

Document:-
A/42/10

**Report of the International Law Commission on the work of its thirty-ninth session, 4 May -
17 July 1987, Official Records of the General Assembly, Forty-second session, Supplement
No. 10**

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1987, vol. II(2)

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DOCUMENT A/42/10*

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

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ABBREVIATIONS

FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
OAS	Organization of American States
OAU	Organization of African Unity

*
* *

I.C.J. Reports ICJ, *Reports of Judgments, Advisory Opinions and Orders*

NOTE CONCERNING QUOTATIONS

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

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

Chapter I

ORGANIZATION OF THE SESSION

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

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

A. Membership

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

Prince Bola Adesumbo AJIBOLA (Nigeria);
Mr. Husain AL-BAHARNA (Bahrain);
Mr. Awn AL-KHASAWNEH (Jordan);
Mr. Riyadh Mahmoud Sami AL-QAYSI (Iraq);
Mr. Gaetano ARANGIO-RUIZ (Italy);
Mr. Julio BARBOZA (Argentina);
Mr. Juri G. BARSEGOV (Union of Soviet Socialist Republics);
Mr. John Alan BEESLEY (Canada);
Mr. Mohamed BENNOUNA (Morocco);
Mr. Boutros BOUTROS-GHALI (Egypt);
Mr. Carlos CALERO RODRIGUES (Brazil);
Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela);
Mr. Gudmundur EIRIKSSON (Iceland);
Mr. Laurel B. FRANCIS (Jamaica);

Mr. Bernhard GRAEFRATH (German Democratic Republic);

Mr. Francis Mahon HAYES (Ireland);

Mr. Jorge E. ILLUECA (Panama);

Mr. Andreas J. JACOVIDES (Cyprus);

Mr. Abdul G. KOROMA (Sierra Leone);

Mr. Ahmed MAHIOU (Algeria);

Mr. Stephen C. MCCAFFREY (United States of America);

Mr. Frank X. NJENGA (Kenya);

Mr. Motoo OGISO (Japan);

Mr. Stanislaw PAWLAK (Poland);

Mr. Pemmaraju Sreenivasa RAO (India);

Mr. Edilbert RAZAFINDRALAMBO (Madagascar);

Mr. Paul REUTER (France);

Mr. Emmanuel J. ROUCOUNAS (Greece);

Mr. César SEPÚLVEDA GUTIÉRREZ (Mexico);

Mr. Jiuyong SHI (China);

Mr. Luis SOLARI TUDELA (Peru);

Mr. Doudou THIAM (Senegal);

Mr. Christian TOMUSCHAT (Federal Republic of Germany);

Mr. Alexander YANKOV (Bulgaria).

B. Officers

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

Chairman: Mr. Stephen C. McCaffrey;

First Vice-Chairman: Mr. Leonardo Díaz González;

Second Vice-Chairman: Mr. Riyadh Mahmoud Sami Al-Qaysi;

Chairman of the Drafting Committee: Mr. Edilbert Razafindralambo;

Rapporteur: Mr. Stanislaw Pawlak.

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as chairman of the Commission¹ 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

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

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

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

C. Drafting Committee

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

D. Secretariat

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

Arsanjani, Mr. Manuel Rama-Montaldo and Mr. Mpazi Sinjela, Legal Officers, served as Assistant Secretaries to the Commission.

E. Agenda

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

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

9. In view of its practice not to hold a substantive debate on draft articles adopted on first reading until the comments and observations of Governments thereon are available, the Commission did not consider agenda item 3, "Jurisdictional immunities of States and their property", nor agenda item 4, "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", pending receipt of the comments and observations which Governments have been invited to submit by 1 January 1988 on the sets of draft articles provisionally adopted by the Commission at its thirty-eighth session on those two topics. The Commission did not consider agenda item 2, "State responsibility", as it felt it appropriate that the new Special Rapporteur for the topic, Mr. Gaetano Arangio-Ruiz, appointed on 17 June 1987 to replace Mr. Willem Riphagen, who was no longer a member of the Commission, should be given an opportunity to make his views known. The Commission held 52 public meetings (1990th to 2041st meetings). In addition, the Drafting Committee of the Commission held 39 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 11 meetings.

³ Mr. Luis Solari Tudela later resigned from the Drafting Committee.

Chapter II

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

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

11. On the basis of the reports of the Special Rapporteur, the Commission, at its second session, in 1950, adopted a formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal⁴ and submitted those principles, with commentaries, to the General Assembly; then, at its sixth session, in 1954, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind⁵ and submitted it, with commentaries, to the General Assembly.⁶

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

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

14. By its resolution 36/105 of 10 December 1981, the General Assembly invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.

15. At its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur

for the topic. From its thirty-fifth session (1983) to its thirty-seventh session (1985), the Commission considered three reports submitted by the Special Rapporteur.⁷

16. By the end of its thirty-seventh session, in 1985, the Commission had reached the following stage in its work on the topic. It 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 on 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.⁸ The General Assembly was requested to indicate whether such a jurisdiction should also be competent with respect to States.⁹

17. Moreover, the Commission stated that it was its intention that the content *ratione personae* of the draft code should be limited at the current 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 of its work on the draft code, the Commission, in accordance with General Assembly resolution 38/132 of 19 December 1983, intended to begin by drawing up a provisional list of offences, while bearing in mind the drafting of an introduction summarizing the general principles of international criminal law relating to offences against the peace and security of mankind.

18. As regards the content *ratione materiae* of the draft code, the Commission intended to include the of-

⁷ These three reports are reproduced as follows:

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

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

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

⁸ On the question of an international criminal jurisdiction, see *Yearbook* . . . 1985, vol. II (Part Two), pp. 8-9, para. 19 and footnotes 16 and 17.

⁹ *Yearbook* . . . 1983, vol. II (Part Two), p. 16, para. 69 (c) (ii).

⁴ Hereinafter referred to as the "Nürnberg Principles" (*Yearbook* . . . 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127).

⁵ *Yearbook* . . . 1954, vol. II, pp. 150-152, document A/2693, paras. 49-54.

⁶ The texts of the 1954 draft code and of the Nürnberg Principles are reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18, and p. 12, para. 45, respectively.

fences covered by the 1954 draft code, with appropriate modifications of form and substance which it would consider at a later stage. As of the thirty-sixth session, in 1984, a general trend had emerged in the Commission in favour of including in the draft code colonialism, *apartheid* and possibly serious damage to the human environment and economic aggression, if appropriate legal formulations could be found. The notion of economic aggression had been further discussed at the thirty-seventh session, in 1985, but no definite conclusions were reached. As regards the use of nuclear 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. With regard to 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 related to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission recognized that it was an international crime under customary international law. It doubted, however, whether in the present international community the offence could be such as to constitute a threat to the peace and security of mankind.¹⁰

19. At its thirty-seventh session, in 1985, the Commission considered the Special Rapporteur's third report, in which he specified the category of individuals to be covered by the draft code and defined an offence against the peace and security of mankind. The Special Rapporteur examined the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft code and possible additions to those paragraphs. He also proposed four draft articles relating to those offences, namely: "Scope of the present articles" (art. 1); "Persons covered by the present articles" (art. 2); "Definition of an offence against the peace and security of mankind" (art. 3); and "Acts constituting an offence against the peace and security of mankind" (art. 4).¹¹

20. At the same session, the Commission referred draft article 1, the first alternative of draft article 2 and both alternatives of draft article 3 to the Drafting Committee. It also referred both alternatives of section A of draft article 4, concerning "The commission [by the authorities of a State] of an act of aggression", to the Drafting Committee, on the understanding that the Committee would consider them only if time permitted and that, if the Committee agreed on a text for section A of draft article 4, it would be for the purpose of

assisting the Special Rapporteur in the preparation of his fourth report.¹²

21. At its thirty-eighth session, in 1986, the Commission had before it the Special Rapporteur's fourth report on the topic.¹³ The Special Rapporteur had divided his fourth report into five parts as follows: part I: Crimes against humanity; part II: War crimes; part III: Other offences (related offences); part IV: General principles; part V: Draft articles.

22. The set of draft articles submitted by the Special Rapporteur in part V of his report contained revised texts of draft articles submitted at the Commission's thirty-seventh session and a number of new draft articles.¹⁴

23. After engaging in an in-depth general discussion of parts I to IV of the Special Rapporteur's fourth report,¹⁵ the Commission decided to defer consideration of the draft articles to future sessions. It was of the opinion that, in the mean time, the Special Rapporteur could recast the draft articles in the light of the opinions expressed and the proposals made by members of the Commission at the thirty-eighth session, and of the views that would be expressed in the Sixth Committee of the General Assembly at its forty-first session.¹⁶

24. At 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 146-148 of its report on that session, reminding the General Assembly in that regard of the conclusion contained in paragraph 69 (c) (i) of the report of the Commission on the work of its thirty-fifth session, in 1983.¹⁷

B. Consideration of the topic at the present session

25. At its present session, the Commission had before it the fifth report of the Special Rapporteur on the topic (A/CN.4/404). In the report, the Special Rapporteur presented revised texts of some of the draft articles he had submitted at the thirty-eighth session. Those draft articles comprise the introduction to the draft code and deal with the definition and characterization of offences against the peace and security of mankind, as well as with general principles. The Commission also had before it the observations of Member States on the topic (A/CN.4/407 and Add.1 and 2).¹⁸

26. In recasting the draft articles, the Special Rapporteur had taken account of the discussion held at the Commission's thirty-eighth session and of the views ex-

¹² *Ibid.*, p. 12, para. 40. Due to lack of time, the Drafting Committee was not able to take up these draft articles.

¹³ *Yearbook . . . 1986*, vol. II (Part One), p. 53, document A/CN.4/398.

¹⁴ For the texts of the draft articles, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 41 *et seq.*, footnote 105.

¹⁵ For a summary of the debate, *ibid.*, pp. 42 *et seq.*, paras. 80-182.

¹⁶ *Ibid.*, p. 54, para. 185.

¹⁷ *Ibid.*; see also para. 16 above.

¹⁸ See also A/41/406, A/41/537 and Add.1 and 2 and A/42/179.

¹⁰ *Yearbook . . . 1984*, vol. II (Part Two), p. 17, para. 65.

¹¹ For the texts, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 14-18, footnotes 40, 46-50, and 52-53.

pressed in the Sixth Committee at the forty-first session of the General Assembly. Moreover, following each of the 11 draft articles submitted in his fifth report, the Special Rapporteur had included a commentary briefly describing the questions raised in those provisions.

27. The Commission considered the fifth report of the Special Rapporteur at its 1992nd to 2001st meetings, from 6 to 21 May 1987. Having heard the Special Rapporteur's introduction, the Commission considered draft articles 1 to 11 as contained in the report and decided to refer them to the Drafting Committee.

28. At its 2031st to 2033rd meetings, from 10 to 13 July 1987, the Commission, after having considered the report of the Drafting Committee, provisionally adopted articles 1 (Definition), 2 (Characterization), 3 (Responsibility and punishment), 5 (Non-applicability of statutory limitations) and 6 (Judicial guarantees). Views expressed by members on those articles are reflected in the commentaries thereto (see sect. C below). Due to lack of time, the Drafting Committee had been unable to formulate texts for articles 4 and 7 (see para. 63 below) and 8 to 11.

29. In introducing *draft article 4*¹⁹ on the *aut dedere aut punire* principle, the Special Rapporteur pointed out that, although several proposals for the establishment of an international criminal jurisdiction had already been made, they had not yielded any fruitful results. The 1937 Convention for the Prevention and Punishment of Terrorism²⁰ had been signed by 24 States, but had never been ratified. Moreover, the draft adopted by the 1953 Committee on International Criminal Jurisdiction at its session in July-August 1953²¹ had never become the subject of a convention.

30. The Special Rapporteur stated that the purpose of draft article 4 was to fill the existing gap with regard to jurisdiction, since there would be no point in drawing up a list of offences unless it had been determined which courts were competent. To date, the most prominent conventions containing specific provisions on jurisdiction were the 1948 Convention on the Prevention and Punishment of the Crime of Genocide²² (art. VI) and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*²³ (art. V). Those articles embodied the principle of territorial jurisdiction or that of an international penal tribunal having jurisdiction with respect to those parties "which shall have accepted its jurisdiction". In other words, if an international court were established, there would be dual competence, since States would have the option either to apply territorial jurisdiction, or to have

recourse to the international court. The two jurisdictions were not exclusive, but coexistent. The difference between the provisions of the two above-mentioned Conventions relating to jurisdiction and draft article 4 was that the latter broadened the scope of jurisdiction to include that of any State in the territory of which the alleged perpetrator of the offence was found. That State had the duty to arrest and try the alleged perpetrator or to extradite him.

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

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

33. Some members took the view that the article should clearly indicate that the concept of a political offence could not be invoked as a defence in connection with the crimes covered by the draft code and, in particular, could not prevent the extradition of the alleged perpetrator. With regard to the right of asylum, attention was drawn to the Declaration on Territorial Asylum,²⁴ which excludes asylum for persons suspected of having committed crimes against the peace and security of mankind (art. 1, para. 2). It was suggested that the Commission should adopt the compromise solution embodied in a number of recent conventions, such as those dealing with certain offences relating to air travel, the taking of hostages and crimes against internationally protected persons.

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

¹⁹ Draft article 4 submitted by the Special Rapporteur read:

"Article 4. Aut dedere aut punire

"1. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

"2. The provision in paragraph 1 above does not prejudice the establishment of an international criminal jurisdiction."

²⁰ League of Nations, document C.546.M.383.1937.V.

²¹ See *Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*, annex: revised draft statute for an international criminal court.

²² United Nations, *Treaty Series*, vol. 78, p. 277.

²³ *Ibid.*, vol. 1015, p. 243.

²⁴ General Assembly resolution 2312 (XXII) of 14 December 1967.

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

36. In his summing-up, the Special Rapporteur said that he was willing to add a new provision incorporating some of the suggestions made during the discussion. He also pointed out that, contrary to what might be thought, the existence of an international criminal court would not preclude the jurisdiction of States. Such a court would have only optional jurisdiction. That was the spirit of the Conventions on genocide and on *apartheid*. Draft article 4 also contained a new element. As a general rule, States did not consider that they were bound to try an alleged offender in the case where an application for extradition was rejected. The same was true where no application for extradition was made. That obligation did, of course, exist in some conventions having a specific purpose, but not in all conventions. It was thus not provided for in the Conventions on genocide and on *apartheid* and had no general effect. If article 4 were adopted, it would be the first provision of universal effect in the matter. Lastly, the Special Rapporteur pointed out that universal jurisdiction and the obligation of States to try the alleged offender were the only means of ensuring the effective enforcement of penalties. Moreover, universal jurisdiction corresponded to the nature of the crime, which was a crime under *jus gentium* and one that consequently jeopardized the interests of the international community.

37. With regard to *draft article 7*,²⁵ the Special Rapporteur noted that the place of the *non bis in idem* rule in the draft code would depend on whether or not it was decided to establish an international criminal court. If it were so decided, it would be difficult to invoke that rule, since, by virtue of the primacy of international criminal law, an international criminal court would in principle be competent to try international crimes. However, the inclusion of that rule appeared to be necessary in the case of universal jurisdiction, since a plurality of courts or intervention by several courts in

trying one and the same offence might make the offender liable to several penalties.

38. During the discussion, some members made suggestions concerning the wording of the article. It was thus proposed that the Latin title should be replaced; that the word "alleged" should be added before "offence"; and that the words "penal procedure of a State" should be replaced by "penal procedure provided for in the present Code". Some members proposed reformulations of the article. For example, it was suggested that the word "offence" should be replaced by "crime against the peace and security of mankind" and that the words "in accordance with the law and penal procedure of a State" should be deleted. Other members suggested that the text should be redrafted to make it clear that it did not preclude the possibility of a second trial and that only the reimposition of the penalty was prohibited. In that connection, it was noted that it would be justified to provide for the possibility, in the case where new evidence was discovered that would constitute a fresh charge or in the case where a new characterization was possible for the same acts, of reopening a case that had already been tried in order to prevent an international crime from going unpunished. Another member proposed the addition of a second paragraph stating: "The *non bis in idem* rule shall apply only as between States pending the establishment of an international criminal jurisdiction." During the discussion, it was stressed that the problem of the *non bis in idem* rule would arise not only within the framework of a system of universal jurisdiction, but also in the case where an international court of criminal jurisdiction was established covering totally or in part the scope of the code.

39. In response to the comments made on draft article 7, the Special Rapporteur proposed, in his summing-up of the discussion, that a second paragraph should be added, reading:

"2. The foregoing rule cannot be pleaded before an international criminal court, but may be taken into consideration in sentencing."

40. With regard to *draft article 8*,²⁶ the Special Rapporteur noted that non-retroactivity was a basic guarantee. It was embodied in the Universal Declaration of Human Rights²⁷ (art. 11, para. 2); the International Covenant on Civil and Political Rights²⁸ (art. 15, para. 1); the European Convention on Human Rights²⁹ (art. 7, para. 1); the American Convention on Human

²⁵ Draft article 7 submitted by the Special Rapporteur read:

"Article 7. *Non bis in idem*

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

²⁶ Draft article 8 submitted by the Special Rapporteur read:

"Article 8. *Non-retroactivity*

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

"2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

²⁷ General Assembly resolution 217 A (III) of 10 December 1948.

²⁸ United Nations, *Treaty Series*, vol. 999, p. 171.

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (*ibid.*, vol. 213, p. 221).

Rights³⁰ (art. 9); and the African Charter on Human and Peoples' Rights³¹ (art. 7, para. 2).

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

42. With regard to paragraph 2, several members pointed out that the reference to the "general principles of international law" or the "general principles of law recognized by the community of nations" might pave the way for unwarranted extensions in an area where offences had to be defined and listed exhaustively. That wording was imprecise and ambiguous and might bring non-legal considerations into play in the application of a basic rule of criminal law. Those members were in favour of deleting paragraph 2. Other members, on the basis of existing practice and, in particular, the Charter of the Nürnberg Tribunal³² and human rights conventions, urged that the paragraph be retained.

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

44. The Special Rapporteur said that *draft article 9*,³³ concerning exceptions to the principle of responsibility, was the counterpart of draft article 3, setting out the principle of responsibility (see sect. C below). He also noted that, in some circumstances, the act committed lost its character as an offence. That was so, for example, in the case of self-defence, which erased the offence. In other instances, the offence existed and remained, but could not give rise to responsibility, by reason either of the status of its perpetrator (for example, in the event of incapacity) or of the circumstances surrounding its commission (for example, coercion, *force majeure*, state of necessity, error).

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

46. Some members expressed the view that self-defence should not be included as an exception to

criminal responsibility. Other members considered that, if self-defence, as recognized under Article 51 of the Charter of the United Nations, relieved States of criminal responsibility, it should also relieve individuals having exercised it on behalf of the State of criminal responsibility.

47. The Special Rapporteur said that the means of defence provided for in subparagraph (b), namely coercion, state of necessity or *force majeure*, would appear difficult to invoke in the case of crimes against humanity. He recalled the judicial precedents on which that distinction was founded and which included those of the military tribunals established in application of Law No. 10 of the Allied Control Council.³⁴ He also described the terminological problems to which those concepts gave rise in international law. Some jurists regarded the concepts as different, while others saw no clear dividing line between them. Their common feature was that they represented a grave peril, the only escape from which was the commission of the offending act. Moreover, their basic conditions were the same in that the perpetrator must have committed no wrongful act and that there should be no disproportionality between the interest protected and the interest sacrificed.

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

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

50. The Special Rapporteur stressed the need to include error of fact in draft article 9 and, in response to various comments to the contrary, referred to the example of the recent attack made on United States vessels in the Persian Gulf. If an error of fact had not been admitted in that instance, the act committed would have constituted aggression. Consequently, error of fact could not be ruled out in certain circumstances.

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

³⁰ The "Pact of San José, Costa Rica", signed on 22 November 1969 (*ibid.*, vol. 1144, p. 123).

³¹ Adopted at Nairobi on 26 June 1981 (see OAU, document CAB/LEG/67/3/Rev.5).

³² See footnote 35 below.

³³ Draft article 9 submitted by the Special Rapporteur read:

"Article 9. *Exceptions to the principle of responsibility*

"The following constitute exceptions to criminal responsibility:

"(a) self-defence;

"(b) coercion, state of necessity or *force majeure*;

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

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

³⁴ Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

the Charter of the Nürnberg International Military Tribunal.³⁵

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

53. Some members of the Commission expressed the view that certain incapacities, such as minority and mental incapacity, should be incorporated in article 9 as exceptions to criminal responsibility.

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

55. Finally, some members made proposals for the recasting of draft article 9 as a whole. Some preferred the former wording of the article (art. 8), as contained in the Special Rapporteur's fourth report. Others considered that the article should be formulated from the point of view of exceptions to intent, rather than of exceptions to responsibility. Another member said that it would be preferable to leave it to the competent court to determine the circumstances attenuating or extinguishing responsibility. Yet another member said that two separate provisions should be drafted, one entitled "causes of non-responsibility" and the other "justifying circumstances".

56. The Special Rapporteur said that the provision in *draft article 10*,³⁶ on responsibility of the superior, had been reproduced from article 86, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions. He had considered that it would be better to devote a

special article to the question, rather than leave the act to be qualified on the basis of judicial precedent, by application of the theory of complicity, as in the *Yamashita* case.³⁷

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

58. The Special Rapporteur said that *draft article 11*,³⁸ on the official position of the perpetrator, corresponded to article 7 of the Charter of the Nürnberg International Military Tribunal and to article 6 of the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal).³⁹ The Commission had also embodied the rule set forth in article 11 in Principle III of the Nürnberg Principles.

59. Several members approved of draft article 11. One member was of the view that the provision relating to exceptions should be included in the early articles, since it formed part of the general principles.

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

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

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

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

64. As regards the title of the topic, the Commission wishes to point out that the word "crimes" has been used in some language versions, whereas others have used the word "offences"—a difference which derives

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

³⁶ Draft article 10 submitted by the Special Rapporteur read:

"Article 10. *Responsibility of the superior*

"The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence."

³⁷ See United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43.

³⁸ Draft article 11 submitted by the Special Rapporteur read:

"Article 11. *Official position of the perpetrator*

"The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility."

³⁹ *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

from resolutions adopted by the General Assembly towards the end of the 1940s. After discussing the matter in plenary and in the Drafting Committee, the Commission decided, with a view to harmonizing the substance and the form of all the language versions, that the word "crimes" should be used in all languages in the draft articles provisionally adopted. Thus, while the title of the topic remains for the time being as it appears on the Commission's agenda and in the General Assembly resolutions on the subject, the title and texts of the draft articles now use the term "crimes" in all languages.

65. In view of what has been said in the preceding paragraph, the Commission wishes to recommend to the General Assembly that it amend the title of the topic in English, in order to achieve greater uniformity and equivalence between the different language versions. If the General Assembly accepts this recommendation, the English title of the topic would be: "Draft Code of Crimes against the Peace and Security of Mankind".

C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind and commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session

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

CHAPTER I
INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

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

Commentary

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

(2) It was generally agreed, however, that crimes against the peace and security of mankind had certain specific characteristics. In particular, there seemed to be unanimity on the criterion of seriousness. These are crimes which affect the very foundations of human society. Seriousness can be deduced either from the nature of the act in question (cruelty, monstrosity, barbarity, etc.), or from the extent of its effects (massiveness, the victims being peoples, populations or

ethnic groups), or from the motive of the perpetrator (for example, genocide), or from several of these elements. Whichever factor makes it possible to determine the seriousness of the act, it is this seriousness which constitutes the essential element of a crime against the peace and security of mankind—a crime characterized by its degree of horror and barbarity—and which undermines the foundations of human society.

(3) Some members of the Commission expressed the opinion that the definition of a crime against the peace and security of mankind should include the element of "intent". It should be noted that there are two schools of thought on this point. According to one school represented in the Commission, intent is deduced from the massive and systematic nature of a crime, and when these elements are present a guilty intent must be presumed. Thus, in the case of genocide or *apartheid*, for example, the intention to commit these crimes need not be proved; it follows objectively from the acts themselves and there is no need to inquire whether the perpetrator was conscious of a criminal intent. His intent is presumed if the act has certain characteristics. In such a case, liability is strict. According to another school of thought, intent may not be presumed, but must always be established. The difference between these two views is much more a difference of procedure than of substance. In both cases, guilty intent is a condition for the crime. The difference lies in whether it is necessary or unnecessary to prove its existence.

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

(5) The expression "under international law" appears between square brackets because the Commission did not reach agreement on whether it was necessary or useful to include it. Some members considered that this expression might weaken the effect of the text and introduce some confusion into the interpretation of the article, and that it would raise the question of the relationship between international law and internal law. The expression might also give the impression that the code dealt with crimes committed by States, thus raising the delicate question of the possible criminal responsibility of a State, whereas the Commission's intention at the present stage was to limit the content of the code

ratione personae to individuals (see para. (3) of the commentary to article 3 below). Other members strongly supported the inclusion of the expression "under international law". They pointed out that the Commission had included it in article 1 of the 1954 draft code. Moreover, the Commission had already sanctioned the expression in 1950 by using it in Principles I, II, III, V, VI and VII of the Nürnberg Principles. Finally, some members thought that its inclusion would make it necessary to add to the draft code a provision regulating the incorporation of international obligations into the internal law of States. It was also pointed out that the inclusion of the expression raised the question whether crimes against the peace and security of mankind were governed by rules of general international law, even outside the draft code. Some members also wondered whether such rules did not have a *jus cogens* character. Finally, it was maintained that the inclusion of this expression was premature and that it was necessary, before deciding the matter, to wait until the list of crimes in question was known in detail. One member suggested that, if the expression were retained, it should be inserted between the words "constitute crimes" and "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.

Commentary

(1) Article 2 concerns the relationship between the code and internal law as regards a concrete matter, namely the characterization of an act or omission as a crime against the peace and security of mankind. The characterization or determination by the code of what constitutes a crime of this kind is treated by the present article as being entirely independent of internal law. It is useful to recall that, as early as 1950, the Commission laid down in Principle II of the Nürnberg Principles that: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."

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

(3) While the first sentence of article 2 establishes the principle of the autonomy of characterization by the code, the second sentence excludes any effect which a possible characterization or absence of characterization of an act or omission under internal law might have on the characterization made under the code. Indeed, it is conceivable that the same act may be characterized by a

State simply as a crime and not as a crime against the peace and security of mankind. The two concepts are not subject to the same régime, in particular as regards statutory limitations, substantive rules, etc. Such a characterization cannot be invoked against the characterization of the same act under the code. Some members of the Commission considered that the second sentence of the article was not strictly necessary.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and punishment

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

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

Commentary

Paragraph 1

(1) Paragraph 1 of article 3 limits to the "individual who commits a crime" the principle of responsibility and punishment for a crime against the peace and security of mankind. The act for which an individual is responsible may also be attributable to a State (whether the individual acted as an "agent of the State", "on behalf of the State", "in the name of the State" or in a simple *de facto* relationship).

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

(3) During the discussion of the draft code in plenary, some members of the Commission supported the proposition that not only an individual, but also a State

could be held criminally responsible. At its thirty-sixth session, however, the Commission decided that the draft code "should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments".⁴⁰ It should be pointed out that, assuming that the criminal responsibility of the State can be codified, the rules applicable to it cannot be the same, as regards investigation, appearance in court and punishment. The two régimes of criminal responsibility would be different. In the commentary to article 19 of part 1 of the draft articles on State responsibility, adopted at its twenty-eighth session, the Commission already warned against the tendency to derive from the expression "international crime", used in that article, a criminal content as understood in criminal law. It sounded a warning against

any confusion between the expression "international crime" as used in this article and similar expressions, such as "crime under international law", "war crime", "crime against peace", "crime against humanity", etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes, for which those instruments require States to punish the guilty persons adequately, in accordance with the rules of their internal law. . . .⁴¹

It emphasized that:

. . . The obligation to punish personally individuals who are organs of the State and are guilty of crimes against the peace, against humanity, and so on does not, in the Commission's view, constitute a form of international responsibility of the State . . .⁴²

Paragraph 2

(4) Whereas paragraph 1 of article 3 refers to the criminal responsibility of the individual, paragraph 2 leaves intact the international responsibility of the State, in the traditional sense of that expression as it derives from general international law, for acts or omissions attributable to the State by reason of offences of which individuals are accused. As the Commission has already emphasized in the commentary to article 19 of part 1 of the draft articles on State responsibility, the punishment of individuals who are organs of the State

. . . certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs. . . .⁴³

The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime. For example, a State could be obliged to make reparation for injury (damages, compensation, etc.).

(5) The word *sanction* in the French title of the article corresponds to the word "punishment" used in the English title.

Article 5. Non-applicability of statutory limitations

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

Commentary

(1) In adopting the rule of non-applicability of statutory limitations laid down in article 5, the Commission took account of the fact that, in internal law, statutory limitation for crimes or other offences is neither a general rule nor an absolute rule, as is shown by a detailed study of comparative law. It is unknown in certain systems of law (e.g. Anglo-American law), and is not an absolute rule in other systems. In France, for instance, it is not applicable to serious military offences or to offences against the security of the State. Moreover, doctrine is not unanimous on the nature or scope of the rule of statutory limitation, particularly on the question whether it is a substantive or a procedural rule.

(2) At first, international law relating to crimes against the peace and security of mankind took no account of the rule of statutory limitation for crimes. Thus the 1945 London Agreement⁴⁴ establishing the International Military Tribunal did not mention this question. No declaration made during the Second World War (neither the St. James nor the Moscow Declaration) referred to statutory limitation.

(3) It was more recently, owing to subsequent circumstances, that the international community and international law were led to concern themselves with the rule of statutory limitation as applied to crimes against the peace and security of mankind. The need to prosecute the perpetrators of the odious crimes committed during the Second World War and the obstacle placed in the way of such prosecution by the rule of statutory limitation known to certain systems of national law led to the recognition of the rule of non-applicability of statutory limitations in international law in the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁴⁵ Some States acceded to the Convention without reservation; others restricted non-applicability to crimes against humanity, excluding war crimes. However, the objections to such restrictions became quite clear very recently on the occasion of the trial of Klaus Barbie. The exclusion of certain war crimes from the rule of non-applicability of statutory limitations in France having provoked a strongly emotional reaction by public opinion, the Cour de cassation, in its judgment of 20 December 1985,⁴⁶ had recourse to a broad interpretation of the notion of a crime against humanity, including in it crimes committed by an occupation régime against its political opponents, "whatever the form of their opposition", which includes armed opposition.

⁴⁰ *Yearbook* . . . 1984, vol. II (Part Two), p. 17, para. 65 (a).

⁴¹ *Yearbook* . . . 1976, vol. II (Part Two), p. 119, para. (59) of the commentary to article 19.

⁴² *Ibid.*, p. 104, para. (21) of the commentary.

⁴³ *Ibid.*

⁴⁴ See footnote 35 above.

⁴⁵ United Nations, *Treaty Series*, vol. 754, p. 73.

⁴⁶ *Fédération nationale des déportés et mutilés résistants et patriotes et autres v. Klaus Barbie, La Gazette du Palais* (Paris), 7-8 May 1986, p. 247.

(4) In view of the foregoing considerations, the Commission provisionally adopted article 5, reserving the possibility of re-examining it in the light of the offences enumerated as crimes against the peace and security of mankind. In particular, it may be necessary to provide for statutory limitations with regard to war crimes, although it is not always easy to distinguish between war crimes and crimes against humanity. These notions sometimes overlap when crimes against humanity are committed in wartime. The Charter of the Nürnberg Tribunal⁴⁷ distinguished between crimes committed against a "civilian population of or in occupied territory", which were classed as war crimes (art. 6 (b)), and crimes committed against "any civilian population . . . on . . . racial or religious grounds", which were classed as crimes against humanity (art. 6 (c)). But that distinction is defective. Crimes committed against populations in occupied territory are obviously war crimes, but they can also be crimes against humanity by reason of their cruelty and irrespective of any racial or religious element. Thus the distinction between war crimes and crimes against humanity is neither systematic nor absolute.

Article 6. Judicial guarantees

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

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

2. He shall have the right:

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

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

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

(d) To be tried without undue delay;

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

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

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

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

Commentary

(1) Article 6 relates to the judicial guarantees to be enjoyed, as a human being, by the alleged perpetrator of a crime against the peace and security of mankind. Several international instruments have established the principles relating to the treatment to which any person accused of a crime is entitled, and to the procedural conditions under which his guilt or innocence can be objectively established. Provisions of this kind are to be found in international instruments relating not only to human rights, but also to certain aspects of crimes against the peace and security of mankind. Mention may be made of the Charter of the Nürnberg Tribunal (art. 16) and the Charter of the Tokyo Tribunal (arts. 9 *et seq.*);⁴⁸ the International Covenant on Civil and Political Rights (art. 14); the European Convention on Human Rights (arts. 6 and 7); the American Convention on Human Rights (arts. 5, 7 and 8); the African Charter on Human and Peoples' Rights (art. 7);⁴⁹ the 1949 Geneva Conventions⁵⁰ (art. 3 common to the four Conventions); and Additional Protocols I (art. 75) and II⁵¹ (art. 6) to the 1949 Geneva Conventions.

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

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

(4) The expression "established by law" in article 14, paragraph 1, of the Covenant has been replaced in article 6, paragraph 2 (a), by the expression "established by law or by treaty". Indeed, if an international criminal court or a court common to several States was to be established, it could only be established by treaty.

(5) The expression "in any case where the interests of justice so require" in article 14, paragraph 3 (d), of the Covenant has not been reproduced in article 6, as the Commission considered that the appointment of counsel for the defence, either by the accused or by the court, was necessary in all cases, by reason of the extreme seriousness of the crimes covered by the draft code and the probable severity of the punishment.

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

⁴⁸ See footnotes 35 and 39 above, respectively.

⁴⁹ Concerning these four instruments, see footnotes 28 to 31 above.

⁵⁰ Geneva Conventions of 12 August 1949 for the protection of war victims (United Nations, *Treaty Series*, vol. 75).

⁵¹ *Ibid.*, vol. 1125, pp. 3 and 609, respectively.

⁴⁷ See footnote 35 above.

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

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

D. Points on which comments are invited

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

(a) draft articles 1 to 3, 5 and 6, provisionally adopted by the Commission at its present session (see sect. C above);³²

³² Attention is drawn to the fact that the expression "under international law" has been placed between square brackets in article 1.

(b) the scope and conditions of application of the *non bis in idem* principle contained in draft article 7 as submitted by the Special Rapporteur (see paras. 37-39 and 63 above);

(c) the conclusion set out in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session, in 1983.³³

³³ Paragraph 69 (c) (i) of the Commission's report on its thirty-fifth session reads:

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

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

(*Yearbook* . . . 1983, vol. II (Part Two), p. 16.)

Chapter III

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction⁵⁴

68. The Commission included the topic "Non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international watercourses.⁵⁵ 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 Special Rapporteur for the topic.

69. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States⁵⁶ to a questionnaire⁵⁷ 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.⁵⁸ The Commission's consideration of the topic at that session led to general agreement that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work.⁵⁹

70. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission. Mr. Schwebel submitted his first report⁶⁰ at the Commission's thirty-first session, in 1979.

71. Mr. Schwebel submitted a second report containing six draft articles at the Commission's thirty-second

session, in 1980.⁶¹ 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: art. 1 (Scope of the present articles); art. 2 (System States); art. 3 (System agreements); art. 4 (Parties to the negotiation and conclusion of system agreements); art. 5 (Use of waters which constitute a shared natural resource); and art. X (Relationship between the present articles and other treaties in force).⁶²

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

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

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

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.⁶³

73. Following Mr. Schwebel's resignation from the Commission upon his election to the ICJ 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 of the previous Special Rapporteur, Mr. Schwebel, was circulated.⁶⁴

74. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.⁶⁵ The report contained, as a basis for discussion, an outline for a draft convention 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 expression "international watercourse system" and the

⁵⁴ For a fuller account of the Commission's work on the topic, see *Yearbook* . . . 1985, vol. II (Part Two), pp. 68 *et seq.*, paras. 268-290.

⁵⁵ *Yearbook* . . . 1974, vol. II (Part Two), p. 265, document A/CN.4/274.

⁵⁶ *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 received from the Governments of 11 additional Member States; see *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.

⁵⁷ The final text of the questionnaire, as communicated to Member States, is reproduced in *Yearbook* . . . 1976, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6; see also *Yearbook* . . . 1984, vol. II (Part Two), pp. 82-83, para. 262.

⁵⁸ *Yearbook* . . . 1976, vol. II (Part One), p. 184, document A/CN.4/295.

⁵⁹ *Yearbook* . . . 1976, vol. II (Part Two), p. 162, para. 164.

⁶⁰ *Yearbook* . . . 1979, vol. II (Part One), p. 143, document A/CN.4/320.

⁶¹ *Yearbook* . . . 1980, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

⁶² The texts of these articles and the commentaries thereto appear in *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

⁶³ *Ibid.*, p. 108, para. 90.

⁶⁴ *Yearbook* . . . 1982, vol. II (Part One) (and corrigendum), p. 65, document A/CN.4/348.

⁶⁵ *Yearbook* . . . 1983, vol. II (Part One), p. 155, document A/CN.4/367.

question of an international watercourse system as a shared natural resource.

75. At its thirty-sixth session, in 1984, the Commission had before it the second report by Mr. Evensen.⁶⁶ It contained the revised text of the outline for a draft convention, comprising 41 articles arranged in six chapters. The Commission focused its discussion on draft articles 1 to 9⁶⁷ and questions related thereto and decided to refer those draft articles to the Drafting Committee for consideration in the light of the debate.⁶⁸ Due to lack of time, however, the Drafting Committee was unable to consider those articles at the 1984, 1985 and 1986 sessions.

76. At its thirty-seventh session, in 1985, the Commission appointed Mr. Stephen C. McCaffrey Special Rapporteur for the topic following Mr. Evensen's resignation from the Commission upon his election to the ICJ.

77. The Special Rapporteur submitted to the Commission at that session a preliminary report⁶⁹ reviewing the Commission's work on the topic to date and setting out his preliminary views as to the general lines along which the Commission's work on the topic could proceed. The Special Rapporteur's recommendations in relation to future 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 Committee had been unable to consider at the 1985 session, be taken up by the Drafting Committee at the 1986 session and not be the subject of another general debate in plenary session; and, secondly, that the Special Rapporteur should 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.

⁶⁶ *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

⁶⁷ Those nine draft articles were the following:

Chapter I. Introductory articles: art. 1 (Explanation (definition) of the term "international watercourse" as applied in the present Convention); art. 2 (Scope of the present Convention); art. 3 (Watercourse States); art. 4 (Watercourse agreements); art. 5 (Parties to the negotiation and conclusion of watercourse agreements);

Chapter II. General principles, rights and duties of watercourse States: art. 6 (General principles concerning the sharing of the waters of an international watercourse); art. 7 (Equitable sharing in the uses of the waters of an international watercourse); art. 8 (Determination of reasonable and equitable use); art. 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States).

For the texts of these articles, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 89 *et seq.*, footnotes 288, 290, 291, 292, 295, 296, 300, 301 and 304.

⁶⁸ It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (see para. 72 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see footnote 62 above) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report (see *Yearbook . . . 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250).

⁶⁹ *Yearbook . . . 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

78. At its thirty-eighth session, in 1986, the Commission had before it the second report of the Special Rapporteur on the topic.⁷⁰ In the report, the Special Rapporteur, after reviewing the status of the Commission's work on the topic, set out his views on draft articles 1 to 9 as submitted by the previous Special Rapporteur,⁷¹ and discussed 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 of watercourses.⁷² In presenting his second report, the Special Rapporteur drew the Commission's attention to four points concerning draft articles 1 to 9 which he had raised in the report and on which he considered the Commission could profitably focus, namely: (a) whether the Commission could, for the time being at least, defer the matter of attempting to define the expression "international watercourse" and base its work on the provisional working hypothesis which it had accepted in 1980 (see para. 72 above); (b) whether the expression "shared natural resource" should be employed in the text of the draft articles; (c) whether the article concerning the determination of reasonable and equitable use should contain a list of factors to be taken into account in making such a determination, or whether those factors should be referred to in the commentary; (d) whether the relationship between the obligation to refrain from causing appreciable harm to other States using the international watercourse, on the one hand, and the principle of equitable utilization, on the other, should be made clear in the text of an article. In addition, the Special Rapporteur invited the Commission's general comments on the draft articles contained in his second report, recognizing that there was insufficient time for them to be considered thoroughly at that session.

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

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

81. There was also a division of views on the question whether a list of factors to be taken into consideration in determining what amounted to reasonable and equitable use of an international watercourse should be set out in the text of an article. The Special Rapporteur supported the suggestion by some members that the Commission should strive for a flexible solution, which might take the form of confining the factors to a limited indicative list of more general criteria.

⁷⁰ *Yearbook . . . 1986*, vol. II (Part One), p. 87, document A/CN.4/399 and Add.1 and 2.

⁷¹ See footnote 67 above.

⁷² Those five draft articles were the following: art. 10 (Notification concerning proposed uses); art. 11 (Period for reply to notification); art. 12 (Reply to notification; consultation and negotiation concerning proposed uses); art. 13 (Effect of failure to comply with articles 10 to 12); art. 14 (Proposed uses of utmost urgency).

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

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

B. Consideration of the topic at the present session

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

85. In the report, the Special Rapporteur briefly reviewed the status of the work on the topic (chap. I); set forth general considerations on procedural rules relating to the utilization of international watercourses (chap. II); submitted six draft articles (arts. 10-15) concerning general principles of co-operation and notification⁷³ (chap. III); and addressed the question of exchange of data and information (chap. IV).

86. The Commission considered the third report of the Special Rapporteur at its 2001st to 2014th meetings, from 21 May to 12 June 1987.

87. In introducing his report, the Special Rapporteur indicated that the first two chapters were intended largely as background information for members. Chapter III formed the core of the report, since it contained the draft articles he was submitting for discussion and action at the present session. Chapter IV was an introduction to the subtopic of exchange of data and information, on which he intended to submit draft articles in his next report.

88. Focusing on chapter III of his report, the Special Rapporteur explained that the purpose of the procedural rules set out in the draft articles contained in the chapter was to ensure that information and data on the uses of a watercourse by other States were available to the State planning its own uses, thus enabling it to take such data and information into account and to avoid any breach of the equitable utilization principle. He pointed out that the draft articles to be included in chapter III of the draft—which he suggested should be entitled “General principles of co-operation, notification and provision of data and information”—fell into

two categories. The first consisted only of draft article 10, which dealt with the general obligation to co-operate; the second comprised draft articles 11 to 15, which set out rules on notification and consultation concerning proposed uses and could best be considered together.

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

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

91. At its 2028th to 2030th and 2033rd meetings, the Commission, after having considered the report of the Drafting Committee on the draft articles referred to it on the present topic, approved the method followed by the Committee with regard to article 1 and the question of the use of the term “system”, and provisionally adopted the following draft articles: article 2 (Scope of the present articles); article 3 (Watercourse States); article 4 ([Watercourse] [System] agreements); article 5 (Parties to [watercourse] [system] agreements); article 6 (Equitable and reasonable utilization and participation); and article 7 (Factors relevant to equitable and reasonable utilization).⁷⁴ The articles adopted at the present session are based on draft articles 2 to 8 referred to the Drafting Committee by the Commission at its thirty-sixth session, in 1984, as well as on articles 1 to 5 provisionally adopted by the Commission at its thirty-second session, in 1980 (see paras. 75 and 71 above, respectively). Due to lack of time, the Drafting Committee was unable to complete its consideration of draft article 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States), submitted by the previous Special Rapporteur and referred to the Committee in 1984, nor was it able to take up draft articles 10 to 15 referred to it at the present session. Thus the Drafting Committee remains seized of draft articles 9 to 15, which it will consider at a future session.

92. The following paragraphs set out briefly the major trends of the discussion held at the present session on draft articles 10 to 15 contained in the Special Rapporteur's third report, including the conclusions drawn by the Special Rapporteur following the debate.⁷⁵

⁷⁴ The texts of these articles and the commentaries thereto appear in section C of the present chapter.

⁷⁵ It should be noted that the views expressed during the debate, including remarks of a general character, and the comments made on the Commission's earlier work and on the previous reports of the Special Rapporteur are reflected extensively in the summary records of the 2001st to 2014th meetings (see *Yearbook* . . . 1987, vol. I). It

⁷³ See footnotes 76 and 77 below.

93. Concerning the general question of the Commission's approach in formulating draft articles on the topic—i.e. preparing articles for inclusion in a "framework agreement" (see article 4 in section C below)—most members who addressed the question were in general agreement with the approach followed by the Commission since 1980 of preparing general, residual rules applicable to all international watercourses and designed to be complemented by other agreements which, when the States concerned chose to conclude them, would enable States of a particular watercourse to establish more detailed arrangements governing its use. A "framework agreement" could also be viewed as an "umbrella agreement". These members believed that State practice and arbitral awards showed that rules of international law concerning the topic had been developed and recognized by States and could form the basis for formulating articles setting out binding rules, albeit of a general and residual nature. The framework instrument might also include, in non-binding provisions to be proposed at a later stage, recommendations or guidelines for certain matters, such as the administration and management of international watercourses, to be used by States as models in the negotiation of future watercourse or system agreements and, particularly, in making their own co-operative arrangements for joint endeavours.

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

95. As to draft article 10,⁷⁴ the debate focused on the existence and nature of a general obligation under international law to co-operate. Several members believed such an obligation—an obligation of conduct—did exist in international law, as evidenced by various international instruments and State practice. The legal principle of international co-operation was viewed as a necessary element of the principle of the sovereign equality of States. Some members considered it to be an

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

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

97. A number of members suggested that an article on co-operation, appropriately drafted, should be included among the articles of chapter II of the draft, on "General principles", as long as that did not detract from the significance of the article.

98. In summing up the debate on draft article 10, the Special Rapporteur stated that, while there was a divergence of views on the existence of a duty to co-operate under general international law, there had been no objection to the idea of including an article on co-operation, provided it was appropriately drafted. In his view, co-operation within the meaning of article 10 denoted a general obligation to act in good faith with regard to other States in the utilization of an international watercourse. Co-operation was necessary to the fulfilment of certain specific obligations; there was no intention to refer to an abstract obligation to co-operate. He said that the duty to co-operate was quite

should also be noted that the Special Rapporteur has indicated his intention to review draft articles 10 to 15 (see footnotes 76 and 77 below) as referred to the Drafting Committee, with a view to proposing revised texts to the Committee in the light of the debate.

⁷⁴ Draft article 10 submitted by the Special Rapporteur in his third report read:

"Article 10. General obligation to co-operate

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

clearly an obligation of conduct. What it involved was not a duty to take part with other States in collective action, but rather a duty to work towards a common goal. The relevant international instruments, as well as State practice and decisions in disputes relating to watercourses, clearly showed that States recognized co-operation as a basis for such important obligations as those relating to equitable utilization and the avoidance of causing appreciable harm. In fact, most agreements on watercourse uses referred to co-operation for a specific purpose and many of them indicated the legal basis for co-operation. The Special Rapporteur therefore agreed that draft article 10 needed further refinement, including references to the specific purposes and objectives of co-operation, as well as to the principles of international law on which co-operation was based. He believed that, in the light of the constructive comments made, a formulation could be found that would make it clear that the obligation of co-operation was a fundamental obligation designed to facilitate the fulfilment of more specific obligations under the draft articles. The new formulation could, for example, provide that watercourse States would co-operate in good faith in the utilization and development of an international watercourse [system] and its waters in an equitable and reasonable manner, in order to achieve optimum utilization and protection thereof, on the basis of the equality, sovereignty and territorial integrity of the watercourse States concerned.

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

100. Commenting generally on *draft articles 11 to 15*,⁷⁷ the Special Rapporteur stated that procedural rules

⁷⁷ Draft articles 11 to 15 submitted by the Special Rapporteur in his third report read:

"Article 11. Notification concerning proposed uses"

"If a State contemplates a new use of an international watercourse which may cause appreciable harm to other States, it shall provide those States with timely notice thereof. Such notice shall be accompanied by available technical data and information that are sufficient to enable the other States to determine and evaluate the potential for harm posed by the proposed new use."

"Article 12. Period for reply to notification"

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

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

"2. During the period referred to in paragraph 1 of this article, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that are available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use without the consent of the notified States.

"3. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view

were necessary to give effect to the substantive provisions of the draft. Otherwise, it would be difficult for

to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the contemplated use or the attainment of an agreed resolution under paragraph 3 of article 13."

"Article 13. Reply to notification: consultation and negotiation concerning proposed uses"

"1. If a State notified under article 11 of a contemplated use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying State's depriving the notified State of its equitable share of the uses and benefits of the international watercourse, the notified State shall so inform the notifying State within the period provided for in article 12.

"2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.

"3. If, under paragraph 2 of this article, the States are unable to adjust the determinations satisfactorily through consultations, they shall promptly enter into negotiations with a view to arriving at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the contemplated use to eliminate the causes of harm, adjustment of other uses being made by either of the States and the provision by the proposing State of compensation, monetary or otherwise, acceptable to the notified State.

"4. The negotiations provided for in paragraph 3 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and interests of the other State.

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

"Article 14. Effect of failure to comply with articles 11 to 13"

"1. If a State contemplating a new use fails to provide notice thereof to other States as required by article 11, any of those other States believing that the contemplated use may cause it appreciable harm may invoke the obligations of the former State under article 11. In the event that the States concerned do not agree upon whether the contemplated new use may cause appreciable harm to other States within the meaning of article 11, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 13, with a view to resolving their differences. If the States concerned are unable to resolve their differences through negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute-settlement provisions of the present articles.

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

"3. If a State fails to provide notification of a contemplated use as required by article 11, or otherwise fails to comply with articles 11 to 13, it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article [9]."

"Article 15. Proposed uses of utmost urgency"

"1. Subject to paragraphs 2 and 3 of this article, a State providing notice of a contemplated use under article 11 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 13, proceed with the initiation of the contemplated use if the notifying State determines in good faith that the contemplated use is of the utmost urgency, due to public health, safety, or similar considerations, and provided that the notifying State makes a formal declaration to the notified State of the urgency of the contemplated use and of its intention to proceed with the initiation of that use.

(Continued on next page.)

a State to know whether it was complying with general provisions such as the rules on equitable utilization and the prevention of appreciable harm. Some members expressed the view that these draft articles were, on the whole, too narrowly drawn, were unbalanced in favour of the notified State and placed unduly heavy burdens on the State contemplating the new use. It was said that the procedures should be more flexible in order to leave more freedom for the States involved. It was also maintained that articles 11 to 15 failed to provide an instrument for co-operation and instead concentrated on imposing rigid procedures leading to compulsory settlement of disputes. One member wondered whether the provisions concerning procedural rules should not be drafted in the form of recommendations by using the term "should" instead of "shall". Other members found the system of procedural rules contained in the articles acceptable on the whole, while expressing reservations on certain details. The wide gap between the very general nature of the obligation to co-operate set out in article 10 and the technical, not to say restrictive, nature of the procedures provided for in articles 11 to 15 was, it was said, understandable: the paradox was explained by the fact that a very general rule required precise procedures for its practical application. Most members agreed that co-operation between watercourse States should be encouraged and must be given concrete form as it applied to the context of reconciling the needs and interests of watercourse States.

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

102. Some members noted that procedures were necessary not only with regard to new uses, but also in order to maintain equitable utilization and to deal with so-called "structural" or "creeping" pollution. The Special Rapporteur pointed out that, while new uses⁷⁹ were dealt with in articles 11 to 15, the other questions

were covered by paragraph 2 of draft article 8 submitted by the previous Special Rapporteur in 1984.⁸⁰ That provision required States to negotiate with a view to maintaining an equitable balance of the uses and benefits of the international watercourse. The Special Rapporteur indicated that "structural" or "creeping" pollution could also be dealt with specifically in the article on pollution which he intended to submit in a future report.

103. Some members commented on the relationship between draft article 9 submitted by the previous Special Rapporteur in 1984⁸¹ and draft articles 11 to 15. They noted that the "triggering mechanism" for the duty to notify under article 11 was "a new use . . . which may cause appreciable harm" to other watercourse States, whereas article 9 required watercourse States not to cause appreciable harm to other watercourse States. In the view of these members, the "triggering mechanism" of article 11 would, in effect, oblige States to admit in advance that they planned to commit an internationally wrongful act. They pointed out that it could not be assumed that States would intentionally commit such an act. The Special Rapporteur explained that, under his approach to draft article 9, causing appreciable harm would not always be wrongful. In the case of a "conflict of uses", the doctrine of equitable utilization could only minimize the harm to each State; it could not eliminate it entirely. The harm would thus be wrongful only if it were not consistent with the equitable utilization of the watercourse by the watercourse States concerned.⁸² The Special Rapporteur noted that the "triggering mechanism" was intended as a factual, not a legal, criterion, and was designed, as he had explained in paragraph (5) of his comments on article 11, to allow a notified State to determine whether a project would result in its being deprived of its equitable share of the uses and benefits of the international watercourse. He suggested that, since the expression "appreciable harm" had caused some confusion, article 11 could instead refer to new uses which "may have an appreciable adverse effect upon other watercourse States". The expression "adverse effect", which did not have the same connotation as "harm", had received support in the debate and might thus be a more suitable criterion. Some members also commented on the need to reconcile the principles expressed in draft articles 6 and 9 and to take this relationship into account with regard to article 9.

104. The Special Rapporteur was, however, of the view that the reference in draft article 13, paragraph 1, to "depriving the notified State of its equitable share

(Continued from page 22.)

"2. The right of the notifying State to proceed with a contemplated new use of utmost urgency pursuant to paragraph 1 of this article is subject to the obligation of that State to comply fully with the requirements of article 11, and to engage in consultations and negotiations with the notified State, in accordance with article 13, concurrently with the implementation of its plans.

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

"The Special Rapporteur explained that, as he had noted in paragraph (3) of his comments on draft article 11, the expression "new use" was intended to comprehend an addition to or alteration of an existing use, as well as new projects and programmes. He stated that the article was, in short, intended to require notification of any contemplated alteration in the régime of the watercourse that might entail adverse effects for another State.

⁷⁹ See *Yearbook . . . 1984*, vol. II (Part Two), p. 96, footnote 301.

⁸⁰ Draft article 9 submitted by the previous Special Rapporteur read:

"Article 9. *Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States*

"A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."
(*Ibid.*, footnote 304.)

⁸¹ See the Special Rapporteur's second report, *Yearbook . . . 1986*, vol. II (Part One), pp. 133-134, document A/CN.4/399 and Add.1 and 2, paras. 179 *et seq.*

...” should be retained, since the fundamental objective of the set of draft articles was to protect against such a deprivation. Thus, while the criterion for giving notice would be that the proposed new use would have an “appreciable adverse effect”, the test for whether the new use could lawfully be implemented would be whether it would deprive the notified State of its equitable share of the uses and benefits of the international watercourse.

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

106. The Special Rapporteur agreed with these observations. He stated that notification should be given early enough in the planning stages to allow meaningful consultations concerning the design of the project, and late enough for sufficient technical data to be available for the notified State to determine whether the new use would be likely to result in appreciable harm (or an adverse effect).

107. The question was also raised whether the term “State”, at the beginning of article 11, included private activities within a State. The Special Rapporteur replied that the term was intended to include such activities, and that this could be clarified in the context of fixing the time at which notification was required, i.e. “before a watercourse State undertakes, authorizes or permits” the new use in question.

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

109. The Special Rapporteur stated that there was ample precedent for requiring the proposing State not to proceed with a project until potentially affected States had been given an opportunity to discuss it with the proposing State, and he cited examples. He noted that most projects that were likely to entail appreciable adverse effects would take a number of years to plan and implement, so that even a nine-month period did not seem

unreasonably long in many cases. He further stated that a fixed period would encourage the proposing State to provide early notification in order to start the period running, so that it could proceed with its plans as soon as possible. The Special Rapporteur therefore proposed reformulating the article to provide for a “suspensive effect” of a fixed maximum period, which could be extended at the request of the notified State. He indicated that such a modification would eliminate the need for paragraph 3 of article 12.

110. *Draft article 13* was viewed by some members as placing too little emphasis on the obligations of the notified State. It was suggested that the notified State should be required to indicate the reasons why it considered that the proposed new use would result in the notifying State’s exceeding its equitable share. The Special Rapporteur agreed, and suggested that the notified State could be required to provide a reasoned and documented explanation of such a position. He noted that whether that State should also be required to establish that the new use would cause it appreciable harm would depend largely on the Commission’s decision concerning draft article 9, which was before the Drafting Committee.

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

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

act in good faith within the meaning of the arbitral award in the *Lake Lanoux* case.¹²

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

114. The Special Rapporteur proposed that a number of steps could be taken to redress the balance in draft article 14. He suggested making it clear in paragraph 1 that failure to notify did not necessarily signify that the State contemplating a new use had failed to comply with article 11. The article should also include a new provision corresponding to the one he had suggested in connection with article 13, requiring a State which believed it might be adversely affected by the new use to provide a reasoned and documented explanation of its grounds for considering that the proposed new use would result in the notifying State's exceeding its equitable share, to the extent that the first State possessed adequate information concerning the proposed use. The subsequent procedures would then parallel those in article 13: consultation and, if necessary, negotiation and further procedures aimed at adjusting the notified State's determination or the notifying State's plans, so as to preserve an equitable balance in the uses and benefits of the watercourse. The Special Rapporteur also suggested that the reference in paragraph 2 to article 9—an article which required the avoidance of causing appreciable harm—should perhaps be replaced by a reference to article 6, which laid down the obligation of equitable utilization. It had rightly been pointed out that the proviso at the end of paragraph 2 should be amended so as to refer to article 11 and to only paragraphs 1 and 2 of article 12. As for paragraph 3 of article 14, the Special Rapporteur concluded that the Commission seemed to be generally agreed that it was not necessary, since the notifying State would, in any event, be responsible for a breach of its international obligations. The paragraph could therefore be deleted without loss to the system of procedural rules as a whole.

115. While some members considered *draft article 15* to be a positive provision, others believed it required careful consideration and greater precision. Certain

language in the article was criticized as being vague. The seriousness of the considerations mentioned in paragraph 1 should, it was suggested, be highlighted. It was also questioned how it would be possible, in the event of an emergency project, for a State to comply with the requirements of articles 11 and 13. Paragraph 3 required closer examination, since a State could not properly be penalized for causing appreciable harm in cases involving what was, in effect, *force majeure*. The article was considered unacceptable by certain members, who believed it could provide a convenient escape from the obligations set out in articles 11 to 14: it was said that a proposed use could be of the utmost urgency only in the case where a disaster had occurred.

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

C. Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session

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

PART I

INTRODUCTION

Article 1. [Use of terms]¹³

Article 2. Scope of the present articles¹⁴

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

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

Commentary

(1) *Paragraph 1.* The term "uses" as employed in article 2 derives from the title of the topic. It is intended

¹³ The Commission agreed to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980. Thus the word "system" appears in square brackets throughout the draft articles.

¹⁴ This article is based on article 1 as provisionally adopted by the Commission in 1980 and on draft article 2 as submitted by the previous Special Rapporteur in 1984.

¹² See the discussion of this award in the Special Rapporteur's second report, *ibid.*, pp. 116 *et seq.*, paras. 111-124.

to be interpreted in its broad sense, to cover all but navigational uses of an international watercourse, as indicated by the phrase "for purposes other than navigation".

(2) Square brackets have been employed in the expression "international watercourse[s] [systems]" throughout the articles provisionally adopted at the present session, as a result of the Commission's decision to postpone consideration of the definition of the expression "international watercourse" and thus of the use of the term "system". The brackets are intended to indicate the two alternative expressions currently envisaged by the Commission, namely "international watercourses" and "international watercourse systems". The expression ultimately decided upon will depend in large part on the manner in which the Commission decides to define the expression "international watercourse" in article 1. The source of the term "system" is the provisional working hypothesis accepted by the Commission in 1980.⁵⁵

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

(4) The reference to "measures of conservation related to the uses of" international watercourse [systems] is meant to embrace not only measures taken to deal with degradation water quality, notably uses resulting in pollution, but also those aimed at solving other watercourse problems, such as those relating to living resources, flood control, erosion, sedimentation and salt water intrusion. It will be recalled that the questionnaire addressed to States on this topic⁵⁶ inquired whether problems such as these should be considered and that the replies were, on the whole, that they should be, the specific problems just noted being named. Also included in the expression "measures of conservation" are the various forms of co-operation, whether or not institutionalized, concerning the utilization, development and conservation of international watercourses, and promotion of the optimum utilization thereof.

(5) *Paragraph 2* of article 2 recognizes that the exclusion of navigational uses from the scope of the present

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

Article 3. Watercourse States⁵⁷

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

Commentary

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

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

Article 4. [Watercourse] [System] agreements⁵⁸

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 inter-

⁵⁵ See para. 72 above.

⁵⁶ See footnote 57 above.

⁵⁷ This article is based on article 2 as provisionally adopted by the Commission in 1980 and on draft article 3 as submitted by the previous Special Rapporteur in 1984.

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

national watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the international watercourse [system].

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

Commentary

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

(2) During the course of its work on the present topic, the Commission has developed a promising solution to the problem of the diversity of international watercourses and the human needs they serve: that of a framework agreement, which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and provide guidelines for the negotiation of future agreements. This approach recognizes that optimum utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned. It also takes into account the difficulty, as revealed by the historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal principles concerning the uses of such watercourses. It contemplates that these principles will be set forth in the framework agreement. This approach has been broadly endorsed both in the Commission and in the Sixth Committee of the General Assembly.⁸⁹

(3) There are precedents for such framework agreements in the field of international watercourses. An early illustration is the Convention relating to the Development of Hydraulic Power Affecting more than One State (Geneva, 9 December 1923),⁹⁰ which, after

setting forth a number of general principles concerning the development of hydraulic power, provides in article 4:

Article 4

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

A more recent illustration is the Treaty of the River Plate Basin (Brasilia, 23 April 1969),⁹¹ by which the parties agree to combine their efforts to promote the harmonious development and physical integration of the River Plate Basin. Given the immensity of the basin involved and the generality of the principles contained in the Treaty, the latter may be viewed as a kind of framework or umbrella treaty to be supplemented by system agreements concluded pursuant to article VI of the Treaty, which provides:

Article VI

The provisions of this Treaty shall not prevent the Contracting Parties from concluding specific or partial bilateral or multilateral agreements designed to achieve the general objectives of the development of the Basin.

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

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

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

⁸⁹ See, in this regard, the conclusions contained in the commentary (paras. (2) and (4)) to article 3 as provisionally adopted by the Commission at its thirty-second session (*Yearbook* . . . 1980, vol. II (Part Two), pp. 112-113), in the Commission's report on its thirty-sixth session (*Yearbook* . . . 1984, vol. II (Part Two), p. 88, para. 285) and in its report on its thirty-eighth session (*Yearbook* . . . 1986, vol. II (Part Two), p. 63, para. 242).

⁹⁰ League of Nations, *Treaty Series*, vol. XXXVI, p. 75.

⁹¹ United Nations, *Treaty Series*, vol. 875, p. 3; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60. The States parties are Argentina, Bolivia, Brazil, Paraguay and Uruguay.

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

(7) The second sentence of paragraph 2 deals with the subject-matter of watercourse or system agreements. The language is permissive, affording watercourse States a wide degree of latitude, but a proviso is included to protect the rights of watercourse States that are not parties to the agreement in question. The sentence begins by providing that such an agreement "may be entered into with respect to an entire international watercourse [system]". Indeed, technical experts consider that the most efficient and beneficial way of dealing with a watercourse is to deal with it as a whole, including all watercourse States as parties to the agreement. Examples of treaties following this approach are those relating to the Amazon, the Plate, the Niger and the Chad basins.⁹² Moreover, some issues arising out of the pollution of international watercourses necessitate co-operative action throughout an entire watercourse. An example of instruments responding to the need for unified treatment of such problems is the Convention for the protection of the Rhine against Chemical Pollution (Bonn, 1976).⁹³

(8) However, system States must be free to conclude system agreements "with respect to any part" of an international watercourse or a particular project, programme or use, provided that the use by one or more other system States of the waters of the international watercourse system is not, to an appreciable extent, affected adversely.

(9) Of the 200 largest international river basins, 52 are multi-State basins, among which are many of the world's most important river basins: the Amazon, the Chad, the Congo, the Danube, the Elbe, the Ganges, the Mekong, the Niger, the Nile, the Rhine, the Volta and the Zambezi basins.⁹⁴ In dealing with multi-State systems, States have often resorted to agreements regulating only a portion of the watercourse, which are effective between only some of the States situated on it.

(10) The *Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin*, published by FAO,⁹⁵ indicates that a very large number of watercourse treaties in force are limited to a part of the watercourse system. For example, for the decade 1960-1969, the *Index* lists 12 agreements that came into force for the Rhine system. Of these 12 agreements, only one includes all the Rhine States as parties; several others, while not localized, are effective

only within a defined area; and the remainder deal with subsystems of the Rhine or with limited areas of the Rhine system.

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

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

(13) At the same time, if a watercourse agreement is concerned with only part of the watercourse or only a particular project, programme or use relating thereto, it must be subject to the proviso that the use, by one or more other watercourse States not parties to the agreement, of the waters of the watercourse is not, to an appreciable extent, adversely affected by the agreement. Otherwise, a few States of a multi-State international watercourse could appropriate a disproportionate amount of its benefits for themselves or unduly prejudice the use of its waters by watercourse States not parties to the agreement in question. Such results would run counter to fundamental principles which will be shown to govern the non-navigational uses of international watercourses, such as the right of all watercourse States to use an international watercourse in an equitable and reasonable manner and the obligation not to use a watercourse in such a way as to injure other watercourse States.⁹⁶

(14) In order to fall within the proviso, however, the adverse effect of a watercourse agreement on watercourse States not parties to the agreement must be "appreciable". If those States are not adversely affected "to an appreciable extent", other watercourse States

⁹² See the discussion of these agreements in the first report of Mr. Schwebel, *Yearbook* . . . 1979, vol. II (Part One), pp. 167-168, document A/CN.4/320, paras. 93-98.

⁹³ *Ibid.*, pp. 168-169, para. 100.

⁹⁴ *Ibid.*, p. 170, para. 108 (table).

⁹⁵ FAO, Legislative Study No. 15 (Rome, 1978).

⁹⁶ The second sentence of paragraph 2 is based on the assumption, well founded in logic as well as in State practice, that less than all watercourse States would not conclude an agreement that purported to apply to an entire international watercourse. If such an agreement were concluded, however, its implementation would have to be consistent with paragraph 2 of article 4 for the reasons stated in paragraph (13) of the commentary.

may freely enter into such a limited watercourse agreement.

(15) The expression "to an appreciable extent" means to an extent that can be established by objective evidence (provided the evidence can be secured). There must be a real impairment of use. What is intended to be excluded is situations of the kind involved in the *Lake Lanoux* case (see paras. (20)-(21) below), in which Spain insisted upon delivery of Lake Lanoux water through the original system. The arbitral tribunal found that:

... thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters ...; at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; ..."

The tribunal continued by pointing out that Spain might have claimed that the proposed diversionary works:

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

In the absence of any assertion that Spanish interests were affected in a tangible way, the tribunal held that Spain could not require maintenance of the natural flow of the waters. It should be noted that the French proposal relied upon by the tribunal was arrived at only after a long-drawn-out series of negotiations beginning in 1917, which led to, *inter alia*, the establishment of a mixed commission of engineers in 1949 and the presentation in 1950 of a French proposal (later replaced by the plan on which the tribunal pronounced) which would have appreciably affected the use and enjoyment of the waters in question by Spain."

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

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

[system] as envisaged by the provisional working hypothesis,¹⁰⁰ all watercourse States would not always be under this obligation.

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

(19) Even with these qualifications, the Commission is of the view that the considerations set forth in the preceding paragraphs, especially paragraph (13), import the necessity of the obligation set out in paragraph 3 of article 4. Furthermore, the existence of a principle of law requiring consultations among States in dealing with fresh water resources is explicitly supported by the 1957 arbitral award in the *Lake Lanoux* case.

(20) That case involved a proposal by the French Government to carry out certain works for the utilization of the waters of Lake Lanoux, waters which flowed into the Carol River and on to the territory of Spain. Consultations and negotiations over the proposed diversion of waters from Lake Lanoux took place between the Governments of France and Spain intermittently from 1917 until 1956. Finally, France decided upon a plan of diversion which entailed the full restoration of the diverted waters before the Spanish border. Spain nevertheless feared that the proposed works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of 26 May 1866 between France and Spain and the Additional Act of the same date. Spain claimed that, under the Treaty and the Additional Act, such works could not be undertaken without the previous agreement of France and Spain. Spain asked the arbitral tribunal to declare that France would be in breach of the Treaty of Bayonne and of the Additional Act if it implemented the diversion scheme without Spain's agreement, while France maintained that it could legally proceed without such agreement.

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

In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that

⁹⁹ *International Law Reports*, 1957 (London), vol. 24 (1961), p. 123, para. 6 (first subparagraph) of the arbitral award. Original French text of the award in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*; partial translation in *Yearbook* ... 1974, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

¹⁰⁰ *International Law Reports*, 1957 ... , p. 123, para. 6 (third subparagraph) of the arbitral award.

¹⁰¹ *Ibid.*, pp. 105-108. See the discussion of this arbitration in the Special Rapporteur's second report, *Yearbook* ... 1986, vol. II (Part One), pp. 116 *et seq.*, document A/CN.4/399 and Add.1 and 2, paras. 111-124.

¹⁰⁰ See the third paragraph of the provisional working hypothesis (para. 72 above).

the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a "right of assent", a "right of veto", which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.

That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement. Thus one speaks, although often inaccurately, of the "obligation of negotiating an agreement". In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith . . .¹⁰¹

. . . In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements; there would thus appear to be an obligation to accept in good faith all communications and contacts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. . . .¹⁰²

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

Article 5. Parties to [watercourse] [system] agreements¹⁰³

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 agree-

ment, to the extent that its use is thereby affected, and to become a party thereto.

Commentary

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

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

(3) *Paragraph 2* is concerned with agreements that deal with only part of the watercourse. It provides that any watercourse State whose use of the watercourse may be appreciably affected by the implementation of an agreement applying to only a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations and negotiations relating to such a proposed agreement, to the extent that its use is thereby affected, and is further entitled to become a party to the agreement. The rationale is that, if the use of water by a State can be affected appreciably by the implementation of treaty provisions dealing with part or aspects of a watercourse, the scope of the agreement necessarily extends to the territory of that State.

(4) Because water in a watercourse is in continuous movement, the consequences of action taken under an agreement with respect to water in a particular territory may produce effects beyond that territory. For example, States A and B, whose common border is the River Styx, agree that each may divert 40 per cent of the river flow for domestic consumption, manufacturing and irrigation purposes at a point 25 miles upstream from State C, through which the Styx flows upon leaving States A and B. The total amount of water available to State C from the river, including return flow in States A and B, will be reduced as a result of the diversion by 25 per cent from what would have been available without diversion.

(5) The question is not whether States A and B are legally entitled to enter into such an agreement. It is whether a set of draft articles that are to provide general principles for the guidance of States in concluding agreements on the use of fresh water should ensure that State C has the opportunity to join in consultations and negotiations, as a prospective party, with regard to proposed action by States A and B that would substantially reduce the amount of water that flowed through State C's territory.

(6) The right is formulated as a qualified one. It must appear that there will be an appreciable effect upon the use of water by a State in order for it to be entitled to

¹⁰¹ *International Law Reports*, 1957 . . . , p. 128, para. 11 (second and third subparagraphs) of the arbitral award.

¹⁰² *Ibid.*, pp. 129-130, para. 13 (first subparagraph) of the arbitral award. The obligation to negotiate has also been addressed by the ICJ in cases concerning fisheries and maritime delimitation. See, for example, the *Fisheries Jurisdiction* cases, *I.C.J. Reports* 1974, pp. 3 and 175; the *North Sea Continental Shelf* cases, *I.C.J. Reports* 1969, p. 3; the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *I.C.J. Reports* 1982, p. 18, at pp. 59-60, paras. 70-71; and the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), *I.C.J. Reports* 1984, p. 246, at pp. 339-340, para. 230.

¹⁰³ This article is based on article 4 as provisionally adopted by the Commission in 1980 and on draft article 5 as submitted by the previous Special Rapporteur in 1984.

participate in consultations and negotiations relating to the agreement, and to become a party thereto. If a watercourse State would not be affected by an agreement regarding a part or an aspect of the watercourse, the physical unity of the watercourse does not of itself require that the State have these rights. The participation of one or more watercourse States whose interests were not directly concerned in the matters under discussion would mean the introduction of unrelated interests into the process of consultation and negotiation.

(7) The meaning of the term "appreciable" is explained in paragraphs (15) and (16) of the commentary to article 4. As indicated there, it is not used in the sense of "substantial". A requirement that a State's use must be substantially affected before it would be entitled to participate in consultations and negotiations would impose too heavy a burden upon the third State. The exact extent to which the use of water may be affected by proposed action is likely to be far from clear at the outset of negotiations. The *Lake Lanoux* decision illustrates the extent to which plans may be modified as a result of negotiations and the extent to which such modification may favour or harm a third State. That State should be required to establish only that its use may be affected to some appreciable extent.

(8) The right of a watercourse State to participate in consultations and negotiations concerning a limited watercourse agreement is further qualified. The State is so entitled only "to the extent that its use is thereby affected", i.e. to the extent that implementation of the agreement would affect its use of the watercourse. The watercourse State is not entitled to participate in consultations or negotiations concerning elements of the agreement whose implementation would not affect its use of the waters, for the reasons given in paragraph (6) of the present commentary. The right of the watercourse State to become a party to the agreement is not similarly qualified, because of the technical problem of a State becoming a party to a part of an agreement. This matter would most appropriately be dealt with on a case-by-case basis: in some instances, the State concerned might become a party to the elements of the agreement affecting it via a protocol; in others, it might be appropriate for it to become a full party to the agreement proper. The most suitable solution in each case will depend entirely on the nature of the agreement, the elements of it that affect the State in question and the nature of the effects involved.

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

a watercourse State does have the right to participate in consultations and negotiations concerning a limited agreement which may affect that State's interests in the watercourse, and to become a party to such an agreement.

PART II

GENERAL PRINCIPLES

*Article 6. Equitable and reasonable utilization and participation*¹⁰⁴

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

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

Commentary

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

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

(3) The second sentence of paragraph 1 elaborates upon the concept of equitable utilization, providing that watercourse States shall use and develop an international watercourse with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the watercourse. The expression "with a view to" indicates that the attainment

¹⁰⁴ This article is based on draft articles 6 and 7 as submitted by the previous Special Rapporteur in 1984.

of optimum utilization and benefits is the objective to be sought by watercourse States in utilizing an international watercourse. Attaining optimum utilization and benefits does not mean achieving the "maximum" use, the most technologically efficient use, or the most monetarily valuable use. Nor does it imply that the State capable of making the most efficient use of a watercourse—whether economically, in terms of avoiding waste, or in any other sense—should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each.

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

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

obligation and correlative right provided for in paragraph 2 are not dependent on a specific agreement for their implementation.

(6) The second sentence of paragraph 2 emphasizes the affirmative nature of equitable participation by providing that it includes not only "the right to utilize the international watercourse [system] as provided in paragraph 1", but also the duty to co-operate actively with other watercourse States "in the protection and development" of the watercourse. This duty to co-operate is linked to the future article to be prepared on the basis of the article submitted by the Special Rapporteur on the general obligation to co-operate in relation to the use, development and protection of international watercourses.¹⁰⁵ While not stated expressly in paragraph 2, the right to utilize an international watercourse referred to in the second sentence carries with it an implicit right to the co-operation of other watercourse States in maintaining an equitable allocation of the uses and benefits of the watercourse. The latter right will be elaborated in greater detail in the future article on co-operation.

(7) In the light of the foregoing explanations of the provisions of article 6, the following paragraphs provide a brief discussion of the concept of equitable utilization and a summary of representative examples of support for the doctrine.

(8) There is no doubt that a watercourse State is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every State whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of States results in every watercourse State having rights to the use of the watercourse that are qualitatively equal to, and correlative with, those of other watercourse States.¹⁰⁶ This fundamental principle of "equality of right" does not, however, mean that each watercourse State is entitled to an equal share of the uses and benefits of the watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse State is entitled to use and benefit from the watercourse in an equitable manner. The scope of a State's rights of equitable utilization depends on the facts and circumstances of each individual case, and specifically on a weighing of all relevant factors, as provided in article 7.

(9) In many cases, the quality and quantity of water in an international watercourse will be sufficient to satisfy the needs of all watercourse States. But where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized, a "conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right.

¹⁰⁵ See paras. 95-99 above; see also the Special Rapporteur's third report, document A/CN.4/406 and Add.1 and 2, para. 59.

¹⁰⁶ See, for example, commentary (a) to article IV of the Helsinki Rules on the Uses of the Waters of International Rivers (hereinafter referred to as "Helsinki Rules"), adopted by the International Law Association in 1966 (ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 486-487).

These adjustments or accommodations are to be arrived at on the basis of equity,¹⁰⁷ and can best be achieved on the basis of specific watercourse agreements.

(10) A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses—including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases—reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field.¹⁰⁸

(11) The basic principles underlying the doctrine of equitable utilization are reflected, explicitly or implicitly, in numerous international agreements between States in all parts of the world.¹⁰⁹ While the language and approaches of these agreements vary considerably,¹¹⁰ their unifying theme is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application. This is true of treaty provisions relating to both contiguous¹¹¹ and successive¹¹² watercourses.

¹⁰⁷ See, for example, article 3 of the resolution on "Utilization of non-maritime international waters (except for navigation)" adopted by the Institute of International Law at its Salzburg session in September 1961, which reads:

"Article 3

"If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances."

(*Annuaire de l'Institut de droit international*, 1961 (Basel), vol. 49, tome II, p. 382; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.)

¹⁰⁸ See, for example, the authorities surveyed in the Special Rapporteur's second report, *Yearbook . . . 1986*, vol. II (Part One), pp. 103 *et seq.*, document A/CN.4/399 and Add.1 and 2, paras. 75-168.

¹⁰⁹ See, for example, the agreements surveyed in the third report of Mr. Schwebel, *Yearbook . . . 1982*, vol. II (Part One) (and corrigendum), pp. 76-82, document A/CN.4/348, paras. 49-72; the authorities discussed in the Special Rapporteur's second report (see footnote 108 above); and the agreements listed in annexes I and II to chapter II of the latter report.

¹¹⁰ See the examples referred to in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 (see footnote 108 above), para. 76 and footnote 78.

¹¹¹ The expression "contiguous watercourse" is used here to mean a river, lake or other watercourse which flows between or is located upon, and is thus "contiguous" to, the territories of two or more States. Such watercourses are sometimes referred to as "frontier" or "boundary" waters. The Special Rapporteur's second report contains an illustrative list of treaty provisions relating to contiguous watercourses, arranged by region, which recognize the equality of the rights of the riparian States in the use of the waters in question (*ibid.*, chap. II, annex I).

¹¹² The expression "successive watercourse" is used here to mean a watercourse which flows ("successively") from one State into another State or States. According to Lippert, "all of the numerous treaties dealing with successive rivers have one common element—the recognition of the shared rights of the signatory States to utilize the waters of an international river" (J. Lippert, "Equitable utilization", *The Law of International Drainage Basins*, A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1967), p. 33). The Special Rapporteur's second report contains an illustrative list of treaty provisions relating to successive

(12) A number of modern agreements, rather than stating a general guiding principle or specifying the respective rights of the parties, go beyond the principle of equitable utilization by providing for integrated river-basin management.¹¹³ These instruments reflect a determination to achieve optimum utilization and benefits through organizations competent to deal with an entire international watercourse.

(13) A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every watercourse State to utilize and benefit from an international watercourse in a reasonable and equitable manner.¹¹⁴ While some States have, on occasion, asserted the doctrine of absolute sovereignty, these same States have generally resolved the controversies in the context of which such assertions were made by entering into agreements that actually apportioned the water or recognized the rights of other watercourse States.¹¹⁵

(14) A number of intergovernmental and non-governmental bodies have adopted declarations, statements of principles, and recommendations concerning the non-navigational uses of international

watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of the benefits of the waters, or in some other way equitably apportion the benefits, or recognize the correlative rights of the States concerned (document A/CN.4/399 and Add.1 and 2 (see footnote 108 above), chap. II, annex II).

¹¹³ See especially the recent agreements concerning African river basins, including: the Agreement of 24 August 1977 for the establishment of the Organization for the Management and Development of the Kagera River Basin (United Nations, *Treaty Series*, vol. 1089, p. 165); the Convention relating to the status of the Senegal River and the Convention establishing the Organization for the Development of the Senegal River, both signed at Nouakchott on 11 March 1972 (United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), pp. 16 and 21, respectively; discussed in the Special Rapporteur's third report, document A/CN.4/406 and Add.1 and 2, paras. 21 *et seq.*); the Act of 26 October 1963 regarding navigation and economic co-operation between the States of the Niger Basin (United Nations, *Treaty Series*, vol. 587, p. 9) and the Agreement of 25 November 1964 concerning the Niger River Commission and the Navigation and Transport on the River Niger (*ibid.*, p. 19); the 1965 Convention between Gambia and Senegal for the integrated development of the Gambia River Basin (*Cahiers de l'Afrique équatoriale* (Paris), 6 March 1965), as well as the 1968 and 1973 agreements concerning the same basin; and the Convention and Statutes of 22 May 1964 relating to the development of the Chad Basin (*Official Gazette of the Federal Republic of Cameroon* (Yaoundé), vol. 4, No. 18 (15 September 1964), p. 1003).

See also the Treaty of the River Plate Basin of 23 April 1969 (see footnote 91 above).

¹¹⁴ See generally the survey contained in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 (see footnote 108 above), paras. 78-99.

¹¹⁵ A well-known example is the controversy between the United States of America and Mexico over the waters of the Rio Grande. This dispute produced the "Harmon Doctrine" of absolute sovereignty but was ultimately resolved by the 1906 Convention concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes. See the Special Rapporteur's discussion of this dispute and its resolution in his second report (*ibid.*, paras. 79-87), where he concluded that "the 'Harmon Doctrine' is not, and probably never has been, actually followed by the State that formulated it [i.e. the United States]" (*ibid.*, para. 87).

See also the examples of the practice of other States discussed in the same report (*ibid.*, paras. 88-91).

watercourses. These instruments provide additional support for the rules contained in article 6. Only a few representative examples will be referred to here.¹¹⁶

(15) An early example of such an instrument is the Declaration of Montevideo concerning the industrial and agricultural use of international rivers, adopted by the Seventh International Conference of American States at its fifth plenary session on 24 December 1933,¹¹⁷ which includes the following 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 over the margin under its jurisdiction.

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

(16) Another Latin-American instrument, the Act of Asunción on the use of international rivers, adopted by the Ministers of Foreign Affairs of the River Plate Basin States (Argentina, Bolivia, Brazil, Paraguay and Uruguay) at their Fourth Meeting, from 1 to 3 June 1971,¹¹⁸ contains the Declaration of Asunción on the Use of International Rivers, paragraphs 1 and 2 of which provide:

1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.

2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.

(17) The United Nations Conference on the Human Environment, held in 1972, adopted the Declaration on the Human Environment (Stockholm Declaration),¹¹⁹ Principle 21 of which provides:

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own 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.

¹¹⁶ See generally the collection of such instruments in the report by the Secretary-General on "Legal problems relating to the utilization and use of international rivers" and the supplement thereto (*Yearbook* . . . 1974, vol. II (Part Two), p. 33, document A/5409, and p. 265, document A/CN.4/274). See also the representative examples of such instruments discussed by the Special Rapporteur in his second report, document A/CN.4/399 and Add.1 and 2 (see footnote 108 above), paras. 134-155.

¹¹⁷ *The International Conferences of American States, First Supplement, 1933-1940* (Washington (D.C.), Carnegie Endowment for International Peace, 1940), p. 88. See the reservations by Venezuela and Mexico and the declaration by the United States of America, *ibid.*, pp. 105-106. All these texts are reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 212, document A/5409, annex I.A.

¹¹⁸ Text reproduced in OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington (D.C.), 1971), pp. 183-186; extracts in *Yearbook* . . . 1974, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

¹¹⁹ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

The Conference also adopted an "Action Plan for the Human Environment",¹²⁰ Recommendation 51 of which provides:

Recommendation 51

It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for co-operation between interested States for water resources common to more than one jurisdiction.

(b) The following principles should be considered by the States concerned when appropriate:

(ii) The basic objective of all water resource use and development activities from the environmental point of view is to ensure the best use of water and to avoid its pollution in each country;

(iii) The net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected;

(18) The "Mar del Plata Action Plan", adopted by the United Nations Water Conference, held at Mar del Plata (Argentina) in 1977,¹²¹ contains a number of recommendations and resolutions concerning the management and utilization of water resources. Recommendation 7 calls upon States to frame "effective legislation . . . to promote the efficient and equitable use and protection of water and water-related ecosystems".¹²² With regard to "international co-operation", the Action Plan provides, in Recommendations 90 and 91:

90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, *inter alia*, in principle 21 of the Declaration of the United Nations Conference on the Human Environment.

91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.¹²³

(19) In a report submitted in 1971 to the Committee on Natural Resources of the Economic and Social Council, the Secretary-General recognized that: "Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers."¹²⁴ The report went on to note that international water resources, which were defined as water in a natural hydrological system shared by two or more countries, offered "a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures

¹²⁰ *Ibid.*, chap. II, sect. B.

¹²¹ *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), part one.

¹²² *Ibid.*, p. 11.

¹²³ *Ibid.*, p. 53.

¹²⁴ E/C.7/2/Add.6, para. 1.

of international association where all parties can benefit in a tangible and visible way through co-operative action."¹²⁵

(20) The Asian-African Legal Consultative Committee in 1972 created a Standing Sub-Committee on international rivers. In 1973, the Sub-Committee recommended to the plenum that it consider the Sub-Committee's report at an opportune time at a future session. The revised draft propositions submitted by the Sub-Committee's Rapporteur follow closely the Helsinki Rules adopted in 1966 by the International Law Association,¹²⁶ which are discussed below. Proposition III provides in part:

1. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

2. What is a reasonable and equitable share is to be determined by the interested basin States by considering all the relevant factors in each particular case.¹²⁷

(21) International non-governmental organizations have reached similar conclusions. At its Salzburg session, in 1961, the Institute of International Law adopted a resolution concerning the non-navigational uses of international watercourses.¹²⁸ This resolution, entitled "Utilization of non-maritime international waters (except for navigation)", provides in part:

Article 1

The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States.

Article 2

Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin.

Article 3

If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking

¹²⁵ *Ibid.*, para. 3.

¹²⁶ See footnote 130 below.

¹²⁷ The next paragraph of proposition III contains a non-exhaustive list of 10 "relevant factors which are to be considered" in determining what constitutes a reasonable and equitable share. See Asian-African Legal Consultative Committee, *Report of the Fourteenth Session held at New Delhi* (10-18 January 1973) (New Delhi), pp. 7-14; text reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367. The Committee's work on the law of international rivers was suspended in 1973, following the Commission's decision to take up the topic. However, in response to urgent requests, the topic was again placed on the Committee's agenda at its twenty-third session, held at Tokyo in May 1983, in order to monitor progress in the work of the Commission. See the statements made by the Committee's observers at the Commission's thirty-sixth session (*Yearbook . . . 1984*, vol. I, p. 334, 1869th meeting, para. 42) and thirty-seventh session (*Yearbook . . . 1985*, vol. I, p. 167, 1903rd meeting, para. 21).

¹²⁸ *Annuaire de l'Institut de droit international*, 1961 (Basel), vol. 49, tome II, pp. 381-384; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076. The resolution, which was based on the final report of the Rapporteur, Juraj Andrassy, submitted at the Institute's Neuchâtel session in 1959 (*Annuaire de l'Institut de droit international*, 1959 (Basel), vol. 48, tome I, pp. 319 *et seq.*), was adopted by 50 votes to none, with one abstention.

particular account of their respective needs, as well as of other pertinent circumstances.

Article 4

No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.

Article 5

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

(22) The International Law Association (ILA) has prepared a number of drafts relating to the topic of the non-navigational uses of international watercourses.¹²⁹ Perhaps the most notable of these for present purposes is that entitled "Helsinki Rules on the Uses of the Waters of International Rivers", adopted by the Association at its Fifty-second Conference, held at Helsinki in 1966.¹³⁰ Chapter 2 of the Helsinki Rules, entitled "Equitable utilization of the waters of an international drainage basin", contains the following provision:

Article IV

Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

(23) Decisions of international courts and tribunals lend further support to the principle that a State may not allow its territory to be used in such a manner as to cause injury to other States.¹³¹ In the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse States have equal and correlative rights to the uses and benefits of the watercourse. An instructive parallel can be found in the decisions of municipal courts in cases involving competing claims in federal States.¹³²

(24) The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value. However, the survey does provide an indication of the

¹²⁹ The first of these drafts was the resolution adopted by the Association at its Forty-seventh Conference, held at Dubrovnik in 1956, and among the most recent was the resolution on the law of international ground-water resources which it adopted at its Sixty-second Conference, held at Seoul in 1986. See part II of the report of the Committee on International Water Resources Law, entitled "The law of international ground-water resources" (ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987), pp. 238 *et seq.*).

¹³⁰ For the texts of the Helsinki Rules and the commentaries thereto, see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

¹³¹ See the discussion of international judicial decisions and arbitral awards, including the *River Oder* case, the *Diversion of Water from the Meuse* case, the *Corfu Channel* case, the *Lake Lanoux* arbitration, the *Trail Smelter* arbitration and other arbitral awards concerning international watercourses, in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 (see footnote 108 above), paras. 100-133.

¹³² See the decisions of municipal courts discussed in the Special Rapporteur's second report, *ibid.*, paras. 164-168.

wide-ranging and consistent support for the rules contained in article 6. Indeed, the rule of equitable and reasonable utilization rests on sound foundations and provides a basis for the duty of States to participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.

*Article 7. Factors relevant to equitable and reasonable utilization*¹³³

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

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

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

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

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

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

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

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

Commentary

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

(2) *Paragraph 1* of article 7 provides that "utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances", and sets forth an indicative list of such factors and circumstances. This provision means that, in order to assure that their conduct is in conformity with the obligation of equitable utilization contained in article 6, watercourse States must take into account, in an ongoing manner, all factors that are relevant to en-

suring that the equal and correlative rights of other watercourse States are respected. However, article 7 does not exclude the possibility of technical commissions, joint bodies or third parties also being involved in such assessments, in accordance with any arrangements or agreements accepted by the States concerned.

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

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

¹³³ This article is based on draft article 8 as submitted by the previous Special Rapporteur in 1984.

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

(5) *Paragraph 2* anticipates the possibility that, for a variety of reasons, the need may arise for watercourse States to consult with each other with regard to the application of article 6 or paragraph 1 of article 7. Examples of situations giving rise to such a need include natural conditions, such as a reduction in the quantity of water, as well as those relating to the needs of watercourse States, such as increased domestic, agricultural or industrial needs. The paragraph provides that watercourse States are under an obligation to "enter into consultations in a spirit of co-operation". As indicated in paragraph (6) of the commentary to article 6, a future article will spell out in greater detail the nature of the general obligation of watercourse States to co-operate. This paragraph enjoins States to enter into consultations, in a spirit of co-operation, concerning the use, development or protection of an international watercourse, in order to respond to the conditions that have given rise to the need for consultations. Under the terms of this provision, the obligation to enter into consultations is triggered by the fact that a need for such consultations has arisen. While this implies an objective standard, the requirement that watercourse States enter into consultations "in a spirit of co-operation" indicates that a request by one watercourse State to enter into consultations may not be ignored by other watercourse States.

(6) Several efforts have been made at the international level to compile lists of factors to be used in giving the principle of equitable utilization concrete meaning in individual cases. In 1966, the International Law Association adopted the "Helsinki Rules on the Uses of the Waters of International Rivers",¹³⁴ article IV of which deals with equitable utilization (see para. (22) of the commentary to article 6 above), and article V of which concerns the manner in which "a reasonable and equitable share" is to be determined, reading:

Article V

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

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

- (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
- (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
- (c) the climate affecting the basin;
- (d) the past utilization of the waters of the basin, including in particular existing utilization;
- (e) the economic and social needs of each basin State;
- (f) the population dependent on the waters of the basin in each basin State;
- (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- (h) the availability of other resources;
- (i) the avoidance of unnecessary waste in the utilization of waters of the basin;

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

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

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

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

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

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

- (1) Agreements,
 - (2) Judgments and awards, and
 - (3) Established lawful and beneficial uses;
- and of other considerations such as:
- (4) The development of the system that has already taken place and the possible future development, in the light of what is a reasonable use of the water by each riparian;
 - (5) The extent of the dependence of each riparian upon the waters in question; and
 - (6) Comparison of the economic and social gains accruing, from the various possible uses of the waters in question, to each riparian and to the entire area dependent upon the waters in question.¹³⁵

(8) Finally, in 1973, the Rapporteur of the Asian-African Legal Consultative Committee's Sub-Committee on international rivers submitted a set of revised draft propositions. In proposition III, paragraphs 1 and 2 deal with equitable utilization (see para. (20) of the commentary to article 6 above), and paragraph 3 deals with the matter of relevant factors, reading:

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

- (a) the economic and social needs of each basin State, and the comparative costs of alternative means of satisfying such needs;
- (b) the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State;
- (c) the past and existing utilization of the waters;
- (d) the population dependent on the waters of the basin in each basin State;
- (e) the availability of other water resources;
- (f) the avoidance of unnecessary waste in the utilization of waters of the basin;
- (g) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses;
- (h) the geography of the basin;
- (i) the hydrology of the basin;
- (j) the climate affecting the basin.¹³⁶

(9) The Commission is of the view that an indicative list of factors is necessary to provide guidance for States in the application of the rule of equitable and reasonable utilization set forth in article 6. An attempt

¹³⁵ United States of America, *Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay river system under customary international law and the Treaty of 1909*, Memorandum of the State Department of 21 April 1958, 85th Congress, 2nd session, Senate document No. 118 (Washington (D.C.), 1958), p. 90.

¹³⁶ See footnote 127 above.

¹³⁴ See footnote 130 above.

has been made to confine the factors to a limited, non-exhaustive list of general considerations that will be applicable in many specific cases. Nevertheless, it perhaps bears repeating that the weight to be accorded to individual factors, as well as their very relevance, will vary with the circumstances.

D. Points on which comments are invited

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

Chapter IV

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

A. Introduction

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

120. From its thirty-second session (1980) to its thirty-sixth session (1984), the Commission considered the five reports submitted by the Special Rapporteur.¹³⁷ The reports sought to develop a conceptual basis for the topic and included a schematic outline and five draft articles. The schematic outline was contained in the Special Rapporteur's third report, submitted to the Commission at its thirty-fourth session, in 1982.¹³⁸ The five draft articles were contained in the Special Rapporteur's fifth report, submitted to the Commission at its thirty-sixth session, in 1984,¹³⁹ and were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

121. At its thirty-sixth session, in 1984, the Commission also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain, among other matters, whether obligations which States owed to each other and discharged as members of international organizations could, to that extent, fulfil or replace some of the procedures referred to in the schematic outline;¹⁴⁰ and the "Survey of State

practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law", prepared by the Secretariat.¹⁴¹

122. At its thirty-seventh session, in 1985, the Commission appointed Mr. Julio Barboza Special Rapporteur, following the death of Robert Q. Quentin-Baxter. At the same session, the Special Rapporteur submitted a preliminary report,¹⁴² followed by a second report¹⁴³ submitted at the thirty-eighth session, in 1986.

B. Consideration of the topic at the present session

123. At its present session, the Commission had before it the Special Rapporteur's second report (A/CN.4/402), held over from the previous session for further consideration, and his third report (A/CN.4/405). The Commission considered the topic at its 2015th to 2023rd meetings, from 16 to 30 June 1987.

124. In his third report, the Special Rapporteur submitted the following six draft articles, broadly corresponding to section 1 of the schematic outline of the topic.¹⁴⁴

Article 1. Scope of the present articles

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

Article 2. Use of terms

For the purposes of the present articles:

1. "Situation" means a situation arising as a consequence of a human activity which gives rise or may give rise to transboundary injury.

2. The expression "within the territory or control":

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

¹³⁷ The five reports of the previous Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook* . . . 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook* . . . 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook* . . . 1982 vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook* . . . 1983, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook* . . . 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

¹³⁸ The text of the schematic outline is reproduced in the Commission's report on its thirty-fourth session: *Yearbook* . . . 1982, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline by the previous Special Rapporteur are indicated in the Commission's report on its thirty-fifth session: *Yearbook* . . . 1983, vol. II (Part Two), pp. 84-85, para. 294.

¹³⁹ The texts of draft articles 1 to 5 as submitted by the previous Special Rapporteur are reproduced in the Commission's report on its thirty-sixth session: *Yearbook* . . . 1984, vol. II (Part Two), p. 77, para. 237.

¹⁴⁰ The replies to the questionnaire, prepared by the previous Special Rapporteur with the assistance of the Secretariat, appear in *Yearbook* . . . 1984, vol. II (Part One), p. 129, document A/CN.4/378.

¹⁴¹ Document A/CN.4/384, reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

¹⁴² *Yearbook* . . . 1985, vol. II (Part One), p. 97, document A/CN.4/394.

¹⁴³ Document A/CN.4/402, reproduced in *Yearbook* . . . 1986, vol. II (Part One).

¹⁴⁴ See footnote 138 above.

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

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

3. "State of origin" means a State within the territory or control of which an activity or situation such as those specified in article 1 occurs.

4. "Affected State" means a State within the territory or control of which persons or objects or the use or enjoyment of areas are or may be affected.

5. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a State of origin and which affect persons or objects or the use or enjoyment of areas within the territory or control of an affected State.

6. "Transboundary injury" means the effects defined in paragraph 5 which constitute such injury.

Article 3. Various cases of transboundary effects

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

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

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

Article 4. Liability

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

Article 5. 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 6. Absence of effect upon other rules of international law

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

125. Introducing his third report, the Special Rapporteur said that the six proposed articles were primarily concerned with the question of the scope of the draft. Articles 1, 2, 5 and 6 were roughly the same as articles 1 to 4 as submitted by the previous Special Rapporteur.¹⁴⁵

126. The Special Rapporteur pointed out that draft article 1 was the key provision. It set out three distinct limitations or conditions as criteria which had to be fulfilled for a given circumstance to fall within the scope of the draft articles. First, there was the transboundary element: the effects felt within the territory or control of one State had to have their origin in an activity or situation which occurred within the territory or control of another State. Secondly, the activity had to give rise to a physical consequence, which involved a connection of a specific type: i.e. the consequence had to stem from the activity as a result of a natural law. Thus the causal relationship between the activity and the harmful effect had to be established through a chain of physical events. Thirdly, those physical events had to have social repercussions, in keeping with the arbitral award in the *Lake Lanoux* case.¹⁴⁶ It then had to be shown that the physical consequences "adversely" affected persons, objects or the use or enjoyment of areas within the territory or control of another State. The inclusion of the word "adversely" was necessary, for without it a State might argue that, although the effect was beneficial, it was not to its liking and it would rather have an unchanged *status quo ante*.

127. Draft article 2 defined key terms so as to avoid the need for lengthy explanations and paraphrases in later articles and in the commentaries. The article included a definition of the expression "within the territory or control", as used in the draft, which extended the concept to include designated maritime areas of coastal States, vessels or objects of flag-States, and aircraft or space objects of States of registry. Article 2 also defined "injury". Injury was an important concept under the present topic and had to be conceived in terms of its nature and extent. Thus injury under the present topic was not the same as in the case of State responsibility for wrongful acts. In the latter case, the law attempted to restore, as far as possible, the situation that had existed prior to the failure to fulfil the obligation in question. Under the present topic, injury was the consequence of lawful activities and had to be determined by reference to a number of factors. When building a régime, States might negotiate the extent of the injury

¹⁴⁵ See footnote 139 above.

¹⁴⁶ Original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports*, 1957 (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

flowing from the activities contemplated in the agreement and thus resolve, among themselves, the question of the threshold of injury above which the liability of a State would be engaged. In the case of injury caused in the absence of such a régime, the State of origin and the affected State would negotiate the amount of compensation, taking into account factors such as those set out in section 6 of the schematic outline. Since the injury was a disruption of the balance of the various factors and interests at stake, the amount of compensation would be calculated so as to redress the balance. That explained why, in some cases, it would be lower than the actual cost of the injury.

128. Draft article 3 dealt with certain specific cases of transboundary effects. The purpose of the article was to expand the meaning of the term “transboundary” beyond reference to political boundaries between contiguous States. Although the article might appear to be redundant in view of article 1, two considerations militated in favour of its inclusion. First, the scope article of any set of rules or convention was traditionally interpreted narrowly in the event of any ambiguity in the text. Secondly, even if the issue was treated extensively in the *travaux préparatoires*, the latter might be of limited value for interpretation. It was therefore felt that it would be prudent to spell out important concepts in more detail in the articles themselves, so as to minimize any ambiguities. Subparagraph (b) was an attempt to respond to the concern expressed in the Commission and in the Sixth Committee of the General Assembly about harmful effects occurring in areas beyond national jurisdictions. It gave the affected State a limited right of action when its territory or an area beyond national jurisdiction in which it had a specific interest was affected by transboundary injury originating within the territory or control of another State.

129. Draft article 4 served to introduce the rest of the articles. In addition, it set out two important conditions, both of which had to be fulfilled to engage the liability which the articles imposed on States: first, the State of origin had to know or have means of knowing that the activity in question was taking place or was about to take place in its territory; and secondly, the activity had to create an appreciable risk of transboundary injury. The question of liability for prevention or reparation of harm would be subject to special review in the case of those developing countries with large territories or vast spaces such as the exclusive economic zone, where the means for effective monitoring might be lacking. In the view of the Special Rapporteur, those conditions were compatible with those embodied in the judgment of the ICJ in the *Corfu Channel* case¹⁴⁷ and in the arbitral award in the *Trail Smelter* case,¹⁴⁸ notwithstanding the opinion that those two decisions applied to cases of State responsibility for wrongful acts. In the *Trail Smelter* case, the State of origin could be declared liable even though all the precautions imposed by the régime established by the tribunal had been taken if, by accident, the level of pollution exceeded a certain

limit; in the *Corfu Channel* case, there was no reason why the presumption that a State had knowledge of everything that was happening in its territory should be limited to responsibility for wrongful acts. The Special Rapporteur stated that, depending on the goal pursued and, of course, the context in which the activity occurred, there were two ways of applying the principle embodied in article 4. One was through specific norms of prohibition, the breach of which would give rise to wrongfulness. The other was through norms of liability for risk or “strict liability”. The concept of “strict liability” was a legal technique for achieving results compatible with the specific goals sought, namely to prevent harm and repair injuries, without prohibiting activities.

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

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

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

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

¹⁴⁷ *I.C.J. Reports 1949*, p. 4.

¹⁴⁸ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

1. GENERAL CONSIDERATIONS

(a) *Development of science and technology*

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

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

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

137. It was stressed by some members that, in developing substantive and procedural rules for dealing with extraterritorial injury arising from uses of modern technology, further scientific development should not be discouraged. The issue of international liability for injurious consequences arising out of lawful acts should not result in some kind of punishment for pioneering activities and should not hamper scientific and technological progress.

(b) *Underlying basis of the topic*

138. Some members questioned the existence of a basis for the topic in international law. They agreed that there were a number of bilateral and some multilateral treaties regulating certain activities which also entailed liability. However, they expressed doubt that the concept of liability for non-prohibited acts existed in general international law. In the absence of established, scientifically substantiated international standards for the determination of adverse transboundary effects in various spheres, the elaboration of general principles could contribute to the emergence of disputes, while the lack of such standards would impede their settlement. In the opinion of some members, the concept of liability did not exist in customary international law, for it could not be established outside treaty régimes relating to specific subjects. In accordance with this view, they of course found it difficult to draft a general régime of

liability in the absence of a solid basis in general international law. It might therefore be better for States to focus on particular types of activity and to avoid drafting a general treaty.

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

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

141. Some members were less concerned about whether or not there was a solid basis for the topic in general international law. For them, such emphasis did not properly take account of an important function of the Commission, namely to make proposals for the progressive development of international law. They believed that it would be improper for the Commission to wait for more disasters and catastrophic accidents causing tremendous human suffering and environmental damage so that certain customary norms would be created which could then be codified many years later. An important task of the Commission was also to look into the future and, taking into account the needs of the international community and the possibility of future conflicts, to try to elaborate rules which would prevent those conflicts or at least minimize their disruptive impact. They believed that, if the Commission decided to shy away from this task, the topic would probably be assigned to another international organization for codification.

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

143. The Special Rapporteur did not find it particularly useful to grapple on the theoretical level with the question whether the foundations of the topic could be found in customary international law, as he was proposing some principles as a matter of progressive development of the law, not of its codification. He believed

there were sufficient treaties and other forms of State practice to provide an appropriate conceptual basis for the topic. He agreed with some members that the principle *sic utere tuo ut alienum non laedas* provided adequate conceptual foundations for the development of the topic. He recalled the observation made by the World Commission on Environment and Development in its report entitled *Our Common Future* that:

National and international law has traditionally lagged behind events. Today, legal régimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature. . . .¹⁴⁹

144. It was suggested that the Commission should fulfil the mandate assigned to it by the General Assembly concerning the development of rules on the topic. Considering the urgent need for coherent and practical rules regarding activities having extraterritorial injurious consequences, the Commission should accelerate its work on the topic. However, one member suggested that, in view of the wide divergence of views among members on basic theoretical issues, the Commission should either request the General Assembly to defer consideration of the topic, or adopt the three principles mentioned in paragraph 194 (d) below as a working hypothesis, leaving aside theoretical issues.

(c) *Relationship between the present topic and State responsibility*

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

146. Other members agreed with the Special Rapporteur that there were practical policy reasons as well as objective criteria for separating the topic of State responsibility from that of international liability. Reference was made to a similar debate held in the Commission at the outset of its consideration of the topic of State responsibility. The Commission had taken the view then that:

. . . Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. . . .¹⁵⁰

Contrary to State responsibility, international liability rules were primary rules, for they established an obligation and came into play not when the obligation had been violated, but when the condition that triggered that same obligation had arisen. These members also agreed with the Special Rapporteur's view that, apart from differences in the nature of the rules of the two topics, there were other differences. In State responsibility, the harmful event which triggered the effect was the breach of an obligation. Under the present topic, on the other hand, the harmful event, while perhaps being a foreseeable event, did not constitute a breach of an obligation. In the case of State responsibility, responsibility was discharged if the respondent State proved that it had used all reasonable means at its disposal to prevent the event but had none the less failed. In the view of these members, however, under the régime of the present topic the State liable would have to compensate as a general rule. The other difference between the two topics related to harm. Under part 1 of the draft articles on State responsibility,¹⁵¹ violation of an obligation and not actual harm was sufficient for a cause of action against the author State. In the international liability topic, the existence of actual harm was essential. While the purpose of reparation in State responsibility was in principle to restore the legal condition that had existed prior to the commission of the wrongful act, compensation under the present topic was determined by reference to a number of factors and might or might not be equivalent to the actual damage suffered. The rules of attribution were also different under the two topics. In the case of liability without a wrongful act, the place where the activity was carried on determined the State that was in principle liable. In the case of responsibility for a wrongful act, that criterion was, on the contrary, inadequate.

147. It was also pointed out that there were relations between the present topic, State responsibility and the law of the non-navigational uses of international watercourses. Those relations did not justify combining the three topics, but careful attention was required to ensure that they were compatible.

(d) *Protection of innocent victims*

148. It was stated by some members that the primary beneficiaries of activities creating a risk of transboundary injury were the States in whose territory the activities were conducted and their populations. The primary victims of such injury were innocent human beings who happened to live on the other side of the political boundary. The injury suffered might take many forms, including financial and health deprivations. From the logical, legal, practical, social and humanitarian points of view, one could only conclude that innocent victims should not be left to bear the loss resulting from such serious and substantial deprivations. Any other conclusion would be inconsistent with the principles of justice.

149. It was, of course, recognized that certain forms of injury were not directly and immediately felt by

¹⁴⁹ Oxford University Press, 1987, p. 330.

¹⁵⁰ *Yearbook* . . . 1973, vol. II, p. 169, document A/9010/Rev.1, para. 38.

¹⁵¹ See *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

human beings. For example, the gradual degradation of the quality of the environment might not always immediately affect human beings. Therefore, while recognizing the urgent need for prevention and reparation of injury that a particular activity might cause immediately and directly, long-term and gradual harm to the environment should not be ignored.

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

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

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

2. SCOPE OF THE TOPIC

(a) *Activities having physical consequences*

152. Many members welcomed the use of the expression "physical consequence" in the definition of the scope of the topic. That requirement properly limited the scope of the topic to the use of the environment, an area which had become of utmost importance in inter-State relations and for the international community as a whole. Furthermore, that requirement again quite properly excluded from the immediate scope of the topic other activities which did not necessarily produce physical consequences beyond territorial boundaries. Such activities included those of a monetary, economic, political and social character. Application of the present articles to such vast areas of activity within State territories and control was considered inappropriate, undesirable and politically unacceptable to most States.

153. Some members found it, on the contrary, regrettable that the criteria introduced by the Special Rapporteur for defining the scope of the topic in fact excluded economic and social activities. Most of the adverse consequences that affected millions of people in the modern world were of an economic or social nature. In their view, the previous Special Rapporteur had

recognized the importance of those types of activity. These members did not believe that economic and social activities could be excluded while a régime of liability was established for the rest.

154. Some questions were raised as to the technical meaning of "physical consequence". It was pointed out that certain genetic experiments might have extraterritorial physical consequences. Similarly, extensive deforestation of tropical forests would lead to climatic changes all over the world. Those extraterritorial effects could also be qualified as "physical". Was the scope of the topic defined so as to include those types of activity? Another point raised was whether radio waves could be considered "physical consequences". If so, was the topic intended to include broadcasting across territorial boundaries?

155. The Special Rapporteur stated that these questions touched upon the corner-stone of the topic. He recalled that, from the beginning of its consideration of the topic, the Commission had grappled with the question as to which types of activity having extraterritorial injurious consequences were to be covered. The previous Special Rapporteur, R. Q. Quentin-Baxter, had ultimately provided an answer—which had not satisfied everyone, but had received general support—by introducing the criterion of "physical consequences". In the Special Rapporteur's opinion, that criterion was sound. He pointed out that an important element in establishing liability under the present topic was proof of a cause-and-effect relationship between the activity and the injury. Such a causal relationship, in his opinion, could be established with certainty only in the physical world. Economic and social interactions involved, in high degree, human psychology, which was much harder to measure and predict. It would be very difficult to establish a causal relationship in those areas with certainty. He understood the concern of those members who wanted to expand the scope of the topic to include economic and social activities; but he did not find such a course prudent, for it would take the topic into a field with so many factual variations and divergent conceptions of action and injury as to render it unmanageable.

(b) *Dangerous activities*

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

157. Some other members, on the other hand, agreed with the Special Rapporteur that the concept of "danger" was relative. Activities considered dangerous today might not be so considered in the near future, with the advance of technology and forecasting techniques. Moreover, listing activities could result in duplication for many activities already covered by special conventions. The whole exercise of listing activities would therefore be futile. Even if the list were to be updated periodically, it would still be impractical. It would therefore be better to define the concept of "dangerous activities" for the purposes of this topic. While such a definition might be susceptible to constant and unpredictable interpretation, it was still a more viable solution. At the same time, a general definition of dangerous activities would secure the relevance and applicability of the provisions on the topic to future activities.

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

(c) *The concepts of "territory", "control" and "jurisdiction"*

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

160. The term "jurisdiction" should be examined carefully. In the context of the 1982 United Nations Convention on the Law of the Sea,¹⁵² the jurisdiction of a State might not always be complete and exclusive over certain waters, such as the exclusive economic zone. In that respect, jurisdiction was not always synonymous with "territory". As to the concept of "control", questions were raised as to whether the term referred to control over an activity or over the territory in which the activity was conducted. The question was also raised as to how these concepts were to apply to activities on the high seas or in outer space.

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

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. . . .

. . . This right has as corollary a duty: the obligation to protect within the territory the rights of other States . . . Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; . . .¹⁵³

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

163. The Special Rapporteur explained that the term "control" had been considered in the light of international law, including the situation referred to by the ICJ in the *Namibia* case.¹⁵⁴ In his view, a State effectively exercising exclusive jurisdiction over a territory should be held liable for certain extraterritorial injurious consequences of activities conducted therein. But, he said, for reasons of principle the international community did not, in certain circumstances, want to legitimize the presence of such a State in a territory by acknowledging, even incrementally, that it had, or was acquiring, a right to jurisdiction. Yet, according to the Special Rapporteur, it still wanted to hold such a State liable, for to do otherwise would be to reward it for its illegal presence. The word "control" was used, *inter alia*, to refer to that type of situation.

164. There were two more situations to be covered. One concerned activities conducted beyond areas under the exclusive jurisdiction of any State. In those areas, the common areas of the planet, all States were entitled to user, subject to international law and the rights of other States. Where such user caused injury to others, the party causing injury should be held liable. Here, the draft articles contemplated activities on the high seas, on the sea-bed beyond national jurisdiction, or in outer space.

165. The second situation concerned activities conducted within those parts of the globe which were neither territory of a State nor a common area. These were portions of the globe in which international law allocated certain sovereign rights and jurisdiction to one State while reserving other rights to other States. The exercise of such sovereign rights and jurisdiction by that State could engage its liability; and, where other States

¹⁵³ United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), pp. 838-839.

¹⁵⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16.

¹⁵² *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

were allocated other rights in the same area, they were liable for the consequences of their activities. An example of such an area was the exclusive economic zone, where the coastal States exercised such sovereign rights and jurisdiction, while other States had been given rights such as freedom of navigation and overflight and freedom to lay submarine cables and pipelines.

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

(d) *The concepts of "risk" and "injury"*

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

168. The wisdom of the requirement of foreseeability of injury was also questioned. For some members, it was inconceivable that, when injury occurred, liability—in terms of an obligation to compensate—should be excluded simply because the possibility of such injury could not be foreseen. The basis for liability, or for the obligation to compensate, they agreed, should be injury, whether or not it had been foreseeable. Foreseeability, though a useful basis for prevention, should not be transformed into a basis for liability. It was generally understood that the Special Rapporteur's purpose in qualifying the terms "risk" and "injury" was to narrow the scope of the topic as defined in article 1, but they were not certain that those additional modifications were particularly helpful.

169. Some members considered that the question of the threshold of injury was not yet satisfactorily resolved. Referring to "appreciable injury" did not seem to add to the clarity. That expression suffered from the same shortcomings as "appreciable risk": it helped a little, but not enough. The concept of shared expectations introduced in the schematic outline was new and, if possible, should not be used. If the Special Rapporteur found it necessary to use that concept, he should spell out its meaning in article 2, on the use of terms.

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

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

(e) *Knowledge or means of knowing*

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

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

174. Other members expressed their appreciation for the efforts made by the Special Rapporteur to take into account the special needs of developing countries. However, they could not accept the proposal that lack of knowledge or means of knowing could by itself exonerate a State that had authorized a particular activity.

The principle of sovereignty had its corresponding duty of protection of the rights and interests of other States. That duty should not be minimized.

3. PREVENTION AND REPARATION

(a) *Relative degrees of emphasis on prevention and reparation*

175. It was suggested by some members that the Commission had moved away from the basic concept of liability and compensation to the duty of care and rules of prevention, with the emphasis on procedures. Procedures had become the main and indeed the exclusive concern of the topic. It was advisable to deal with prevention, but not at the expense of substantive rules of liability. Such an approach would result in the concept of liability for injurious consequences arising out of acts not prohibited by international law fading away. Damage would be compensated not on the basis of mere causality, but because a State, in failing to fulfil its obligation of prevention, had committed a wrongful act. Under the schematic outline (sect. 2, para. 8),¹⁵⁵ the failure to comply with procedural rules of prevention did not give rise to any right of action. However, the Special Rapporteur proposed to eliminate that provision, the effect being to place prevention in a more prominent position. That approach would bring the topic even more within the scope of State responsibility.

176. It was also stated that liability rules, in principle, did not cover rules of prevention. They had different emphases. The present topic, at least according to its title, related only to liability issues. Preventive rules were therefore misplaced in the topic.

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

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

179. The Special Rapporteur stated that, in his view, the duty to take preventive measures should not be reduced to an option entirely at the discretion of the State of origin. That was why he suggested deleting the proposal in section 2, paragraph 8, of the schematic outline stating that failure to comply with preventive rules did not give rise to any right of action. Deletion of

that proposal would not mean that failure to comply with preventive rules did give rise to a right of action, but simply that the discretionary and voluntary nature of compliance with preventive rules was removed. Under international law, some preventive measures might have reached the point of becoming obligatory and some were probably still voluntary. His view was that the question whether a particular preventive measure was an obligation or not should be left to international law. What he was concerned about and thought was extremely important to this topic was the creation of some reasonable, logical and effective linkage between prevention and reparation. This linkage was necessary to the unity of the substance of the topic and would enhance its usefulness. Some such linkage already existed in terms of rules of evidence. Where a State refused to negotiate or take preventive measures, it would shift the presumption to its own disadvantage, as in the *Corfu Channel* case,¹⁵⁶ in which it had been presumed that the State of origin knew or should have known that a harmful activity was being conducted in its territory. There might be other ways of linking rules of prevention and rules of reparation. In any case, it was important to bridge the legal gap between them by either procedural or substantive provisions.

(b) *Private-law remedies*

180. It was pointed out by some members that, as far as the duty of reparation was concerned, State practice showed that there were ways of allocating damages for lawful activities which did not always entail the liability of the State of origin alone. Under many treaties, an operator engaging in certain dangerous activities was primarily liable for damage caused by such activities, with the State being the guarantor for the operator's liability. One example was the 1963 Vienna Convention on Civil Liability for Nuclear Damage.¹⁵⁷ Similar mixed-liability rules were to be found in treaties governing the operation of nuclear ships and the carriage by sea of nuclear material. The extent of such liability was, however, still open to debate. On the other hand, the direct liability of the State for damage caused by lawful activities had been recognized in only one convention, the 1972 Convention on International Liability for Damage Caused by Space Objects.¹⁵⁸

181. The Special Rapporteur said that, by proposing that liability be attributed to States in international law, he was not in any way altering or withholding private-law remedies available to the State internationally liable against the entity that may have actually caused the injury. Private-law remedies included those available to the State under its domestic law or under private international law. He admitted that most existing conventions imposed primary liability on the operator of the entities that caused injury and that some held the State liable only as guarantor for payment. But that type of remedy was one of many available to parties when negotiating a régime. They could even agree to limit or

¹⁵⁵ See footnote 138 above.

¹⁵⁶ See footnote 147 above.

¹⁵⁷ United Nations, *Treaty Series*, vol. 1063, p. 265.

¹⁵⁸ *Ibid.*, vol. 961, p. 187.

to allocate liability as between themselves, or only to provide equal access to courts and other domestic-law remedies. But he was not persuaded that such private-law remedies were sufficient to exonerate the State from liability in the absence of any régime. In his view, private-law remedies, while useful in giving various choices to the parties, failed to guarantee prompt and effective compensation to innocent victims, who, after suffering serious injury, would have to pursue foreign entities in the courts of other States. In addition, private-law remedies by themselves would not encourage a State to take preventive measures in relation to activities conducted within its territory having potential transboundary injurious consequences.

182. A few members, while not opposing the Special Rapporteur's conclusion that primary liability should be attributed to the State, hoped that he would indicate in an appropriate place in the draft that compensation should, in the final analysis, be paid by the entity which had actually caused the injury. In accordance with this view, such a provision was necessary to enable developing States held liable to seek compensation from the operator.

4. THE CONCEPT OF STRICT LIABILITY

183. It was stated by some members that "strict liability", which was suggested by the Special Rapporteur as the main underlying concept of the present topic, did not exist in international law. That concept was taken from domestic law and was, moreover, familiar only to common-law systems. There was therefore no basis for asserting strict liability as a general rule of international law applicable to all transboundary injury: that would be tantamount to adopting the concept of "absolute" liability. It should be remembered that the Commission was attempting to develop rules of international law which States could use in their mutual relations in certain cases of transboundary injury caused by lawful activities. In that connection, attention was drawn to the conclusion reached by the previous Special Rapporteur, R. Q. Quentin-Baxter, that there were two boundary lines for the topic and that one could not, on the one hand, establish the principle of strict liability for lawful activities and, on the other hand, exclude economic activities.¹⁵⁹

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

185. Some members disagreed with the assertion that the concept of strict liability did not exist in international law. It was incorporated, as a concept if not as a term, in a number of multilateral treaties. The principle was recognized in the *Trail Smelter* arbitration,¹⁶⁰ in the *Gut Dam Claims* case¹⁶¹ and in many other forms

of State practice referred to in the Secretariat study on the topic.¹⁶² Strict liability was the basis on which a solution to the fundamental problems under the present topic should be sought. The schematic outline conformed to a modified version of strict liability and that was a reasonable approach. Under that approach, the schematic outline encouraged States to establish a régime for hazardous activities. Only in the absence of such a régime could reparation be determined in the manner proposed in the outline. Even then the matter would be settled through negotiations, which would take account not only of the extent of injury, but also of many other factors, including the efforts made by the State of origin to comply with its duty of care—a significant modification of strict liability.

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

5. RELATIONSHIP BETWEEN THE DRAFT ARTICLES ON THE PRESENT TOPIC AND OTHER INTERNATIONAL AGREEMENTS

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

¹⁵⁹ See R. Q. Quentin-Baxter's fourth report, document A/CN.4/373 (see footnote 137 above), paras. 12-13.

¹⁶⁰ See footnote 148 above.

¹⁶¹ See *International Legal Materials* (Washington, D.C.), vol. 8 (1969), p. 118.

¹⁶² See footnote 141 above.

188. The Special Rapporteur agreed that the articles on the present topic should not interfere with specific international agreements designed to cover certain types of activities also covered by the topic. He thought, however, that article 5, as drafted, was adequate for that purpose. He was prepared to align the Spanish and French texts, containing the expressions *sin perjuicio* and *sans préjudice*, with the English text, which followed the formula of article 30, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties,¹⁶³ which provided: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."

6. FINAL FORM AND NATURE OF THE DRAFT ARTICLES ON THE PRESENT TOPIC

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

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

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

192. The Special Rapporteur did not believe that the Commission should, at the present stage, be concerned about the eventual form of the articles on the topic. Nor did he think that the eventual form of the articles should

affect the Commission's method of work. He believed that the standard of care in drafting should be maintained, whatever the eventual nature of the draft. In his view, the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles. Factors or criteria should be scientific, identifiable and logical, with the aim of improving international law and inter-State relations. In the final analysis, the provisions on the present topic would win support and compliance because of those factors and not necessarily because of the form in which they appeared.

7. CONCLUSIONS

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

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

(a) The Commission must endeavour to fulfil its mandate from the General Assembly on the present topic by regulating activities which have or may have transboundary physical consequences adversely affecting persons or objects;

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

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

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

- (i) Every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States;
- (ii) States must respect the sovereignty and equality of other States;
- (iii) An innocent victim of transboundary injurious effects should not be left to bear his loss.

¹⁶³ United Nations, *Treaty Series*, vol. 1155, p. 331.

Chapter V

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

A. Introduction

195. The topic entitled "Relations between States and international organizations" has been studied by the Commission in two parts. The first part, relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session, in 1971, when it adopted a set of draft articles and submitted them to the General Assembly.¹⁶⁴

196. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference which was convened in Vienna in 1975 and which adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.¹⁶⁵

197. At its twenty-eighth session, in 1976, the Commission commenced its consideration of the second part of the topic, dealing with the status, privileges and immunities of international organizations, their officials, and experts and other persons engaged in their activities not being representatives of States.¹⁶⁶

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

199. The previous Special Rapporteur submitted his first (preliminary) report¹⁶⁷ to the Commission at its twenty-ninth session, in 1977. At the conclusion of its debate, the Commission authorized the Special Rapporteur to continue his study of the second part of the topic along the lines indicated in the preliminary report. The Commission also decided that the Special Rapporteur should seek additional information and expressed the hope that he would carry out his research in the normal way, by examining *inter alia* the agreements concluded and the practices followed by international organizations, whether within or outside the United Nations system, and also the legislation and practice of States. Those conclusions of the Commission regarding its work on the second part of the topic were subsequently endorsed by the General Assembly in paragraph 6 of its resolution 32/151 of 19 December 1977.

200. Pursuant to the authority to seek additional information to assist the Special Rapporteur and the Commission, the Legal Counsel of the United Nations, by a letter of 13 March 1978 addressed to the heads of the specialized agencies and IAEA, circulated a questionnaire aimed at eliciting information concerning the practice of the specialized agencies and IAEA relating to the status, privileges and immunities of those organizations, their officers, and experts and other persons engaged in their activities not being representatives of States. The replies to the questionnaire were intended to supplement the information gathered from a similar questionnaire circulated to the same organizations on 5 January 1965, which had formed the basis of a study prepared by the Secretariat in 1967 entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".¹⁶⁸

201. The previous Special Rapporteur submitted his second report¹⁶⁹ to the Commission at its thirtieth session, in 1978.

202. The Commission discussed the second report of the Special Rapporteur at that session.¹⁷⁰ Among the questions raised in the course of the discussion were: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by Governments for the express purpose of engaging in operational—and sometimes even commercial—activities, and difficulty of applying to them the general rules of international immunities; relationship between the privileges and immunities of international organizations and their responsibilities; responsibility of States to ensure respect by their nationals of their obligations as international officials; need to study the case-law of national courts in the sphere of international immunities; need to define the legal capacity of international organizations at the level of both internal and international law; need to study the proceedings of committees on host country relations, such as that functioning at the Headquarters of the United Nations in New York; need to analyse the

¹⁶⁴ *Yearbook* . . . 1971, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sects. C and D.

¹⁶⁵ United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

¹⁶⁶ *Yearbook* . . . 1976, vol. II (Part Two), p. 164, para. 173.

¹⁶⁷ *Yearbook* . . . 1977, vol. II (Part One), p. 139, document A/CN.4/304.

¹⁶⁸ *Yearbook* . . . 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

¹⁶⁹ *Yearbook* . . . 1978, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

¹⁷⁰ See *Yearbook* . . . 1978, vol. I, pp. 260 *et seq.*, 1522nd meeting (paras. 22 *et seq.*), 1523rd meeting (paras. 6 *et seq.*) and 1524th meeting (para. 1); and *Yearbook* . . . 1978, vol. II (Part Two), pp. 146-147, paras. 155-156.

relationship between the scope of the privileges and immunities of the organizations and their particular functions and objectives.

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

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

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

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

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

204. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz González Special Rapporteur for the topic to succeed Mr. Abdullah El-Erian, who had resigned upon his election to the ICJ.¹⁷¹

205. Owing to the priority that the Commission had assigned, upon the recommendation of the General Assembly, to the conclusion of its studies on a number of topics in its programme of work with respect to which the process of preparing draft articles was already advanced, the Commission did not take up the topic at its thirty-second session, in 1980, or at its subsequent two sessions. It resumed its work on the topic only at its thirty-fifth session, in 1983.

206. The Commission resumed its consideration of the topic at its thirty-fifth session on the basis of a preliminary report¹⁷² submitted by the present Special Rapporteur.

207. In his preliminary report, the Special Rapporteur gave a concise historical account of the Commission's work on the topic, indicating the major questions that had been raised during the consideration of the previous reports¹⁷³ and outlining the major decisions taken by the Commission concerning its approach to the study of the topic.¹⁷⁴

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

mission during its consideration of the two previous reports mentioned above.

209. It emerged from the Commission's consideration of the Special Rapporteur's preliminary report¹⁷⁵ that nearly all the members were in agreement with the conclusions endorsed by the Commission at its thirtieth session, in 1978 (see para. 202 above), and referred to in the preliminary report.

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

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

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

(b) This work should proceed with great prudence;

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

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

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

(f) The Legal Counsel of the United Nations should be requested to send the legal counsels of regional organizations a questionnaire similar to that circulated to the legal counsels of the specialized agencies and IAEA, with a view to gathering information of the same kind as that acquired through the two questionnaires sent to the United Nations specialized agencies and IAEA in 1965 and 1978.¹⁷⁶

212. At its thirty-seventh session, in 1985, the Commission had before it the second report submitted by the Special Rapporteur.¹⁷⁷ In the report, the Special Rapporteur examined the question of the notion of an international organization and possible approaches to the scope of the future draft articles on the topic, as well as the question of the legal personality of international organizations and the legal powers deriving therefrom. Regarding the latter question, the Special Rapporteur proposed to the Commission a draft article with two alternatives in regard to its presentation.¹⁷⁸ The Commission also had before it a supplementary study

¹⁷¹ *Yearbook* . . . 1979, vol. II (Part Two), p. 189, para. 196.

¹⁷² *Yearbook* . . . 1983, vol. II (Part One), p. 227, document A/CN.4/370.

¹⁷³ *Ibid.*, p. 228, para. 9.

¹⁷⁴ *Ibid.*, para. 11.

¹⁷⁵ See *Yearbook* . . . 1983, vol. I, pp. 237 *et seq.*, 1796th to 1798th meetings and 1799th meeting (paras. I to 11).

¹⁷⁶ *Yearbook* . . . 1983, vol. II (Part Two), pp. 80-81, para. 277.

¹⁷⁷ *Yearbook* . . . 1985, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

¹⁷⁸ For the text of this draft article, see *Yearbook* . . . 1985, vol. II (Part Two), p. 67, footnote 252.

prepared at the Commission's request (see para. 211 (e) above) by the Secretariat on the basis of replies received to the questionnaire sent by the Legal Counsel of the United Nations to the legal counsels of the specialized agencies and IAEA, on the practice of those organizations concerning their status, privileges and immunities.¹⁷⁹

213. In considering the topic, the Commission focused its discussion on the matters dealt with by the Special Rapporteur in his second report.

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

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

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

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

(d) In this connection, the Special Rapporteur may examine the possibility of submitting at the thirty-eighth session of the Commission his concrete suggestions, bearing in mind the views expressed by members of the Commission, on the possible scope of the draft articles to be prepared on the topic;

(e) The Special Rapporteur may also consider the possibility of presenting at the Commission's thirty-eighth session a schematic outline of the subject-matter to be covered by the various draft articles he intends to prepare on the topic;

(f) It would be useful if the Secretariat could submit to the members of the Commission, at its thirty-eighth session, copies of the replies to the questionnaire referred to in paragraph [211] (f) above.¹⁸⁰

215. At the thirty-eighth session, in 1986, the Special Rapporteur submitted his third report on the topic¹⁸¹ to the Commission, which was unable to consider it due to lack of time.

B. Consideration of the topic at the present session

216. At its present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/401). The Commission also had before it a document prepared by the Secretariat (ST/LEG/17) setting out the replies received, on a question-by-question basis, from regional organizations to the questionnaire concerning their status, privileges and immunities sent to them by the Legal Counsel of the United Nations on 5 January 1984 (see para. 211 (f) above).

217. In his third report, the Special Rapporteur analysed the debates on the topic held in the Sixth Committee of the General Assembly at its fortieth session and in the Commission at its thirty-seventh session, and

drew a number of conclusions from those debates. He also set out various considerations regarding the scope of the topic and submitted to the Commission, in compliance with its request, an outline of the subject-matter to be covered by the draft articles he intended to prepare on the topic.¹⁸²

218. The Commission considered the Special Rapporteur's third report at its 2023rd to 2027th and 2029th meetings, from 30 June to 8 July 1987. After hearing the Special Rapporteur's introduction, the Commission held an exchange of views on various aspects of the topic, such as the scope of the future draft, the relevance of the outline submitted by the Special Rapporteur and the methodology to be followed in the future.

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

¹⁸² The outline submitted by the Special Rapporteur read as follows:

- "I. Privileges and immunities of the organization
 - "A. Non-fiscal privileges and immunities:
 - “(a) immunity from legal process;
 - “(b) inviolability of premises and exercise of control by the organization over those premises;
 - “(c) immunity of property and assets from search and from any other form of interference;
 - “(d) inviolability of archives and documents;
 - “(e) privileges and immunities in respect of communication facilities (use of codes and dispatch of correspondence by courier or in diplomatic bags, etc.);
 - "B. Financial and fiscal privileges:
 - “(a) exemption from taxes;
 - “(b) exemption from customs duties;
 - “(c) exemption from currency controls;
 - “(d) bank deposits.
- "II. Privileges and immunities of officials
 - "A. Non-fiscal:
 - “(a) immunity in respect of official acts;
 - “(b) immunity from national service obligations;
 - “(c) immunity from immigration restrictions and registration of aliens;
 - “(d) diplomatic privileges and immunities of executives and other senior officials;
 - “(e) repatriation facilities in times of international crisis;
 - "B. Financial and fiscal:
 - “(a) exemption from taxation of salaries and emoluments;
 - “(b) exemption from customs duties.
- "III. Privileges and immunities of experts on mission for, and of persons having official business with, the organization."

¹⁷⁹ Document A/CN.4/L.383 and Add.1-3, reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

¹⁸⁰ *Yearbook . . . 1985*, vol. II (Part Two), p. 67, para. 267.

¹⁸¹ Document A/CN.4/401, reproduced in *Yearbook . . . 1986*, vol. II (Part One).

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. State responsibility

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

B. Jurisdictional immunities of States and their property

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

222. The Commission wishes to recall that, at its 1972nd meeting, on 20 June 1986, it decided that in accordance with articles 16 and 21 of its statute the draft articles provisionally adopted by the Commission on first reading should be transmitted through the Secretary-General to the Governments of Member States for comments and observations. The Commission also wishes to recall that the General Assembly, in paragraph 9 of its resolution 41/81 of 3 December 1986, urged Governments:

... to give full attention to the request of the International Law Commission, transmitted through the Secretary-General, for comments and observations on the draft articles on jurisdictional immunities of States and their property ... adopted on first reading by the Commission;

and that the Secretary-General, by letter dated 25 February 1987, invited Governments to submit their comments and observations by 1 January 1988. The Commission wishes to emphasize the importance of that deadline for the continuation of its work on the topic.

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

223. The Commission wishes to recall that, at its 1980th meeting, on 2 July 1986, it decided that in accordance with articles 16 and 21 of its statute the draft articles provisionally adopted by the Commission on first reading should be transmitted through the Secretary-General to the Governments of Member States for comments and observations. The Commission also wishes to recall that the General Assembly, in paragraph 9 of its resolution 41/81 of 3 December 1986, urged Governments:

... to give full attention to the request of the International Law Commission, transmitted through the Secretary-General, for comments and observations on the draft articles ... on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, adopted on first reading by the Commission;

and that the Secretary-General, by letter dated 25 February 1987, invited Governments to submit their comments and observations by 1 January 1988. The Commission wishes to emphasize the importance of that deadline for the continuation of its work on the topic.

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

224. At its 1990th meeting, on 4 May 1987, the Commission noted that, in paragraph 5 of its resolution 41/81 of 3 December 1986, the General Assembly had requested it:

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

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

225. The Planning Group of the Enlarged Bureau was established by the Commission at its 1991st meeting, on 5 May 1987. The Planning Group was composed of Mr. Leonardo Díaz González (Chairman), Prince Bola Adesumbo Ajibola, Mr. Awn Al-Khasawneh, Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Julio Barboza, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Mohamed Bennouna, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Andreas J. Jacovides, Mr. Abdul G. Koroma, Mr. Paul Reuter, Mr. Emmanuel J. Roucounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

226. The Planning Group held 11 meetings, on 5, 6 and 14 May, 19 and 30 June and 8, 9, 13, 14 and 15 July 1987. It had before it, in addition to the section of the topical summary of the discussion held in the Sixth Committee during the forty-first session of the General Assembly entitled "Programme and methods of work of the Commission" (A/CN.4/L.410, paras. 755 to

787), a number of proposals submitted by members of the Commission.

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

Planning of activities

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

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

230. As the Commission has already indicated,¹⁸³ while the adoption of any rigid schedule of operation would be impracticable, the use of goals in planning its activities affords a helpful framework for decision-making.

231. The Commission noted that the Chairman of the Planning Group had convened a meeting of special rapporteurs with a view to ascertaining their plans in relation to their respective topics and thereby facilitating the planning of the activities of the Commission for the term of office of its members. The intentions expressed by the special rapporteurs during that meeting are reflected in the table annexed to the present report.

232. Taking into account the progress achieved on the topics in its current programme and the prospects for making further progress, and bearing in mind the different degrees of complexity and delicacy of the various topics, the Commission concluded that it would endeavour to complete in the course of the five-year term the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (1988) and the second reading of the draft articles on jurisdictional immunities of States and their property (1989), provided that, in both cases, as was desirable, the written comments and observations requested from Governments were available on time. The Commission also concluded that it would endeavour to complete by 1991 the first

reading of the draft articles on the draft Code of Offences against the Peace and Security of Mankind and the first reading of the draft articles on the law of the non-navigational uses of international watercourses. The Commission intends to make substantial progress, during the same period, on State responsibility, on international liability for injurious consequences arising out of acts not prohibited by international law and on the second part of the topic of relations between States and international organizations. It considers it premature, however, to set itself specific goals in relation to those topics.

233. With respect to State responsibility, the Special Rapporteur expressed the wish that, as for the other topics, the secretariat of the Commission provide the assistance of its experts. As regards in particular the programme he proposed to carry out for the 1988 session, he informed the Commission that he had officially called the attention of the Secretary to the Commission as well as of the Legal Counsel to the necessity that exhaustive and analytical research be carried out on time on the substantive content of international responsibility (draft articles 6 and 7 of part 2 of the present draft), particularly on the cessation of the wrongful conduct, *restitutio in integrum*, reparation *stricto sensu*, satisfaction, guarantees of non-repetition and the qualitative aspects of damage (injury).

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

Methods of work

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

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

¹⁸³ *Yearbook* . . . 1975, vol. II, p. 184, document A/10010/Rev.1, para. 147.

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

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

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

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

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

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

Duration of the session

243. The Commission noted with appreciation that, despite the current financial crisis of the United Nations, its position as set out in paragraph 252 of its report on its thirty-eighth session¹⁸⁴ had been duly taken

into account and that the competent services of the Secretariat had found it possible to reduce by one week only the normal duration of its session. However, the Commission wishes to reiterate its view that the nature of its task of progressive development and codification of international law as envisaged in the Charter, as well as the magnitude and complexity of the topics on its agenda, make it essential that its annual sessions be of the usual 12-week duration. In planning its activities for the term of office of its members, as requested in paragraph 5 (a) (i) of General Assembly resolution 41/81, the Commission assumed that the full duration of its sessions would be restored. Should that not be done, the Commission would find it impossible to abide by the plan it agreed upon and some concentration of its efforts would have to take place, with the possible consequence that not every one of the topics on its agenda would be considered at any one session. The Commission wishes to emphasize that, had it not been for the exceptional circumstance that three of the items on its agenda were not considered at the present session for the reasons explained in chapter I (para. 9), the type of difficulties referred to in paragraph 252 of its 1986 report would undoubtedly have been encountered at the present session as well.

Documentation

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

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

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

247. The Commission wishes to emphasize the usefulness of the publication *The Work of the International Law Commission*, which is used extensively in

¹⁸⁴ *Yearbook* . . . 1986, vol. II (Part Two), pp. 64-65.

diplomatic and academic circles as a basic work of reference. It notes with satisfaction that measures have been taken to find the funds necessary for the printing of the updated fourth edition of the book in the near future.

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

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

E. Co-operation with other bodies

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

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

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

F. Date and place of the fortieth session

253. The Commission decided to hold its next session at the United Nations Office at Geneva from 9 May to 29 July 1988.

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

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

H. International Law Seminar

255. Pursuant to General Assembly resolution 41/81 of 3 December 1986, the United Nations Office at Geneva organized the twenty-third session of the International Law Seminar during the present session of the Commission. The Seminar is intended for postgraduate students of international law and young professors or government officials who normally deal with questions of international law in the course of their work. Twenty-three candidates of different nationalities and mostly from developing countries, selected by a committee under the chairmanship of Mr. Edilbert Razafindralambo, participated in this session of the Seminar, as well as one observer.

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

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

Seminar on questions related to the protection of refugees, human rights complaints procedures and legal aspects of emergency management.

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

259. The Seminar is funded by voluntary contributions of Member States and receives assistance rendered by the United Nations Secretariat and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Argentina, Austria, Cyprus, Denmark, Finland, the Federal Republic of Germany, the Netherlands, New Zealand and Sweden had made fellowships available to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. With the award of those fellowships, it was possible to achieve adequate geographical distribution of participants and bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. In 1987, fellowships were awarded to 15 participants. Of the 522 candidates, representing 121 nationalities, accepted as participants in the Seminar since its inception in 1964, fellowships have been awarded to 255.

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

261. At the end of the Seminar, Mr. Stephen C. McCaffrey, Chairman of the Commission, and Mr. Jan

Martenson, Director-General of the United Nations Office at Geneva, presided over a ceremony in which the participants were presented with certificates attesting to their participation in the twenty-third session of the Seminar.

I. Gilberto Amado Memorial Lecture

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

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

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

ANNEX

Plans of the Special Rapporteurs concerning the draft articles and reports they intend to submit at each session until the end of the Commission's five-year term of office (1991)*

Topic	Session			
	1988	1989	1990	1991
Draft Code of Offences against the Peace and Security of Mankind	Draft articles on crimes against peace	Draft articles on crimes against humanity	Draft articles on war crimes	Completion of the draft articles on first reading
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	Report for the second reading of the provisional draft articles ^a	—	—	—
The law of the non-navigational uses of international watercourses	Report covering chapter IV (Exchange of data) and chapter V (Environmental protection, pollution and related matters) of the draft articles ^b	Report covering chapter VI (Management of international watercourses and international mechanisms) and chapter VII (Settlement of disputes) of the draft articles	Completion of the draft articles on first reading, depending on progress of work in the Drafting Committee	—
International liability for injurious consequences arising out of acts not prohibited by international law	Revised general provisions and draft articles on principles and on procedures of implementation	Remaining draft articles	—	—
State responsibility	Report on the questions dealt with in draft articles 6 and 7 of part 2 of the draft ^c and completion of the preparatory work for the second reading of part 1 of the draft	Report on countermeasures in the case of delicts	Report on countermeasures in the case of crimes	Report on part 3 (Settlement of disputes) of the draft articles
Jurisdictional immunities of States and their property	Report for the second reading of the provisional draft articles ^d	See footnote <i>d</i>	—	—
Relations between States and international organizations (second part of the topic)	Report	Report	Report	Completion of the draft articles on first reading

* See paragraph 231 of the present report.

^a If, by 1 January 1988, there has been an insufficient number of replies to the request for observations addressed to Governments, the second reading of the draft articles will have to take place in 1989.

^b The submission of the report might be deferred to the following year, depending on the progress of work in the Drafting Committee, where draft articles 10 to 15 are pending.

^c As submitted by the previous Special Rapporteur, and subject to the Commission's secretariat being able to provide the necessary assistance.

^d If, by 1 January 1988, there has been an insufficient number of replies to the request for observations addressed to Governments, the second reading of the draft articles will have to take place in 1989. The Special Rapporteur is inclined to consider 1989 as a more realistic deadline, in view of the complexity of the topic.