonable utilisation of international watercourses. It also forms the basis for the regular exchange of data and information under article 10, as well as for the other parts of the draft.

Article 10

Regular exchange of data and information

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

148/ European Water Charter, adopted by the Consultative Assembly of the Council of Europe (CE) on 28 April 1967 (Recommendation 493 (1967)) and by the Committee of Ministers of the CE on 26 May 1967 (Resolution (67) 10), Principle XII, text in Yearbook ... 1974, vol. II (Part Two), pp. 342-343, para. 373.

149/ Institute of International Law, Annuaire de l'Institut de droit international, 1979, vol. 58, Part Two. Article VII provides that "[i]n carrying out their duty to co-operate, States bordering the same hydrographic basin shall, as far as practicable, especially through agreements, resort to the following ways of co-operation", including providing data concerning pollution, giving advance notification of potentially polluting activities and consulting on actual or potential transboundary pollution problems.

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.

Commentary

(1) Article 10 sets forth the general, minimum requirements for the exchange between watercourse States of the data and information necessary to ensure the equitable and reasonable utilization of an international watercourse [system]. Watercourse States require data and information concerning the condition of the watercourse in order to apply article 7, provisionally adopted at the 1987 session, which calls for watercourse States to take into account "all relevant factors and circumstances" in implementing the obligation of equitable utilization laid down in article 6. The rules contained in article 10 are, of course, residual: they apply in the absence of particularized regulation of the subject in an agreement of the kind envisaged in article 4 of the present draft articles, i.e., one relating to a specific international watercourse [system]. Indeed the need is clear for watercourse States to conclude such agreements among themselves in order to provide, inter alia, for the collection and exchange of data and information in light of the characteristics of the international watercourse [system] involved, as well as their special requirements and circumstances. The smooth and effective functioning of the régime envisaged in the present article is dependent upon co-operation between watercourse States. The rules in this article thus constitute a specific application of the general obligation to co-operate laid down in article 9, as reflected in the opening phrase of paragraph 1.

(2) The requirement of paragraph 1 that data and information be exchanged on a regular basis is designed to ensure that watercourse States will have the facts necessary to enable them to comply with their obligation of equitable and reasonable utilization under articles 6 and 7, and their obligation under article 8 not to cause appreciable harm to other watercourse States. The data

and information may be transmitted directly or indirectly. In many cases watercourse States have established joint bodies which have been entrusted, inter alia, with the collection, processing and dissemination of data and information of the kind ferred to in this paragraph. 150/ But the States concerned are, of course, free to utilise for this purpose any mutually acceptable method.

(3) The Commission recognizes that circumstances such as an armed conflict, or absence of diplomatic relations may raise serious obstacles to the direct exchange of data and information, as well as to a number of the procedures provided for in articles 11 to 20. The Commission decided that this problem would be best dealt with through a general savings clause, specifically providing for indirect procedures, which has taken the form of article 21.

150/ For illustrative lists of such entities and discussions thereof see, e.g.: Yearbook ... 1974, vol. II (Part Two), pp. 351 et seq. document A/CN.4/274; et seq.; Experiences in the development and management of international river and lake basins. Proceedings of the United Nations Interregional Meeting of International River Organisations, Dakar, Senegal, 5-14 May 1981, Natural Resources/Water Series No. 10, ST/ESA/120 (United Nations publication, Sales No. E.82.II.A.17) especially pp. 142 et seq; Ely and Wolman, "Administration", in The Law of International Drainage Basins, A. Garretson, R. Hayton, and C. Olmstead, eds., Dobbs Ferry, N.Y., Oceana Publications, 1967, chap. 4, p. 124, at pp. 125-133; Management of International Water Resources: Institutional and Legal Aspects. Natural Resources/Water Series No. 1, ST/ESA/5 (United Nations publication, Sales No. E.75.II.A.2), annex IV, at pp. 198 et seq. (1975); and Parnall and Utton, at pp. 254 et seq. Notable among these administrative mechanisms are the Danube Commission; the Intergovernmental Co-ordinating Committee of the River Plate Basin; the International Commission for the Protection of the Moselle against Pollution; the International Commission for the Protection of the Rhine against Pollution; the Lake Chad Basin Commission; the International Joint Commission, Canada and the United States; the International Boundary and Water Commission, Mexico and the United States; the Committee for Co-ordination of the Lower Mekong Basin; the River Niger Commission; the Permanent Joint Technical Commission for Nile Waters, Egypt and Sudan; the Permanent Indus Commission, India and Pakistan; the Joint Rivers Commission, India and Bangladesh; the Helmand River Delta Commission, Afghanistan and Iran; the Joint Finnish-Soviet Commission on the Utilization of Frontier Watercourses; and the Organization for the Management and Development of the Kagera River Basin.

(4) In requiring the "regular" exchange of data and information, article 10 provides for an on-going and systematic process, as distinct from the ad hoc provision of information concerning planned measures envisaged in Part III.

(5) Paragraph 1 requires that watercourse States exchange data and information that is "reasonably available". 151/ This expression is employed to indicate that as a matter of general legal duty a watercourse State is obligated to provide only such information as is reasonably at its disposal - e.g., that which it has already collected for its own use or is easily accessible. 152/ In a specific case, whether data and information were "reasonably" available would depend upon an objective evaluation of such factors as the effort and cost its provision would entail, taking into account the human, technical, financial and other relevant resources of the requested watercourse State. The adjective "reasonably", as used in paragraphs 1 and 2, or "reasonable" as used in paragraph 2, is thus a term of art bearing a meaning corresponding roughly to the expression "in light of all the relevant circumstances" or the English word "feasible" rather than, e.g., "rationally" or "logically".

151/ Article XXIX, paragraph 1 of the International Law Association's 1966 Helsinki Rules on the Uses of the Waters of International Rivers (hereafter referred to as "Helsinki Rules") employs the expression "relevant and reasonably available". International Law Association, Report of the Fifty-second Conference held at Helsinki, p. 518.

152/ Cf. the commentary to Article XXIX of the Helsinki Rules, which states in pertinent part:

> "The reference to 'relevant and reasonably available information' makes it clear that the basin State in question cannot be called upon to furnish information which is not pertinent and cannot be put to the expense and trouble of securing statistics and other data which are not already at hand or readily obtainable. The provision of the Article is not intended to prejudge the question whether a basin State may justifiably call upon another to furnish information which is not 'reasonably available' if the first State is willing to bear the cost of securing the desired information."

Helsinki Rules, ibid., at p. 519.

(6) In the absence of agreement to the contrary, watercourse States are not required to process the data and information to be exchanged. Under paragraph 3 of the present article, however, they are to employ their best efforts to provide the information in a form that is usable by the States receiving it.

(7) Examples of instruments which employ the term "available", in reference to information to be provided, are the 1960 Indus Waters Treaty between India and Pakistan, 153/ and the 1986 Vienna Convention on early notification of a nuclear accident. 154/.

(8) Watercourse States are required to exchange data and information concerning the "condition" of the international watercourse [system]. This term, which also appears in article 11, carries its usual meaning, referring generally to the current state or characteristics of the watercourse. As indicated by the words "in particular", the kinds of data and information mentioned, while by no means comprising an exhaustive list, are those that are regarded as being the most important for the purpose of equitable utilisation. Although the article does not mention the exchange of samples, the Commission recognizes that this may indeed be of great practical value in some circumstances, and should be effected as appropriate.

153/ Indus Waters Treaty (India-Pakistan), 19 September 1960, art. 7, para. 2, note 99 above, p. 300. That paragraph provides, inter alia, that a Party planning to construct engineering works which would affect the other party materially

> "shall notify the other Party of its plans and shall supply such data relating to the work as may be available and as would enable the other Party to inform itself of the nature, magnitude and effect of the work".

Ibid. (emphasis added). Compare art. XXIX of the Helsinki Rules and commentary thereto, quoted note 152 above.

154/ International Legal Materials, vol. XXV, p. 1370 (1986), art. 2 (b), which requires in pertinent part the provision of "available information relevant to minimizing the radiological consequences ...".

(9) The data and information transmitted to other watercourse States should include indications of effects upon the condition of the watercourse of present uses thereof within the State transmitting the information. Possible effects of planned uses are dealt with in articles 11 to 20.

(10) Paragraph 1 requires the regular exchange of, inter alia, data and information of an "ecological" nature. The Commission regarded this term as being preferable to "environmental" since it relates more specifically to the living resources of the watercourse itself. The term "environmental" was thought to be susceptible of a broader interpretation, which would result in the imposition of too great a burden upon watercourse States.

(11) Watercourse States are required by paragraph 1 to exchange not only data and information on the present condition of the watercourse, but also related forecasts. The latter requirement is, like the former, subject to the qualification that such forecasts be "reasonably available". Thus, watercourse States are not required to undertake special efforts in order to fulfil this obligation. The forecasts envisaged would relate to such matters as weather patterns and the possible effects thereof upon water levels and flows; foreseeable ice conditions; possible long-term effects of present uses; and the condition or movement of living resources.

(12) The requirement of paragraph 1 applies even in the relatively rare instances in which no watercourse State is presently using or planning to use the watercourse. If data and information concerning the condition of the watercourse is "reasonably" available, the Commission believed that requiring the exchange of such data and information would not be excessively burdensome. In fact, the exchange of data and information concerning such watercourses may assist watercourse States in planning for the future and in meeting development or other needs.

(13) Paragraph 2 concerns requests for data and information that is not reasonably available to the watercourse State from which it is sought. In such cases, the State in question is to employ its "best efforts" to comply with the request, i.e., it is to act in good faith and in a spirit of co-operation in endeavouring to provide the data or information sought by the requesting watercourse State.

(14) For data and information to be of practical value to watercourse States, it must be in a form which permits them to use it. Paragraph 3 therefore requires watercourse States to use their "best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilisation". The meaning of the expression "best efforts" was explained in the commentary to paragraph 2, above. The expression "where appropriate" is employed in order to provide a measure of flexibility, which is necessary for several reasons. In some cases, it may not be necessary to process data and information in order to render it usable by another State. In other cases, such processing may be necessary in order to ensure that the material is usable by other States, but this may entail undue burdens for the State providing the material.

(15) The need for the regular collection and exchange of a broad range of data and information relating to international watercourses has been recognized in a large number of international agreements, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 155/ An example of an agreement containing a general provision on the regular exchange of data and information is the 1964 Agreement between Poland and the Soviet Union concerning the use of water resources in frontier waters, 156/ which provides in article 8 that the parties

> "shall establish principles of co-operation governing the regular exchange of hydrological, hydrometeorological and hydrogeological information and forecasts relating to frontier waters and shall determine the scope, programmes and methods of carrying out measurements and observation and of processing their results and also the places and times at which the work is to be done". 157/

155/ The fourth report of the Special Rapporteur (A/CN.4/412) contains a survey of the relevant provisions of these instruments in paras. 15-26. See also article 3 of the Charter of Economic Rights and Duties of States, quoted in paragraph (25) of the commentary to article 8.

156/ United Nations, Treaty Series, vol. 552, p. 175.

157/ As summarized in Yearbook ... 1974, vol. II (Part Two), document A/CN.4/274, para. 274.

Other examples of agreements containing provisions on the exchange of data and information are the 1960 Indus Waters Treaty between India and Pakistan (article VI), 158/ the 1944 Agreement between the United States and Mexico (article 9 (j)), 159/ the 1964 Agreement concerning the River Niger Commission and the navigation and transport on the River Niger (article 2 (c)), 160/ and the 1971 Agreement between Finland and Sweden concerning frontier rivers (article 3, chapter 9). 161/

(16) The regular exchange of data and information is particularly important for the effective protection of international watercourses, preservation of water quality and prevention of pollution. This is recognized in a number of agreements, declarations, resolutions and studies. 162/ For example, the 1987 ECE Principles regarding co-operation in the field of transboundary waters provide in relevant part as follows:

> "11 (a). In addition to supplying each other with information on events, measures and plans at the national level affecting the other contracting parties, as well as on implementation of jointly harmonised programmes, contracting parties should maintain a permanent exchange of information on their practical experience and research. Joint commissions offer numerous opportunities for this exchange, but joint lectures and seminars serve also as suitable means of passing on a great deal of scientific and practical information." 163/

158/ Note 99 above.

159/ Note 104 above.

160/ United Nations, Treaty Series, vol. 587, p. 19.

161/ United Nations, Treaty Series, vol. 825, p. 191.

162/ Examples of these are collected in the fourth report of the Special Rapporteur (A/CN.4/412), in note 43.

163/ Note 138 above (the Principles are limited by their preamble to flood management and the prevention and control of pollution).

(17) In summary, the regular exchange by watercourse States of data and information concerning the condition of the watercourse provides those States with the material necessary to comply with their obligations under articles 6 to 8, as well as for their own planning purposes. While article 10 concerns the exchange of data and information on a regular basis, the articles in Part III, which follows, deal with the provision of information on an ad hoc basis, namely, with regard to planned measures.

PART III

PLANNED MEASURES

Article 11

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

Commentary

(1) Article 11 introduces the articles contained in Part III and provides a bridge between Part II, which concludes with article 10 on the regular exchange of data and information, and Part III, which deals with the provision of information concerning planned measures.

(2) Article 11 lays down a general obligation of watercourse States to provide each other with information concerning the possible effects upon the condition of the international watercourse [system] of measures they might plan to undertake. The article also requires that watercourse States consult with each other on the effects of such measures.

(3) The expression "possible effects" includes all potential effects of planned measures, whether adverse or beneficial. Article 11 thus goes beyond articles 12 and following, which concern planned measures that may have an appreciable adverse effect upon other watercourse States. Indeed, watercourse States have an interest in being informed of possible positive as well as negative effects of planned measures. In addition, requiring the exchange of

information and consultation with regard to all possible effects avoids problems inherent in unilateral assessments of the actual nature of such effects.

(4) The term "measures" is to be taken in its broad sense, as including new projects or programmes of a major or minor nature, as well as changes in existing uses of an international watercourse [system].

(5) Illustrations of instruments and decisions which lay down a requirement similar to that contained in article 11 are provided in the commentary to article 12.

Article 12

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Commentary

(1) Article 12 introduces a set of articles on planned measures that may have an appreciable adverse effect upon other watercourse States. These articles establish a procedural framework designed to assist watercourse States in maintaining an equitable balance between their respective uses of an international watercourse [system]. It is envisaged that this set of procedures will thus help to avoid disputes relating to new uses of the watercourse.

(2) The procedures provided for in articles 12 to 20 are triggered by the criterion that measures planned by a watercourse State may have "an appreciable adverse effect" upon other watercourse States. 164/ The threshold

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164/ The Draft Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious exploitation of natural resources shared by two or more States, adopted by the Governing Council of the United Nations Environment Programme (decision 6/14, 19 May 1978), defines the term "significantly affect" as referring to "any appreciable effects on a shared natural resource and exclud[ing] de minimis effects". Document UNEP/IG.12/2, annexed to document UNEP/GC.16/17.

established by this standard is intended to be lower than that of "appreciable harm" under article 8. Thus, an "appreciable adverse effect" may not rise to the level of "appreciable harm" within the meaning of article 8. "Appreciable harm" is not an appropriate standard for the setting in motion of the procedures under this set of articles since use of that standard would mean that the procedures would be engaged only where implementation of the new measures might result in a violation of article 8. Thus, a watercourse State providing a notification of planned measures would be put in the position of admitting that the measures it was planning might cause appreciable harm to other watercourse States in violation of article 8. The standard of "appreciable adverse effect" is employed to avoid such a situation.

(3) The expression "implements or permits the implementation of" is intended to make clear that the article covers not only measures planned by the State but also those planned by private entities. The word "permits" is employed in its broad sense, as meaning both "allow" and "authorise". Thus, in the case of measures planned by a private entity, the watercourse State in question is under an obligation not to authorise the entity to implement the measures, and otherwise not to allow it to go forward with their implementation, before notifying other watercourse States as provided in article 12. References in subsequent articles 165/ to "implementation" of planned measures are to be taken to include permitting the implementation thereof.

(4) The term "timely" is intended to require notification sufficiently early in the planning stages to permit meaningful consultations and negotiations under subsequent articles, if such prove necessary. An example of a treaty containing a requirement of this kind is the 1966 Agreement between Austria, the Federal Republic of Germany and Switzerland regulating the withdrawal of water from Lake Constance 166/ which provides in article 7 that "riparian States shall, before authorizing [certain specified] withdrawals of water, afford one another in good time an opportunity to express their views".

165/ See articles 15, para. 2, 16, and 19, para. 1.

166/ Concluded 30 April 1966, entered into force 25 November 1967, United Nations, Treaty Series, vol. 620, p. 191, summarized in Yearbook ... 1974, vol. II (Part Two), p. 301, document A/CN.4/274, para. 142.

(5) The reference to "available" technical data and information is intended to indicate that the notifying State is generally not required to conduct additional research at the request of a potentially affected State, but must only provide such relevant data and information as has been developed in relation to the planned measures, and is readily accessible. (The meaning of the term "available" is also discussed in paragraphs (5) to (7) of the commentary to article 10.) If a notified State requests data or information that is not readily available, but is accessible only to the notifying State, it would generally be appropriate for the former to offer to indemnify the latter for expenses incurred in producing the requested material. As provided in article 20, the notifying State is not required to divulge data or information that is vital to its national defence or national security. Examples of instruments which employ the term "available", in reference to information to be provided, are given in paragraph (7) of the commentary to article 10.

(6) The principle of notification of planned measures is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organisations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations. 167/ An example of a treaty containing such a provision is the 1954 Convention between Yugoslavia and Austria concerning water economy questions relating to the Drava, 168/ which provides in its article 4 that should Austria, the upper riparian State,

> "seriously contemplate plans for new installations to divert water from the Drava basin or for construction work which might affect the Drava river régime to the detriment of Yugoslavia, Austria undertakes to discuss such plans with Yugoslavia prior to legal negotiations concerning rights in the water".

167/ A survey of these authorities is contained in the third report of the Special Rapporteur (A/CN.4/406), in paras. 62-86, and ibid., Add.2, annex II.

168/ Entered into force 15 January 1955. United Nations Treaty Series, vol. 227, p. 128; summarized in Yearbook ... 1974, vol. II (Part Two), at p. 142, document A/5409, paras. 693 et seq.

Provisions to the same or similar effect may be found in a number of other agreements, beginning as early as 1866 with the Treaty of Bayonne between France and Spain 169/ (article XI). Additional examples are the 1972 Statute of the Senegal River 170/ (article 4), the 1960 Convention on the protection of Lake Constance against pollution 171/ (article 1, paragraph 3), the 1960 Indus Waters Treaty between India and Pakistan 172/ (article 7), and the 1923 Convention relating to the development of hydraulic power affecting more than one State (article 4).

(7) A number of agreements provide for notification and exchange of information concerning new projects or uses through an institutional mechanism established to facilitate the management of a watercourse. An example is the 1975 Statute of the Uruguay River, 173/ adopted by Uruguay and Argentina, which contains detailed provisions on notification requirements, contents of the notification, the period for reply, and procedures applicable in the event the parties fail to agree on the proposed project. These provisions are set forth in full, since they are relevant not only to article 12, but also to following articles in Part III:

"Article 7

"A party planning the construction of new channels, the substantial modification or alteration to existing ones, or the execution of any other works of such magnitude as to affect navigation, the régime of the river or the quality of its waters, shall so inform the Commission, which shall determine expeditiously, and within a maximum period of 30 days, whether the project may cause appreciable harm to the other party.

169/ Additional Act to the Boundary Treaties of 2 December 1856, 14 April 1862 and 26 May 1866, signed at Bayonne on 26 May 1866, ratified 12 July 1866, summarized in Yearbook ... 1974, vol. II (Part Two), p. 170, document A/5409, para. 895. This agreement was construed and applied in the Lake Lanoux arbitration, note 126 above.

170/ Note 94 above.

171/ Note 109 above.

172/ Note 99 above.

173/ Actos internacionales Uruguay-Argentina, 1830-1980 (Montevideo, 1981), pp. 594-596.

"If it is determined that such is the case, or if no decision is reached on the subject, the party concerned shall, through the Commission, notify the other party of its project.

"The notification shall give an account of the main aspects of the project and, as appropriate, its mode of operation and such other technical data as may enable the notified party to assess the probable effect of the project on navigation or on the régime of the river or the quality of its waters.

"Article 8

"The notified party shall be allowed a period of 180 days in which to evaluate the project, from the date on which its delegation to the Commission receives the notification.

"If the documentation referred to in article 7 is incomplete, the notified party shall be allowed a period of 30 days in which, through the Commission, so to inform the party planning to execute the project.

"The aforementioned period of 180 days shall begin to run from the date on which the delegation of the notified party receives complete documentation.

"This period may be extended by the Commission, at its discretion, if the complexity of the project so requires.

"Article 9

"If the notified party presents no objections or does not reply within the period specified in article 8, the other party may execute or authorize the execution of the planned project.

"Article 10

"The notified party shall have the right to inspect the works in progress in order to determine whether they are being carried out in accordance with the project submitted.

"Article 11

"If the notified party concludes that the execution of the works or the mode of the operation may cause appreciable harm to navigation or to the régime of the river or the quality of its waters, it shall so inform the other party, through the Commission, within the period of 180 days specified in article 8.

"Its communication shall state which aspects of the works or of the mode of operation may cause appreciable harm to navigation or to the régime of the river or the quality of its waters, the technical grounds for that conclusion and suggested changes in the project or the mode of operation.

"Article 12

"If the parties fail to reach agreement within 180 days of the date of the communication referred to in article 11, the procedure indicated in chapter XV shall be followed." 174/

Other agreements providing for notification of planned measures through a joint body include the régime governing the Niger River 175/ and the 1973 Treaty between Argentina and Uruguay on the Plata River and its maritime outlet 176/ (article 17).

(8) The subject of notification concerning planned measures was dealt with extensively by the tribunal in the Lake Lanoux arbitration. 177/ Relevant conclusions reached by the tribunal include the following: (1) At least in the factual context of the case, international law does not require prior agreement between the upper and lower riparian concerning a proposed new use, but "prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this

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174/ Ibid. Chapter XV of the Statute (art. 60), referred to in article 12, provides for "Judicial settlement of disputes", while chapter XIV (arts. 58 and 59) provides for a conciliation procedure. Ibid., at pp. 606-607.

175/ See the Act Regarding Navigation and Economic Co-operation between the States of the Niger Basin (Act of Niamey), 26 October 1963, art. 4, United Nations, Treaty Series, vol. 587, p. 9; and the Agreement concerning the River Niger Commission of 25 November 1964, art. 12, ibid., vol. 587, p. 19.

176/ Entered into force 12 February 1974. Summarized in Yearbook ... 1974, vol. II (Part Two), p. 298, document A/CN.4/274, paras. 115 et. seq.

177/ Note 126 above.

agreement"; 178/ (2) under then-current trends in international practice concerning hydroelectric development, "consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right"; 179/ (3) "the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own"; 180/ and (4) there is an "intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted". 181/ France had, in fact, consulted with Spain prior to the initiation of the diversion project there at issue, in response to Spain's claim that it was entitled to prior notification under article 11 of the 1866 Additional Act to the Treaty of Bayonne. 182/

(9) The need for prior notification of planned measures has been recognised in a number of declarations and resolutions adopted by intergovernmental organizations, conferences and meetings. Recommendation 51 of the Action Plan adopted at the 1972 United Nations Conference on the Human Environment contained the following principle relating to notification of planned new uses:

178/ Yearbook ... 1974, vol. II (Part Two), p. 197, document A/5409, para. 1065.

179/ Ibid., p. 198, para. 1068.

180/ Ibid.

181/ Ibid.

182/ Note 126 above.

"Nations agree that when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged; ..." 183/

(10) Nearly 40 years earlier, the Seventh International Conference of American States adopted the Declaration of Montevideo, which provides, inter alia, not only for advance notice of planned works, but also for prior consent with regard to potentially injurious modifications:

"2. ... no State may, without the consent of the other riparian State, introduce into watercourses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State.

"...

"7. The works which a State plans to perform in international waters shall be previously announced to the other riparian or co-jurisdictional States. The announcement shall be accompanied by the necessary technical documentation in order that the other interested States may judge the scope of such works, and by the name of technical expert or experts who are to deal, if necessary, with the international side of the matter.

"8. The announcement shall be answered within a period of three months, with or without observations. In the former case, the answer shall indicate the name of the technical expert or experts to be charged by the respondent with dealing with the technical experts of the applicant, and shall propose the date and place for constituting the Mixed Technical Commission of technical experts from both sides to pass judgement on the case. The Commission shall act within a period of six months, and if within this period no agreement has been reached, the members shall set forth their respective opinions, informing the Governments thereof." 184/

183/ Report of the United Nations Conference on the Human Environment, Note 138 above, p. 17.

184/ Declaration of Montevideo concerning the industrial and agricultural use of international rivers, approved by the Seventh Inter-American Conference at its fifth plenary session, 24 December 1933, Pan-American Union, Seventh International Conference of American States, Plenary Sessions, Minutes and Antecedents (Montevideo, 1933), p. 114; reproduced in Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, annex I.A. Paragraph 9 of the Declaration provides for the resolution of any remaining differences through diplomatic channels, conciliation, and, ultimately, any procedures under

Examples of similar provisions are the "Principle of information and consultation" of the OECD Principles concerning trans-frontier pollution, 185/, and the recommendation on "Regional co-operation" of the United Nations Water Conference, held at Mar del Plata in 1977. 186/

(11) Provisions on notification concerning planned measures may be found in a number of studies adopted by intergovernmental and international non-governmental organisations. For reasons of brevity, examples of these studies will merely be mentioned here, without setting forth the relevant provisions in full. 187/ This listing is intended to provide an indication of the wide-ranging recognition of the need for such prior notification.

(12) Provisions on prior notification of planned measures are contained, e.g. in the revised draft convention on the industrial and agricultural use of international rivers and lakes, adopted by the Inter-American Juridical Committee in 1965 (especially articles 8 and 9); 188/ the revised draft

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conventions in effect in America. The tribunal is to act within a three-month period and its award is to take into account the proceedings of the Mixed Technical Commission provided for in para. 8. It may be noted that Bolivia and Chile recognised that the Declaration embodied obligations applicable to the Lauca River dispute between the two States. See Council of the Organisation of American States, documents OEA/SER.G/VI, C/INF-47, 15 and 20 April 1962, and OEA/Ser.G/VI, C/INF-50, 19 April 1962.

185/ Recommendation C(74)224, adopted by the Council of the Organisation for Economic Co-operation and Development on 14 November 1974, paras. 6-8. Reprinted in OECD, OECD and the Environment (Paris, 1986), pp. 144 and 145-146.

186/ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977, document E/CONF.70/29 (United Nations publication, Sales No. E.77.II.A.12), at p. 52, especially paragraph (g).

187/ Relevant provisions of the instruments mentioned are set forth in extenso in the third report of the Special Rapporteur, A/CN.4/406, paras. 80-86.

188/ Report of the Inter-American Juridical Committee on the work accomplished during its 1965 meeting (OEA/Ser.1/VI.1, CIJ-83) (Washington, D.C., Panamerican Union, 1966), pp. 7-10. Text of the revised draft convention reproduced in part in Yearbook ... 1974, vol. II (Part Two), pp. 350-351, document A/CN.4/274, para. 379.

propositions submitted to the Asian-African Legal Consultative Committee in 1972 by its sub-committee on the law of international watercourses (especially propositions IV, paragraph 2 and X); 189/ the 1961 Resolution on the use of international non-maritime waters adopted by the Institute of International Law (articles 4-9); 190/ the Resolution on the use of international rivers adopted by the Inter-American Bar Association at its Tenth Conference in 1957 (paragraph 3); 191/ the Helsinki Rules on the Uses of the Waters of International Rivers adopted in 1966 by the International Law Association (ILA) (article XXIX); 192/ the Resolution on regulation of the flow of water of international watercourses, adopted by the ILA at its 1980 Conference in Belgrade (articles 7 and 8); 193/ the Rules on Water Pollution in an International Drainage Basin, adopted by the ILA at its Montreal Conference

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189/ Asian-African Legal Consultative Committee, Report of the Fourteenth Session held at New Delhi (10-18 January 1973) (New Delhi), pp. 7-14; reprinted in Yearbook ... 1974, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367.

190/ Annuaire de l'Institut de droit international, 1961, pp. 381-384. (The text of the resolution is reproduced in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076.

191/ Inter-American Bar Association, Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957, vol. 1, pp. 246-248 (Buenos Aires, 1958); reprinted in Yearbook ... 1974, vol. II (Part Two), p. 208, document A/5409, para. 1092.

192/ Note 151 above.

193/ For the text of the articles, with introduction and commentary (Chairman: E. Manner), see ILA, Report of the Fifty-ninth Conference (Belgrade, 1980 pp.367-369. The expression "regulation of the flow [etc.]" was defined as

> "continuing measures intended for controlling, moderating, increasing or otherwise modifying the flow of the waters in an international watercourse for any purpose; such measures may include storing, releasing and diverting of water by means such as dams, reservoirs, barrages and canals ..."

in 1982 (articles 5 and 6); 194/ and the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious exploitation of natural resources shared by two or more States, adopted by the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States, and approved by the Governing Council of the United Nations Environment Programme (principles 6 and 7). 195/

(13) The foregoing survey of authorities is illustrative only, but it reveals the importance that States and expert bodies attach to the principle of prior notification of planned measures. Procedures to be followed subsequent to a notification under article 12 are dealt with in articles 13 to 17.

Article 13

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

Commentary

(1) The provision of a notification under article 12 has two effects, which are dealt with in articles 13 and 14. The first effect, covered in the present article, is that the period for reply to the notification begins to run. The second effect, dealt with in article 14, is that the obligations specified in that article arise for the notifying State.

(2) A full understanding of the effect of article 13 requires that brief reference be made to the provisions of several subsequent articles. Article 13 affords the notified State or States a period of six months for article 13 and request such a further suspension as provided in paragraph 3 of

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194/ Ibid. The Association has prepared other studies that are of present relevance. See, e.g., article 3, para. 1 of the "Rules of International Law Applicable to Transfrontier Pollution", and article 3 of the "Rules on Water Pollution in an International Drainage Basin", both adopted at the Association's 1982 meeting in Montreal; ILA, Report of the Sixtieth Conference (Montreal, 1982), pp. 1-3, 13, 535 et seq.

195/ Document UNEP/IG.12/2, annexed to document UNEP/GC.16/17.

article 17. In any event, paragraph 1 of article 15 requires the notified State to reply as early as possible, out of good faith consideration for the interest of the notifying State in proceeding with its plans. Of course, the notified State may reply after the six-month period has elapsed, but such a reply could not operate to prevent the notifying State from proceeding with the implementation of its plans, in view of the provisions of article 16. The latter article allows the notifying State to proceed to implementation if it receives no reply within the six-month period.

(3) The Commission considered the possibility of using a general standard for the determination of the period for reply, such as "a reasonable period of time", 196/ rather than a fixed period such as six months. 197/ It concluded, however, that a fixed period, while necessarily somewhat arbitrary, would ultimately be in the interest of both the notifying and the notified States. While a general standard would be more flexible and adaptable to different situations, its inherent uncertainty could at the same time lead to disputes between the States concerned. All of these considerations demonstrate the need for watercourse States to agree upon a period of time that is appropriate to the case concerned, in light of all relevant facts and circumstances. Indeed, the opening clause of article 13, "unless otherwise agreed", is intended to emphasise that, in each case, States are expected and encouraged to agree upon an appropriate period. The six-month period provided for in article 13 is thus residual, and applies only in the absence of agreement between the States concerned upon another period.

196/ Instruments using this kind of standard include the 1961 Salzburg Resolution of the Institute of International Law, article VI: (Annuaire de l'Institut de droit international, 1961, pp. 381-384. The text of the resolution is reproduced in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076); and the 1966 Helsinki Rules of the International Law Association, note 151 above, article XXIX, para. 3.

197/ An instrument employing a six-month period is the 1975 Statute of the Uruguay River, note 86 above, article 8.

Article 14

Obligations of the notifying State during the period for reply

During the period referred to in article 13 the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.

Commentary

(1) As its title indicates, article 14 deals with the obligations of the notifying State during the period specified in article 13 for reply to a notification made pursuant to article 12. These obligations are two. The first is an obligation of co-operation, which takes the specific form of a duty to provide the notified State or States, on their request, "with any additional data and information that is available and necessary for an accurate evaluation" of the possible effects of the planned measures. Such data and information would be "additional" to that which had already been provided under article 12. The meaning of the term "available" is discussed in paragraph (5) of the commentary to article 12.

(2) The second obligation of the notifying State under article 14 is not to "implement, or permit the implementation of, the planned measures without the consent of the notified States". The expression "implement, or permit the implementation of" is discussed in paragraph 3 of the commentary to article 12, and bears the same meaning as in that article. It perhaps goes without saying that this second obligation is a necessary element of the procedures provided for in Part III, since these procedures are designed to maintain a state of affairs characterized by the expression "equitable utilization", within the meaning of article 6. If the notifying State were to proceed with implementation before the notified State had had an opportunity to evaluate the possible effects of the planned measures and inform the notifying State of its findings, the notifying State would not have at its

disposal all of the information it would need to be in a position to comply with articles 6 to 8. The duty not to proceed with implementation is thus intended to assist watercourse States in ensuring that any measures they plan will not be inconsistent with their obligations under articles 6 and 8.

Article 15

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding.

Commentary

(1) Article 15 deals with the obligations of the notified State or States concerning their responses to the notification provided under article 12. As with article 14, there are two obligations. The first, contained in paragraph 1, is to communicate findings concerning possible effects of the planned measures to the notifying State "as early as possible". As explained in paragraph (2) of the commentary to article 13, this communication must be made within the six-month period provided for in article 13 in order for a notified State to have the right to request a further suspension of implementation under paragraph (3) of article 17. If a notified State completed its evaluation in less than six months, however, paragraph 1 would call for it to inform the notifying State immediately of its findings. A finding that the planned measures would be consistent with articles 6 and 8 would conclude the procedures under Part III, and the notifying State could proceed without delay to implement its plans. Even if a contrary finding were made, however, early communication of that finding to the notifying State would result in bringing to a speedier conclusion the applicable procedures under article 17.

(2) Paragraph 2 deals with the second obligation of the notified States. This obligation only arises, however, in respect of a notified State which "finds that implementation of the planned measures would be inconsistent with

the provisions of articles 6 or 8". That is, the obligation is triggered by a finding that implementation of the plans would result in a breach of the obligation of equitable and reasonable utilization under article 6, or of the duty not to cause appreciable harm under article 8. (As noted in paragraph (3) of the commentary to article 12, the term "implementation" applies to measures planned by private parties as well as those planned by the State itself.) Paragraph 2 requires a notified State which has made such a finding to provide the notifying State, within the six-month period specified in article 13, with an explanation of the finding. The explanation must be "documented" - i.e. it must be supported by an indication of the factual or other bases for the finding - and must set forth the reasons for the notified State's conclusion that implementation of the planned measures would violate articles 6 or 8. 198/ The word "would" was used instead of terms such as "might" in order to indicate that the notified State must conclude that a violation of articles 6 or 8 is more than a mere possibility. The reason for the strictness of these requirements is that a communication of the kind described in paragraph 2 permits a notified State to request, pursuant to paragraph 3 of article 17, further suspension of the implementation of the planned measures in question. This effect of the communication justifies the requirements of paragraph 2 that the notified State demonstrate its good faith by showing that it has made a serious and considered assessment of the effects of the planned measures.

Article 16

Absence of reply to notification

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

198/ A similar requirement is contained in article 11 of the 1975 Statute of the Uruguay River (note 86 above), which provides in the relevant part that the communication of the notified Party "shall state which aspects of the works or of the mode of operation may cause appreciable harm to ... the régime of the river or the quality of its waters, the technical grounds for that conclusion and suggested changes in the project or the mode of operation."

Commentary

(1) Article 16 deals with cases in which the notifying State, during the six-month period provided for in article 13, receives no communication under paragraph 2 of article 15 - i.e. one which states that the planned measures would be inconsistent with the provisions of articles 6 or 8, and provides an explanation for such finding. In such a case, the notifying State may implement or permit the implementation of the planned measures, subject to two conditions. The first is that the plans be implemented "in accordance with the notification and any other data and information provided to the notified States" under articles 12 and 14. The reason for this condition is that the silence of a notified State with regard to the planned measures can be regarded as tacit consent only in relation to matters which were brought to its attention. The second condition is that implementation of the planned measures be consistent with the obligations of the notifying State under articles 6 and 8.

(2) The idea underlying article 16 is that if a notified State does not provide a response under paragraph 2 of article 15 within the required period, it is precluded from claiming the benefits of the protective régime contained in Part III. The notifying State may then proceed with the implementation of its plans, subject to the conditions referred to in paragraph (1) of the commentary to this article. Permitting the notifying State to proceed in such cases is an important aspect of the balance the articles seek to strike between the interests of the notifying and notified States.

Article 17

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Commentary

(1) Article 17 deals with cases in which there has been a communication under paragraph 2 of article 15, that is, one containing a finding by the notified State that "implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8".

(2) Paragraph 1 of article 17 calls for the notifying State to enter into consultations and negotiations with a State making a communication under paragraph 2 of article 15, "with a view to arriving at an equitable resolution of the situation". The "situation" referred to is that produced by the good faith finding of the notified State that implementation of the planned measures would be inconsistent with the obligations of the notifying State under articles 6 and 8. The "equitable resolution" referred to in paragraph 1 could include, for example, modification of the plans to eliminate their potentially harmful aspects, adjustment of other uses being made by either of the States, or the provision by the notifying State of monetary or another form of compensation acceptable to the notified State. Consultations and negotiations have been required in similar circumstances in a number of treaties 199/ and

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199/ See, e.g., the 1954 Convention between Austria and Yugoslavia concerning water economy questions relating to the Drava, United Nations, Treaty Series, vol. 227, p. 128, article 4; the 1960 Convention on the protection of Lake Constance against pollution, note 109 above, article 1, paragraph 3; the 1964 Agreement between Poland and the Soviet Union concerning the use of water resources in frontier waters, note 141 above, article 6; the 1964 Agreement concerning the River Niger Commission and the navigation and transport on the River Niger, note 94 above, article 12; and the 1981 Convention between Hungary and the Soviet Union concerning water economy questions in frontier waters, referred to in Environmental Protection and Sustainable Development, Legal Principles and Recommendations, pp. 106, 142, articles 3-5.

decisions. 200/ The need for such consultations and negotiations has also been recognized in a variety of resolutions and studies by intergovernmental 201/ and international non-governmental organizations. 202/

200/ See especially the Lake Lanoux award (note 123 above), discussed in the second report of the Special Rapporteur (A/CN.4/399, paras. 111-124). After finding that under general international law an agreement with potentially affected States was not a prerequisite in the implementation of planned measures, the tribunal stated:

> "... international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement ... [T]here would thus be an obligation for States to agree in good faith to all negotiations and contacts which should, through a wide confrontation of interests and reciprocal goodwill, place them in the best circumstances to conclude agreements. ... The Tribunal considers that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own."

Yearbook ... 1974, vol. II (Part Two), pp. 197, 198, document A/5409, paras. 1065, 1068, citing "The Tacna-Arica Question", in United Nations, Reports of International Arbitral Awards, vol. II (United Nations publication, Sales No. 1949. Vol. I), pp. 921 et seq.; and "Railway traffic between Lithuania and Poland", in P.C.I.J., Series A/B 42, pp. 108 et seq. Of general relevance in this regard are several decisions of the International Court of Justice in cases involving the law of the sea, such as the North Sea Continental Shelf cases (I.C.J. Reports, 1969, p. 3), especially paragraphs 85 and 87; and the Fisheries Jurisdiction case (I.C.J. Reports, 1974, p. 3), especially paragraphs 71 and 78.

201/ See, e.g., the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974), article 3; General Assembly resolution 3129 (XXVIII) of 13 December 1973; the 1974 Recommendation of the OECD Council concerning transfrontier pollution (recommendation C(74)224, Annex, Title E); and the 1978 Draft Principles of Conduct on Shared Natural Resources adopted by UNEP, note 195 above, principles 5, 6 and 7.

202/ See, e.g., the resolutions adopted by the Institute of International Law in 1961 (note 196 above), article 6, and 1979 (Annuaire de l'Institut de droit International, 1979, vol. 58, Part Two, p. 199), article 7 (d); and those adopted by the International Law Association in 1980 (note 193 above), article 8, and 1982 (on water pollution) (ILA, Report of the Sixtieth Conference (Montreal, 1982) article 6.

(3) Paragraph 2 concerns the manner in which the consultations and negotiations provided for in paragraph 1 are to be conducted. The language employed was inspired chiefly by the judgement of the International Court of Justice in the Fisheries Jurisdiction case 203/ and the award of the tribunal in the Lake Lanoux arbitration. 204/ The manner in which consultations and negotiations are to be conducted was also addressed by the Court in The North Sea Continental Shelf Cases. 205/ The expression "legitimate" interests was employed in article 3 of the Charter of Economic Rights and Duties of States, 206/ and is utilised in paragraph 2 in order to provide some limitation of the scope of the term "interests".

(4) Paragraph 3 requires the notifying State to suspend implementation of the planned measures for a further period of six months, but only if requested to do so by the notified State when the latter makes a communication under paragraph 2 of article 15. Implementation of the measures during a reasonable period of consultations and negotiations would not be consistent with the requirements of good faith laid down in paragraph 2 and discussed in the Lake Lanoux award. 207/ By the same token, however, consultations and negotiations should not further suspend implementation for more than a reasonable period of time. This period should be the subject of agreement by the States concerned, who are in the best position to decide upon a length of time that is appropriate under the circumstances. In the event that they are not able to reach agreement, however, paragraph 2 sets a period of six months. After this period has expired, the notifying State may proceed with the implementation of its plans, subject always to its obligations under articles 6 and 8.

203/ Note 200 above. See especially paragraph 78 of that judgement.

204/ Note 123 above. See the passages of this award quoted in not 200 above.

205/ See I.C.J. Reports, 1969, paras. 85 and 87.

206/ Article 3 is set forth in the text accompanying note 139 above.

207/ See, e.g. the excerpts from the award in note 200 above.

Article 18

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

Commentary

(1) Article 18 addresses the situation in which a watercourse State is aware that measures are being planned by another State (or by private parties in that State) and believes that they may have an appreciable adverse effect upon it, but has received no notification thereof. In such a case, article 18 allows the first State to seek the benefits of the protective régime provided for under articles 12 and following.

(2) Paragraph 1 allows "a watercourse State" in the position described above to request the State planning the measures in question "to apply the provisions of article 12". Several comments are called for concerning the quoted language. First, the expression "a watercourse State" is not intended to exclude the possibility that more than one State believes measures are being planned by another State. Second, the expression "apply the provisions of article 12" should not be taken as suggesting that the State planning measures necessarily failed to comply with its obligations under article 12. That is, the State may have made an assessment of the potential of the planned measures for causing appreciable adverse effects upon other watercourse States, and concluded in good faith that no such effects would result

therefrom. Paragraph 1 allows a watercourse State to request that the State planning measures take a "second look" at its assessment and conclusion, and does not prejudge the question whether the planning State initially complied with its obligations under article 12. In order to be entitled to make such a request, however, two conditions must be satisfied. The first is that the requesting State have "serious reason to believe" that measures are being planned which may have an appreciable adverse effect upon it. The second is that the requesting State must provide a "documented explanation, setting forth the reasons for such belief". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A serious and substantiated belief is necessary, particularly in view of the possibility that the planning State may be required to suspend implementation of the plans under paragraph 3 of the present article.

(3) The first sentence of paragraph 2 deals with the case in which the planning State concludes, after taking a "second look" as described in the preceding paragraph, that it is not under an obligation to provide a notification under article 12. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the planning State to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the planning State does not satisfy the requesting State. It requires that, in such a situation, the planning State promptly enter into consultations and negotiations with the other State (or States), at the request of the latter. The consultations and negotiations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 17. That is, their purpose is to achieve "an equitable resolution of the situation", and they are to be conducted "on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State". These phrases have been discussed in the commentary to article 17.

(4) Paragraph 3 requires the planning State to refrain from implementing the planned measures for a period of six months, in order to allow consultations and negotiations, if it is requested to do so by the other State at the time it requests consultations and negotiations under paragraph 2. This provision

is similar to that contained in paragraph 3 of article 17, but in the context of article 18 the period starts running from the time of the request for consultations under paragraph 2 of that article.

Article 19

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

Commentary

(1) Article 19 deals with planned measures whose implementation is of the utmost urgency "in order to protect public health, public safety or other equally important interests". It does not deal with emergency situations, which will be addressed in a subsequent article. Article 19 concerns highly exceptional cases in which interests of overriding importance require that planned measures be implemented immediately, without awaiting the expiration of the periods allowed for reply and for consultations and negotiations. Provisions of this kind have been included in a number of international agreements. 208/ In formulating the article, the Commission has endeavoured to guard against possibilities of abuse of the exception it establishes.

(2) Paragraph 1 refers to the kinds of interests that must be involved in order for a State to be entitled to proceed to implementation under article 19. The interests in question are those of the highest order of

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208/ See, e.g., the 1922 Convention relating to watercourses and dikes on the Danish-German frontier (League of Nations, Treaty Series, vol. X, p. 217), article 29; and the 1960 Convention on the Protection of Lake Constance from Pollution, note 109 above, article 1, paragraph 3.

importance, such as protecting the population from the danger of flooding. Paragraph 1 also contains a waiver of the waiting periods provided for under article 14 and paragraph 3 of article 17. The right of the State to proceed to implementation is, however, subject to its obligations under paragraphs 2 and 3 of the present article.

(3) Paragraph 2 requires a State proceeding to immediate implementation under article 19 to provide the "other watercourse States referred to in article 12" with a formal declaration of the urgency of the measures, together with the relevant data and information. These requirements are intended to provide for a demonstration of the good faith of the State proceeding to implementation, and to ensure that the other States are informed as fully as possible of the possible effects of the measures. The "other watercourse States" are those upon which the measures "may have an appreciable adverse effect".

(4) Paragraph 3 requires that the State proceeding to immediate implementation enter promptly into consultations and negotiations with the other States, if and when requested to do so by those States. The requirement that the consultations and negotiations be conducted in the manner indicated in paragraphs 1 and 2 of article 17 is the same as that contained in paragraph 2 of article 18, and is discussed in the commentary to that paragraph.

Article 20

Data and information vital to national defence or security

> Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Commentary

Article 20 creates a very narrow exception to the requirements of articles 10 to 19. The Commission is of the view that States cannot realistically be expected to agree to the release of information that is vital to their national defence or security. At the same time, however, a watercourse State that may experience adverse effects of planned measures should not be left entirely without information concerning those possible

effects. The article therefore requires a State withholding information to "co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances". The "circumstances" referred to are those that led to the withholding of the data or information. The obligation to provide "as much information as possible" could be fulfilled in many cases by furnishing a general description of the manner in which the measures would alter the condition of the water or would affect other States. 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. As always, the exception created by article 20 is without prejudice to the obligations of the planning State under articles 6 and 8.

Article 21

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

Commentary

Article 21 addresses the exceptional case in which direct contacts cannot be established between the watercourse States concerned. As already mentioned in the commentary to article 10, 209/ circumstances such as an armed conflict or absence of diplomatic relations may raise serious obstacles to the kinds of direct contacts provided for in articles 10 to 20. Even in such circumstances, however, there will often be channels which the States concerned utilize for the purpose of conveying communications to each other. Examples of such channels are third countries, armistice commissions, and the good offices of international organizations. Article 21 requires that the various forms of contact provided for in articles 10 to 20 be effected through any such channel, or "indirect procedure", which has been accepted by the

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209/ See paragraph (3) of the commentary to article 10.

States concerned. All of the forms of contact required by articles 10 to 20 are covered by the expressions employed in article 21, namely, "exchange of data and information, notification, communication, consultations and negotiations".

D. Points on which comments are invited

191. The Commission would welcome the views of Governments either in the Sixth Committee or in written form in particular on the following points:

(1) The degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection, relating to the law of the non-navigational uses of international watercourses, problems which are discussed in paragraphs 134-137, 169-170 and 175-176 above;

(2) The concept of "appreciable harm" in the context of paragraph 2 of article 16, discussed in paragraphs 151-159 above.

CHAPTER IV

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

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

193. On the basis of the reports of the Special Rapporteur, the Commission (a) at its second session, in 1950, adopted a formulation of the principles of international law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of Offences against the Peace and Security of Mankind, with commentaries, to the General Assembly. 210/

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

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

196. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of

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

Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.

197. The Commission, at its thirty-fourth session in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. The Commission, from its thirty-fifth session, in 1983, to its thirty-seventh session, in 1985, received three reports from the Special Rapporteur. 211/

198. The stage reached by the Commission in its work on the topic by the end of its thirty-seventh session, in 1985, was as follows. The Commission was of the opinion that the draft Code should cover only the most serious international offences. These offences would be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject. As to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on that point, because of the political nature of the problem of the international criminal responsibility of States. As to the implementation of the Code, since some members considered that a Code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requested the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals. 212/ The General Assembly was requested to indicate whether such jurisdiction should be competent with respect to States. 213/

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

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

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

199. Moreover, the Commission had stated that it was its intention that the content rationae personae of the draft Code should be limited at the stage to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. As to the first stage in the Commission's work on the draft Code and in the light of General Assembly resolution 38/132 of 19 December 1983, the Commission intended to begin by drawing up a provisional list of offences, while bearing in mind the drafting of an introduction summarising the general principles of international criminal law relating to offences against the peace and security of mankind.

200. As regards the content rationae materiae of the draft Code, the Commission intended to include the offences covered by the 1954 draft Code, with appropriate modifications of form and substance to be considered by the Commission at a later stage. As of the thirty-sixth session, a general trend had emerged in the Commission in favour of including, in the draft Code, colonialism, apartheid and, possibly, serious damage to the human environment and economic aggression, if appropriate legal formulations could be found. The notion of economic aggression had been further discussed at the thirty-seventh session of the Commission, but no definite conclusions were reached. As regards the use of atomic weapons, the Commission had discussed the problem at length, but intended to examine the matter in greater depth in the light of any views expressed in the General Assembly. With regard to mercenarism, the Commission considered that, in so far as the practice was used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constituted an offence against the peace and security of mankind. The Commission considered, however, that it would be desirable to take account of the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. As regards the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc., and the hijacking of aircraft, the Commission considered that these practices had aspects which could be regarded as relating to the phenomenon of international terrorism and should be approached from that angle. With regard

to piracy, the Commission recognized it as an international crime under customary international law. It none the less doubted whether, in the present international community, the offence could be such as to constitute a threat to the peace and security of mankind. 214/

201. At its thirty-seventh session, in 1985, the Commission considered the Special Rapporteur's third report, which specified the category of individuals to be covered by the draft Code and defined an offence against the peace and security of mankind. The report examined the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft Code and possible additions to those paragraphs. The report also proposed a number of draft articles: namely, article 1 ("Scope of the present articles"); article 2 ('Persons covered by the present articles"); article 3 ("Definition of an offence against the peace and security of mankind"); and article 4 ("Acts constituting an offence against the peace and security of mankind"). 215/

202. The Commission, at its thirty-seventh session, referred draft article 1, draft article 2 (first alternative) and draft article 3 (both alternatives) to the Drafting Committee. It also referred section A of draft article 4 (both alternatives), entitled "The Commission [by the authorities of a State] of an act of aggression" to the Drafting Committee, on the understanding that the Drafting Committee would consider it only if time permitted and that, if the Drafting Committee agreed on a text for draft article 4, section A, it would be for the purpose of assisting the Special Rapporteur in the preparation of his fourth report. 216/

203. At its thirty-eighth session, in 1986, the Commission had before it the Special Rapporteur's fourth report on the topic (A/CN.4/398 and Corr.1-3). The Special Rapporteur had divided his fourth report into five parts, namely:

214/ Yearbook ... 1983, vol. II (Part Two), p. 17, document A/39/10, para. 65.

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

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

I. Crimes against humanity; II. War crimes; III. Other offences (related offences); IV. General principles; and V. Draft articles.

204. The set of draft articles submitted by the Special Rapporteur in part V of the report contained a recasting of the draft articles submitted at the Commission's thirty-seventh session, as well as a number of new draft articles. 217/

205. The Commission, after engaging in an in-depth general discussion of parts I to IV of the Special Rapporteur's fourth report, 218/ decided to defer consideration of the draft articles to future sessions. It was of the opinion that, meanwhile, the Special Rapporteur could recast the draft articles in the light of the opinions expressed and proposals made that year by the members of the Commission and of the views that would be expressed in the Sixth Committee of the General Assembly at its forty-first session. 219/

206. During the same session, the Commission again discussed the problem of the implementation of the Code when it considered the principles relating to the application of criminal law in space. It indicated that it would examine carefully any guidance that might be furnished on the various options set out in paragraphs 146 to 148 of its report on that session, 220/ reminding the General Assembly in that regard of the conclusions contained in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session in 1983. 221/

207. At its thirty-ninth session, the Commission had before it the fifth report on the topic submitted by the Special Rapporteur (A/CN.4/404 and Corr.1 and 2 (Spanish only)). In his report, the Special Rapporteur recast some of

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

218/ Ibid., paras. 80 to 102.

219/ Ibid., para. 185.

220/ Ibid.

221/ Ibid. See also para. 207 below.

the draft articles he had proposed at the thirty-eighth session. Those draft articles comprise the introduction to the draft Code and deal with the definition and characterization of crimes against the peace and security of mankind, as well as with the general principles. The Commission also had before it views on the topic submitted by Member States (A/41/406, A/41/537 and Add.1-2, A/42/179 and A/CN.4/407 and Add.1-2).

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

209. At the thirty-ninth session, the Commission considered the text of draft articles 1 to 11, as contained in the fifth report, and decided to refer them to the Drafting Committee. It furthermore recommended to the General Assembly that it amend the title of the topic in English, in order to achieve greater uniformity and equivalence between the different versions. The General Assembly in its resolution 42/156 endorsed that recommendation so that the English title of the topic now reads: "Draft Code of crimes against the peace and security of mankind".

210. Also at the thirty-ninth session, the Commission, after having considered the report of the Drafting Committee, provisionally adopted articles 1 (Definition), 2 (Characterization), 3 (Responsibility and punishment), 5 (Non-applicability of statutory limitations) and 6 (Judicial guarantees), with the commentaries thereto.

B. Consideration of the topic at the present session

211. At its present session, the Commission had before it the sixth report on the topic submitted by the Special Rapporteur (A/CN.4/411 and Corr.1 and 2). In his report, the Special Rapporteur recast draft article 11, on crimes

against peace, as proposed in his fourth report. 222/ In recasting the draft article, the Special Rapporteur took account of the discussions held at the Commission's thirty-eighth session and of the opinions expressed in the Sixth Committee at the forty-first session of the General Assembly. The Special Rapporteur divided his sixth report into two main parts. In part I, he sought to revise and supplement the part of the 1954 draft Code relating to crimes against peace. He dealt, in particular, with the problems raised by preparation of aggression, annexation, the sending of armed bands into the territory of another State and intervention in the internal and external affairs of a State. In part II of his sixth report, the Special Rapporteur "tackled" new characterisations of acts as crimes against peace and dealt in particular with colonial domination and mercenarism.

212. The Commission considered the Special Rapporteur's sixth report at its 2053rd to 2061st meetings. After having heard the introduction by the Special Rapporteur, the Commission considered draft article 11, on crimes against peace, as contained in the sixth report by the Special Rapporteur, and decided to refer it to the Drafting Committee.

213. At its 2082nd to 2085th meetings, the Commission, after having considered the report of the Drafting Committee, provisionally adopted the articles.

214. The views expressed by the members on these articles are reflected in the commentaries thereto, which are contained in section C below, together with the text of the articles.

1. Aggression

215. With regard to the crime of aggression, draft article 11, paragraph 1, as submitted by the Special Rapporteur, reproduced the Definition of Aggression contained in General Assembly resolution 3314 (XXIX) of 14 December 1974, with the exception of the provisions relating to evidence of aggression, the consequences of aggression and interpretation.

222/ See Report of the International Law Commission on the work of its thirty-eighth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10, para. 79, note 84).

216. The various positions stated in the Commission on the crime of aggression led to the text of the draft article reproduced in section C below and are reflected in the commentaries thereto.

2. Threat of aggression

217. In draft article 11, paragraph 2, 223/ the Special Rapporteur included a separate provision on threat of aggression as a crime against peace.

218. Some members expressed doubts about threat of aggression as a crime against peace. They asked how individuals could be punished for having committed a threat of aggression and what would happen if the threat was not carried out. In their view, a threat which was not followed by some specific action should not be regarded as a criminal act.

219. Many members nevertheless stated that they were in favour of including threat of aggression as a separate crime. It was pointed out in that regard that threat of aggression, which had been covered by the 1954 draft Code, was referred to in Article 2, paragraph 4, of the Charter, on the prohibition of the use of force and that the General Assembly, in its resolution 42/22 of 18 November 1987 containing the "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations" referred to it seven times as an act constituting a violation of international law and of the Charter and entailing the responsibility of the State.

223/ The relevant text submitted by the Special Rapporteur, reads as follows:

CHAPTER II

Acts constituting crimes against the peace and security of mankind

PART I. Crimes against peace

"Article 11. Acts constituting crimes against peace

...

2. Recourse by the authorities of a State to the threat of aggression against another State."

220. As to its concrete manifestations, threat of aggression could take the form of intimidation, troop concentrations or military manoeuvres near another State's borders or mobilization for the purpose of exerting pressure on that State to make it yield to demands. In some circumstances, the result of threat of aggression was the same as that of aggression. Its inclusion as a specific crime against peace in the draft Code was thus fully justified and would, at the same time, help to deter would-be aggressors from preparing aggression.

221. As to the wording of the article in regard to threat of aggression, some members indicated that it was important not to allow any confusion between an actual threat of aggression and mere verbal excesses. There was also the delicate problem of proof, as in the case of preparation of aggression. It was essential to avoid a loosely drafted definition that would enable a State to use the pretext of a so-called threat in order to justify aggression. In that connection, one member pointed out that useful guidance could be derived from the judgment of the International Court of Justice in the Nicaragua v. United States of America case (Merits) 224/, in which the Court had dwelt on the distinction between aggression and threat of aggression and between the latter and intervention.

3. Annexation

222. The Special Rapporteur did not include in draft article 11, a separate provision on annexation as a crime against peace. In the oral introduction to his report, he recalled that annexation was already covered in article 3 (a) of the Definition of Aggression (annex to General Assembly resolution 3314 (XXIX), dated 14 December 1974) which referred, inter alia, to "any annexation by the use of force of the territory of another State or part thereof". Since he had used that wording in the draft articles on aggression being proposed to the Commission, he asked whether that provision was enough or whether there should be another, separate provision on annexation, as had been the case in the 1954 draft Code.

224/ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986 (Merits) I.C.J. Reports 1986, p.14.

223. Many members of the Commission pointed out that annexation, as covered by the Definition of Aggression, meant only annexation resulting from the use of armed force. Yet annexation was the acquisition, against the wishes of a State, of part or all of its territory by another State and it could result not only from the actual use of force, but also from a threat. The wording used in the 1954 draft Code was thus much broader, since it referred to annexation by means of acts contrary to international law. In the opinion of those members, any annexation, whatever its modalities, should be regarded as a crime against peace. It should therefore be included as a separate crime in the draft Code.

4. Preparation of aggression

224. The Special Rapporteur did not include in draft article 11, a provision on the preparation or planning of aggression. In his report, he pointed out that preparation of aggression had been covered by the Charter of the Nürnberg International Military Tribunal (art. 6, para. (a)) and by the Charter of the International Military Tribunal for the Far East (art. 5, para. (a)), as well as by the Commission in the "Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (Principle VI, para. (i)). He nevertheless questioned whether preparation of aggression should be kept as an offence separate from aggression, since it was very difficult to make a clear-cut distinction between preparation of aggression and preparation for defence. He also questioned how criminal intent could be established if aggression had not occurred and whether a perpetrator who had deliberately decided not to carry out his plan for preparation, which was not followed by execution, should be prosecuted.

225. Many members of the Commission were of the opinion that preparation of aggression should be dealt with as a crime distinct from aggression itself. The concept would nevertheless have to be precisely defined. The fact that the concept was elusive was not a valid argument for not including it in the Code. It was pointed out that a distinction could be drawn between preparation of aggression and defensive measures on the basis of existing military, technical, legal and political criteria. It was noted that the inclusion of preparation of aggression would be of vital importance for deterrence and prevention, particularly of nuclear war. Nowadays, aggression

involved far more complicated techniques than formerly and, hence, more sophisticated planning, which would be carried out by the entire State apparatus. It was a fairly long-term undertaking and, at every stage, it involved particular persons who occupied key posts in the State military or economic apparatus, took decisions and could not be relieved of responsibility. It was pointed out that the inclusion of preparation of aggression would offer the advantage of making it possible to incriminate not only preparations which did not lead to actual aggression for reasons beyond the control of the potential aggressor, but also preparations carried out by authorities which were not the same as those that committed the aggression. It was also noted that the necessary elements of the crime of preparation of aggression were criminal intent and the material element of preparation. In general, preparation would not consist simply of military measures, such as a build-up of weapons and armed forces, which would be difficult to distinguish from a country's preparation of its defence. Preparation of aggression would consist rather of a high degree of military preparation far exceeding the needs of legitimate national defence; the planning of attacks by the general staff; the pursuit of foreign policies of expansion and domination; and persistent refusal of the peaceful settlement of disputes.

226. Some members, however, were of the view that preparation of aggression should not be included as a separate offence under the Code. They believed that it would be very difficult to distinguish acts amounting to preparation of aggression from other legitimate acts of defence, and in any case it could be covered by the crime of the threat of aggression.

227. Several members who were in favour of the inclusion of preparation of aggression referred to the concept of planning as an element of preparation.

228. With regard to the concept of planning, the Special Rapporteur pointed out that the Charter of the Nürnberg International Military Tribunal referred to "participation in a common plan" (art. 6 (a)) and to the "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy". The Special Rapporteur agreed that it was an important question, one that was, moreover, covered by the Charter of the International Military Tribunal for the Far East (art. 5 (a)), which referred to "participation in a common plan", and by Law No. 10 of the

Control Council for Germany (art. II (a)), which referred to "participation in a common plan or conspiracy". He also recalled that he had dealt with the question in his fourth report, in connection with criminal participation, and in particular, with the concept of conspiracy and that that concept, which involved the idea of collective responsibility, would be considered during the study of related offences.

5. Sending of armed bands into the territory of another State

229. With regard to the organisation or toleration of armed bands within the territory of a State for the purpose of incursions into the territory of another State, acts which had been characterised as offences against the peace and security of mankind in the draft Code prepared by the Commission in 1954, the Special Rapporteur pointed out that they had been included among the acts constituting aggression, as defined by the General Assembly in resolution 3314 (XXIX) of 14 December 1974 (art. 3 (g)). He therefore proposed that such acts should not be made separate crimes, but should be regarded as forming part of the crime of aggression.

230. The Commission shared the view of the Special Rapporteur.

6. Intervention and terrorism

231. In his report, the Special Rapporteur submitted two alternatives for draft article 11, paragraph 3 225/ concerning intervention, including acts of terrorism.

225/ The alternatives for draft article 11, paragraph 3, submitted by the Special Rapporteur read as follows:

"Article 11. Acts constituting crimes against peace

The following constitute crimes against peace:

...

3. First alternative:

Interference by the authorities of a State in the internal or external affairs of another State. The term 'interference' means any act

232. The Special Rapporteur said that intervention was an elusive concept as regards both its nature and its manifestations. It could be military, political or economic and based on the most varied motives. Military intervention merged into aggression. When the intervention was political, the problem was to determine from what point in time it became wrongful. It was difficult to exclude from international relations the influence which certain States had on other States and which was sometimes mutual. That influence created a kind of privileged relationship between them that authorized certain forms of intervention which were acceptable to those concerned. That type of intervention, which often took the form of advice or friendly pressure, was not at issue. Not all pressure was friendly. Beyond certain limits, it became coercion.

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or any measure, whatever its nature or form, amounting to coercion of a State.

3. Second alternative:

Interference by the authorities of a State in the internal or external affairs of another State:

(i) By fomenting, encouraging or tolerating the fomenting of civil strife or any other form of internal disturbance or unrest in another State;

(ii) By organizing, training, arming, assisting, financing or otherwise encouraging activities against another State, in particular terrorist activities.

(a) Definition of terrorist acts

The term 'terrorist acts' means criminal acts directed against a State or the population of a State and calculated to create a state of terror in the minds of public figures, or a group of persons or the general public.

(b) Terrorist acts

The following constitute terrorist acts:

(i) Any act causing death or grievous bodily harm or loss of liberty to a head of State, persons exercising the

233. As to the legal basis of the principle of non-intervention, the Special Rapporteur pointed out that, since the Charter of the United Nations, that principle had been enunciated in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (General Assembly resolution 2131 (XX), of 21 December 1965) and in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), of 24 October 1970) which devotes five paragraphs to that principle. In addition, according to the Judgment of 27 June 1986 of the International Court of Justice in the Nicaragua case, the rules of non-use of force and non-intervention are part of customary international law. "In the present dispute", the Judgment emphasized, "the Court, while exercising its jurisdiction only in respect of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other

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prerogatives of the head of State, their hereditary or designated successors, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

(ii) Acts calculated to destroy or damage public property or property devoted to a public purpose;

(iii) Any act calculated to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity;

(iv) The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act."

ways". 226/ The Court also stated that "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference" and that "though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law". 227/

234. As to the legal content of the concept of intervention, the Special Rapporteur wondered whether, in view of the nuances and degrees involved, the concept was not too general and too varied in its manifestations to constitute a legal concept. The relevant instruments generally contained too broad a definition of intervention.

235. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, of 24 October 1970, 228/ gave a very broad definition of intervention. Intervention could be "direct" or "indirect"; it covered internal affairs as well as external affairs. It did not only concern the use of armed force, but covered "all other forms of interference or attempted threats" against another State. The Declaration drew on the Bogotá Charter (art. 18), whereby "No State or group of States has the right to intervene directly or indirectly in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements".

236. That very broad content, the Special Rapporteur pointed out, was also found in resolution 78, of 21 April 1972, of the General Assembly of the Organization of American States, which reaffirmed "the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another State and obtain from it advantages of any kind"

226/ I.C.J. Reports 1986, p. 98, para. 185.

227/ Ibid., p. 106, para. 202.

228/ General Assembly resolution 2625 (XXV).

(para. 2). 229/ That provision, which concerns coercive measures, is supplemented by another provision, which refers to acts of subversion and relates to the obligation "to refrain from organising, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another State and from intervening in a civil war in another state or in its internal struggles" (para. 3). 230/

237. The Special Rapporteur pointed out that the Court had been called upon to consider the problem of the content of the concept of intervention, but only with reference to the elements which it considered relevant to the disputes before it. It had noted that "A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines and indeed forms the very essence of prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State". 231/

238. Further to those considerations, the Special Rapporteur noted that the concept of intervention was very complex and involved several types and degrees, but he pointed out that the Commission's 1954 draft Code had invoked the concept of intervention only in connection with "coercive measures of an economic or political character" (art. 2, para. (9)). Yet intervention, in the Special Rapporteur's view, was not limited to such measures alone. It also covered, in addition to coercive measures, acts of subversion which were dealt with in separate provisions in the 1954 draft Code, namely, activities to undertake or encourage civil strife in another State (art. 2, para. 5), and

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229/ Quoted in I.C.J. Reports 1986, p. 102, para. 192.

230/ Ibid.

231/ Ibid., p. 108, para. 205.

so on. He wondered, in the circumstances, why the 1954 draft Code used the expression "intervention ... in the internal or external affairs of another State" only in connection with coercive acts of an economic or political character. In the Special Rapporteur's opinion, moreover, the forms of intervention enumerated in the 1954 draft did not cover the whole subject. Many other forms of intervention deserved mention. The modern world experienced many other means of subversion, such as training at special camps, provision of arms, financing of internal movements, whatever their tendency, etc. The decision of the Court in the Nicaragua case had listed the most typical of those means and the second alternative for the Special Rapporteur's draft paragraph 3 on intervention expressly enumerated various forms of subversion, including terrorist acts.

239. With reference to terminology, some members of the Commission expressed doubts regarding the distinction between lawful intervention and wrongful intervention. In their opinion, the term "intervention" should be utilised as a term of act for wrongful conduct and the concept should be distinguished from forms of relations between States which, since they did not include an element of coercion, did not fall within the definition of intervention.

240. The Special Rapporteur pointed out that he had used such a distinction in analysing the concept of intervention - as had the Court itself in its judgment - yet the distinction had not been drawn in the relevant paragraph of the proposed draft article, which dealt with intervention as a wrongful act.

241. Many members were of the view that the direct use of armed force by a State against another State was more a matter of aggression than of intervention in the proper sense. Some other members felt that the case of minor armed incidents which are not serious enough to constitute aggression under General Assembly resolution 3314 (XXIX) on the Definition of Aggression should be left aside. Intervention consisted of coercion by one State of another State that was an obstacle to the free exercise of its sovereign rights, in other words, the rights recognized by international law as falling exclusively within its national competence. Intervention had become the most common form of coercion and the customary expression of power relations in the world. It took on subtle forms to elude the sanctions on aggression, yet sometimes led to the same results.

242. Some members pointed to particularly odious examples of intervention. One example was "intervention by consent" or "intervention by request", in other words, intervention by one State in the territory of another with the latter's alleged consent expressed in a so-called agreement beforehand or afterwards. That kind of intervention had often been used in the past to prevent a people from adopting the political, economic or social régime of its choice. Another particularly odious example of intervention was the neo-colonial action whereby a State, while seemingly respecting the sovereignty of another State, actually took over from that State in regard to fundamental aspects of its activities, thereby affecting its identity.

243. Several members were of the view that, in its work on the crime of intervention, the Commission should adopt as a guide the formulations contained in the annex to General Assembly resolution 2625 (XXV), containing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, as well as principle VI of the Final Act of the Helsinki Conference on Security and Co-operation in Europe.

244. As to the alternatives for draft article 11, paragraph 3, submitted by the Special Rapporteur, many members found that the first was too vague and lacked precision and they expressed a preference for the second alternative. Several of those members were of the opinion that the second alternative should be supplemented by reproducing the formulation contained in article 2, paragraph (9), of the Commission's 1954 draft Code, which spoke of intervention "by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind". Other members also criticised the second alternative as being too vague in referring to such notions as "unrest" or "activities against another State". It was suggested that the wording should follow the definition of intervention in General Assembly resolution 2625 (XXV), Annex.

245. One member said that he was in favour of combining the alternatives proposed by the Special Rapporteur. Another was of the opinion that it was not necessary to have intervention in the Code as a separate crime. The more serious acts included in the notion of intervention should be precisely described and each of them inserted in the Code as a separate crime.

246. With regard to terrorism, specified in draft article 11, paragraph 3 (ii) (second alternative), as being a form of intervention, the Special Rapporteur pointed out in his report that the definition of terrorism contained in his proposed text reproduced the relevant terms of the Convention on the Prevention and Punishment of Terrorism, adopted at Geneva on 16 November 1937 by the International Conference on the Repression of Terrorism.

247. In the course of the Commission's discussion a distinction was drawn between internal terrorism, which is carried out by individuals or local groups without any foreign support, and two types of international terrorism, namely State terrorism (operations financed, organized, encouraged, directed or supported, either individually or collectively, from a material or logistic point of view by a State or a group of States, for the purpose of intimidating another State, person, group or organization) and terrorism by groups or organizations operating at the international level.

248. A consensus emerged in the Commission that acts of terrorism confined to a State without any foreign support did not fall within the chapter of the draft Code concerning crimes against peace. With regard to international terrorism, many members were of the opinion that the draft Code should cover terrorism committed by a State against another State.

249. Some members were of the view that, in some respects, terrorism could constitute not only a crime against peace but also a crime against mankind and that the other kind of international terrorism, in other words, terrorism by groups or organizations acting at the international level, should also be covered by the draft Code. It was pointed out in that connection that the particularly immoral aspect of modern terrorism was that the perpetrators sought to terrorize public figures or the public at large by killing blindly, by taking hostages or by threatening the lives of innocent people, as was the case with hijackings of aircraft or with bomb attacks in public places. Terrorism, it was pointed out, was taking on increasingly heinous forms. Nowadays, terrorism might well extend to the use of chemical, bacteriological or nuclear weapons and use as its targets power stations, including nuclear power stations, irrigation facilities, reservoirs of drinking water, industrial plant, weapons depots - in short, a State's nerve-centres. In the opinion of these members, while terrorism was by its very purposes detrimental

to peace, particularly when it was State organised and State directed, it could, in addition, because of the methods employed and its sometimes unlimited scale, above all when it was used against an innocent population, have the character of a crime against mankind. It was also pointed out that the Commission in the further elaboration of the definition and scope of international terrorism should attach greater importance to treaties in force as well as to the work of experts dealing with the subject.

250. While commending the efforts of the Special Rapporteur in defining international terrorism, it was suggested that such a definition could usefully draw upon the example of several recent international conventions and treaties which adopted an enumerative technique like the Indo-Canadian extradition treaty of 1987.

251. Some reservations were expressed with regard to the definition of terrorist acts incorporated by the Special Rapporteur in his draft article.

252. For example, it was remarked that the 1937 Convention for the Prevention and Punishment of Terrorism, on which the Special Rapporteur had drawn, did not have the same effect as the draft Code. The 1937 Convention covered all acts of terrorism perpetrated by individuals, regardless of whether or not they were committed for political reasons and whether or not States took part in them. The draft Code was supposed to deal solely with acts of terrorism that constituted crimes against the peace and security of mankind. Since the field covered by the 1937 Convention was much broader, the provisions derived therefrom were not always appropriate; for instance, draft article 11, paragraph 3 (b) (ii), mentioned "Acts calculated to destroy or damage public property or property devoted to a public purpose" and, it was pointed out, it would be exaggerated to rank the act of damaging public property in one's own country as a crime against the peace and security of mankind. The presence of an international element was essential for an act to constitute a crime under the draft Code. In paragraph 3 (b), there was some overlap between subparagraphs (i) and (iii). The persons mentioned in subparagraph (iii) were "charged with public functions or holding public positions" and, hence, covered by subparagraph (i). Furthermore, the seizure of aircraft and the taking of hostages were dealt with in special international instruments and did not always affect international peace and security. On the other hand,

acts perpetrated against ships and airports did not seem to be covered by the formulation. In the opinion of one member, further thought should be given to the phrase "violence directed against persons who enjoy international protection or diplomatic immunity", in subparagraph (iii), for it was difficult to conceive of a brawl with a diplomat as being a crime against mankind.

253. Some members were of the opinion that a degree of caution was required on the part of the Commission in the matter of international terrorism. They indicated that terrorism could be inspired by the most diverse motives, particularly idealism.

254. The Special Rapporteur stated that, regardless of the motive for certain kinds of conduct, acts of terrorism should not be directed against innocent people and persons alien to a conflict and that a distinction should be drawn between the legitimacy of a struggle and the ways and means put to use for that struggle.

255. Not all acts of international terrorism necessarily constituted acts of intervention, since the author was not always a State, and certain members therefore suggested that the provisions on international terrorism as an independent crime should form the subject of a separate provision.

7. Breach of treaties designed to ensure international peace and security

256. With regard to draft article 11, paragraphs 4 and 5, 232/ the Special Rapporteur said that draft paragraph 4 reproduced article 2, paragraph (7), of the 1954 draft. However, whereas the 1954 draft had covered

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232/ Draft article 11, paragraphs 4 and 5, as submitted by the Special Rapporteur, read as follows:

"Article 11: Acts constituting crimes against peace

The following constitute crimes against peace:

...

4. A breach of the obligations of a State under a treaty designed to

only treaties concerning restrictions, limitations on armaments, military preparation, fortifications or other restrictions of the same kind, the present draft also covered, in paragraphs 4 and 5, breaches of treaties prohibiting the emplacement or testing of weapons in certain territories or in outer space. The Special Rapporteur also observed that the term "fortifications", employed in article 2, paragraph (7), of the 1954 draft, was replaced in his own draft by the term "strategic structures", for the word "fortifications" reflected a vocabulary which had fallen into disuse and was not in line with the realities of today. In his commentary to the proposed paragraphs, the Special Rapporteur pointed out that the prohibition on the emplacement of weapons in places under international protection was the subject of various international conventions. He mentioned in particular the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, of 5 August 1963, and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof, adopted on 7 December 1970 and opened for signature on 11 February 1971.

257. The comments by members of the Commission on paragraphs 4 and 5 of draft article 11 may be classified into in three categories: on the nature of the obligations breached, on responsibility for the breach, and on matters of form.

258. With reference to the nature of the obligations breached, several members emphasized that the paragraphs should be better drafted, so as to cover only the most serious breaches of treaty obligations, breaches which, in view of

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ensure international peace and security, in particular by means of:

(i) Prohibition of armaments, disarmament, restriction or limitation of armaments;

(ii) Restriction on military training or on strategic structures or any other restrictions of the same character.

5. A breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space."

their scale or their nature, constituted a threat to international peace and security. In the opinion of another member, the treaties mentioned by the Special Rapporteur in his commentary could also include the Antarctic Treaty, signed in Washington in 1959 and the Treaty for the Prohibition of Nuclear Weapons in Latin America signed at Tlatelolco, Mexico, in 1967.

259. Some members stressed that care should be taken to ensure that States not parties to a treaty on the maintenance of peace and security should not be placed in an advantageous position in relation to States that signed such a treaty. One member, in particular, pointed out that, if a State had adopted wide-ranging disarmament measures well beyond what other States were ready to agree to, the agents of that State should not incur international responsibility for a breach of its commitments. According to another opinion, paragraph 4 should not provide an encouragement to a potential aggressor nor give the impression that the inherent right of self-defence under the Charter was being impaired.

260. Some members emphasized that the proposed paragraphs brought out once again the problem of the relationship between the author of the crime and the act whereby his responsibility is incurred. It was suggested that the paragraphs should be recast so as to bring out that relationship better. According to those members, while it was true that the State alone could be held responsible for failure to meet its obligations, it was individuals who played the crucial role in the decisions leading to a breach by the State of its international obligations. Those members also thought that it would be necessary to specify that not only the Head of State, but also officials and other persons in the political and administrative hierarchy, could be held responsible for such breaches.

261. In regard to form, several members suggested that the two paragraphs could be merged into a single provision.

8. Colonial domination

262. In his report, the Special Rapporteur submitted two alternatives for draft article 11, paragraph 6, 233/ on colonial domination. He recalled that colonial domination as an international crime was expressly referred to in article 19, paragraph 3 (b), of part 1 of the draft on State responsibility. He also referred to Article 76 (b) of the Charter of the United Nations (contained in Chapter XII (International Trusteeship System)) and to General Assembly resolution 1514 (XV), of 14 December 1960, and stressed that the Commission's earlier discussions had shown that the point at issue was not the principle of colonialism as a crime against peace, but simply the way in which it was expressed in legal terms. Two draft provisions were proposed by the Special Rapporteur in the form of the two alternatives for article 11, paragraph 6. The first alternative reproduced the wording of article 19 of the Commission's draft on State responsibility, while the second was taken from General Assembly resolution 1514 (XV), of 14 December 1960.

263. Some members found that the first alternative proposed by the Special Rapporteur was preferable. It was pointed out that the term "colonialism" was a familiar expression and that, despite the advances of decolonization, remnants of old colonialism still existed and there was no assurance that new forms of colonialism would not appear. Moreover, the first alternative was in harmony with the wording of article 19 of the draft

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233/ The two alternatives for draft article 11, paragraph 6, submitted by the Special Rapporteur read as follows:

"Article 11. Acts constituting crimes against peace

The following constitute crimes against peace:

6. First alternative:

The forcible establishment or maintenance of colonial domination.

6. Second alternative:

The subjection of a people to alien subjugation, domination and exploitation."

articles on State responsibility which the Commission had adopted on first reading and which it did not seem advisable to change without good reason.

264. Other members said that they preferred the second alternative proposed by the Special Rapporteur because it was broad enough to cover not only the historical forms of colonialism, but also any other forms of domination. In addition, the second alternative was in keeping with the wording of General Assembly resolutions 1514 (XV) of 14 December 1960 and 2625 (XXV) of 24 October 1970.

265. Many members of the Commission stated that they were in favour of combining or merging the two alternatives proposed by the Special Rapporteur. In that connection, it was pointed out that the Commission did not have to make any distinction between colonialism and alien subjugation. Colonialism necessarily involved subjugation and national servitude led to colonization, in other words, to a change in the national identity of the subjugated people. The fact that colonialism and alien subjugation were similar in many respects did not, however, mean that they were exactly the same. It should therefore not be necessary to choose between the two proposed alternatives; the only solution was to combine them.

266. It was also pointed out in support of merging the two alternatives that a rule of international law could be strong only if it could be uniformly and impartially applied. The principle of self-determination, proclaimed in the Charter of the United Nations as a universal principle, had been applied mainly in eradicating colonialism, but there were other cases in which it had been and could and should be used. By not tying it exclusively to colonial contexts, it could be applied much more widely. In this connection, all members of the Commission believe that the principle of self-determination is of universal application.

267. The Commission went on to discuss the scope of the principle of self-determination. Some members questioned whether a distinction should be made between the self-determination of peoples and the self-determination of States. One member said that self-determination was a perpetual, imprescriptible right which was contemplated by international law in both its internal as well as its external dimension. It protected not only the acquisition and preservation of independence from alien domination but also

the right of any people, in any State, freely to choose and change at any time its political, economic and social status. Still other members drew attention to the fact that the term "self-determination of peoples" might potentially contain the idea of secession in heterogeneous communities and stated that, in the framework of the question under consideration, namely, colonialism, the concept of self-determination related only to the freedom of peoples subjected to colonial domination or alien exploitation. In the opinion of one member, paragraph 6 might be divided into two parts, the first dealing with the maintenance of colonial domination, and the second with the establishment of new exploitation or domination that could be classed as foreign. The commentary to the article might then make it clear that the crime of colonial domination applied only to the subjection of a non-metropolitan people which had not yet attained independence and did not cover the case of a minority wishing to secede from the national community.

9. Mercenarism

268. Draft article 11, paragraph 7, 234/ as submitted by the Special Rapporteur, deals with mercenarism as a crime against peace. In his report,

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234/ Draft article 11, paragraph 7, submitted by the Special Rapporteur read as follows:

"Article 11. Acts constituting crimes against peace

The following constitute crimes against peace:

...

7. The recruitment, organization, equipment and training of mercenaries or the provision of facilities to them in order to threaten the independence or security of States or to impede national liberation struggles.

A mercenary is any person who:

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

(b) Does, in fact, take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a

the Special Rapporteur pointed out that the phenomenon of mercenarism was already covered in the Definition of Aggression (art. 3 (g)) contained in the annex to General Assembly resolution 3314 (XXIX) of 14 December 1974). He therefore questioned whether it was necessary to have a separate provision on mercenarism. He also pointed out that the study of mercenarism had been entrusted by the General Assembly to an Ad Hoc Committee, which had not completed its work. In the circumstances, any definition of the phenomenon within the framework of the draft Code could only be provisional. He pointed out that the definition of a "mercenary" contained in the draft paragraph he was proposing was the one found in article 47 of Additional Protocol I to the 1949 Geneva Conventions.

269. The comments by the members of the Commission on mercenarism focused on three questions: whether the concept of mercenarism should be the subject of a separate provision in the draft Code or be included in the definition of aggression as a crime against peace; whether the definition proposed by the Special Rapporteur was appropriate in the light of the objectives of the draft Code; and whether the Commission should defer its consideration of these two questions until the Ad Hoc Committee established by the General Assembly had completed its work.

270. Some members were of the opinion that it would be more logical to deal with mercenarism within the general context of aggression. At the present time, when it was more difficult to resort to open forms of aggression, the same ends were being achieved by covert forms of aggression, including

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Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) Is not a member of the armed forces of a Party to the conflict; and

(f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."

mercenarism. In the view of those members, it would be difficult to imagine a situation involving mercenaries that did not have a State or States behind it.

271. Most members were, however, of the opinion that mercenarism should form the subject of a separate provision in the draft Code. It was pointed out that mercenarism involved not only an attack on the territorial integrity of a State, but also the infliction of serious harm on its population. Any person who organised the recruitment, equipment, training and use of mercenaries should be deemed guilty of a crime against peace. Recent practice showed that mercenarism was quite often carried out by private individuals or non-governmental organisations and that it might be difficult to prove direct State involvement, where it existed. In some cases, gangsters or drug traffickers, acting on their own initiative, organised, armed and used mercenaries to threaten the sovereignty and territorial integrity of the States in which they operated. Mercenarism therefore had to be made a crime distinct from aggression. It was also pointed out that, although reference was often made to recruitment and training, some mercenaries were former army officers who needed no training. Since they were unable to settle back into civilian life, they sought further adventure at the cost of many innocent victims. Mercenarism therefore had to be included in the draft Code, despite difficulties relating to the criteria of recruitment, training and compensation.

272. As to the definition of a "mercenary" which the Special Rapporteur was proposing and which was taken from Additional Protocol I to the 1949 Geneva Conventions, some members found that it was not entirely satisfactory, since, from the standpoint of humanitarian law, the Protocol applied only to mercenarism in time of war and not to mercenarism in time of peace, which was the type of mercenarism covered by the draft Code. Other reservations with regard to the definition of a "mercenary" related to the concept of "compensation". It was pointed out that it was necessary to specify what was meant by such compensation or rather, what criteria should be used to decide whether such compensation constituted a crime. It was noted that, according to the present wording, all a State had to do to prevent a mercenary from being regarded as such was to recruit him without openly giving him a

substantial amount of pay, which could be called by some other name or given secretly. One member expressed the view that in defining a mercenary, "private gain" as a motivation should be regarded as an important element and that the exact amount of compensation paid or the nationality of the person in question should not be over-emphasized.

273. Some members were of the opinion that, before defining the crime of mercenarism, the Commission had to await the results of the work of the Ad Hoc Committee set up by the General Assembly.

274. Most members nevertheless expressed the opinion that, while taking account of the work being done in parallel bodies such as the Ad Hoc Committee and the Third Committee of the General Assembly (General Assembly resolution 41/102), the Commission should continue its own work on the topic and try to complete the task assigned to it by the General Assembly as rapidly as possible.

10. Other proposed crimes against peace

275. Some members of the Commission proposed that other crimes should be included in the draft Code as "crimes against peace". One member stated that acts such as "the massive expulsion by force of the population of a territory" invariably affected the peace and security of mankind and should be identified as a crime under the Code. Another member was of the opinion that the "forcible transfer of populations" was a plague of the twentieth century and that no just world order could tolerate such grave abuses of political and military power. The forcible expulsion of a people from its traditional area of settlement amounted to a clear violation of the right to self-determination. Other members requested that the draft Code should include the crime of implanting settlers in an occupied territory and changing the demographic composition of a foreign territory, as referred to in article 85, paragraph 4 (a), of Additional Protocol I to the 1949 Geneva Conventions.

276. The Special Rapporteur, while agreeing with the principle that such situations warranted consideration, was of the opinion that they came within the category of crimes against humanity and could be dealt with in that context.

277. A consensus took shape within the Commission that every crime qualifying as a "crime against peace" should form the subject of a separate article of the draft Code, rather than a paragraph of one and the same draft article.

278. At the end of the discussion, the Commission decided to refer draft article 11 to the Drafting Committee.

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

1. Texts of the draft articles provisionally adopted so far by the Commission

279. The texts of the draft articles provisionally adapted so far by the Commission are reproduced below.

CHAPTER I

INTRODUCTION

PART I. Definition and characterization

Article 1

Definition

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

Article 2

Characterization

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

PART II. General principles

Article 3

Responsibility and punishment

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

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

Article 4

Obligation to try or extradite

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

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

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

Article 5

Non-applicability of statutory limitations

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

Article 6

Judicial guarantees

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

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

2. He shall have the rights:

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

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

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

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

(d) To be tried without undue delay;

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

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

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

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

Article 7

Non bis in idem

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

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

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

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

(a) if the act which was the subject of the previous judgement took place on the territory of that State;

(b) if that State has been the main victim of the crime.

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

Article 8

Non-retroactivity

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

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

Article 10

Responsibility of the superior

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

Article 11

Official position and criminal responsibility

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

CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Part I. Crimes against peace

Article 12

Aggression

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Texts of draft articles 4, 7, 8, 10, 11 and 12, with commentaries thereto, provisionally adopted by the Commission at its fortieth session

280. The texts of draft articles 4, 7, 8, 10, 11 and 12, with commentaries thereto, provisionally adopted by the Commission at its fortieth session are reproduced.

CHAPTER I

INTRODUCTION

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Part II. General principles

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Article 4

Obligation to try or extradite

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

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

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

Commentary

(1) The Commission had several possibilities for ensuring the punishment of the crimes covered in the draft Code: one was to give jurisdiction to an international criminal court; another was to make national courts competent for the prosecution of such crimes; a third possibility was to have an international court co-exist with national courts and a fourth one to enforce the Code through national courts to which would be added a judge from the jurisdiction of the accused and/or one or more judges from jurisdictions whose jurisprudence differed from that of both the accused and the national court in question. Without ruling out any of those solutions, which might be considered at a later stage, the Commission based its approach at the current stage on national courts. It also decided that the draft article would relate only to the general principles of jurisdiction and extradition. The formulation of more specific rules needed for the actual implementation of the Code and to be included in an appropriate part of the draft Code is left until a later stage.

(2) The category of international crimes, such as genocide, apartheid, mercenarism, international terrorism, the taking of hostages, the unlawful seizure of aircraft, wrongful acts against the safety of civil aviation and offences against internationally protected persons, is assuming growing importance. Many ordinary crimes also have international repercussions. There are, however, few conventions which give jurisdiction to an international criminal court. Only the Convention on the Prevention and Punishment of the Crime of Genocide (article VI) 235/ and the International Convention on the Suppression and Punishment of the Crime of Apartheid

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

235/ United Nations, Treaty Series, vol. 78, p. 277.

(article V) 236/ do so. Such jurisdiction is, moreover, not exclusive; it co-exists with the jurisdiction of national courts. The majority of the conventions that apply to the above-mentioned crimes rely on national jurisdiction (e.g. 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft, article 7; 237/ 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, article 7; 238/ 1971 Washington Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, article 5; 239/ 1977 European Convention on the Suppression of Terrorism, article 7; 240/ and 1979 International Convention against the Taking of Hostages, article 8). 241/

(3) Draft article 4, paragraph 1, establishes the general principle that any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present is bound either to try or extradite him. This is the principle on which several of the conventions referred to in the preceding paragraph are based. It was pointed out in the Commission that the words "an individual alleged to have committed a crime" should be defined, perhaps in an article on the use of terms, in order to make it clear that they could apply to a person not on the basis of allegations which were too flimsy or indices which were too fragile but on the basis of pertinent facts. It was also agreed in the Commission that the word "try" is intended to cover all the stages of prosecution proceedings.

236/ General Assembly resolution 3068 (XXVIII), Annex.

237/ United Nations, Treaty Series, vol. 680, p. 112.

238/ Ibid., vol. 1035, p. 173.

239/ Tias 8413, 27 UST 3951.

240/ ETS 90.

241/ General Assembly resolution 34/146, Annex.

(4) Paragraph 2 deals with the case where the State in whose territory an individual alleged to have committed a crime is present receives several requests for extradition. Normally, a situation of this kind should be dealt with through the establishment of a list of priorities which would indicate the order in which the State concerned should consider such requests, but, in the present case, the Commission had problems in drawing up such a list. The first problem was, as shown in paragraph (1) of this commentary, that no final choice with regard to jurisdiction has yet been made. The second problem was to find a compromise solution acceptable to those in favour of different principles relating to extradition: territoriality, the nationality of the victim, the proper administration of justice, the discretionary power of the State in whose territory the alleged offender is present, etc. Despite these problems, which discouraged the Commission from trying, at the current stage, to establish an order of priorities in respect of extradition, many members of the Commission were of the opinion that paragraph 2 should give preference to extradition to the State where the crime was committed. Other members said that they were against such a preference, since they were, rather, in favour of the freedom of the State in whose territory an individual alleged to have committed a crime was present. It was also pointed out that the principle of giving preference to the State on whose territory the crime was committed would give rise to practical difficulties in particular in the case of the crime of apartheid. The paragraph as finally adopted is a compromise between the two positions, since it provides that special consideration will be given to the request of the State in whose territory the crime was committed. This wording, as provisionally adopted, does not establish any priority, but attaches special importance to the request of the State in whose territory the crime was committed; it nevertheless continued to give rise to reservations on the part of some members who would have liked to see a more clear-cut enunciation of the principle of territoriality and the establishment of a more definite order of priorities in respect of extradition. The members in question reserved their position with regard to the future formulation by the Commission of rules on extradition under the draft Code.

(5) Paragraph 3 of the draft article deals with the possible establishment of an international criminal court and it further reflects the fact that the

provisions contained in draft article 4 are not yet final. It shows that the jurisdictional solution adopted in draft article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court. In this connection, one member pointed out that, under its current terms of reference, the Commission could undertake such a task right away without expressly being requested to do so by the General Assembly.

(6) One member of the Commission reserved his position on the draft article as a whole. Some members could not accept the general applicability of the principle of universal jurisdiction to the draft Code.

Article 7

Non bis in idem

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

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

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

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

(a) if the act which was the subject of the previous judgement took place on the territory of that State;

(b) if that State has been the main victim of the crime.

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

Commentary

(1) Draft article 7 covers two situations: the non bis in idem rule before an international criminal court and the non bis in idem rule before national criminal courts. The draft article obviously does not cover the case where the rule is applied within a national legal system. It thus relates only to the application of the rule at the international level, either as a result of the existence of an international criminal court or as a result of the involvement of the courts of several legal systems.

(2) Paragraph 1 provides that the non bis in idem principle would apply without exception to the decisions of an international criminal court. This paragraph has been placed in square brackets to take account of the possibility of the establishment of an international criminal court, a possibility which has not been ruled out and which the Commission might consider at a later stage. In this connection, it was asked whether the term "international criminal court" meant only an international criminal court of a universal character or whether it also took account of the possible existence of regional courts common to several States. More specifically, the question was whether the rule stated in article 7, paragraph 1, also applied to decisions by a regional court. Many members were of the opinion that the rule should also apply to such decisions. It was explained in the Commission that the words "an international criminal court" should be understood as referring to an international court recognised by the international community of States and by the parties to the draft Code. It was also agreed 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.

(3) Paragraphs 2, 3 and 4 enunciate the non bis in idem rule and the exceptions to it in international criminal law when several national courts are involved. These three paragraphs are the result of a compromise between certain trends which emerged in the Commission in connection with this principle. It was pointed out that draft article 7 gave rise to theoretical and practical problems. In theoretical terms, it was noted that this principle was a rule applicable in internal law and that its implementation in relations between States gave rise to the problem of respect by one State for

final judgements pronounced in another State, since international law did not make it an obligation for States to recognise a criminal judgement handed down in a foreign State. In practical terms, it was pointed out that a State could provide a shield for an individual who had committed a crime against the peace and security of mankind and who was present in its territory by sentencing him to a penalty which was not at all commensurate with the seriousness of the crime, but which would enable him to avoid harsher penalties in another State and, in particular, in the State where the crime was committed or in the State which was the main victim. The view was, however, expressed that the non bis in idem rule was necessary in order to prevent a person who had committed a crime from being prosecuted more than once for the same acts and that, in this sense, it was a fundamental guarantee of the human person. Draft article 7, paragraphs 2, 3 and 4, are thus a compromise between these positions. When the first judgement has been handed down by a national court, the non bis in idem rule involves exceptions which are provided for in paragraph 2 and which limit its scope. Further proceedings may be instituted:

(a) When an act which has been tried in one State as an ordinary crime corresponds to one of the crimes characterised in the draft Code; for example, an act is characterized as murder whereas, in view of the circumstances in which it was committed, it constituted an act of genocide (paragraph 3);

(b) When the judgement was handed down by a court other than that of the State in which the crime was committed or that of the State which was the main victim, if, for example, these States consider that the decision did not correspond to a proper appraisal of the acts or to their seriousness (paragraph 4). The wording used clearly shows that the possibility of a new trial and judgement is an option available to the States concerned, but it is in no way an obligation. In addition, article 2 makes it clear that a general condition for the application of the non bis in idem principle in the case of a final judgement by a national court is that, in the event of conviction, the punishment should have been enforced or should be in the process of being enforced.

(4) It should also be noted that, according to paragraph 3, an international criminal court may again try and punish acts already tried by a national

court, if the acts were tried as ordinary crimes and corresponded to one of the crimes characterized in the draft Code. The words "by an international criminal court or" appear in square brackets in order to take account of the possible establishment of an international criminal court. It was also explained in the Commission that the provision of draft article 3 did not affect the principle of non-retroactivity embodied in draft article 8.

(5) The deduction of a penalty in the case of a subsequent conviction, as provided for in paragraph 5 of the draft article, is applicable in cases of subsequent conviction either by a national court or by an international criminal court.

Article 8

Non-retroactivity

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

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

Commentary

(1) The principle of the non-retroactivity of criminal law has been embodied in a number of international instruments, such as the Universal Declaration of Human Rights (article 11 (2)), the International Covenant on Civil and Political Rights (article 15 (1)) and the European Convention on Human Rights (article 7 (1)). This principle is, in fact, an application of the principle "nullum crimen sine lege". The principle would be violated if the draft Code was to be applied to crimes committed before the Code's entry into force.

(2) Paragraph 1 of the draft article enunciates the principle of non-retroactivity by clearly specifying the limits of application, namely convictions "under this Code" for acts committed "before its entry into force". It was agreed in the Commission that the word "acts" should be interpreted as "acts or omissions". This interpretation of the word "act" 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. By limiting

the application of the principle to convictions "under this Code", the draft article leaves open the possibility of convictions on a basis other than that for crimes expressly covered by the draft Code. This is the subject-matter of paragraph 2.

(3) The application of the principle of the non-retroactivity of criminal law has sometimes raised difficulties in international law. While there is a school of thought that interprets the word "lex" in the principle "nullum crimen sine lege" as relating to written (conventional) law, another school attaches a much broader meaning to the word "lex", covering both conventions and custom and general principles.

(4) In formulating paragraph 2 of the draft article, the Commission was guided by two fundamental considerations. On the one hand, it did not want the principle of non-retroactivity set out in the draft Code to prejudice the possibility of prosecution, in the case of acts committed before the entry into force of the Code, on different legal grounds, for example a pre-existing convention to which a State was a party, or again, under customary international law. Hence the provision contained in paragraph 2. On the other hand, the Commission did not want this wider possibility to be used with such flexibility that it might give rise to prosecution on legal grounds that are too vague. For this reason, it preferred to use in paragraph 2 the expression "in accordance with international law" rather than less concrete expressions such as "in accordance with the general principles of international law". Similarly, in the event of a conviction on the basis of pre-existing domestic law, the Commission deemed it necessary to specify that such domestic law should be applicable "in conformity with international law".

Article 10

Responsibility of the superior

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

Commentary

(1) The principle of the responsibility of the superior for crimes against the peace and security of mankind committed by the superior's subordinates has antecedents both in international judicial decisions and in texts on international criminal law adopted after the Second World War, such as Additional Protocol I to the 1949 Geneva Conventions (article 86, paragraph 2).

(2) With reference to international judicial decisions in criminal cases, in the Yamashita case, the United States Supreme Court had given an affirmative answer to the question of whether the laws of war imposed the duty on an army commander to take such appropriate measures as were within his power to control the troops under his orders and prevent them from committing acts in violation of the laws of war. The Supreme Court had held that General Yamashita had been criminally responsible because he had failed to take such measures. 242/ For its part, the Tokyo Tribunal had decided that it was the duty of all on whom responsibility rested to secure proper treatment of prisoners and to prevent their ill-treatment. 243/ Similarly, in the Hostages case, the American military tribunal had stated that a corps commander must be held responsible for acts by his subordinate commanders in carrying out his orders that the corps commander knew or ought to have known about. 244/

(3) This draft article is formulated, with the exception of a few minor drafting changes, on the basis of article 86, paragraph 2, of the 1977 Additional Protocol I to the 1949 Geneva Conventions. The criminal responsibility of superiors is involved when the two conditions laid down in the draft article are fulfilled, namely:

242/ United Nations War Crimes Commission, Law Reports of Trials of War Criminals, London, H.M. Stationery Office, 1947-1949, vol. IV, p. 43; and United States Reports (Washington D.C.), vol. 327, pp. 14-15.

243/ United Nations War Crimes Commission, Law Reports ... , vol. XV, p. 73.

244/ Trials of war criminals (case No. 7, vol. XI, p. 1303).

(a) The superiors knew or had information enabling them to conclude, in the circumstances at the time, that a crime was committed or was going to be committed by a subordinate;

(b) They did not take all feasible measures within their power to prevent or repress the crime.

(4) Condition (a) above establishes a link between the superior's responsibility and his knowledge that a crime was committed or was going to be committed by the subordinate. The superior is presumed to know, a presumption that stems from the fact that he had information enabling him to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit the crime. He incurs criminal responsibility even if he has not examined the information sufficiently or, having examined it, has not drawn the obvious conclusions. In order to harmonise the various language versions, the Commission decided to bring the original English version of article 86, paragraph 2, of Protocol I, whereby the information "should have enabled them to conclude", into line with the French wording, which speaks of information "enabling them to conclude". This is purely a drafting change and does not involve any intention by the Commission to place on the draft article an interpretation different from that of article 86, paragraph 2, of the Protocol.

(5) As to condition (b) mentioned in paragraph (3) above, it was asked whether the "feasible measures within their power" mentioned in the draft article alluded to the superior's legal competence, to his practical possibilities, or to both. It was understood by the Commission that, for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures.

Article 11

Official position and criminal responsibility

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

Commentary

(1) The principle established by this draft article has precedents in the provisions on the charters of the International Military Tribunals established after the Second World War. For example, article 7 of the Charter of the Nürnberg International Military Tribunal states that "the official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment". A provision establishing the same principle is also to be found in the Charter of the International Military Tribunal for the Far-East (article 6).

(2) Later on, provisions containing the same principle were included in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the Commission in 1950 and in the Draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954. Principle III of the above-mentioned Principles reads as follows: "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law". Article 3 of the 1954 draft Code also provides that "The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code".

(3) The wording of this draft article contains elements from several of the formulations reproduced above. Although it refers expressly to Heads of State or Government, because they have the greatest power of decision, the words "the official position of an individual ... and particularly" show that the article also relates to other officials. The real effect of the principle is that the official position of an individual who commits a crime against peace and security can never be invoked as a circumstance absolving him from responsibility or conferring any immunity upon him, even if the official claims that the acts constituting the crime were performed in the exercise of his functions.

(4) The words "that he acts" apply to the exercise of both legal powers and factual powers. If a person was acting as though he were Head of State or

Government or as an official when he was not, he would incur criminal responsibility just as much, if the acts he committed were criminal acts under the draft Code.

CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Part I. Crimes against peace

Article 12

Aggression

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

(1) Paragraph 1 of draft article 12 reflects the concern of the Commission to establish a link between the act of aggression, which can only be committed by a State, and the individuals who are subject to criminal prosecution and punishment for acts of aggression under draft article 3. Paragraph 1 has been provisionally adopted and will have to be reviewed at a later stage in the elaboration of the Code. It is provisional, first, because the question what category of individuals is involved is still unsettled. It remains to be

decided whether only government officials are concerned, or also other persons having political and military responsibility and having participated in the organisation and planning of aggression. It will also have to be decided whether the article applies to private persons who place their economic and financial power at the disposal of the authors of the aggression. In addition, this question is linked with the notions of complicity and conspiracy and will have to be studied later in relation to those notions. Secondly, the paragraph is provisional because it will be advisable later to draft a more general provision applying either to all crimes, or to a category of crimes covered by the draft Code. Lastly, some members of the Commission expressed doubts about the need for paragraph 1. In their view, that paragraph is an unnecessary repetition of article 3 of the draft, according to which "Any individual who commits a crime against the peace and security of mankind ... is liable to punishment therefor". They consider that that provision, which relates to the responsibility of anyone committing a crime against the peace and security of mankind, also, applies to aggression.

(2) The other paragraphs of draft article 12 are largely taken from the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX), of 14 December 1974. The text of the draft article does not mention that resolution, however, in order to take account of the position of certain members of the Commission who feel that a resolution intended to serve as a guide for a political organ such as the Security Council cannot be used as a basis for criminal prosecution before a judicial body.

(3) On that question, two schools of thought appeared in the Commission. According to the first, the international judicial function in criminal law should be clearly separated from the executive functions of the Security Council, which ensures the maintenace of international peace and security by recommendations and by the measures it takes against aggression or the threat of aggression. The object of the judicial function is to punish the authors of an aggression. Consequently, the advocates of the automony of the judicial organ considered that the Definition of Aggression contained in resolution 3314 (XXIX) should not be transferred in toto to a penal code. They advocated a definition of aggression independent of that in

resolution 3314 (XXIX) or, in any event, one which did not reproduce all the elements of that definition. While they agreed that the enumeration of acts of aggression contained in the resolution could be reproduced in the penal definition of aggression, they did not agree that the list should be exhaustive for the judge, who should remain free to characterise other acts as constituting aggression, by referring to the general definition contained in article 12, paragraph 2. They therefore wished to retain the words "in particular" in paragraph 4 and to delete paragraph 5. According to the second school of thought, the whole of the Definition of Aggression contained in resolution 3314 (XXIX) should be reproduced in the Code. Not only should it be reproduced, but the decisions of the judicial organ should be subordinated to those of the Security Council in regard to resolutions determining the existence or non-existence of aggression. A number of members addressed the question whether a tribunal would be free to consider allegations of the crime of aggression in the absence of any consideration or finding by the Security Council. The text of draft article 12 provisionally adopted reflects the two above-mentioned trends and leaves some questions in abeyance, as is shown by the words and phrases in square brackets.

(4) Paragraphs 2 and 3 of draft article 12 reproduce, respectively, articles 1 and 2 of the Definition of Aggression, except for the explanatory note and the words "as set out in this Definition", which have been omitted from paragraph 2 of the draft article.

(5) Paragraph 4 is based on article 3 of the Definition of Aggression. However, the words "In particular" at the beginning of paragraph 4 reflect a point of disagreement already referred to in paragraph (2) above. Some members of the Commission considered that national courts should be enabled to characterize as aggression, acts other than those listed in paragraph 4, taking due account of paragraphs 2 and 3 of the draft article. Other members, on the other hand, considered that to accord such a faculty to national courts was inadmissible, since it would go far beyond the competence of an internal judicial organ. The acts listed in paragraph 4, subparagraphs (a) to (g) of article 12 are the same as those listed in the corresponding subparagraphs of article 3 of the Definition of Aggression. Paragraph 4 (h) of draft article 12 corresponds to article 5 of the Definition of Aggression and takes

account of the power of the Security Council, under Article 39 of the Charter of the United Nations, to determine that other acts constitute acts of aggression under the provisions of the Charter.

(6) Paragraph 5 reflects another point of disagreement within the Commission, which has already been referred to in paragraph (3) of this commentary. Some members, who were opposed to paragraph 5, maintained that to link the application of the Code to the operation of the Security Council would render all the work of elaborating the Code pointless. Other members thought that a determination made by the Security Council on the basis of Chapter VII of the United Nations Charter, was binding on all Member States and a fortiori on their courts. Paragraph 5 applies only to national courts. The question of the relationship between the decisions of an international criminal court and the decisions of the Security Council has been left in abeyance. It was understood in the Commission that the words "Any determination by the Security Council as to existence of an act of aggression" referred both to a positive and to a negative determination.

(7) Paragraphs 6 and 7 of draft article 12 reproduce verbatim articles 6 and 7 of the Definition of Aggression adopted by General Assembly resolution 3314 (XXIX).

CHAPTER V

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

A. Introduction

281. The Commission at its twenty-ninth session, in 1977, began its consideration of the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier", pursuant to General Assembly resolution 31/76 of 13 December 1976.

282. At its thirtieth session, in 1978, the Commission considered the report of a Working Group on the topic, which it had established under the Chairmanship of Mr. Abdullah El-Erian. The results of the study undertaken by the Working Group were submitted by the Commission in its report to the General Assembly, at its thirty-third session in 1978. The General Assembly in its resolution 33/139 of 19 December 1978, recommended that the Commission should continue the study concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and, in resolution 33/140 of 19 December 1978, decided that it would give further consideration to this question when the Commission submits to the General Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the topic.

283. The Commission at its thirty-first session, in 1979, appointed Mr. Alexander Yankov, Special Rapporteur for the topic, for the purpose of the preparation of a set of draft articles for an appropriate legal instrument.

284. Between its thirty-second session, in 1980, and its thirty-eighth session, in 1986, the Commission had received and considered seven reports from the Special Rapporteur which contained, among other matters, proposals for texts of draft articles on the topic. 245/

245/ For a more complete historical review of the work of the Commission on the topic, see (a) the reports of the Commission: Yearbook ... 1978, Vol. II (Part Two), pp. 138 et seq., paras. 136-144; Yearbook ... 1979, Vol. II (Part Two), pp. 170 et seq., paras. 149-165; Yearbook ... 1980, Vol. II (Part Two), pp. 162 et seq., paras. 145-176; Yearbook ... 1981, Vol. II (Part Two), pp. 159 et seq., paras. 228-249; Yearbook ... 1982, Vol. II (Part Two), pp. 112 et seq., paras. 199-249; Yearbook ... 1983,

285. As of the conclusion of its thirty-eighth session in 1986, the Commission had completed the first reading of the draft articles on the topic. 246/

286. At the same session, the Commission decided that in accordance with articles 16 and 21 of its Statute the draft articles on the topic should be transmitted through the Secretary-General to Governments for comments and observations, and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1988. 247/

287. By paragraph 9 of resolution 41/81 of 3 December 1986, and again by paragraph 10 of resolution 42/156 of 7 December 1987, both entitled "Report of the International Law Commission", the General Assembly urged Governments to give full attention to the request of the International Law Commission for comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

288. Pursuant to the Commission's request, the Secretary-General addressed circular letters, dated respectively 25 February 1987 and 22 October 1987, to Governments inviting them to submit their comments and observations by 1 January 1988.

Vol. II (Part Two), pp. 44 et seq., paras. 134-190; Yearbook ... 1984, Vol. II (Part Two), pp. 18 et seq., paras. 66-194; Yearbook ... 1985, Vol. II (Part Two), pp. 28 et seq., paras. 164-204; Yearbook ... 1986, Vol. II (Part Two), pp. 23 et seq., paras. 23-33; Official Records of the General Assembly, forty-first session, Supplement No. 10 (A/41/10), pp. 52 et seq., paras. 23-32; (b) the reports of the Special Rapporteur: preliminary report, Yearbook ... 1980, Vol. II (Part One), pp. 231 et seq., document A/CN.4/335; second report, Yearbook ... 1981, Vol. II (Part One), pp. 151 et seq., document A/CN.4/347 and Add.1 and 2; third report, Yearbook ... 1982, Vol. II (Part One), pp. ... et seq., document A/CN.4/359 and Add.1, fourth report, Yearbook ... 1983, Vol. II (Part One), pp. 62 et seq., document A/CN.4/374 and Add.1 to 4; fifth report, Yearbook ... 1984, Vol. II (Part One), pp. 72 et seq., document A/CN.4/382; sixth report, Yearbook ... 1985, Vol. II (Part One), pp. ... et seq., document A/CN.4/390; seventh report, Yearbook ... 1986, Vol. II (Part One), document A/CN.4/400.

246/ See Official Records of the General Assembly, Forty-first session, Supplement No. 10 (A/41/10), para. 31 and Section D.1.

247/ Ibid., para. 32.

289. As of the time of the topic's consideration by the Commission at its present session written comments and observations had been submitted by 29 States which were published by the Secretariat in document A/CN.4/409 and Corr.1 and 2 and Add.1 to 5.

B. Consideration of the t pic at the present session

290. At its fortieth session the Commission had before it the eighth report submitted by the Special Rapporteur on the topic (document A/CN.4/417 and Corr.1 and 2). The Commission also had before it the written comments and observations submitted by Governments on the draft articles 248/ (document A/CN.4/409 and Corr.1 and 2 and Add.1 to 5).

291. In his report the Special Rapporteur examined in an analytical manner the written comments and observations submitted by Governments. In connection with each draft article he summarized the main trends and proposals made by Governments in their written comments and observations, and on their basis, he proposed either to revise the text of the draft article concerned, to merge it with some other draft article, to maintain the draft article as adopted on first reading or to delete the draft article.

292. The Commission considered the Special Rapporteur's eighth report at its 2076th to 2080th meetings. After hearing the introduction of the Special Rapporteur, the Commission discussed the proposals made by him for the second reading of the draft articles. At the end of the discussion, the Commission decided to refer the draft articles to the Drafting Committee for their second reading, together with the proposals made by the Special Rapporteur as well as those formulated in plenary during the discussion, on the understanding that the Special Rapporteur could make new proposals to the Drafting Committee, if he deemed it appropriate, on the basis of the comments and observations made in the Commission's plenary and those that might be made in the Sixth Committee of the General Assembly.

248/ See paras. 286 to 289 above.

293. Before introducing his observations and suggestions with regard to specific draft articles, the Special Rapporteur referred to some methodological questions dealt with in his report. He stressed the need for adopting in the elaboration of the draft articles a comprehensive approach leading to a coherent and, as much as possible, uniform régime concerning all kinds of couriers and bags. He also underscored the significance which should be attached to functional necessity as the basic factor in determining the status of all kinds of couriers and bags. As regards the form of the draft, he favoured the adoption of a convention as a distinct legal instrument which should keep an appropriate legal relationship with the codification conventions in the field of diplomatic and consular law adopted under the auspices of the United Nations.

294. Although no extensive general debate was held on the above-mentioned matters, the considerations and suggestions made by the Special Rapporteur were generally shared by the Commission.

295. The following paragraphs reflect the indications and proposals on the draft articles made by the Special Rapporteur on the basis of the written comments and observations by Governments as well as the reaction of members of the Commission to the written comments and observations by Governments and to the suggestions of the Special Rapporteur. In this connection, many members declared that they would not comment on all the provisions of the draft but only on what they considered its most significant aspects, such as its scope, the facilities, privileges and immunities accorded to the courier, the protection of the diplomatic bag and some miscellaneous provisions.

PART I

GENERAL PROVISIONS

296. Draft articles 1 and 2 provisionally adopted by the Commission on first reading deal with the scope of the draft articles. Their text reads as follows:

Article 1

Scope of the present articles

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

Article 2

Couriers and bags not within the scope of the present articles

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

(a) the legal status of such couriers and bags;

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

297. In his oral presentation, the Special Rapporteur noted that two identical written comments had been made by two Governments to the effect that the official communications referred to in draft article 1 should be confined to those between the central Government of a sending State and its own missions or consular posts abroad, communications of missions or consular posts of the sending State with each other being consequently excluded. These two Governments proposed to delete the final words "or with each other" from draft article 1.

298. The Special Rapporteur observed that the words "or with each other" which provided for the "inter se" communications between missions and consular posts of a same sending State were grounded on reasons of practical necessity and on existing legal provisions. He recalled article 27, paragraph 1 of the 1961 Vienna Convention on Diplomatic Relations 249/ which, inter alia, provided that "In communicating with the Government and the other missions and consulates of the sending States, wherever situated, the missions may employ

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249/ United Nations, Treaty Series, vol. 500, p.95

all appropriate means, including diplomatic couriers and messages in code or cipher." A similar provision was also contained in article 35, paragraph 1 of the 1963 Vienna Convention on Consular Relations 250/, article 28, paragraph 1 of the 1969 Convention on Special Missions 251/ and article 27, paragraph 1 and article 57, paragraph 1 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character 252/ (hereinafter the 1975 Convention on the Representation of States).

299. Based on the foregoing and on the fact that the Commission's discussion had evidenced no difficulties with the words "or with each other", the Special Rapporteur proposed to retain these words in the draft article.

300. The Special Rapporteur indicated that one Government had suggested to confine the scope of the draft articles to the status of diplomatic (stricto sensu) and consular couriers and bags. The Special Rapporteur pointed out that the adoption of such a proposal might run against the main purpose of the draft articles which was to adopt a comprehensive and uniform approach to all couriers and bags. Nothing indicated that the relatively small number of ratifications of the 1969 Convention on Special Missions (which was already in force) or the 1975 Vienna Convention on the Representation of States was related to the régime of couriers and bags therein contained. Furthermore, the uniform and comprehensive approach to couriers and bags did not imply a blanket adoption of all provisions contained in those two conventions.

250/ Ibid., vol. 596, p.261.

251/ General Assembly resolution 2530 (XXIV), Annex.

252/ Official Records of the United Nations Conference on the Representation of States in their Relations with International Organisations, vol. II (United Nations publication, Sales No. E.75.V.12).

301. During the Commission's discussion, the view was expressed that the articles should be confined to diplomatic and consular couriers and bags. As an alternative to draft article 33, flexibility could be attained by providing in separate optional protocols for application to the couriers and bags referred to in the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States.

302. With regard to draft article 2, the Special Rapporteur pointed out that while some written comments and observations had been in favour of restricting the scope of the draft articles to couriers and bags of States, other comments and observations were in favour of extending the scope to couriers and bags of international organizations. He pointed out that Section 10 of article III of the 1946 Convention on the Privileges and Immunities of the United Nations, 253/ explicitly stated that: "The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags". An identical provision was embodied in Section 12 of article IV of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. 254/ Similar texts, assimilating the status of the couriers and bags of international organizations to that of diplomatic couriers and bags could be found in legal instruments relating to the privileges and immunities of other intergovernmental organizations.

303. In the light of these considerations and of the comprehensive and uniform approach on which the draft articles were grounded, he suggested for examination and eventual approval a new paragraph 2 to draft article 1 which would read:

253/ United Nations, Treaty Series, vol. 1, p.15.

254/ Ibid., vol. 33, p.261.

"Article 1

Scope of the present articles

1. ...

2. The present articles apply also to the couriers and bags employed for the official communications of an international organisation with States or with other international organisations."

304. Without wishing to detract from the political importance of national liberation (organisation) movements recognised by the United Nations and the respective regional organisations, the Special Rapporteur suggested not to include these entities within the scope of the draft articles as their number was very limited and their official communications very restricted, which did not require legal regulations of a general character.

305. The Special Rapporteur indicated that if the above proposal were adopted, several consequential amendments would have to be introduced. Article 2 should then be deleted and subparagraphs (1) and (2) of paragraph 1 of article 3 (Use of terms) would have to be amended by adding a reference, respectively, to the courier and bag of international organisations. The exact language of these amendments was to be considered in connection with draft article 3.

306. The discussion in the Commission evidenced conflicting views with regard to the possible extension of the scope of the draft articles to international organisations.

307. Some members were reluctant to accept the possibility of such an extension. States and international organisations, they stated, were different subjects of international law and this had already led in the past to the adoption of two separate conventions in the area of the law of treaties. Furthermore, no two international organisations were alike, and this would render the task of extending the scope very difficult. Some host countries, it was also remarked, might have some reluctance in accepting the fact that international organisations situated in their territory maintain communications with States or regional organisations hostile to the host country. It was also maintained that the proposal to extend the scope came at a rather late stage and would imply an in-depth re-examination of the draft

articles. Furthermore, practice had not shown so far any serious problems regarding the functioning of couriers and bags of international organisations which might warrant their being dealt with in the draft articles. The proposed extension might alter the carefully achieved balance of the draft articles and might jeopardise their acceptability.

308. A great number of members, on the other hand, were in favour of extending the scope of the draft articles to international organisations. It was maintained that the insistent differentiation that some made between States and international organisations was particularly unwelcome in this case. States had created international organisations and the latter used couriers and bags. Both the general Convention on Privileges and Immunities of the United Nations and that on the specialised agencies, as well as many headquarters agreements contained specific provisions to that effect. Furthermore, if the Commission did not undertake this task at the present juncture, it would still be asked to do so at a later stage, as had been the case with the law of treaties, thus redoubling the expense of time and money (new Special Rapporteur, etc.) and detracting from the attention given to other topics. The extension of the scope could easily be done by means either of an optional provision or of an optional additional protocol.

309. Many of the members who supported the extension of the scope of the draft articles to international organisations were of the view that this extension should only be done in respect of international organizations of a universal character within the meaning of the 1975 Vienna Convention on the Representation of States, namely, "the United Nations, its specialised agencies, the International Atomic Energy Agency and any similar organisation whose membership and responsibilities are on a world-wide scale" (article 1, paragraph 1 (2)). Some of these members also felt that the extension should cover couriers and bags employed for official communications between organisations or between the headquarters of an organization and its different offices or between the offices with each other.

310. As to the possible extension of the scope of the draft articles to the couriers and bags of national liberation movements, most members felt that such an extension would be inadvisable as national liberation movements were essentially temporary in nature and would later be subsumed into State

structures. Furthermore such an extension would, in their view, greatly detract from the acceptability of the draft articles. This matter should be left for special agreements between States and the movements concerned.

311. Some members felt that an extension of the scope to national liberation movements recognised by the United Nations and some regional organizations was in order, as many States had already upgraded the missions of these movements to the statute of full diplomatic missions. Furthermore, the extension could easily be done by means of an additional optional protocol.

312. The Special Rapporteur indicated that all suggestions arising from the discussion should be carefully considered and the reaction by Governments further scrutinised before a final decision was made on the matter.

313. Draft article 3, on use of terms, as provisionally adopted on first reading by the Commission, reads as follows:

Article 3

Use of terms

1. For the purposes of the present articles:

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

(a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a courier of a permanent mission, of a permanent observer mission, of a delegation, or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

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

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

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character of 14 March 1975;

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

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

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

(6) "mission" means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

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

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

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

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

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

314. The Special Rapporteur indicated that no substantive written comments or proposals had been forwarded by Governments on this draft article.

315. If the proposal to enlarge the scope of the draft articles by the inclusion in article 1 of a mention of couriers and bags of international organisations was accepted, then the Special Rapporteur would suggest that there should be a new subparagraph (e) to paragraph 1 of article 3, which should read:

"(e) a courier employed by an international organisation for official communications with States and other international organisations."

as well as a new subparagraph (e) to paragraph 2 of article 3 which should read:

"(e) a bag of an international organisation used for its official communications with States and other international organisations."

316. No specific suggestions with regard to this draft article were made during the Commission's discussions.

317. Draft articles 4, 5 and 6, provisionally adopted by the Commission on first reading, deal with general principles of diplomatic law relevant to the functioning of official communications. Their text reads as follows:

Article 4

Freedom of official communications

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

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

Article 5

Duty to respect the laws and regulations of the receiving State and the transit State

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

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

Article 6

Non-discrimination and reciprocity

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

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

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

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

318. The Special Rapporteur indicated that in the view of one Government, articles 4 and 5 were unnecessary since their substance appeared to be already adequately dealt with by provisions in earlier instruments such as the Vienna Conventions of 1961 and 1963.

319. In the view of the Special Rapporteur, although it was true that the three general principles embodied in draft articles 4, 5 and 6 derived from the relevant provisions of the four codification conventions in the field of diplomatic and consular law, their present wording took into account the purpose of the exercise of the freedom of official communications by couriers and bags. The three articles contained substantive elements particularly relevant to the status of the diplomatic courier and the diplomatic bag, determining in general terms the balance between the rights and obligations of the sending State, the receiving State and the transit State, as well as the non-discrimination and reciprocity in their legal relationship. The general and specific practical significance of these provisions should not be overlooked in a set of draft articles on the status of all categories of couriers and bags used for official communications.

320. Draft article 4 did not elicit any specific suggestion or drafting proposals in the written comments and observations by Governments. Accordingly, the Special Rapporteur suggested to retain the draft article in its present form. No specific reference was made to this draft article in the Commission's discussion.

321. With reference to draft article 5, the Special Rapporteur indicated that two Governments has proposed to delete the second sentence of paragraph 2, referring to the duty of the diplomatic courier not to interfere in the internal affairs of the receiving or the transit State. The Special Rapporteur was of the view that this proposal could be accepted on the understanding that the duty of the courier to respect the laws and regulations of the receiving or the transit State would imply also the duty not to interfere in their internal affairs. He also suggested that in order to simplify the text the words "as the case may be" at the end of the first sentence of paragraph 2 could also be deleted.

322. During the Commission's discussion, some speakers pronounced themselves against the deletion of the second sentence of paragraph 2 of article 5. In their view, this sentence was necessary as it added some balance to the provision and protected the interests of the receiving State. Another member was in favour of the deletion of the sentence in question.

323. As regards draft article 6, the Special Rapporteur indicated that one Government had proposed the deletion of the words "provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligation of third States" from the text of subparagraph (b) of paragraph 2, arguing that this limited for no valid reason the contractual freedom of States. The Special Rapporteur explained that paragraph 2 (b) of article 6 was a safeguard provision intended to maintain certain international standards and stability regarding the extent of the facilities, privileges and immunities granted to the diplomatic courier and the diplomatic bag. He admitted however that the text could be simplified by taking as a model article 47, paragraph 2 (b) of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the 1963 Vienna Convention on Consular Relations rather than article 49 of the 1969 Convention on Special Missions. He therefore suggested a revised version of paragraph 2 (b) of article 6 which would read as follows:

> "2. However, discrimination shall not be regarded as taking place:
>
> (a) ...
>
> (b) where States by custom or agreement extend to their diplomatic bags more favourable treatment than is required by the provisions of the present draft articles, provided that such extension is not incompatible with the object and purpose of the present draft articles."

324. During the Commission's discussion, one member supported the deletion proposal from paragraph 2 (b) made by one Government as described in paragraph 323 above. In his view, States did not need to be admonished as to what interests were most suitable to them. Another member also supported the deletion of this phrase and suggested that the subparagraph be redrafted as follows:

> "(b) Where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles."

Still another member, sharing the explanation given by the Special Rapporteur, preferred the formulation of paragraph 2 (b) as provisionally adopted by the Commission on first reading.

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG.

325. Draft article 7, on the appointment of the diplomatic courier, as provisionally adopted by the Commission on first reading, reads as follows:

Article 7

Appointment of the diplomatic courier

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

326. The Special Rapporteur indicated that no specific proposals had been made on this draft article in the written comments and observations received from Governments. One Government, however, had pointed out that the article was unnecessary since it was among those which enunciated matters which had heretofore not been regulated by international agreement and which had not caused practical problems to require such regulation.

327. The Special Rapporteur explained that in his view such an article had its place in a set of rules on the status of the diplomatic courier and the diplomatic bag. It codified a rule which had been established in State practice. The cross reference to article 9 (Nationality of the diplomatic courier) and article 12 (The diplomatic courier declared persona non grata or not acceptable) indicated the significance of the appointment of the courier by the competent authorities of the sending State and its international legal implications. When a courier was exercising his functions on behalf of several States, as might be the case in State practice, the act of the appointment of the courier might be relevant to the legal relationship between the courier and the sending State. The Special Rapporteur therefore, proposed to retain draft article 7 as a logical element in a system of rules relating to the status of the courier and the bag.

328. During the Commission's debate, one member wondered how many conventions or national rules or regulations contained a provision of the nature of draft article 7. Another member proposed the deletion of the draft article.

329. Draft article 8, dealing with the documentation of the diplomatic courier, as provisionally adopted on first reading by the Commission, reads as follows:

Article 8

Documentation of the diplomatic courier

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

330. The Special Rapporteur indicated that this draft article had elicited one substantive proposal from one Government. It had been suggested to include in the documentation of the courier not only an indication of his status and the number of packages constituting the diplomatic bag but also essential personal data about the courier and also particulars about the packages constituting the bag, such as serial number, destination, size and weight.

331. The Special Rapporteur was of the view that the official document of the courier could also contain some essential personal data about him, as well as the serial number of the packages and their destination. However, as far as the size and weight of the bag were concerned, this question had already been considered on several previous occasions. The prevailing view both in the Commission and in the Sixth Committee had been not to establish any limitation thereon in the draft articles on the grounds that to act otherwise would introduce some rigidity and restrictions in the system regulating the bag and would not adequately meet the practical requirements and needs of the official communications. Nevertheless, the Commission in its commentary to draft article 24 (Identification of the status of the diplomatic bag) agreed that "it was advisable to determine by agreement between the sending State and the receiving State the maximum size or weight of the diplomatic bag and that that procedure was supported by widespread State practice".

332. In the light of the above considerations, the Special Rapporteur submitted for consideration and eventual approval the following revised text of draft article 8:

"Article 8

Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and essential personal data about him, including his name, official position or rank, as well as the number of packages constituting the diplomatic bag which is accompanied by him, their serial numbers and destination."

333. In the course of the Commission's discussion of the topic, several members supported the proposed amendment.

334. Draft article 9, on the nationality of the diplomatic courier, as provisionally adopted on first reading by the Commission reads as follows:

Article 9

Nationality of the diplomatic courier

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

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

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

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

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

335. The Special Rapporteur indicated that one Government had made a general comment to the effect that this article should be deleted, since it fell under the category of matters, which had not caused practical problems such as to require specific regulation. Another general comment contained a suggestion to delete paragraphs 2 and 3 of the draft article as unrealistic, since they assumed that the diplomatic courier was a person called upon to reside permanently in a receiving State, whereas, in actual fact, in the majority of cases the receiving State had no advance knowledge of his appointment or arrival.

336. The Special Rapporteur pointed out that the question of the nationality of the diplomatic courier had to be the subject of regulation in order to achieve a coherent and uniform régime. So far only the 1963 Vienna Convention on Consular Relations contained a special provision regarding the nationality of the consular courier. As to paragraphs 2 and 3 of article 9, they were a logical elaboration of rules relating to situations constituting exceptions from the general rule of paragraph 1 according to which "the diplomatic courier should in principle be of the nationality of the sending State". The fact that paragraphs 2 and 3 dealt with exceptional cases could not as such justify their deletion.

337. The Special Rapporteur also indicated that two other comments had referred to the timing of the withdrawal of the consent of the receiving State in the case where nationals of the receiving State, nationals of the sending State who are permanent residents of the receiving State or nationals of a third State who are not nationals of the sending State are appointed as diplomatic couriers. It was suggested in the written comments and observations that the consent of the receiving State should not be withdrawn during the performance of the courier's mission and prior to its completion.

338. The Special Rapporteur agreed that the withdrawal of consent, as indicated in the Commission's commentary, should proceed only in serious circumstances such as those related to grave abuses and that in all cases the protection of the diplomatic bag entrusted to the courier and its safe delivery to its recipient had to be ensured. In the light of these considerations, the Special Rapporteur proposed the addition of the following second sentence to the present text of paragraph 2 of draft article 9:

> "However, when the diplomatic courier is performing his functions in the territory of the receiving State, the withdrawal of consent shall not have effect until the diplomatic courier has delivered the diplomatic bag to its final destination."

339. During the Commission's discussion, one member wondered how paragraphs 1 and 2 would apply to a person having the nationality both of the receiving State and the sending State. He felt that this point should be clarified either in the text of the draft article or in the commentary.

340. One member proposed the deletion of the draft article and another member indicated that if the article was retained, he would support the amendment proposed by the Special Rapporteur. But on the whole, he found the article unnecessary, as couriers were not diplomats or consular officers, and the whole matter could be dealt with in a commentary. Furthermore, he was of the view that the rules set out in paragraph 3 of this article did not appear to be compatible with the corresponding rules in respect of consular couriers that are set out in article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations.

341. Regarding this latter observation, the Special Rapporteur stated that the alleged difference seemed to be of a purely drafting nature. Article 35, paragraph 5, of the 1963 Vienna Convention also referred to "a national of the sending State, a permanent resident of the receiving State". The same was true of paragraph 3, subparagraph (a) of draft article 9. He submitted that the formulation in the latter provision was more precise, and was therefore preferable.

342. Draft article 10 on the functions of the diplomatic courier as provisionally adopted on first reading by the Commission reads as follows:

Article 10

Functions of the diplomatic courier

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

343. The Special Rapporteur indicated that this draft article had not elicited any specific substantive or drafting comments, except a general observation submitted by one Government to the effect that the draft article should be deleted, since it was within the category of rules which "have not caused practical problems to require such regulation".

344. In this connection the Special Rapporteur briefly recalled considerations already expressed by him with regard to other provisions, concerning the purpose of the draft articles and the application of a comprehensive approach

to their elaboration. He stressed that it would be hard to conceive a set of draft articles on the status of the diplomatic courier without trying to define his official functions. He therefore suggested to retain the draft article in its present form.

345. No observations regarding this draft article were made during the Commission's discussion of the topic, except that one member proposed its deletion.

346. Draft article 11, on the end of the functions of the diplomatic courier, as provisionally adopted on first reading by the Commission reads as follows:

Article 11

End of the functions of the diplomatic courier

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

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

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

347. The Special Rapporteur indicated that some written comments and observations by Governments had proposed to add to the draft article a new subparagraph (a) relating to the fulfilment of the functions of the diplomatic courier or his return to his country of origin as facts determining the end of the courier's functions. The Special Rapporteur recalled that his original version of the draft article contained a similar formulation. 255/ Yet as a result of the discussions in the Commission and its Drafting Committee, that paragraph had been deleted. Nevertheless, the Commission in its commentary had pointed out that as evidenced by the words "inter alia" in its introductory phrase, article 11 did not intend to present an exhaustive rehearsal of all the possible reasons leading to the end of the courier's

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255/ Yearbook ... 1982, vol. II (Part One), p. 271, para. 218.

functions. It further indicated in the commentary that the most frequent and usual fact having such an effect was the fulfilment of the courier's mission. 256/

348. In the light of the above comments and observations, the Special Rapporteur felt that it might be appropriate to amend draft article 11 by retaining the present subparagraphs and adding a new subparagraph (a) dealing with the end of the functions of the diplomatic courier. Thus, the opening section of the revised text of article 11 would read:

"Article 11

End of the functions of the diplomatic courier

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

"(a) the fulfilment of the functions of the diplomatic courier or his return to the country of origin;"

349. If this amendment was adopted, then present subparagraphs (a) and (b) would accordingly become subparagraphs (b) and (c).

350. In the course of the Commission's discussion on the topic, one member expressly supported the proposed amendment.

351. Another member felt that present subparagraph (a) (as provisionally adopted by the Commission) was not clear enough as to the moment when the courier ceased to be a courier. As to present subparagraph (b), he felt that its right location should be in draft article 12.

352. Draft article 12, dealing with the diplomatic courier declared persona non grata or not acceptable, as provisionally adopted on first reading by the Commission, reads as follows:

Article 12

The diplomatic courier declared persona non grata or not acceptable

1. The receiving State may at any time and without having to explain its decision notify the sending State that the diplomatic courier is

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256/ Yearbook ... 1984, vol II (Part Two) p. 48, para. (5) of the Commentary.

persona non grata or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

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

353. The Special Rapporteur indicated that the only two points raised in the written comments and observations by Governments were in connection with paragraph 2 and touched upon the protection of the bag when the courier is obliged to leave the territory of the receiving State. A comment had been made by one Government suggesting to provide sufficient time to the courier, declared persona non grata or not acceptable, to deliver the bag to the recipient. It had been proposed to add a new paragraph 3 to this effect.

354. The Special Rapporteur pointed out that although this preoccupation seemed well justified, it might not be appropriate to include an additional paragraph since in paragraph 2 of the draft article "a reasonable period" of time was contemplated when the delivery of the bag could be made and, furthermore, the relevant protective measures ensuring the integrity of the bag were provided under draft article 30. He therefore proposed to maintain the present formulation of the draft article.

355. In the course of the Commission's discussion on the topic, one member expressly supported the proposed amendment referred to in paragraph 353 above.

356. Draft article 13, on facilities accorded to the diplomatic courier, as provisionally adopted on first reading by the Commission, reads as follows:

Article 13

Facilities accorded to the diplomatic courier

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

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

357. The Special Rapporteur pointed out that only two general comments had been made on this draft article. One of them considered that the draft article was too vague and could be interpreted much too broadly, making this provision difficult to accept. In his view, the draft article could be deleted altogether or at least be redrafted so as just to lay down the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions. The other comment doubted that any provision of this kind was necessary, since paragraph 1 was vague and unsatisfactory, while paragraph 2 would impose a heavy and unjustifiable burden on receiving States and in particular on transit States.

358. The Special Rapporteur recalled that the text of draft article 13 was based on three draft articles (15, 18 and 19) originally submitted by the Special Rapporteur, 257/ referring, respectively, to general facilities, facilities for communications and facilities for temporary accommodation. Many members of the Commission had thought that the draft articles on facilities as proposed by the Special Rapporteur "were too long and too many". 258/ It had therefore been agreed to combine them, with certain modifications, in a more concise form into one draft article on facilities, which was done by the Drafting Committee. In addition, the commentary of the Commission to the draft article elucidated the contents and purpose of draft article 13 which, in the view of the Special Rapporteur, provided convincing evidence for its practical significance. 259/ In the light of these considerations the Special Rapporteur proposed to retain the present text of draft article 13, with one drafting suggestion, namely, to delete, for the sake of brevity, the words "as the case may be" in paragraphs 1 and 2 as unnecessary.

257/ Yearbook ... 1983, vol. II (Part One), pp. 70-73, paras. 26, 43; Yearbook ... 1983, vol. II (Part Two), pp. 48-49, footnotes 202, 205 and 206; Yearbook ... 1984, vol. II (Part Two), p. 49, footnote 168.

258/ Yearbook ... 1984, vol. II (Part Two), p. 49, para. 1.

259/ Ibid., pp. 50-51, paras. (2) to (7) of the commentary.

359. In the course of the Commission's discussion on the topic some members supported the comments and observations by Governments reflected in paragraph 357 above. They did not see the need for the draft article, particularly in the light of draft article 30, and felt that difficulties of interpretation as to the extent of the obligations involved might lead to disputes between the sending State and the receiving State.

360. Draft article 14 dealing with the entry into the territory of the receiving State or the transit State, as provisionally adopted on first reading by the Commission reads as follows:

Article 14

Entry into the territory of the receiving State or the transit State

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

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

361. The Special Rapporteur indicated that this draft article had elicited only one observation from one Government suggesting to add at the end of paragraph 2 the words "duly taking into account the practice of the sending State in relation to the granting of visas to the diplomatic courier of the State from which the visa is being requested, or, if this latter State does not normally use diplomatic couriers, the practice of the sending State in relation to the granting of visas to the nationals of the State from which the visa is being requested."

362. The Special Rapporteur felt that although the proposal had its merits, it was more appropriate for inclusion in the commentary since it elaborated in more specific terms the general provision already embodied in the draft article. Moreover, the observation indirectly referred to the principle of reciprocity which had been contemplated in article 6. He therefore suggested to retain draft article 14 in its present formulation.

363. No specific reference was made to this draft article during the Commission's discussion of the topic.

364. Draft article 15, on freedom of movement, as provisionally adopted on first reading by the Commission, reads as follows:

Article 15

Freedom of movement

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

365. The Special Rapporteur pointed out that only one general observation had been made on this draft article. One Government had stated that, while not objecting to the draft article in itself, it could not accept the obligation, as pointed out in the commentary of the Commission that "in exceptional circumstances, the courier may be compelled to address a request for assistance to the authorities of the receiving or transit State to obtain an appropriate means of transportation when he has to face insurmountable obstacles which may delay his journey and which could be overcome, to the extent practicable, with the help or co-operation of the local authorities." 260/

366. The Special Rapporteur indicated that it was obvious from the commentary referred to above, that as a rule, the courier had to make his own travel arrangements and that only in exceptional circumstances, facing serious difficulties, the courier might turn to the local authorities of the receiving or transit State for assistance. He therefore submitted that draft article 15 should be retained with only a small amendment, namely, to delete the words "as the case may be".

367. During the Commission's discussion of the topic no comments were made on draft article 15.

368. Draft article 16, on the personal protection and inviolability of the courier, as provisionally adopted on first reading by the Commission, reads as follows:

260/ Ibid., p. 52, para. (2) of the commentary.

Article 16

Personal protection and inviolability

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

369. The Special Rapporteur indicated that the written comments and observations of one Government had expressed the view that this draft article was unnecessary since, in its substance, it appeared to be adequately dealt with by the Vienna Conventions of 1961 and 1963 on diplomatic relations and consular relations, respectively. The Special Rapporteur pointed out that the Commission's commentary to this draft article contained convincing arguments in favour of its retention and illuminated the permanent aspects of the content and scope of the obligations of the receiving State or the transit State with regard to the courier in the performance of his functions. The Special Rapporteur did not deem it necessary to further elaborate on the purpose and practical significance of this provision as evidenced by the four relevant codification conventions and a significant body of bilateral agreements and national legislation. The draft article had an important place in a coherent set of rules governing the status of the diplomatic courier. He therefore suggested to retain the draft article with only one drafting amendment, namely, to delete the words "as the case may be" as unnecessary.

370. Several members of the Commission supported the draft article and were in favour of its retention. One member was in favour of further elaborating the provision in order to better determine the scope of the personal protection accorded to the courier.

371. Draft article 17, on the inviolability of the temporary accommodation, as provisionally adopted on first reading by the Commission, reads as follows:

Article 17

Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State, may not enter the temporary accommodation, except with

the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

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

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

372. The Special Rapporteur pointed out that widely divergent views had been expressed on this draft article in the written comments and observations submitted by Governments. Two main opposing trends had emerged, one of them was characterized by strong objections to the present text, considering it to be unnecessary, unrealistic, not practicable and excessive. Consequently, according to the proponents of this approach, draft article 17 should be deleted altogether. The other view was expressed in equally strong terms and while emphasizing the practical significance of article 17, tended to strengthen the concept of inviolability of the temporary accommodation. Critical observations were made to the effect that paragraph 3 of draft article 17, admitting the inspection of the temporary accommodation of the courier under certain conditions was inconsistent with paragraph 1 of the same article based on the principle of inviolability, which should be the guiding rule. In this connection, one Government had suggested to amend paragraph 1 by adding the following words at the end of the paragraph: "... provided that all necessary measures are taken to ensure the protection of the diplomatic bag, as stipulated in article 28, paragraph 1", and to amend paragraph 3 to the effect that the receiving State or the transit State be under the obligation "in the event of inspection or search of the accommodation of the diplomatic courier, to guarantee him the opportunity to communicate with the

mission of the sending State so that its representative can be present during such inspection or search". Between these two main trends, the Special Rapporteur added, there were some comments and proposals strengthening the compromise provision built in paragraph 3 with a view to making the draft article more acceptable.

373. The Special Rapporteur, while recognising that the draft article could inflict certain burden on the receiving or the transit State, felt that the text provided was an acceptable compromise solution, striking a reasonable balance between the need for an appropriate legal protection to the courier and bag in certain circumstances and the interests of the receiving or transit State. In his view, this was the point at which the Commission should make its choice. The deletion of draft article 17 would inevitably constitute a lacuna within a coherent system of rules governing the legal status of the courier and bag. He submitted that, on the whole, it would be desirable to retain the draft article.

374. During the Commission's discussion on the topic, some members strongly supported the draft article. They felt that the personal inviolability of the courier was practically conditioned by the inviolability of his accommodation. The rationale for according inviolability to the courier's temporary accommodation was an extension of his personal inviolability as provided for in draft article 16 and not only the protection of the bag. In their view, the draft article was not excessive and established an adequate balance between the interests of the sending State and those of the transit or receiving State. Its approach was strictly functional. One member supporting the draft article thought that it might be reformulated so that paragraph 1 would contain the principle of inviolability of temporary accommodation and paragraph 2 the exceptions contained in present paragraphs 1 and 3, with present paragraph 2 becoming paragraph 3.

375. Other members were strongly against the draft article and favoured its deletion. They felt that the protection of the courier was already sufficiently covered by article 16 and that of the bag by draft article 30 and that there was no functional need for draft article 17. Reality showed that no practical problems had arisen with the temporary accommodation of the

courier and that there was therefore no need of specific regulation. Furthermore the draft article, as presently drafted, did not even require that a courier be accompanying the bag in order to qualify for the additional protection. The draft article would place an undue burden on States with a large traffic of couriers and bags, and it would have the undesirable effect of detracting from the acceptability of the draft articles as a whole.

376. Some members, while not opposing in principle the draft article, felt that some compromise solution could be found so as to allay the fears of those opposing it and increase its acceptability. They proposed to delete the first sentence of paragraph 1 which refers to the inviolability of the temporary accommodation. The rest of the draft article would remain without change.

377. One member expressly supported the proposed amendment to paragraph 3 contained in the written comments and observations by Governments reproduced in paragraph 372 above, provided that its last phrase, namely, "so that its representative can be present during such inspection or search" be deleted.

378. The Special Rapporteur was of the view that the text of draft article 17 adopted on first reading without any formal reservations offered the basis for an appropriate provision, but that the question deserved further study in order to find a formulation which might offer better prospects for acceptance.

379. Draft article 18, on immunity from jurisdiction of the diplomatic courier, as provisionally adopted on first reading by the Commission, reads as follows:

Article 18

Immunity from jurisdiction

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

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

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

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

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

380. In his oral presentation, the Special Rapporteur pointed out that the subject matter covered by this draft article counted among the most disputed issues of the topic and the present text of the draft article constituted a compromise based on a functional approach leading to a qualified immunity from jurisdiction. In his report, he had analysed extensively the written comments and observations received from Governments on this draft article. Briefly stated, three main trends could be identified. The first trend, represented by a significant number of States, acquiesced to the functional approach and admitted that the present text of draft article 18 provided a middle ground for agreement. Another trend held the view that paragraph 1 of the draft article was superfluous and unnecessary since under draft article 16 the courier would enjoy personal inviolability. The third trend maintained that the courier should be granted full immunity from the criminal jurisdiction of the receiving State or the transit State and that the functional approach adopted in paragraph 1 should be abandoned. Some drafting amendments had also been proposed.

381. The Special Rapporteur, while expressing a preference for a simple formulation without qualifications on the question of immunities from jurisdiction, felt that the merits of a more restrictive concept of functional and qualified immunity could not be overlooked if considerations of realism and pragmatism were taken into account. On the other hand the deletion of article 18 would result in a gap concerning substantive elements of the couriers's legal status having a bearing on the exercise of his functions. He

therefore proposed to retain draft article 18 in its present compromise form with one addition and some purely drafting changes. Endorsing the proposal from one Government he suggested to add the following sentence to paragraph 2:

> "Pursuant to the laws and other legal regulations of the receiving or transit State, the courier when driving a motor vehicle shall be required to have insurance coverage against third-party risks."

He also proposed to delete the word "all" before the word "acts" in paragraphs 1 and 2 as well as the words "as the case may be" in both paragraphs.

382. During the discussion held in the Commission on the topic, a great number of members supported draft article 18 as a carefully balanced provision which constituted a good compromise formulation between the divergent views which had been expressed on this issue. Support was also voiced by several members with regard to the proposed addition to paragraph 2 by the Special Rapporteur as well as for the other drafting suggestions. In this connection, some members noted that article 78 of the 1975 Vienna Convention on the Representation of States, concerning insurance against third party risks, had some relevance to paragraph 2 of article 18.

383. One member wondered, in connection with paragraph 2, whether the receiving or transit State was always prevented to bring suit against the courier before doing so against the insurance company. Another member expressed doubts about the need for paragraph 5. Still another member proposed the deletion of paragraphs 2 to 4 of the draft article.

384. Finally, one member was unconvinced of the need for the article as a whole, particularly in the light of the existence of draft article 16, and felt that the draft article might run against an effective and smooth administration of justice in the receiving or transit State.

385. The Special Rapporteur stated that, in the light of the discussion, the draft article, with the proposed amendments, seemed to be acceptable to a great number of the Commission's members. As regards the question put in connection with paragraph 2, he pointed out that the immunity from the jurisdiction of the receiving or the transit State was in respect of acts performed by the courier in the exercise of his functions. However, the civil

and administrative immunity did not extend to an action for damages arising from an accident caused by a vehicle the use of which might have involved the liability of the courier where those damages were not recoverable from insurance. In such a case, a civil action against the courier might be instituted if the insurance company could not pay the indemnification. In addition, it had been suggested to include a provision to the effect that the courier shall be required to have insurance coverage against third-party risks. With regard to the doubts expressed by one member on paragraph 5, the Special Rapporteur stated that this paragraph embodied an almost standard rule in diplomatic and consular law, constituting a safeguard provision which might have a preventive effect and, in certain circumstances, an actual application.

386. Draft article 19 on exemption from personal examination customs duties and inspection and draft article 20 on exemption from dues and taxes, as provisionally adopted on first reading by the Commission, read as follows:

Article 19

Exemption from personal examination, customs duties and inspection

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

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

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

Article 20

Exemption from dues and taxes

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind

which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

387. The Special Rapporteur pointed out that some Governments had expressed the view that draft articles 19 and 20 should be deleted. Two main arguments had been advanced to this effect. In the case of paragraph 1 of article 19, the objection to its retention had been based on the grounds that the provision for a courier to enjoy personal inviolability under article 16 made the exemption from his personal examination unnecessary. The other exemptions provided in paragraphs 2 and 3 of that article and in article 20 had also been considered unnecessary by some Governments due to the short duration and transitory nature of the courier's stay.

388. The Special Rapporteur was of the view that the Commission might find it possible to dispense with paragraph 1 of draft article 19, in view of the above interpretation of article 16 on personal inviolability. However, it seemed that the transitory nature of the courier's status as such did not justify the deletion of a specific provision relating to some exemptions to be accorded to the courier in order to facilitate the performance of his functions and assist him in his journey. The courier was an official of the sending State who was entitled to enjoy certain facilities when entering or leaving the territory of the receiving or transit State, facilities which were accorded to any member of the administrative or technical staff of a mission or consular post who is not a national of the receiving or the transit State. The fact that the courier would stay a limited time should not affect his right as a person on an official mission to be granted certain exemptions from customs duties and other dues and taxes which would facilitate his clearance at the frontier, thus providing him with favourable conditions for the exercise of his official functions without undue formalities, in order to ensure the speedy delivery of the diplomatic bag. This was indeed a functional necessity.

389. In the light of all the above considerations, the Special Rapporteur proposed a revised text of draft articles 19 and 20 which would delete the first paragraph of present draft article 19 and would merge its present paragraphs 2 and 3 with draft article 20. He also proposed to delete the

words "as the case may be" from paragraph 2 of present draft article 19 which would become the first paragraph of his newly proposed draft article 19. The new draft article would then read as follows:

"Article 19

Exemption from customs duties and other dues and taxes

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

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

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

390. During the Commission's discussion on the topic several members expressed support for the merger of present draft articles 19 and 20, as proposed by the Special Rapporteur. One member proposed the deletion of present draft article 20 (paragraph 3 of the revised merger).

391. Draft article 21, on the duration of the privileges and immunities of the courier, as provisionally adopted on first reading by the Commission reads as follows:

Article 21

Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is

already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier ad hoc shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

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

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

392. The Special Rapporteur indicated that this draft article had elicited written comments and observations of two categories, namely a general assessment on its necessity and specific substantive and drafting proposals regarding its paragraph 1.

393. As regards the need for the draft article, one Government declared in general terms that it could not support draft article 21 because it spelled out in a somewhat complicated manner, what is already clearly implicit in other provisions of the draft articles (for example, articles 12 and 16) or is expressly stated in provisions of the 1961 Vienna Convention on Diplomatic Relations or the 1963 Vienna Convention on Consular Relations. The same Government expressed its objection to the draft article, including its paragraph 3, in view of its objection in principle to conferring any immunity from jurisdiction on the courier.

394. Turning to the specific substantive and drafting comments on paragraph 1, the Special Rapporteur indicated that they related to two distinct issues: First, the precise moment or fact determining the beginning or the end of the privileges and immunities enjoyed by the diplomatic courier and secondly, the duration of privileges and immunities granted to the courier ad hoc.

395. Addressing the comments and observations from Governments referred to above, the Special Rapporteur indicated that it would not be sufficient for a coherent set of articles on the status of the courier, to consider that such an important problem as the duration of functions should be deduced implicitly

by provisions dealing with persona non grata (art. 12) or protection and inviolability of the diplomatic courier (art. 16). As to the reference to the two Vienna Conventions, there were no specific provisions on the duration of privileges and immunities accorded to the courier. The draft article had been inspired by the relevent provisions of the codification conventions, but it was specifically addressed to the particular legal features of the status of the courier and the transitory character of his functions. This was the reason why it was so relevant for the courier's status to indicate the precise moment or fact (event) determining the beginning or the end of the facilities, privileges and immunities enjoyed by the diplomatic courier, and to indicate the duration of the privileges and immunities accorded to a courier ad hoc when he is resident in the receiving State as a special case.

396. In the view of the Special Rapporteur, a precise indication of the actual moment from which the courier shall enjoy privileges and immunities, in the case when he is already in the territory of the receiving State, was very important. This moment should be clearly spelled out in the text. It might be the moment of the appointment or the moment at which the courier takes custody of the bag. The moment of appointment and receipt of the documentation indicating the status of the courier was very relevant.

397. The Special Rapporteur felt that the present text of paragraph 1 needed further precision and should stipulate that the courier shall enjoy facilities, privileges and immunities from the moment he enters the territory of the receiving or the transit State in order to perform his functions, or if he is already in the territory of the receiving State, from the moment of his appointment and receipt of the document referred to in article 8. Special reference should be made regarding the end of the facilities, privileges and immunities of a courier ad hoc only in the case when he was a resident in the receiving State.

398. Therefore the Special Rapporteur proposed to maintain the present formulation of paragraphs 2 and 3 of the draft article which had not given rise to specific comments or observations and to revise paragraph 1 in the following manner (changes have been underlined):

"1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions, or if he is already in the territory of the receiving State, from the moment of his appointment and receipt of the document referred to in article 8. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving or the transit State. However, the privileges and immunities of the diplomatic courier ad hoc who is a resident in the receiving State shall cease at the moment when he has delivered to the consignee the diplomatic bag in his charge."

399. During the Commission's discussion of the topic, several members supported the revised version of paragraph 1 proposed by the Special Rapporteur.

400. Draft article 22, on waiver of immunities, as provisionally adopted on first reading in the Commission, reads as follows:

Article 22

Waiver of immunities

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

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

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

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

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

401. The Special Rapporteur indicated that one Government which had opposed the granting of jurisdictional immunities to the diplomatic courier, had, on that ground, expressed reservations about draft article 22. No other written comments and observations had been made on this draft article. He therefore proposed to maintain the draft article in its present formulation.

402. In the course of the Commission's discussion on the topic, no specific reference was made to this draft article, except for one member who proposed its deletion.

403. Draft article 23, on the status of the captain of a ship or aircraft entrusted with the diplomatic bag, as provisionally adopted on first reading by the Commission, reads as follows:

Article 23

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

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

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

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

404. In his oral presentation, the Special Rapporteur indicated that one Government had made the proposal to grant to the captain of a ship or aircraft entrusted with the diplomatic bag the same status as the ordinary courier or the courier ad hoc. In this connection, the Special Rapporteur was of the view that there was no valid reason in fact or in law to change the generally recognized rule, embodied in article 27, paragraph 7, of the 1961 Vienna Convention of Diplomatic Relations and the corresponding provisions in the other conventions on consular and diplomatic law, according to which the captain entrusted with the bag shall not be considered to be a diplomatic courier.

405. The Special Rapporteur also pointed out that another substantive point raised in the written comments of one Government suggested that the bag may also be entrusted to a member of the crew of a ship or aircraft rather than the captain. He added that this possibility had already been considered in

his previous reports but reactions to it in the Commission and its Drafting Committee had been divided. Nevertheless, when adopting the present text of draft article 23, the Commission in its commentary pointed out that "the wording of paragraph 1 did not preclude the existing practice of several States to entrust the unaccompanied bag to a member of the crew of the ship or aircraft, either by decision of the central authorities of the State or by delegation from the captain of the ship or aircraft to a crew member". 261/

406. The Special Rapporteur felt that this question should probably be reconsidered. He therefore proposed an amendment to the title and paragraphs 1, 2 and 3 of draft article 23 by the insertion of the words "or an authorised member of the crew", after the word "captain" in the title and accordingly the words "or the authorised member of the crew" after the word "captain" in the first line of paragraphs 1 and 2, and in the last line of paragraph 3. All other parts of the article would remain unchanged.

407. During the Commission's discussion of the topic, one member supported the proposed changes; another member expressed doubts about them.

PART III

STATUS OF THE DIPLOMATIC BAG

408. Draft article 24 on the identification of the diplomatic bag, as provisionally adopted on first reading by the Commission, reads as follows:

Article 24

Identification of the diplomatic bag

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

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

261/ Yearbook ... 1985, Vol. II (Part Two) p. 46, para. (5) of the commentary.

409. The Special Rapporteur indicated that the written comments and observations made on this draft article had been of a very general nature, namely that the draft article should contain more precise and specific rules, but without advancing any concrete proposal.

410. In this connection, the Special Rapporteur felt that the proposed revised version of draft article 8, reproduced in paragraph 49 above, together with draft 24 could provide the basis for a more detailed identification of the bag. He therefore suggested to retain the present text of draft article 24.

411. During the Commission's discussion of this topic no specific reference was made to this draft article.

412. Draft article 25 on the content of the diplomatic bag, as provisionally adopted on first reading by the Commission reads as follows:

Article 25

Content of the diplomatic bag

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

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

413. The Special Rapporteur stated that the present text of the draft article, after thorough discussion, reflected the legitimate concern about some abusive practices with the diplomatic bag which had taken place in recent time. The purpose of the article, as indicated in the commentary of the Commission, was to define the permissible content of the bag emphasizing that it may contain only official correspondence, and documents or articles exclusively for official use. 262/ Furthermore, in order to strengthen the commitments of the sending States to respect the rule governing the permissible content of the bag, a provision of a preventive character was included in paragraph 2 of this article.

262/ Yearbook ... 1985, Vol. II (Part Two), p. 48, paragraphs (2) and (3) of the commentary to article 25.

414. An observation had been made by one Government to the effect that the bag might not contain any article whose importation or possession was prohibited by the law of the receiving or transit State. In this connection the Special Rapporteur pointed out that none of the corresponding provisions of the four codification conventions on diplomatic and consular law contain such a reference. The proposed restriction went beyond the meaning of these provisions. Furthermore, the present formulation of article 25, paragraph 1, modelled on article 35, paragraph 4 of the 1963 Vienna Convention on Consular Relations, might well serve the same purpose without exceeding the well-established rules embodied in the codification conventions with regard to the content of the bag.

415. Two other observations had referred to the need to determine the size and the weight of the bag within reasonable dimensions proportional to the importance of the mission, consular post or delegation of the sending State. Another similar proposal was to keep the weight of the bag within limits considered to be reasonable and normal having regard to the size and needs of the particular mission.

416. In this respect, the Special Rapporteur was of the view that the two above-mentioned proposals, which dealt with matters touched upon in connection with draft article 8 contained expressions relating to the size and weight of the bag which could give rise to subjective and contradictory interpretations that might be considered incompatible with the principle of sovereign equality of States.

417. In the light of the above considerations, the Special Rapporteur proposed to retain the present formulation of draft article 25.

418. In the course of the Commission's discussion on the topic, one member supported the observation reflected in paragraph 414 above concerning articles whose importation or possession was prohibited in the law of the receiving State. In this connection another member pointed out that in the light of article 5 on the duty to respect the laws and regulations of the receiving State and the transit State, it would be inappropriate to define further in draft article 25 the contents of the diplomatic bag as all the provisions of the draft should be interpreted in an integrated manner, taking into account all the draft articles.

419. Draft article 26, on the transmission of the diplomatic bag by postal service or by any mode of transport, as provisionally adopted on first reading by the Commission, reads as follows:

Article 26

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

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

420. The Special Rapporteur indicated that only a few written observations had been made on this draft article, to the effect that the ensurance of the best possible conditions for the expeditious transmission of the bag and the avoidance of lengthy delays should somehow be reflected in this provision. He stressed that the idea of accelerating the transmission and providing for a special treatment of the diplomatic bag by postal service or by any other mode of transport had been reflected in the text of draft article 26 only in general terms because the handling of the bag was dependent on the procedures followed by the respective administrations or agencies. In this connection he recalled that the proposal to introduce a new category of postal items under the nomination of "diplomatic bags" in the international postal service by amending article 18 of the international regulations of the Universal Postal Union, had been rejected by the UPU Congress held in 1979 in Rio de Janeiro. Consequently, the diplomatic bag had to be treated in the same way as other letter-post items, unless the postal administrations could enter into bilateral or multilateral agreements for a more favourable treatment of the diplomatic bags conveyed by postal service. As a matter of fact, he added, there were a number of such bilateral instruments. He was of the view that the present work of the Commission on the topic might well provide the basis for a general framework for the transmission of diplomatic bags through postal channels.

421. In the light of the comments and observations made by some Governments, the Special Rapporteur proposed the following revised version of draft article 26:

"Article 26

Transmission of the diplomatic bag by postal service or by any other mode of transport

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

422. Some members of the Commission stressed that the greatest number of diplomatic and consular bags circulating in official communications between States were of the kind referred to in article 26. And yet all the elaborate system of protection for the diplomatic bag established in the draft articles did not seem to extend to this specific type of bag, which was the most frequently used. Cases of loss, partial destruction and disregard for this kind of bag, including delays and other difficulties, were unfortunately not unheard of. These members felt that the provision regarding the protection of these bags should be more elaborate.

423. The Special Rapporteur reiterated the remarks he had made in introducing the revised version of the draft article. He admitted that the concern expressed by some members was very legitimate and relevant, and he was conscious of the fact that the proposed revised version of the draft article did not meet this genuine concern in all aspects. Yet, as he had explained, the proposals to obtain a favourable treatment of the bag by the national postal administrations had not been accepted by the competent organs of UPU. In view of this situation, further attempts should be explored to render the text more adequate with regard to this type of unaccompanied bag by providing certain measures for bilateral or multilateral arrangements assuring the safe and rapid transmission of the bag.

424. Draft article 27 on facilities accorded to the diplomatic bag, as provisionally adopted on first reading by the Commission, reads as follows:

Article 27

Facilities accorded to the diplomatic bag

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

425. The Special Rapporteur indicated that some comments and observations from Governments had criticised the draft article as being too general and vague. In this connection he recalled the Commission's commentary in which it was stated that "it would seem neither advisable nor possible to provide a complete listing of the facilities to be accorded to the diplomatic bag". 263/ The commentary further indicated that the obligations of the receiving or transit State might entail "favourable treatment in case of transportation problems or also the speeding up of the clearance procedures and formalities applied to incoming and outgoing consignments". 264/ The Special Rapporteur added that the sending State was also under an obligation to take all appropriate measures to avoid any difficulties which may contribute to possible complications for the unimpeded and rapid transmission and delivery of the bag.

426. The Special Rapporteur furthermore pointed out that one Government proposed a drafting amendment to draft article 27, namely, to insert after the word "shall", the following expression, "... as permitted by local circumstances; ...".

427. In the light of all the above considerations and proposals, the Special Rapporteur submitted the following revised version of draft article 27:

"Article 27

Facilities accorded to the diplomatic bag

> The receiving State or the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag and shall prevent technical and other formalities which may cause unreasonable delays. The sending State on its part shall make adequate arrangements for ensuring the rapid transmission or delivery of its diplomatic bags."

263/ Yearbook ... 1985, Vol. II (Part Two), p. 50, para. (4) of the commentary.

264/ Ibid.

428. During the Commission's discussion on the topic, there were very few specific references to this draft article. One member did not agree with the proposed amendments; another member proposed the deletion of the draft article.

429. Draft article 28 on the protection of the diplomatic bag, as provisionally adopted on first reading by the Commission, reads as follows:

Article 28

Protection of the diplomatic bag

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

2. Nevertheless, if the competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or the transit] State may require that the bag be returned to its place of origin.

430. During his oral presentation, the Special Rapporteur indicated that this draft article had been discussed extensively and divergent points of view had been expressed throughout the work of the Commission on the topic. The main reason for the special attention given to the draft article had been the conception that, as a key provision, it involved basic rules which should lay down an acceptable balance between the confidentiality of the content of the bag and the prevention of possible abuses. The written comments and observations submitted by Governments had confirmed this assessment. A wide range of political, legal and methodological problems were raised, most of them already considered by the Commission and the Sixth Committee. In the view of the Special Rapporteur, the main issues involved in both paragraphs of draft article 28 were the following:

(a) The concept of inviolability of the diplomatic bag and its relevance to draft article 28;

(b) The admissibility of scanning of the bag;

(c) Whether a comprehensive and uniform approach would be applicable to all categories of bags or there should be a differentiated treatment of the bags in strict compliance with the relevant provisions, on the one hand, of the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States and, on the other hand, of the 1963 Vienna Convention on Consular Relations;

(d) If a comprehensive and uniform approach was followed, whether the treatment of all kinds of bags should be governed by article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, or by article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations; and

(e) Whether the transit State should have the same rights as the receiving State with regard to the treatment of the bag, especially if the option to request the opening of the bag would be provided.

431. With regard to question (a) above, the Special Rapporteur indicated that the written comments and observations by Governments had been the subject of divergent views. Some Governments claimed that it was inconsistent with the need for observance of any laws and regulations which the receiving States had adopted with a view to the protection of their legitimate interests. This approach was questioned by other Governments on the ground that inviolability of the bag would be a logical extension of the inviolability of the archives, documents and official correspondence, as reflected in article 25 and article 27, paragraph 2, of the Vienna Convention on Diplomatic Relations. This latter view was shared by the Special Rapporteur who felt that the inviolability of the bag was a basic requirement for ensuring the confidentiality of the content of the bag and the proper functioning of official communications.

432. As regards question (b) above, the Special Rapporteur indicated that a significant number of the written comments and observations raised serious reservations and objections to the examination of the bag directly or through electronic or other technical devices. It had been proposed that the words within brackets in the present text be kept and the brackets be eliminated.

433. Some Governments saw no obstacles in subjecting the bag to non-intrusive security checks as, for instance, the use of sniffing dogs, or other methods of external examination, but not to electronic scanning as this might jeopardise the bag's inviolability. Other Governments however had expressed the view that an examination by measures of electronic scanning might be permissible in exceptional cases and under certain conditions. In this connection one Government had submitted the following proposal for paragraph 2 of draft article 28 (underlined in the original).

> "2. If the competent authorities of the receiving or the transit State have serious reasons to believe that the diplomatic bag contains any articles which are not intended for official use only and which heavily endanger either the public security of the receiving or transit State or the safety of individuals, they may, after giving the sending State sufficient opportunity to dissipate suspicion, request that the bag be subjected to examination through electronic or other technical devices.
>
> Examination may only take place if the sending State consents and a representative of the sending State is invited to be present. The examination may in no circumstances jeopardise the confidentiality of the documents and other legitimate articles in the bag.
>
> If such examination does not satisfy the competent authorities of the receiving or transit State, they may further request that the bag be opened in their presence by an authorised representative of the sending State.
>
> If either request is refused by the authorities of the sending State, the competent authorities of the receiving or transit State may require that the bag be returned to its place of origin."

434. Commenting on the above-mentioned proposals, the Special Rapporteur observed that sniffing dogs could not jeopardise the confidentiality of the bag's contents. As to electronic scanning, it was very difficult to prove that the recourse to scanning would not affect the integrity and secrecy of the documents and articles for official use. Only States which had at their disposal comparable technological capacity could be satisfied with such a provision. And in the foreseeable future the great majority of States in the world would not possess a scanning technology comparable to that of States technologically most advanced.

435. With regard to questions (c) and (d) above, the Special Rapporteur indicated that some Governments had proposed to adopt the text of paragraph 1 without brackets and to delete altogether paragraph 2. Some other Governments, maintaining that it would not be possible to overlook the existence, under the 1963 Convention, of a different treatment for the consular bag, advanced the proposal to adopt a differentiated approach to be reflected in paragraph 2 of the article, which should, in their view, deal only with the consular bag in accordance with article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Still other Governments considered that the present formulation on scanning did not provide adequate safeguards with respect to the confidentiality of the correspondence, but were prepared to agree with the proposal to apply the treatment provided in article 35, paragraph 3, of the 1963 Vienna Convention not only to consular bags but also to all categories of bags, including the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations.

436. In connection with question (c) above, the Special Rapporteur indicated that while some Governments had been in favour of the concept that the transit States are equally entitled to the rights referred to in draft article 28, paragraph 2, other Governments had expressed reservations and objections. In this respect, the Special Rapporteur pointed out that this problem should not create much difficulty in view of the fact that, in practice, if the examination or the opening of the bag were accepted, the transit State would seldom request to exercise its rights. On the other hand, it must also be borne in mind that, in most instances, transit States were on an equal footing with receiving States, as far as their obligations regarding the bag are concerned, and this might be viewed by some Governments as justifying the attribution to transit States of the same rights as receiving States.

437. Finally, the Special Rapporteur drew attention to a communication addressed to the Commission by the International Conference on Drug Abuse and Illicit Trafficking, in which 138 States and a great number of organizations were represented. The "Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuses", adopted by the Conference on 26 June 1987 by consensus (see document A/CONF.132/12), contained a special reference to the topic under consideration, which states:

"248. If conclusive evidence comes to light of illicit trafficking being carried out by means of the misuse of the diplomatic bag or of the diplomatic status, or of the consular status, it is open to the Government of the receiving State to take measures for halting this traffic and for dealing with the diplomatic or consular staff involved in strict conformity with the provisions of the Vienna Conventions on Diplomatic and Consular Relations. The Conference draws the attention of the International Law Commission to possible misuse of the diplomatic bag for illicit drug trafficking, so that the Commission could study the matter under the topic relating to the status of the diplomatic bag."

438. The same Conference had adopted by acclamation a Declaration which requested the Secretary-General of the United Nations to keep under constant review the activities referred to in this Declaration and in the Comprehensive Multidisciplinary Outline. Under paragraph 8 of General Assembly resolution 42/112, the Secretary-General was requested to report to the Assembly at its forty-third session in 1988 on the implementation of the said resolution.

439. The Special Rapporteur felt that the above recommendations deserved special attention and should be taken into consideration at the moment when the Commission proceeded to the second reading of draft article 28. He recalled that in their written observations some Governments, while not particularly referring to possible abuse relating to drug trafficking, most probably had this in mind when suggesting not to exclude such non-intrusive external security examination as the use of sniffing dogs as well as other similar methods of external examination.

440. In the light of all the above considerations the Special Rapporteur proposed the following three alternative revised texts for draft article 28:

Alternative A

"Article 28

Protection of the diplomatic bag

The diplomatic bag shall be inviolable wherever it may be, it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices."

Alternative B

"Article 28

Protection of the diplomatic bag

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

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, and documents or articles, referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin."

Alternative C

"Article 28

Protection of the diplomatic bag

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

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reasons to believe that the bag contains something other than the correspondence, and documents or articles referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the competent authorities of the receiving State or the transit State may request that the bag be returned to its place of origin."

441. In the course of the Commission's discussion on the topic, some members strongly supported alternative A presented by the Special Rapporteur. They felt that its formulation was a reflection of existing law on the matter. The inviolability of the bag therein enshrined was a natural and logical extension of the inviolability of documents and archives of the mission recognized by the 1961 Vienna Convention on Diplomatic Relations. The other two alternatives were not acceptable as they brought down the régime of the

diplomatic bag to that of the consular bag. In connection with alternative A, one member was of the view that it should contain a subvariant, which would exclude from it the concept of inviolability.

442. One member expressed a preference for alternative B proposed by the Special Rapporteur. It was in his view a good compromise solution. Its paragraph 2 was based on article 35, paragraph 3 of the 1963 Vienna Convention on Consular Relations, although it extended to the transit State the same rights accorded to the receiving State. It was also pointed out that variant B was closer to the codification conventions in the field of diplomatic and consular law, but at the same time an objection was raised against according to the transit State the same rights as those of the receiving State.

443. Some other members expressed a preference for the proposal on paragraph 2 of the draft article presented in the written observations of one Government and reproduced in paragraph 443 above. This proposal, in cases of suspicion, would allow the receiving State or the transit State with the consent of the sending State and in the presence of its representative, to subject the bag to examination through electronic or other technical devices, provided that in no circumstances would the examination jeopardise the confidentiality of the documents and other legitimate articles in the bag. One member supported in general this formulation but not its aspects concerning possible electronic examination of the bag neither the extension of rights to transit States.

444. In connection with this proposal, a discussion arose about the permissibility of electronic scanning of the bag. Some members were in favour of allowing electronic scanning of the bag taking into consideration the safety concerns of the receiving or the transit State. In their view, electronic scanning could be done without necessarily affecting the confidentiality of the bag's contents. Furthermore, most airports checking points were not controlled by State authorities but by private transportation companies which had an obvious interest in ensuring the safety of carriers and passengers. They also argued that electronic scanning was not actually forbidden by existing international law regulating the bags.

445. Other members were strongly opposed to any examination of the bag by electronic or any other technical devices. They felt that if a bag was subjected to electronic scanning there was absolutely no way to be sure that the receiving or transit State using those means would not abuse their right and intend to violate the confidentiality of the contents, which was perfectly possible with present-day technology. Yet reciprocity would not serve as a restraining factor since this was a technology at the disposal of only a few developed States, which developing countries did not possess. They felt that it was the duty of States to ensure that private transportation companies complied with provisions concerning the inviolability of the bag and the confidentiality of its contents, as internal law could not be invoked for non-compliance with international law. These members were more favourably inclined towards non-intrusive ways of examination, such as sniffing dogs. These means could be considered as permissible in the light of present-day international law, did not violate the contents of the bag, and could take care of the legitimate concerns expressed by the International Conference on Drug Abuse and Illicit Trafficking concerning the possible misuse of the diplomatic bag for drug trafficking.

446. A great number of members supported alternative C presented by the Special Rapporteur. They felt that it offered the necessary flexibility and that it struck the right balance between the need for ensuring the inviolability of the bag and the confidentiality of its contents on the one hand, and the legitimate security concerns of the receiving and the transit State. They welcomed it as a realistic solution which contained preventive and safeguard provisions.

447. However a view was expressed that variant C did not constitute a compromise since, according to this variant, transit States as well as receiving States would acquire the right to request that both the diplomatic and consular bags be sent to their place of origin. This would mean a revision of the existing conventions, namely the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.

448. One member, while supporting in general alternative C, proposed that paragraph 1 should be modified to read as follows:

The diplomatic bag shall be inviolable wherever it may be. It shall not be opened or detained, subject to paragraph 2, and its contents shall be exempt from examination directly or through electronic or other technical devices".

The intention in introducing the words "its contents" was to make clear that external examination of the bag would be permitted; with the link provided by the words "subject to paragraph 2", the word "Nevertheless" would be deleted from paragraph 2. This member also suggested that the words "something other than the correspondence and documents or articles referred to in article 25" in paragraph 2 should be qualified by the words "and which seriously endanger the public security of the receiving State or transit State or the safety of the individual".

449. Some members of the Commission expressed reservations about the extension to transit States of the same rights accorded to the receiving States under paragraph 2.

450. The Special Rapporteur stated that the discussion in the Commission had offered the grounds for further reflection. The easiest way out, apparently, would be to adhere to the proposed alternative B, leading to a double régime with regard to the protection of the bag; one for the consular bag under article 35, paragraph 3 of the 1963 Consular Convention, and another for the diplomatic and other bags employed for official communications, based on article 27, paragraph 3 of the 1961 Convention on Diplomatic Relations. This approach would constitute a deviation from the objective to establish a coherent and uniform régime. Such an alternative, though not deprived of legal foundation in the existing conventional law, had however not obtained sufficient support during the discussion held in the present session. There were several other proposals, including the bracketed text of article 28 considered on first reading, alternatives A and C, suggested by the Special Rapporteur, the proposal submitted by one Government reflected in paragraph 433 above and other proposals advanced during the session, including the amended alternative C reflected in paragraph 440 above.

451. All these proposals deserved meticulous examination and reflection on their implications. It might be advisable to take into account the subsequent consideration of the Commission's report by the Sixth Committee at the

forthcoming session of the General Assembly and any additional written comments and observations to be submitted by Governments. It therefore might be appropriate to exercise more patience and prudence at this stage, though the current debate seemed to have indicated a trend more in favour of alternative C.

452. Another point on the treatment of the bag related to the position of the transit State with regard to its option to request the opening of the bag in transit. Some members had been of the view that the transit State should not enjoy the same position as that of the receiving State, in the case when the request for examination or opening of the bag was admissible. Without overlooking the legitimate interests of the transit State, the Special Rapporteur also felt that such a procedure might lead to unreasonable delays and impediment of the rapid transmission or delivery of the bag. Therefore it seemed that the above-mentioned views might be justified.

453. Draft article 29 on exemption from customs duties, dues and taxes, as provisionally adopted on first reading by the Commission, reads as follows:

Article 29

Exemption from customs duties, dues and taxes

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

454. The Special Rapporteur indicated that this draft article had not elicited any substantive or drafting comments except for one Government which had expressed a doubt as to whether there was a need for this provision.

455. The Special Rapporteur explained that the reasons for including this draft article had been well explained in the Commission's commentary. 265/ He added that in the absence of special provisions on exemption from customs and other fiscal dues and taxes and related charges for customs clearance or other

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265/ Yearbook ... 1986, vol. II (Part Two), p. 30, paras. (2) and (3) of the commentary to article 29.

formalities, there might be instances where such requirements would be imposed by the law of a receiving or transit State. Draft article 29 therefore could be conceived at least as a safeguard provision.

456. In the light of the above considerations the Special Rapporteur proposed to retain the present text of the draft article, with the deletion of the words "as the case may be".

457. During the Commission's discussion of the topic no specific reference was made to this draft article.

PART IV

MISCELLANEOUS PROVISIONS

458. Draft article 30, on protective measures in case of force majeure or other circumstances, as provisionally adopted on first reading by the Commission, reads as follows:

Article 30

Protective measures in case of force majeure or other circumstances

1. In the event that, due to force majeure or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take repossession of it.

2. In the event that, due to force majeure, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

459. The Special Rapporteur pointed out that in its written comments and observations, one Government accepted that in the circumstances referred to in paragraph 1 of this article, the obligations of a receiving or a transit State in respect of the bag did not cease to apply; it did not think it reasonable that additional and positive obligations should be imposed on a receiving or a transit State.

460. Invoking the pertinent commentary of the Commission, the Special Rapporteur pointed out that paragraph 1 clearly referred to situations

such as death, serious illness or an accident of the courier or the captain of a ship or aircraft and was not intended to cover the case of loss or of mishap to the diplomatic bag transmitted by postal service or by any mode of transport. It was also clear in the commentary that the receiving State or the transit State could assume such obligations if they had knowledge of the existence of special circumstances and when there was no one to take care of the bag. As to paragraph 2, the obligations therein contemplated arose only in cases of force majeure or other exceptional or unforeseen circumstances such as adverse weather conditions, forced landing of an aircraft or other events beyond the control of the courier or of the carrier of the bag.

461. In the view of the Special Rapporteur it was difficult to conceive how in this interdependent world in which international co-operation and solidarity by States had acquired evergrowing significance, a provision designed to render assistance in the case of a distress or in exceptional conditions could be considered to be excessive and therefore not acceptable, the more so as provisions of a similar character could be found in the relevant articles of the four codification conventions on diplomatic and consular law adopted under the auspices of the United Nations.

462. The Special Rapporteur also indicated that one Government had suggested to add the words "or other circumstances" after the words "force majeure" in order to keep the paragraph in line with the same expression used in paragraph 1. In addition, the Special Rapporteur would propose to delete the words ", as the case may be," in paragraph 1.

463. Taking into account the above drafting suggestions the Special Rapporteur proposed a revised version of draft article 30 which would delete the words "as the case may be" in paragraph 1 and would add the expression "or other circumstances" after the words "force majeure" in paragraph 2.

464. During the Commission's discussion on the topic no specific reference was made to draft article 30.

465. Draft article 31 on non-recognition of States or Governments or absence of diplomatic or consular relations, as provisionally adopted on first reading by the Commission, reads as follows:

Article 31

Non-recognition of States or Governments or absence of diplomatic or consular relations

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

466. The Special Rapporteur indicated that this draft article had elicited several written comments and observations of a substantive and a drafting nature. In some of those observations, the scope of the draft article in its present form had been criticized as too broad and not in conformity with international law and State practice. In this connection the suggestion had been made to confine draft article 31 to cases of non-recognition of the sending State or of its Government or non-existence of diplomatic or consular relations between that State and the receiving State which is a host State of an international organization or an international conference. Another observation contained a proposal to mention also special missions in draft article 31, namely, that the draft article should also apply to couriers and bags of special missions.

467. In the light of the above-mentioned written comments and observations submitted by Governments and the suggestions contained therein, the Special Rapporteur proposed the following revised formulation of the draft article (the suggested addition has been underlined):

"Article 31

Non-recognition of States or Governments or absence of diplomatic or consular relations

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations <u>between that State and the receiving State in whose territory an international organization has its seat or office, or an international conference takes place, or where a special mission of the sending State is present</u>."

468. During the Commission's discussion of the topic, no specific reference was made to draft article 32, except for one member who wondered whether it was necessary.

469. Draft article 32 on the relationship between the present articles and existing bilateral and regional agreements, as provisionally adopted on first reading by the Commission reads as follows:

Article 32

Relationship between the present articles and existing bilateral and regional agreements

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

470. The Special Rapporteur indicated that the written comments and observations received from Governments had concentrated on the relationship between the draft articles and three categories of agreements, namely,

(a) the bilateral and unilateral agreements on the same subject matter in force as between the parties to them other than the four codification conventions on diplomatic and consular law adopted under the auspices of the United Nations;

(b) the above-mentioned four codification conventions; and

(c) the future agreements on the same subject matter.

471. In connection with agreements in category (a) above, the Special Rapporteur indicated that the word "regional" used in the draft article had been questioned by one Government. The Special Rapporteur was of the view that this term should be deleted as it might create certain confusion with the notion of agreements confined to a specific geographical area as contemplated in Article 52 of the United Nations Charter.

472. With regard to agreements in category (b) above, the Special Rapporteur pointed out that in its written comments, one Government had expressed the view that the draft articles might be considered as a basis for the elaboration and adoption of a universal multilateral convention, which in its capacity as a special law (lex specialis), would have precedence over the general conventional norms of diplomatic and consular law. In this

connection, the Special Rapporteur explained that it might be appropriate to indicate explicitly the relationship between the draft articles and the four above-mentioned codification conventions. The main purpose of the draft articles was to establish a coherent régime governing the status of all categories of couriers and bags through the harmonization of existing provisions in the codification conventions and further elaboration of additional concrete rules. These conventions should constitute the legal basis for the draft on the status of the courier and the bag. Therefore, as was pointed out in the commentary of the Commission, the draft articles would complement the provisions on the courier and the bag contained in the codification conventions. However, if the comprehensive and uniform approach was to be carried out in a coherent manner some of the provisions of those conventions, particularly on the treatment of the bag, might be affected.

473. As to the relationship between the draft articles and future agreements on the same subject matter, the Special Rapporteur said it was clear this problem was settled by paragraph 2 (b) of article 6 adopted on first reading and would also be settled by the revised version of that subparagraph proposed by him.

474. Taking into consideration the written comments and observations submitted by Governments and with a view to clarifying the relationship between the draft articles and the agreements on the same subject matter in force as between States parties to them, including the relationship with the four codification conventions, the Special Rapporteur proposed for consideration and approval the following revised text of draft article 32:

"Article 32

Relationship between the present articles and other agreements and conventions

The provisions of the present articles shall not affect other international agreements in force as between parties to them and shall complement the conventions listed in article 3, paragraphs 1 and 2."

475. A great number of members expressed dissatisfaction with the draft article as provisionally adopted, categorizing it as insufficient and confusing.

476. As to the revised version submitted by the Special Rapporteur, some reservations were also expressed. In the view of some members, the word "complement" did not adequately reflect the relationship between the draft articles and the four codification conventions, as in some cases, the draft articles really intended to modify some provisions of those conventions and should, as lex specialis, take precedence over them. It was observed in this connection that the proposed formulation did not seem to be fully in accordance with article 30 of the Vienna Convention on the Law of Treaties.

477. Several members suggested that the draft article should be drafted along the lines of article 311 of the United Nations Convention on the Law of the Sea.

478. One member, on the other hand, expressed his preference for the formulation submitted by the Special Rapporteur in his seventh report, which contained three main aspects (a) the draft articles would complement the provisions on the courier and the bag contained in the four codification conventions on diplomatic and consular law; (b) the draft articles would be without prejudice to other international agreements in force as between States parties to them and (c) nothing in the draft articles would preclude States from concluding international agreements relating to the status of the courier or the bag and from modifying the provisions thereof, provided that such modifications were in conformity with article 6 of the draft articles.

479. The Special Rapporteur observed that there was a need for further reflection on the most adequate formulation of the complex relationships covered by the draft article. There were divergent starting points with regard to the scope and legal implications of the aim of the draft articles, namely to harmonize and unify existing rules and at the same time to develop specific and more precise rules not fully covered by the existing codification conventions, i.e. to complement these conventions. Reference had been made to article 311 of the United Nations Law of the Sea Convention. The Special Rapporteur has had this in mind both when he had submitted his first draft in 1983 and later in the debates in the Commission and in the Drafting Committee. Account had also been taken of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, particularly articles 30 and 41 thereof. In the case of the draft articles, the doctrine of lex posterior or

lex specialis had to be considered with great caution and prudence. This draft was based on the four codification conventions but, on some provisions, particularly with regard to the legal protection of the bag and on some other provisions to a lesser extent, it went further than those conventions. He thought it might be useful to examine some precedents in order to draw some conclusions that might be relevant to the case of the draft articles. Such a study had to be made with caution, taking into account the specific legal features involved in each particular case. There were many differences between article 311 of the Law of the Sea Convention and the situation envisaged under article 32 of the draft. In fact these were completely different situations. The Law of the Sea Convention was conceived from its inception as an "umbrella" convention, constituting the legal basis for special conventions in the field of the law of the sea. This function was specifically indicated in article 237, paragraph 2 of the Convention with regard to special conventions on the protection and preservation of the marine environment, stipulating that, "specific obligations assumed by States under special conventions ... should be carried out in a manner consistent with the general principles and objectives of this Convention". Furthermore, article 311, paragraph 1 explicitly stated that the Convention "shall prevail as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958". This rule and the other provisions were inspired by Article 103 of United Nations Charter and, taken together, had an effect similar to that article in respect of the prevailing function of the Charter in the event of conflict between the obligations of Member States under the Charter and their obligations under any other international agreement. The draft articles, on the contrary, had a modest role, they were aimed as a special convention, based on the four codification conventions, with certain provisions which intended to harmonize and unify existing rules and supplement them with some specific rules.

480. It was obvious that this problem needed further scrutiny in order to arrive at a formulation which would be as precise as possible and could obtain wide acceptance.

481. Draft article 33, on optional declaration, as provisionally adopted on first reading by the Commission, reads as follows:

Article 33

Optional declaration

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraphs 1 and 2 of article 3, to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary who shall circulate copies thereof to the parties and to the States entitled to become parties to the present articles. Any such declaration made by a contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another party which has accepted the applicability of those provisions to that category of courier and bag.

482. In the course of his oral presentation, the Special Rapporteur explained that the main objective of the draft article was to introduce a certain measure of flexibility into the draft articles in order to provide better prospects of acceptance by States for the set of rules as a whole. This provision offered a legal option through a declaration specifying to which category of courier and bag the State concerned would not apply the present articles. Initially, during the discussion in the Commission and in the Sixth Committee, this provision was considered to be a necessary and acceptable compromise solution but there had also been serious reservations and objections on the grounds that draft article 33 might create a plurality of régimes and bring about a confusion in the applicable law.

483. As to the written comments and observations submitted by Governments, the Special Rapporteur indicated that, with one exception, they had expressed serious doubts about the necessity and viability of this draft article and therefore had proposed its deletion.

484. In view of the little support obtained by the draft article and of the substantial reservations and objections that it had aroused, the Special Rapporteur proposed its deletion.

485. In the course of the Commission's discussion of the topic a large number of members supported the deletion of the draft article. In their view this provision ran directly against one of the main purposes of the draft articles, namely the establishment of a uniform régime for all couriers and bags. They spoke of the "atomisation" or "fragmentation" in the legal system governing couriers and bags that the proposed draft article would introduce if maintained, thus undermining the solidity of the future instrument to be adopted on this topic. The need for flexibility in the future convention should not lead to a situation in which the amount of difficulties the draft article would create would outweigh any possible advantage that it might have. The analogy that some had drawn between draft article 33 and article 298 of the Convention on the Law of the Sea was not appropriate as this article referred only to the system for peaceful settlement of disputes whereas draft article 33 would affect the whole functioning of the draft articles as a coherent set of rules on couriers or bags. Flexibility, some members added, could be introduced by other established means of the international law of treaties, such as reservations or a separate optional protocol. Perhaps it could also be made clear, somewhere in the draft or the commentaries, that the acceptance of a uniform régime for all couriers and bags did not imply a blanket acceptance of all provisions contained in the 1969 Convention on Special Missions on the 1975 Convention on the Representation of States, for those States which had not become parties to those conventions. The argument was also advanced that the article should be deleted as, in present day international relations, the distinction between different types of couriers and bags had become academic.

486. Some members expressed themselves in favour of retaining draft article 33 in its present form. In their view, the draft article was an expression of the flexibility that multilateral treaties should have. As many States had not become parties to the two above-mentioned codification conventions and continued to make a distinction between different categories of bags it was

essential to offer them the possibility to opt out of draft article 28. Even though the uniform approach of the draft might suffer somewhat from such a provision, the draft articles would still continue to be useful for the States that had become parties to all four codification conventions on diplomatic and consular law, and also in a more limited way, for those who had not, as a guideline for a future possible wider consensus on a uniform approach. The draft article was, in the final analysis, the price to be paid in order to ensure a wider acceptability of the draft articles.

487. The view was also expressed that the objective of the draft article could be attained by providing for optional protocols dealing with couriers and bags under the 1969 Convention on Special Missions or the 1975 Vienna Convention on the Representation of States.

488. The Special Rapporteur indicated that the majority trend which had emerged from the Commission's discussion was clearly in favour of the deletion of the draft article. Nevertheless the arguments invoked by the other trend in favour of providing the grounds for a wider acceptance of the draft articles should not be overlooked. Perhaps further efforts could be explored to achieve the same results through other provisions of the draft.

Provisions concerning peaceful settlement of disputes

489. At the time of introducing his report, the Special Rapporteur indicated that in their written comments and observations, two Governments had expressed the view that it might be desirable, if the draft articles were incorporated in a treaty, to include a special chapter or provisions containing binding regulations concerning the settlement of disputes on its interpretation or application and that if such a chapter was decided upon, it should be of a flexible nature and should supplement the settlement machinery in the form of negotiations between States through the diplomatic channel.

490. The Special Rapporteur added that this being the first time that the question on the settlement of disputes had been raised in connection with the topic, he would seek the advice and guidance of the Commission since it constituted a very important problem deserving special consideration.

491. In the course of the Commission's discussion on the topic, a number of members referred to the above-mentioned question. They were generally in

favour of contemplating provisions on the peaceful settlement of disputes relating to the application or interpretation of the draft articles. Most of them were of the view that such provisions should be included in an optional additional protocol which should be annexed to the future instrument adopting the draft articles. In support of this view, they pointed out that this was the solution adopted in the matter of peaceful settlement of disputes by the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

492. The Special Rapporteur stated that the discussion of this issue had been very useful and would provide the basis for an acceptable solution. On the idea of an additional protocol, he stated that the approach adopted by the codification conventions on diplomatic and consular law could serve as an indication of the attitude of States on these matters, particularly if account was taken of the number of States which had become parties to such protocols in the case of the three conventions mentioned in the preceding paragraph. As to the 1975 Vienna Convention on the Representation of States, it had adopted a different course, by providing the settlement of disputes procedure through consultations (article 84) and conciliation (article 85). Such options could also be considered.

493. The Special Rapporteur suggested that the most appropriate approach to be adopted on this matter for the purposes of the draft articles should be further examined.

CHAPTER VI

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

494. The topic "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by the decision of the Commission at its thirtieth session, in 1978, 266/ on the recommendation of the Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

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

496. From its thirty-second session to its thirty-eighth session (1986), the Commission received seven further reports from the Special Rapporteur, 267/ which contained draft articles arranged in five parts, as follows: part I (Introduction); part II (General principles); part III (Exceptions to State immunity); part IV (State immunity in respect of property from attachment and execution); and part V (Miscellaneous provisions).

266/ Yearbook of the International Law Commission, 1978, vol. II (Part Two), pp. 152-155, paras. 179-190.

267/ For these seven further reports (the second through eighth reports) of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; Yearbook ... 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; Yearbook ... 1982, vol. II (Part One), p. 199, document A/CN.4/357; Yearbook ... 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1; Yearbook ... 1984, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2; Yearbook ... 1985, vol. II (Part One), p. 21, document A/CN.4/388; Yearbook ... 1986, vol. II (Part One), pp. 8-22, document A/CN.4/396.

497. After long deliberations over eight years, at its 1972nd meeting, on 20 June 1986, the Commission adopted on first reading an entire set of draft articles on the topic, 268/ which was transmitted, in accordance with articles 16 and 21 of the Commission's statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.

B. Consideration of the topic at the present session

498. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/415 and Corr.1). The report attempted to analyse the comments of 23 Member States and Switserland, which had been submitted and were reproduced in document A/CN.4/410 and Add.1. The Commission had also before it further replies which had been later received from five member States and were reproduced in document A/CN.4/410/Adds 2-5.

499. The Commission, due to lack of time, was however unable to give consideration to the topic at the present session. The Commission however found it advisable to allow the Special Rapporteur to introduce his report in order to expedite work on the topic at future sessions.

500. At the 2081st meeting of the Commission, the Special Rapporteur introduced his preliminary report on the topic.

501. The Special Rapporteur first made comments of a general nature concerning the distinction between two kinds of acts of States, namely "acta jure imperii" and "acta jure gestionis". The Special Rapporteur noted that there were fundamental differences of views in both the Commission and in the Sixth Committee of the General Assembly, as well as in the comments submitted by Governments on the conclusion that the jurisdictional immunity could only be applied to the "acta jure imperii" and not to the "acta jure gestionis". The theoretical differences of view, he noted, were between those countries which favoured the so-called restrictive theory of State immunity and those which supported the absolute theory.

268/ Yearbook ... 1986, vol. II (Part Two), pp. 8-12.

502. The Special Rapporteur observed that some countries in their comments expressed the view that recent international law as well as the national practice of States which tended to limit the immunity of a State from the jurisdiction of the courts of another State should be reflected in the draft articles. Other countries however were of the view that the goal of the future Convention was to reaffirm and strengthen the concept of jurisdictional immunities of States with clearly stated exceptions. According to these countries, he said, to replace this principle with the concept of the so-called functional immunity, would considerably weaken the effectiveness of the principle of State immunity. The number of exceptions, in the view of those States, he said, should also be kept to a minimum.

503. In the view of the Special Rapporteur, the general consensus which he thought had emerged during the first reading seemed to be that it would be appropriate not to plunge too much into a theoretical exercise to determine which of the two doctrines was superior. The concentration, in his view, should rather be an individual issue, so as to arrive at a consensus as to what kind of activities of the State should enjoy immunity and what kind of activities should not enjoy immunity from jurisdiction of another State. Even though this approach was likely to leave a grey area, it was, in his view, the only way towards a possible conciliation between those two opposing positions.

504. In connection with draft article 6 which dealt with the principle of State immunity, the Special Rapporteur observed that the concrete question raised was whether to retain or delete the words that appeared in square brackets - "[and the relevant rules of international law]". A number of Governments, he said, supported the retention of the words in brackets in order to maintain sufficient flexibility and to accommodate any further developments in State practice and the corresponding adaptation of general international law. Others favoured the deletion of those words as, in their view, reference to "the relevant rules of general international law" could be interpreted unilaterally.

505. The Special Rapporteur stated in this connection his belief that reference to "the relevant rules of general international law" could perpetuate controversy, not only on matters in the grey zone but also on

latters that belonged to limitations or exceptions under the future Convention. For that reason, he proposed the deletion of those words in square brackets.

506. Concerning the title of Part III, whether the term "limitation on State immunity" or "exception to State immunity" should be used, the Special Rapporteur noted that some Governments preferred the former wording as, according to those States, in the area dealt with in Part III, international law did not recognise that a State had jurisdictional immunity. Other Governments, he said, preferred the latter wording as it seemed to them to be a logical consequence from the doctrine that State immunity was an absolute principle. The Special Rapporteur was however of the view that undue weight had been given to this problem during the first reading, and now a choice could be made either way without prejudice to the various doctrinal positions, if the main issues involved had been settled along the line as stated in paragraph 503 above.

507. On the question of definitions contained in draft articles 2 and 3, the Special Rapporteur stated that he had accepted the proposal made by some Governments to combine the two draft articles into one article. The new combined article would read as follows:

Article 2

Use of terms

1. For the purposes of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(b) "State" means:

(i) the State and its various organs of government;

(ii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(iii) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(iv) representatives of the State acting in that capacity;

(c) "Commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

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

3. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference sould be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract.

As to the issues to be settled, namely the definition of the term "State" of original article 3, paragraph 1, and that of the term "commercial contract" in article 2, paragraph 1 (b) and in article 3, paragraph 2, the Special Rapporteur stated that some salient problems had been raised by some Governments. As to the definition of "State", the treatment of federal States, the conditions under which political subdivisions of the State or agencies or instrumentalities of the State would enjoy immunity; and the treatment of State enterprises with the segregated State property. The Special Rapporteur stated that he would have no objection to the inclusion of constituents of a federal State in the future convention, if such was the wish of the Commission.

508. As to the conditions under which political subdivisions of the State or agencies or instrumentalities of the State would enjoy jurisdictional immunity, the Special Rapporteur expressed the view that he could accept either interpretations that had been given by some Governments, namely that such institutions might only invoke immunity when acting in the exercise of

sovereign authority (acta jure imperii) or that such institutions became invested with sovereign immunity rationae personae, if those political subdivisions were invested with the exercise of sovereign authority, and that the same could be said to be the case with the agencies or instrumentalities of a State. His acceptance of either of the two interpretations, he said, would however be on the understanding that his proposal concerning a State enterprise with segregated State property could somehow be accommodated in the draft articles. In which case, he would then add a phrase at the end of new draft article 2 (b) (iii) that would read "provided that a State enterprise which is distinct from the State, has a right of possessing and disposing of a segregated State property and is capable of suing or being sued, shall not be included in the agencies or instrumentalities of that State, even if that State enterprise has been entrusted with public functions".

509. Regarding the definition of the term "commercial contract" the Special Rapporteur stated that it was necessary to determine criteria according to which it would be decided whether a specific contract was a commercial contract or not. Original article 3, paragraph 2, provided for reference to purpose test in addition to nature test. This provision was criticised in the comments of a number of Governments.

510. Those Governments were of the view that reference should be made only to the nature of the contract and not to its purpose. The Special Rapporteur expressed the view that, while he had no difficulty in deleting the purpose test from the draft article, leaving only the nature test, he was not sure whether such a course of action, though legally tenable, would not raise further difficulties in the Sixth Committee. In his view, the best course of action to resolve this problem was for a new formulation of the purpose test, which would read - "if an international agreement between the States concerned or a written contract stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract".

511. Regarding draft article 11, which stipulated the exception to the State immunity, the Special Rapporteur considered that there were no fundamental

difficulties with the draft article, subject to some drafting changes. He proposed to replace the words "the State is considered to have consented to the exercise of that jurisdiction" by the words "the State cannot invoke immunity from jurisdiction ...".

512. In the light of comments by some Governments, especially those of socialist States, the Special Rapporteur proposed a new article 11 bis that would deal with the question of a State enterprise with segregated State property. The new article 11 bis would read as follows:

Article 11 bis

Segregated State property

If a State enterprise enters into a commercial contract on behalf of a State with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the former State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise, being a party to the contract on behalf of the State, with a right of possessing and disposing of a segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person.

He hoped that the concept along the lines of that proposal in article 11 bis might strike a proper balance between the so-called restrictive theory, and the absolute theory with regard to "commercial contracts" exception (or limitation) to the State immunity, without prejudice to either of the dogmatic positions.

513. As regards draft article 12, which dealt with contracts of employment, the Special Rapporteur, in the light of comments by some Governments, recommended the deletion of reference to social security at the end of paragraph 1 and paragraphs 2 (a) and 2 (b). Similarly, the Special Rapporteur proposed the deletion from draft article 13, that dealt with personal injuries and damage to property, the reference to the presence of the author of the act or omission in the territory at the time of the deed, as that could not, in his view, legitimately be viewed as a necessary criterion for exclusion of State immunity.

514. Regarding draft article 14, dealing with ownership, possession and use of property, the Special Rapporteur expressed doubts as to whether subparagraphs (c), (d) and (e) reflected universal practice. If the intention of the Commission was to let the common law countries practice prevail, he said, he would propose to amend subparagraphs (c), (d) and (e); but if the Commission thought that subparagraphs (b), (c), (d) and (e) of draft article 14 could open the doors to foreign jurisdiction, even in the absence of any link between the property and the forum State, he would agree to the deletion of those four subparagraphs.

515. Regarding articles 15 to 17, the Special Rapporteur noted that, the draft articles appeared to be generally acceptable with some drafting changes.

516. Concerning draft article 18, which dealt with State-owned or State operated ships engaged in commercial service, the Special Rapporteur proposed the deletion of the term "non-governmental" in square brackets from paragraphs 1 and 4 of the draft article in the light of comments from Governments, as that term, in his view, made the meaning of paragraph 1 ambiguous and could become an unnecessary source of controversy. The Special Rapporteur referred in this connection to article 3 of the International Convention for the Unification of Certain Rules relating to Immunity of State-owned Vessels of 1926 and to articles 32, 96 and 236 of the 1982 United Nations Convention on the Law of the Sea, which made a distinction between commercial State-owned vessels and the non-commercial ones, but did not make such a distinction between the governmental vessels and the non-governmental ones.

517. Commenting on draft article 19 which dealt with the effects of an arbitration agreement, the Special Rapporteur proposed to substitute the words "that State cannot invoke immunity from jurisdiction" with the words "that State is considered to have consented to the exercise of jurisdiction ..." in the chapeau of the draft article. As to the bracketed language, i.e. "commercial contract", "civil or commercial matter", appearing in the draft article, the Special Rapporteur expressed his preference for the expression "civil or commercial matter" in the light of comments of several Governments. Then, he proposed that the court of the forum State must be the one of another State on whose territory the arbitration takes place or according to the law

of which the arbitration has taken or will take place in respect of the relevant proceeding. Furthermore, he noted that the relevant proceeding has to concern itself with three matters (a), (b) and (c) listed in draft article 19.

518. Concerning the term "non-governmental" that appears in square brackets in draft article 21, dealing with State immunity from measures of constraint and in draft article 23, dealing with specific categories of property not subject to measures of constraint, the Special Rapportuer proposed the deletion of that term from both draft articles for the same reason as that stated in the comment to draft article 18 above. As to the phrase "property in which it has a legally protected interest" that appears in square brackets in draft article 21 and draft article 22, dealing with consent to measures of constraint, the Special Rapporteur considered that phrase vague and proposed its deletion.

519. In addition, on draft article 23, the Special Rapporteur noted that that provision had originally been proposed in order to protect developing States from giving consent to measures of constraint on those properties due to a misunderstanding. To clarify this point, the Special Rapporteur proposed that an amendment could be made to the effect that the property to be listed in subparagraphs (a), (b), (c), (d) and (e) should not be the object of enforcement even with the consent of the defendant State; the text would read as follows:

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

520. Furthermore, the Special Rapporteur noted, in order to make it clear that not all property of the central bank could automatically enjoy immunity, he would add at the end of paragraph 1 (c) of article 23, the phrase "as serves monetary purposes".

CHAPTER VII

STATE RESPONSIBILITY

A. Introduction

521. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (mise en oeuvre) of international responsibility. 269/

522. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 270/

523. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles on "the content, forms and degrees of international responsibility".

524. The Commission, from its thirty-second to its thirty-eighth sessions in 1986, received seven reports from the Special Rapporteur, Mr. Willem Riphagen, 271/ with reference to Parts Two and Three of the draft

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269/ Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

270/ Yearbook ... 1980, vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

271/ For the seven reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330; Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334; Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354; Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1; Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380; Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389, and for 1986, document A/CN.4/397 and Corr.1 (English and French only), Corr.2 (Arabic, Chinese, French and Russian only) and A/CN.4/397/Add.1 and Corr.1.

articles. The seventh report contained a section (which was neither introduced nor discussed at the Commission) of the preparation for the second reading of Part One of the draft articles, concerning the written comments of Governments on 10 of the draft articles of Part One.

525. As of the conclusion of its thirty-eighth session in 1986, the Commission had provisionally adopted draft articles 1 to 5 of Part Two on first reading. 272/ Draft articles 6 to 16 of Part Two 273/ and draft articles 1 to 5 of Part Three 274/ and its Annex had been referred to the Drafting Committee. 275/

526. The Commission, at its thirty-ninth session in 1987, appointed Mr. Gaetano Arangio-Ruiz Special Rapporteur for the topic of State responsibility. 276/

B. Consideration of the topic at the present session

527. At the present session, the Commission had before it the Special Rapporteur's preliminary report (A/CN.4/416 and Corr.1 (English only), Corr.2, and A/CN.4/416/Add.1 and Corr.1 (English only), Corr.2). The Commission also had before it the comments and observations received from one Government on Part One of the topic (A/CN.4/414).

528. The Commission, due to the lack of time was, however, unable to give consideration to the topic at the present session. The Commission found it advisable to allow the Special Rapporteur to introduce his report in order to expedite work on the topic at its next session.

272/ See section C of this Chapter below.

273/ For the text of draft articles 6 to 16 of Part Two, see Yearbook ... 1985, Vol. II (Part Two), p. 20, note 66.

274/ For the text of draft articles 1 to 5 of Part Three and its Annex, see Yearbook ... 1986, Vol. II (Part Two), p. 35, note 86.

275/ For a full historical review of the Commission's work on the topic up to the thirty-seventh session held in 1985, see Yearbook ... 1985, Vol. II (Part Two), p. 19. For developments as of 1985 see section A of this Chapter.

276/ Official Records of the General Assembly, Forty-second Session, Supplement No. 10, document A/42/10, para. 220.

529. The Special Rapporteur introduced his report at the 2081st and 2082nd meetings of the Commission.

530. The Special Rapporteur pointed out that in his preliminary report, he intended to present to the Commission his approach to the remaining Parts Two and Three of the topic and to re-examine articles 6 and 7 of Part Two currently before the Drafting Committee.

531. As to his approach to the remaining Parts Two and Three of the topic, the Special Rapporteur suggested that, while roughly maintaining the order followed so far (by the previous Special Rapporteur and by the Commission), he would propose to depart from it for reasons of method by three variantes.

532. (i) First, the distinction between delicts and crimes codified in article 19 of Part One made it advisable, in the view of the Special Rapporteur, to deal with the legal consequences of the two sets of wrongful acts separately.

533. (ii) Second, a different approach was also necessary because of the distinction between such substantive legal consequences of a wrongful act as the rights and obligations of States pertaining to cessation and the various forms of reparation, on the one hand, and those procedural consequences which were represented by the rights or facultés of the injured State to resort to measures intended to secure cessation or reparation or to inflict punishment, on the other hand. This distinction should apply, as a matter of method, to the treatment of delicts as well as to the treatment of crimes. The two chapters dealing with delicts and crimes respectively should therefore be divided into two sections, corresponding to substantive consequences and to procedural consequences, respectively.

534. (iii) Third, Part Three of the draft articles, proposed in 1985, covered under the title "Implementation (mise en oeuvre)", both the preconditions and onera to be fulfilled by injured States before resorting to measures and dispute settlement procedures. While provisions concerning the former seemed to be an integral part of the rules covering the applicable measures, any rules on settlement procedures should be dealt with separately. In addition to the differences in the subject matter, the rules relating to disputes settlement might well have to be partly non-mandatory, while the rules governing the preconditions of measures and the onera to be fulfilled

before resorting to measures should all be mandatory. The latter rules belong, together with measures, to Part Two. Part Three should thus only cover dispute settlement.

535. Accordingly the outline of Parts Two an Three would read as follows:

Part Two. Content, forms and degrees of State responsibility

Chapter One. General principles (embodying arts. 1-5 as adopted on first reading)

Chapter Two. Legal consequences deriving from an international delict

Section 1. Substantive rights of the injured State and corresponding obligation of the "author" State

a. Cessation

b. Reparation in its various forms

(i) Restitution in kind

(ii) Reparation by equivalent

(iii) Satisfaction (and "punitive damages")

c. Guarantees against repetition

Section 2. Measures to which resort may be had in order to secure cessation, reparation and guarantees against repetition

Chapter Three. Consequences deriving from an international crime

Section 1. Rights and corresponding obligations deriving from an international crime

Section 2. Applicable measures

Chapter Four. Final Provisions

Part Three. Peaceful settlement of disputes arising from an alleged internationally wrongful act

536. Turning to draft articles 6 and 7 as proposed in 1985, the Special Rapporteur believed that, apart from their merits, they did not deal with the substantive consequences of an internationally wrongful act in adequate depth. In his opinion, the rights and obligations concerning discontinuance of the wrongful conduct and the various forms of reparation (restitution in kind, pecuniary compensation, satisfaction) and guarantees of non-repetition could be dealt with more satisfactorily in a series of articles. In his preliminary report, he proposed a new article 6 on cessation and a new article 7 on restitution in kind. The latter was to replace article 7 now before the Drafting Committee.

537. Cessation of the wrongful act. The necessity for covering cessation among the consequences of internationally wrongful acts of a continuing character arose, according to the Special Rapporteur, from the fact that any wrongful act not only caused injuries to another State, but also created a threat to the rule infringed by the wrongdoer's unlawful conduct. In a system in which the making, the modification and the abrogation of rules rests upon the will of States, any act of a State not in conformity with an existing rule represents a threat not only to the effectiveness but also the validity, and thus the very existence of the infringed rule: particularly so in the case of an unlawful conduct extending in time. A rule on cessation was thus desirable not just in the interest of the injured State or States but also in the interest of any other State which may want to rely on the infringed rule and in the general interest in the preservation of the rule of law. Hence an article on cessation should bind the wrongdoer State to desist, without prejudice to the responsibility it had already incurred, from its wrongful conduct. Such a provision on cessation should cover any wrongful act extending in time, whether consisting of an "omissive" or a "commissive" behaviour.

538. The unique function of cessation as distinguished from any form of reparation warranted, in the Special Rapporteur's view, its treatment in a

separate article. A further reason was the fact that cessation was not subject to the exceptions applicable to forms of reparation such as, for example, restitution in kind.

539. On the basis of this analysis, he proposed the following draft article on cessation:

Article 6

Cessation of an internationally wrongful act of a continuing character

A State whose action or omission constitutes an internationally wrongful act [having] [of] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

540. Restitution in kind. Unlike cessation, restitution in kind followed unlawful conduct in order to make good, either by itself or in combination with other forms of redress, for its injurious consequences. Restitution applied, therefore, to any wrongful act: "commissive" or "omissive"; instantaneous or extending in time. A study of doctrine and practice, the Special Rapporteur said, indicated that there was an almost even division about the concept of restitution. According to one definition restitution would consist of the re-establishment of the situation which existed prior to the occurrence of the wrongful act, namely the status quo ante. According to the other definition, restitution in kind consisted in the re-establishment of the situation which would exist if the wrongful act had not been committed. Despite its division between these two concepts (with regard to which the Special Rapporteur, despite his preference for the second one, did not wish to take a final stand), doctrine and practice were almost unanimous in considering restitution in kind as the primary form of redress that should in principle prevail over any other mode of reparation. At the same time, as stated, doctrine and practice almost unanimously indicated that, notwithstanding the said primacy, restitution in kind did not constitute necessarily the complete and self-sufficient form of reparation for any internationally wrongful act. Statistically, from among the various forms of reparation the form of reparation most frequently resorted to was pecuniary compensation (i.e. reparation by equivalent). Indeed, whether or not a given

form of redress was concretely suitable could only be determined in each particular case with a view to achieving the most complete possible "satisfaction" of the injured State's interest in the removal of all the injurious consequences of the wrongful act. As the most "natural" form of redress, restitution in kind remained, however, logically and chronologically the primary remedy.

541. Turning to the scope of restitution the Special Rapporteur noted that it should apply to any kind of wrongful act. Exceptions to the obligation to provide restitution in kind were dependent not really upon the nature of the wrongful act or of the interests protected by the infringed rule. They rather depended on the nature and the circumstances of the specific injury and the means concretely available to effect restitution. It would therefore be inappropriate to identify a priori categories of wrongful acts as excluded per se from the obligation to provide restitutive redress. In particular, the Special Rapporteur felt unable to share the view that internationally wrongful acts against foreign nationals should be the object of any exception to the general rule of the primacy of restitution in kind. The idea of codifying a less stringent régime for wrongful acts committed to the detriment of foreign nationals seemed to be based on an arbitrary distinction between "direct" and "indirect" injuries to States and on a classification of injuries to aliens as "indirect" injuries to their States.

542. The Special Rapporteur then turned to the exceptions to the obligation to provide restitution in kind, generally indicated by doctrine as physical impossibility, impossibility deriving from legal obstacles of international law, and impossibility deriving from legal obstacles of municipal law. (i) No doubts should arise with regard to the lawfulness for the wrongdoer State to substitute pecuniary compensation for restitutio in case of physical impossibility of the latter. (ii) As regards legal impediments deriving from international law, the Special Rapporteur noted that they were considerably reduced by the high degree of relativity of international legal relations. For example, wrongdoer State A could not avail itself of an incompatible treaty obligation towards State C in order to evade its obligation to provide restitutio for injured State B. The only hypothesis where an international legal impediment could validly be invoked by a wrongdoing State would be the

case in which the action necessary to provide restitution in kind was incompatible with a superior international legal rule (Charter of the United Nations or peremptory norm). It was in particular the view of the Special Rapporteur that no legally valid obstacle to restitution in kind could derive from the principle of domestic jurisdiction. The exception of domestic jurisdiction could, of course, come into play in order to condemn as unlawful the measures contemplated or taken by an injured State in order to obtain reparation. As regards, however, the substantive right of the injured State to obtain reparation the very existence of such a "secondary" right and the corresponding obligation of the wrongdoer State (as well as the existence of the "primary" right the infringement of which gave rise to the "secondary" relationship) clearly excluded any possibility that the limit of domestic jurisdiction came into play. (iii) According to the Special Rapporteur, the so-called legal impediments deriving from municipal law were problematic. The complex structure of any State made it hardly possible for it to comply with any international obligation (including the duty to provide restitution) without setting into motion some mechanism within its internal legal system. For a State to return an unlawfully annexed territory, to withdraw a customs line unlawfully advanced or to restore to freedom a person unlawfully detained, legal provision must be made at the constitutional, legislative, judicial and/or administrative level. In that sense any restitution to be effected by a State was, first and foremost, from the point of view of its internal legal system, a legal restitution. Material restitution would normally be a mere execution of legal provisions of the wrongdoing State's internal system. International law, on the other hand, while constitutionally unfit directly to invalidate or annul any national legal rules putting an obstacle to compliance by a State with an international obligation, should not fail to exert its primacy at the level of inter-State relations. Consequently, one could not recognize as valid, under international law, excuses which the wrongdoer State might draw from its internal legal system in order to evade a duty to provide restitution in kind. Indeed, impediments to restitution deriving from municipal law were not quite legal obstacles justifying exceptions to the international legal obligation to provide

restitution in kind. They could only qualify as factual impediments. As to the question whether any such internal obstacles would justify failure to provide restitution in kind (and consequent substitutive resort to total or partial pecuniary compensation), it would be a matter of factual evaluation of the burden that the wrongdoing State should sustain in order to overcome them and be thus in a position to effect restitution in kind. Only in the case where such burden attained the degree of excessive onerousness would failure to provide restitution be internationally justified.

543. As regards, precisely, excessive onerousness, this would be according to the Special Rapporteur, a feature of restitutive measures that could justify, within limits, non-compliance with the obligation to provide restitution and substitutive resort to pecuniary compensation. The main example would be a situation in which the effectuation of restitution in kind would very seriously affect the political, economic or social system of the wrongdoing State.

544. The Special Rapporteur thought it necessary, however, to draw the attention of the Commission to the doubts he still entertained with regard to the exact definition of the exception of excessive onerousness. One should be careful, in the final drafting of an article on restitution in kind, not to leave too many loopholes in the wrongdoer State's obligation to provide specific reparation. Even the relatively more severe formulation he proposed was perhaps too lenient towards the wrongdoing State.

545. Noting that doctrine and practice seemed to indicate that the ultimate choice between a claim for restitution and a total or partial claim for pecuniary compensation should be left to the injured State, he agreed with such position. It would surely be improper to leave any choice in that respect to the wrongdoer State. On the other hand, the right of choice of the injured State should not be left unlimited. One limit would certainly be represented (apart from the above-mentioned impediments) by the incompatibility of the choice with an obligation deriving from a peremptory norm of international law. A limit should come into play also in the case where the injured State's choice would result in an unjust advantage for the claimant to the detriment of the wrongdoer State.

546. In the light of the above explanations, the Special Rapporteur proposed the following draft article on restitution:

Article 7

Restitution in kind

1. The injured State has the right to claim from the State which has committed an internationally wrongful act, restitution in kind for any injuries it suffered therefrom, provided and to the extent that, such restitution:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

(a) represent a burden out of proportion with the injury caused by the wrongful act;

(b) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (c) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.

C. Text of the draft articles of Part Two provisionally adopted so far by the Commission 277/

547. The texts of the draft articles of Part Two provisionally adopted so far by the Commission are reproduced below.

Article 1 278/

The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

Article 2 279/

Without prejudice to the provisions of articles 4 and [12], the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3 280/

Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

277/ As a result of the provisional adoption of draft article 5 at the thirty-seventh session, the Commission adopted consequential modifications to certain draft articles provisionally adopted at its thirty-firth session (see Report of the International Law Commission on the work of its thirty-seventh session, Yearbook ... 1985, vol.II (Part Two), p.20, para.106. These modifications were as follows: in draft articles 2 and 3, the references to "articles [4] and 5" were changed to "articles 4 and [12]"; and draft article "5" was renumbered draft article "4".

278/ Provisionally adopted by the Commission at its thirty-fifth session. For the the commentary to the article see, Yearbook ... 1983, vol.II (Part Two), p.42.

279/ Ibid., pp.42-43.

280/ Ibid., p.43.

Article 4 281/

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5 282/

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to th benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other

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281/ Ibid.

282/ Provisionally adopted by the Commission at its thirty-seventh session. For the commentary to the article see, Yearbook ... 1985, vol.II (Part Two), pp.25-27.

State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms.

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

CHAPTER VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

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

548. At its 2042nd meeting on 9 May 1988, the Commission noted that in paragraph 5 of its resolution 42/156, the General Assembly had requested the International Law Commission

> "(a) To keep under review the planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;
>
> (b) To consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute to the attainment of the goals referred to in paragraph 3 above and also to a more effective consideration of its report in the Sixth Committee;
>
> (c) To indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work;"

549. The Commission agreed that these requests should be taken up under item 9 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation."

550. The Commission devoted its 2046th meeting held on 17 May 1988 to the consideration of this item and otherwise referred it to the Planning Group of its Enlarged Bureau.

551. The Planning Group of the Enlarged Bureau of the Commission was composed as indicated in paragraph 4 above. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

552. The Planning Group held five meetings on 17 and 30 May and on 6, 13 and 20 June 1988. It had before it, in addition to the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly

during its forty-second session entitled "Programme and methods of work of the Commission" (A/CN.4/L.420, paras. 251 to 262), a number of proposals submitted by members of the Commission.

553. The Enlarged Bureau considered the report of the Planning Group on 27 June 1988. At its 2094th meeting, on 28 July 1988, the Commission adopted the following views on the basis of recommendations of the Enlarged Bureau resulting from the discussions in the Planning Group.

Planning of activities

554. The Commission, in considering the planning of its activities for the remainder of the five-year term office of its members, bore in mind paragraph 5 (a) of resolution 42/156, where the Assembly stressed the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics, as well as paragraph 5 (b) where the Assembly pointed out that staggering of the consideration of some topics might contribute to the attainment of the goals defined in paragraph 232 of the report of the Commission on the work of its thirty-ninth session.

555. The Commission observed that the two topics in relation to which it could in the course of the next three years achieve maximum progress in the preparation of draft articles were clearly those on which complete drafts had already been provisionally adopted in first reading namely the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and the topic "Jurisdictional immunities of States and their property". As a result of late receipt of comments submitted by Governments, however, those topics could not be taken up on time at the current session. It is therefore impossible to complete the second reading of the corresponding drafts in 1988 and 1989 respectively, as had initially been envisaged. The Commission therefore concluded that it should concentrate in 1989 and 1990 respectively on the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and on the draft articles on the jurisdictional immunities of States and their property without excluding other topics. The organization of the work both in plenary and in the Drafting Committee will take due account of the Commission's intentions in respect of those two drafts, in particular through the allocation of sufficient time to the Drafting Committee.

556. Also bearing in mind the criterion set forth in paragraph 5 (a) of General Assembly resolution 42/156, and taking into account the progress achieved thus far on the various other topics before the Commission, the Commission is of the view that it should reiterate the intentions it expressed last year and which are reflected in paragraph 232 of the report on the work of its thirty-ninth session. The Commission will accordingly endeavour to complete by 1991 the first reading of the draft articles on the draft Code of crimes against the peace and security of mankind and the first reading of the draft articles on the law of the non-navigational uses of international watercourses. It will also during the same period endeavour to make substantial progress on State responsibility, and on international liability for injurious consequences arising out of acts not prohibited by international law and will continue consideration of the second part of the topic of relations between States and international organisations.

Future programme of work

557. The Commission noted that attainment of the goals mentioned in paragraphs 8 and 9 above would result in a reduction of the number of topics on its agenda. It is convinced that streamlining of the agenda will be conducive to higher productivity of its work. At the same time it deems it necessary to identify possible topics which could be included in a long-term programme for its future work. To that end it intends to establish a small Working Group which will be entrusted at the next two sessions with the task of formulating appropriate proposals.

558. The Commission noted with satisfaction that in paragraph 11 of resolution 42/156, the Assembly had requested the Secretary-General to update in a timely manner the Survey of international law of 1971 and to make the updated version available to the International Law Commission, and to bear in mind the desirability of updating it every five years thereafter. The Commission would appreciate it if the preparation of the updated version of the Survey could be speeded up.

Methods of work

559. The Commission considered various methodological questions related to its substantive work.

560. The Commission underlines that the general acceptability of its drafts largely depends on the extent to which they reflect the views and practice of all States and groups of States and take into account the various legal systems of the world, as well as the new requirements of international life. It draws attention to the importance of relying on as juridically diverse and geographically broad-based sources as possible and clearly identifying the various sources relied upon in support of the articles proposed for the progressive development and codification of international law.

561. As regards the legal nature of the instruments to be adopted on the basis of its drafts, the Commission wishes to recall that it consistently aims at producing texts sufficiently precise and tightly drawn to be capable of forming the basis of a convention or other legal instrument, in order to leave unimpaired the freedom of action of the General Assembly in deciding on the form which the end product of the Commission's work will eventually take. The Commission is aware that the decision in question can only be arrived at after sufficient progress has been made in the consideration of a topic. It, however, wishes to point out that, should the Assembly find it possible, in certain cases, to provide an advance indication of its intentions in this respect, the work of the Commission would be facilitated and its efficiency enhanced.

562. The Commission thoroughly discussed ways and means of facilitating the work of the Drafting Committee which plays a major role both in the formulation of texts and their reconciliation.

563. As indicated in paragraph 239 of its report on the work of its thirty-ninth session, the Commission is aware that draft articles should not be prematurely referred to the Drafting Committee either at the stage of first reading or at that of second reading. It intends to continue to bear in mind the desirability of striking an appropriate balance between the need to let the discussion in plenary develop sufficiently to provide the Drafting Committee with clear guidelines and the desire to achieve at a relatively early stage concrete results in the form of generally acceptable articles.

564. The Commission is furthermore of the view that the Drafting Committee should be given all facilities for disposing of its workload in due time. It wishes to point out in this connection that the considerable backlog which

existed in the Drafting Committee at the beginning of the session in relation to some topics has been substantially reduced because more time was made available to the Drafting Committee, which allowed for full utilisation of the conference services available to the Commission. The Commission intends to maintain this practice in the future whenever it deems it appropriate and feasible.

565. The Commission has this year organized its work so as to enable the Drafting Committee to present its reports to the plenary in a staggered manner, thereby providing optimum conditions not only for the consideration and adoption in plenary of the reports in question but also for the preparation by Special Rapporteurs of commentaries concerning the texts adopted. The Commission will bear in mind the possibility of proceeding in the same way at future sessions.

566. The Commission is aware that commentaries to draft articles are of crucial importance for the analysis and interpretation of the texts themselves. It therefore considers it essential that those commentaries should duly reflect the collective understanding of members. As a way of facilitating the achievement of this goal, the Commission encourages Special Rapporteurs to conduct in the framework of the Drafting Committee appropriate consultations before the draft commentaries are submitted in plenary.

567. The Commission, as indicated in paragraph 240 of its report on the work of its thirty-ninth session, considers as worthy of further examination the possibility of providing the Drafting Committee with computerized assistance. At the moment, however, it does not have sufficient information to assess the feasibility and potential advantages of such technologies in relation to the work of the Drafting Committee. It intends to revert to this question at a later stage.

568. The Commission also considered the question of the composition of the Drafting Committee. It draws attention in this connection to the two criteria defined in paragraph 238 of its report on the work of its thirty-ninth session, namely ensuring the equitable representation of the principal legal systems and of the various languages and keeping the size of the Committee

within limits compatible with its drafting responsibilities. The Commission believes that while the composition of the Committee should remain governed by those two criteria, due account should be taken of the particular interest of certain Committee members to participate in the deliberations on specific topics only.

Duration of the session

569. The Commission notes with appreciation that, notwithstanding the financial crisis, the normal arrangements for a twelve-week session have been restored, and reiterates its view, as endorsed by the General Assembly in paragraph 7 of resolution 42/156, that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on the agenda make it desirable that the usual duration of the sessions be maintained. It should be noted that the Commission made full use of the time and services made available to it during the twelve weeks of its current session.

Documentation

570. The Commission wishes to stress that the task of its members would be facilitated if they were kept regularly informed of international law-making activities taking place within and outside the United Nations. To that end, the Codification Division should, to the extent allowed by existing resources and United Nations directives on control and limitation of documentation, gather and circulate in a timely manner material relevant to the topics in the current programme of work of the Commission originating in the United Nations, the specialized agencies and the IAEA, and non-governmental organizations concerned with international law. Such material would consist of international treaties elaborated in the framework of the above-mentioned organizations, resolutions or decisions of their principal organs and studies or reports prepared by or for such organs or organizations.

571. The Commission draws attention to the remark in paragraph 244 of its report on the work of its thirty-ninth session that an important condition for the reports of Special Rapporteurs to meet their purpose - namely to lay the ground for a systematic and meaningful consideration of the topics on the agenda - is that they should be submitted and distributed sufficiently early.

The Commission is aware that the views expressed in the Sixth Committee of the General Assembly are an essential ingredient in the preparation of the reports in question, which can therefore not be completed until several months after the conclusion of the Assembly's session. It is, however, concerned at the negative effects which the late circulation of essential documents has on the proceedings. In order to ease the time constraints under which Special Rapporteurs have to work, the Commission expresses the wish that as a way of making up for the unavoidable delays in the issuance of the relevant summary records, the texts of statements delivered in the Sixth Committee on the items concerning the report of the Commission and the Draft Code of Offences against the Peace and Security of Mankind be made available to the Special Rapporteurs as soon as possible. As regards the topical summary of the discussion held in the Sixth Committee on the above-mentioned items, the Commission noted with satisfaction that the topical summary had, this year, been completed and made available to Special Rapporteurs in a provisional form earlier than usual and that the Codification Division intended to make every effort in the future to abide by this year's arrangements.

572. The Commission draws attention to the fact that the deadline which it had set for the submission by Governments of comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and on the jurisdictional immunities of States and their property had been observed by very few States and that the Special Rapporteurs concerned had as a result been unable to produce their respective reports sufficiently early for the Commission to abide by the calendar of work it had set itself in relation to the two topics in question.

573. In setting deadlines for the submission of comments and observations by Governments on draft articles adopted in first reading, the Commission will in the future be guided by two considerations: on the one hand, it will leave sufficient leeway to Governments for the preparation of their comments and observations; on the other hand, it will take into account not only the time needed by Special Rapporteurs to analyse the corresponding communications and propose revisions but also the time needed for the translation and processing of those communications and the unavoidable and sometimes substantial delays which may occur in their transmission.

574. The Commission noted with satisfaction that the fourth edition of the booklet "The Work of the International Law Commission" had been issued in English prior to the opening of the fortieth session. It wishes to express its appreciation to the Codification Division and other competent services of the Secretariat for having thus made available to diplomatic and academic circles a highly informative publication, and at the same time voice the hope that the other linguistic versions will be issued in the near future.

575. The Commission noted that some delays were expected in the issuance of Volume I and Volume II, Part Two of the 1987 edition of the Yearbook of the International Law Commission. It also noted with concern that neither the 1985 nor the 1986 edition of the Yearbook had as yet been published in Russian. While realising that the financial crisis has unavoidable effects on publishing and printing programmes of the Secretariat, the Commission hopes that established schedules for the issuance of the Yearbook will be adhered to as faithfully as possible. The Commission noted that the Yearbook had not as yet been published in Chinese. It hopes that every effort will be made to ensure, in conformity with General Assembly resolution 42/207 C, respect for equal treatment of the official languages of the United Nations in the publication of the Yearbook.

576. As regards summary records, the Commission, taking into account, in particular, the request addressed to the Secretary-General in paragraph 1 of General Assembly resolution 42/207 C to ensure respect for equal treatment of the official languages of the United Nations, is of the view that the statements in plenary should be summarized for the purpose of the records on the basis of the language of delivery rather than on the basis of an interpretation from the original. The Commission observes in this connection that, irrespective of the skills of précis-writers, any retranslation process necessarily results in inaccuracies and distortions, particularly when applied to matters of a highly specialized nature involving the use of complex terminology.

577. The Commission noted that as a result of financial constraints, a special policy was applied at the United Nations Office at Geneva in relation to the issuance of the summary records of United Nations bodies meeting in Geneva from May through July: while the production of the original English or

French version of each record keeps pace with the calendar of meetings of the organ concerned, the same does not apply to the production of the other linguistic versions, which can in the case of some languages, lag seriously behind. The Commission regrets this departure from the principle of equal treatment of all the official languages of the United Nations. It wishes to emphasize that all linguistic versions should be issued in a timely and orderly manner, avoiding skips in the normal sequence and that records should not be published in final form in any language until all the corrections members may find necessary to submit have been received. It also requests that the records issued after the conclusion of the session be dispatched to members without delay.

578. The Commission, while noting with appreciation that the deadline for the submission of corrections to the provisional summary records had been extended from three days to two weeks, observes that the two-week period starts to run from the date appearing on the cover page of the records and that this date often precedes the actual date of release by several days, if not weeks. In order for the time-limit of two weeks to be a meaningful one, the Commission believes that the various linguistic versions of the records should bear a date roughly corresponding to the date of release. The Commission also feels that, as regards the records issued after the conclusion of the session, the deadline for the submission of corrections be further extended or applied with maximum flexibility, taking into account in particular the transmission delays to and from the members' respective places of residence.

579. The Commission has often insisted on the importance it attaches to a meaningful dialogue with its parent body. It therefore considered various ways of strengthening its relationship with the General Assembly. With a view to making it easier for delegations to the Sixth Committee to acquaint themselves with the content of its report, the Commission decided that the general description of its work appearing at the very beginning of the report should henceforth be expanded and include an indication of the concrete results achieved on the various topics in the course of the session, accompanied by footnoted references to the meetings at which each topic was considered. In the Commission's opinion, this expanded treatment of the

general description of the work accomplished during the session meets the purpose of the first of the two proposals referred to in paragraph 246 of last year's report. As for the second of these proposals, the Commission came to the conclusion that for practical reasons, it would be difficult to circulate in advance the introductory statement of the Chairman of the Commission.

580. The Commission is aware that delegations to the General Assembly have little time to study its report before it is taken up by the Sixth Committee. While an obvious remedy would be to expedite the production of the report, there is little the Commission can do to that end.

581. The Commission is of the view that as long as the current time frame is maintained for its session, the only way of allowing delegations to the General Assembly more time for studying the report would be for the Sixth Committee to defer the consideration of the corresponding items to a late stage of the Assembly's session.

582. Also with a view to strengthening its relationship with the General Assembly, the Commission considered the possibility of enabling Special Rapporteurs to attend the debate of the Sixth Committee on the report of the Commission so as to give them the opportunity to get a more comprehensive view of existing positions, to take note of observations made and to engage in the preparation of their reports at an earlier stage. The Commission is of the view that this question, as well as the question dealt with in paragraph 34 above, could usefully be examined in the Sixth Committee at the next session of the General Assembly.

583. In order to facilitate the task of Governments in preparing their comments and observations on drafts adopted on first reading, the Commission asks the Secretariat to accompany its request for such comments and observations with a consolidated compilation of all the articles and relevant commentaries, which are often scattered throughout several reports and therefore not easily accessible.

584. Finally, the Commission wishes to place on record its satisfaction at the overall quality of the services provided by the Secretariat and expresses its thanks to the Codification Division particularly for the help provided to Special Rapporteurs.

B. Co-operation with other bodies

585. The Commission was represented at the May 1987 session of the European Committee on Legal Co-operation, in Strasbourg, by Mr. Emmanuel Roucounas, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Co-operation was represented at the present session of the Commission by Mr. Frits Hondius. Mr. Hondius addressed the Commission at its 2071st meeting on 30 June 1988 and his statement is recorded in the summary record of that meeting.

586. The Commission was represented at the August 1987 session of the Inter-American Juridical Committee, in Rio de Janeiro, by Mr. Stephen McCaffrey, as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Jorge Reinaldo A. Vanossi. Mr. Vanossi addressed the Commission at its 2047th meeting on 18 May 1988 and his statement is recorded in the summary records of that meeting.

587. The Commission was represented at the March 1988 session of the Asian-African Legal Consultative Committee, in Singapore, by Mr. Stephen McCaffrey, as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Frank Njenga. Mr. Njenga addressed the Commission at its 2076th meeting on 8 July 1988 and his statement is recorded in the summary record of that meeting.

C. Date and place of the forty-first session

588. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 8 May and conclude on 28 July 1989.

D. Representation at the forty-third session of the General Assembly

589. The Commission decided that it should be represented at the forty-third session of the General Assembly by its Chairman, Mr. Leonardo Díaz-González.

E. International Law Seminar

590. Pursuant to General Assembly resolution 42/156, the United Nations Office at Geneva organised the twenty-fourth session of the International Law Seminar during the current session of the Commission. The Seminar is intended for post-graduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

591. A Selection Committee under the chairmanship of Professor Philippe Cahier (The Graduate Institute, Geneva) met on 31 March 1988 and, after having considered more than 50 applications for participation in the Seminar, selected 24 candidates of different nationalities and mostly from developing countries. Eighteen of the selected candidates, as well as four UNITAR fellowship holders, were able to participate in this session of the Seminar. 283/

592. The session of the Seminar was held at the Palais des Nations from 6 to 24 June 1988 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office in Geneva. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission and lectures specifically organized for them. Several lectures were given by members of the Commission, as follows: Mr. Gaetano Arangio-Ruiz: "The International Court of Justice" (two lectures); Mr. Julio Barbosa: "International liability for injurious consequences

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283/ The list of participants in the twenty-fourth session of the International Law Seminar is as follows: Mr. Abderrachid Abdessemed (Algeria); Ms. Frida Armas Pfirter (Argentina); Mr. Samuel Blay (Australia); Mr. Ali Bojji (Morocco); Mr. Javier Brito Moncada (UNITAR fellowship holder) (Mexico); Mr. Ayigan-Ayi D'Almeida (Togo); Ms. Neile Fanana (Lesotho); Mr. Carlos Garcia Carranza (Honduras); Mr. Philippe Gautier (Belgium); Ms. Daw Hla Myo Nwe (UNITAR fellowship holder) (Burma); Mr. Robert Hunja (Kenya); Mr. Chinnasamy Jayaraj (India); Mr. Abdu Muntari Kaita (UNITAR fellowship holder) (Nigeria); Mr. Tuomas Kuokkanen (Finland); Mr. Raul Pangalangan (Philippines); Mr. Otavio Sa Ricarte (UNITAR fellowship holder) (Brazil); Mr. Hernan Salinas-Burgos (Chile); Mr. Oscar Schiappa-Pietra Cubas (Peru); Ms. Lena Stenwall (Sweden); Ms. Milena Tabakova (Bulgaria); Ms. Susanne Wasum-Rainer (Federal Republic of Germany); Mr. Thusantha Wijemanna (Sri Lanka).

arising out of acts not prohibited by international law"; Mr. Stephen McCaffrey: "The work of the International Law Commission"; Mr. Ogiso: "The jurisdictional immunities of States and their property"; Mr. Jiuyong Shi: "The case of the future Hong Kong Special Administrative Region"; and Mr. Alexander Yankov: "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

593. In addition talks were given by officials of the United Nations Office at Geneva, and of the Secretariats of other international organisations in Geneva, as well as the International Committee of the Red Cross as follows: Mr. Gudmundur Alfredsson (Centre for Human Rights): "Legal aspects of the activities of the Centre for Human Rights"; Ms. Helga Klein (Secretary of the Human Rights Committee, Centre for Human Rights): "The work of the Human Rights Committee"; Mr. Dennis McNamara (Deputy Director of the Division of Refugee Law and Doctrine, United Nations High Commissioner for Refugees): "International instruments for protection of refugees"; Mr. Frank Verhagen (Office of the United Nations Disaster Relief Co-ordinator): "Legal aspects of emergency management"; Ms. Doswald-Beck (Legal Division of the International Committee of the Red Cross): "International humanitarian law and public international law"; Mr. Alfons Noll (Legal Adviser of the International Telecommunication Union): "The role and activities of the legal advisers in an international organisation: example ITU".

594. As at the last six sessions of the Seminar, the participants were also officially received by the Canton of Geneva in the Alabama Room at the Hôtel-de-Ville. On that occasion they were addressed by Mr. Bollinger, Chief of Information of the Canton, who gave a talk on the constitutional and political features of Switzerland in general and the Canton of Geneva in particular.

595. The participants had access to facilities of the United Nations Library. They received copies of basic documents necessary for following both the debates of the Commission and the lectures and could also obtain or purchase at reduced prices United Nations printed documents.

596. At the end of the session of the Seminar, Mr. Leonardo Díaz-González, Chairman of the International Law Commission, and Mr. Jan Martenson, Director-General of the United Nations Office at Geneva, addressed the

participants. In the course of this brief ceremony, each of the participants was presented with a certificate attesting to his or her participation in the twenty-fourth session of the Seminar.

597. The Seminar is funded by voluntary contributions from Member States and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Argentina, Austria, Denmark, the Federal Republic of Germany, Finland and Sweden had made fellowships available to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, fellowships were awarded to nine participants. Thus, of the 536 participants, representing 122 nationalities, who have participated in the Seminar since it began in 1964, fellowships have been awarded to 264.

598. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enables young lawyers and especially those from developing countries to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. It is therefore concerned that this year only 9 fellowships, as against 15 last year, could be awarded. It recommends that in order to give an increasing number of participants from developing countries an opportunity to attend the seminars, the General Assembly should again appeal to States that can do so to make the voluntary contributions that are urgently needed for the holding of the seminars.

599. The Commission also noted with concern that in 1988 the Seminar was held solely in the English language, no interpretation services being made available to it. The Commission, while being aware of the constraints resulting from the financial crisis, expresses the hopes that every effort will be made to provide the Seminar at future sessions with adequate services and facilities.