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Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995)

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ABBREVIATIONS

ECE	Economic Commission for Europe
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
IMO	International Maritime Organization
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme
WMO	World Meteorological Organization

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AJIL	*American Journal of International Law* (Washington, D.C.)
"Chronique ..."	"Chronique des faits internationaux", *Revue générale de droit international public* (Paris, C. Rousseau, ed.), vols. IX (1902); LXXX, No. 2 (1976); and LXXXIV, No. 1 (1980)
I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
ILM	*International Legal Materials* (Washington, D.C.)

ILR	*International Law Reports*
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1-24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40-80: beginning in 1931)
Recueil des cours...	*Recueil des cours de l'Académie de droit international de La Haye*
RGDIP	*Revue générale de droit international public*
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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NOTE CONCERNING QUOTATIONS

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

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

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

	Source
HUMAN RIGHTS	
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989)	*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49*, resolution 44/128, annex.
American Convention on Human Rights (San José, 22 November 1969)	United Nations, *Treaty Series*, vol. 1144, p. 123.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, p. 13.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51*, resolution 39/46, annex.
Inter-American Convention on Forced Disappearance of Persons (Belen, 9 June 1994)	OAS, document OEA/Ser.A/55 (SEPF).
NATIONALITY AND STATELESSNESS	
Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930)	League of Nations, *Treaty Series*, vol. CLXXIX, p. 89.

	Source
Protocol relating to a Certain Case of Statelessness	Ibid., p. 115.
Protocol relating to Military Obligations in Certain Cases of Dual Nationality	United Nations, *Legislative Series, Laws concerning Nationality* (Sales No. 1954.V.1), p. 572.
Special Protocol concerning Statelessness	Ibid., p. 577.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	United Nations, *Treaty Series*, vol. 360, p. 117.
Convention on the Reduction of Statelessness (New York, 30 August 1961)	Ibid., vol. 989, p. 176.
PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS	
Convention on the Privileges and Immunities of the United Nations (London and New York, 13 February 1946)	Ibid., vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, p. 95.
ENVIRONMENT AND NATURAL RESOURCES	
International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971)	Ibid., vol. 1110, p. 57.
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, 29 December 1972)	Ibid., vol. 1046, p. 120.
Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974)	Ibid., vol. 1507, p. 166.
Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976)	Ibid., vol. 1102, p. 27.
Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution (Kuwait, 24 April 1978)	Ibid., vol. 1140, p. 133.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, England, 1991), vol. 2, p. 301.
Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988)	*International Legal Materials* (Washington, D.C.), vol. XXVII (1988), p. 868.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989)	UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, England, 1991), vol. 2, p. 449.
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991)	*International Legal Materials* (Washington, D.C.), vol. XXX, No. 3 (May 1991), p. 775.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	ECE, *Environmental Conventions*, United Nations publication, 1992, p. 95.
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992)	*International Legal Materials* (Washington, D.C.), vol. XXXI, No. 6 (November 1992), p. 1313.

	Source
Convention on the Transboundary Effects of Industrial Acçidents (Helsinki, 17 March 1992)	Ibid., p. 1335.
Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 9 April 1992)	*Law of the Sea Bulletin*, No. 22 (January 1993), p. 54.
Convention on the Protection of the Black Sea Against Pollution (Bucharest, 21 April 1992)	Ibid.., p. 31.
LAW OF THE SEA	
Convention on the Continental Shelf (Geneva, 29 April 1958)	United Nations, *Treaty Series*, vol. 499, p. 311.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (Sales No. E.84.V.3), p. 151, document A/ CONF.62/122.
LAW APPLICABLE IN ARMED CONFLICT	
Treaty of Versailles (Versailles, 28 June 1919)	H. Trepel, *Nouveau Recueil général de Traités*, 3rd series, vol. XI (Leipzig, Weicher, 1922), p. 323.
Convention relative to the Treatment of Prisoners of War (Geneva, 27 July 1929)	League of Nations, *Treaty Series*, vol. 118, p. 343.
Geneva Convention for the Amelioration of the Wounded and Sick in Armies in the Field (Geneva, 27 July 1929)	Ibid., p. 303.
Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 2 September 1947)	United Nations, *Treaty Series*, vol. 21, p. 77.
Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) (San José, 26 July 1965)	OAS, *Treaty Series*, Nos. 46 and 61.
Geneva Conventions for the Protection of Victims of War (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, pp. 31 *et seq.*
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	Ibid., p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Ibid., p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of armed conflicts (Protocols I and II) (Geneva, 8 June 1977)	Ibid., vol. 1125, pp. 3 *et seq.*
International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49*, resolution 44/34, annex.
LAW OF TREATIES	
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, p. 331.

	Source
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978, vol. III (United Nations publication, Sales No. E.79.V.10).
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	Document A/CONF.129/15.
LIABILITY	
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960)	United Nations, *Treaty Series*, vol. 956, p. 251.
Convention supplementary to the above-mentioned Convention (with annex and Additional Protocol concluded at Paris on 28 January 1964, amending the Supplementary Convention) (Brussels, 31 January 1963)	Ibid., vol. 1041, p. 358.
Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962)	IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series, No. 4, rev. ed. (Vienna, 1976), p. 34.
Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963)	United Nations, *Treaty Series*, vol. 1063, p. 265.
International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)	Ibid., vol. 973, p. 3.
Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage (London, 25 May 1984)	IMO publication, Sales No. 456 85.15.E.
Convention relating to civil liability in the field of maritime carriage of nuclear material (Brussels, 17 December 1971)	United Nations, *Treaty Series*, vol. 974, p. 255.
Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, D.C., 29 March 1972)	Ibid., vol. 961, p. 187.
Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 17 December 1976)	UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 474.
Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (Geneva, 10 October 1989)	United Nations publication (Sales No. E.90.II.E.39).
Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993)	Council of Europe, *European Treaty Series*, No. 150.
DISARMAMENT	
Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	United Nations, *Treaty Series*, vol. 1108, p. 151.
PEACEFUL SETTLEMENT OF DISPUTES	
General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928)	League of Nations, *Treaty Series*, vol. XCIV, p. 57.
Revised General Act for the Pacific Settlement of International Disputes (New York, 28 April 1949)	United Nations, *Treaty Series*, vol. 71, p. 101.

	Source
European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957)	Ibid., vol. 320, p. 243.
NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES	
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	Document E/CONF.82/15 and Corr.2.

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its statute annexed thereto, as subsequently amended, held its forty-seventh session at its permanent seat at the United Nations Office at Geneva, from 2 May to 21 July 1995. The session was opened by the Acting Chairman, Mr. Chusei Yamada.

A. Membership

2. The Commission consists of the following members:

Mr. Husain AL-BAHARNA (Bahrain);
Mr. Awn AL-KHASAWNEH (Jordan);
Mr. Gaetano ARANGIO-RUIZ (Italy);
Mr. Julio BARBOZA (Argentina);
Mr. Mohamed BENNOUNA (Morocco);
Mr. Derek William BOWETT (United Kingdom of Great Britain and Northern Ireland);
Mr. Carlos CALERO RODRIGUES (Brazil);
Mr. James CRAWFORD (Australia);
Mr. John de SARAM (Sri Lanka);
Mr. Gudmundur EIRIKSSON (Iceland);
Mr. Nabil ELARABY (Egypt);
Mr. Salifou FOMBA (Mali);
Mr. Mehmet GÜNEY (Turkey);
Mr. Qizhi HE (China);
Mr. Kamil IDRIS (Sudan);
Mr. Andreas JACOVIDES (Cyprus);
Mr. Peter KABATSI (Uganda);
Mr. Mochtar KUSUMA-ATMADJA (*Indonesia*);
Mr. Igor Ivanovich LUKASHUK (Russian Federation);
Mr. Ahmed MAHIOU (Algeria);
Mr. Vaclav MIKULKA (Czech Republic);
Mr. Guillaume PAMBOU-TCHIVOUNDA (Gabon);
Mr. Alain PELLET (France);
Mr. Pemmaraju Sreenivasa RAO (India);
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);
Mr. Patrick Lipton ROBINSON (Jamaica);
Mr. Robert ROSENSTOCK (United States of America);
Mr. Alberto SZEKELY (Mexico);
Mr. Doudou THIAM (Senegal);
Mr. Christian TOMUSCHAT (Germany);
Mr. Edmundo VARGAS CARREÑO (Chile);
Mr. Francisco VILLAGRÁN KRAMER (Guatemala);
Mr. Chusei YAMADA (Japan);
Mr. Alexander YANKOV (Bulgaria).

3. At its 2378th meeting, on 2 May 1995, the Commission elected Mr. Igor Ivanovich Lukashuk (Russian Federation) to fill the casual vacancy in the Commission created by the election of Mr. Vladlen Vereshchetin to ICJ.

B. Officers

4. At its 2378th and 2379th meetings, on 2 and 3 May 1995, the Commission elected the following officers:

Chairman: Mr. Pemmaraju Sreenivasa Rao
First Vice-Chairman: Mr. Guillaume Pambou-Tchivounda
Second Vice-Chairman: Mr. Mehmet Güney
Chairman of the Drafting Committee: Mr. Alexander Yankov
Rapporteur: Mr. Francisco Villagrán Kramer.

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as Chairman of the Commission,[1] and the Special Rapporteurs.[2] The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2379th meeting, on 3 May 1995, 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 of the following members: Mr. Guillaume Pambou-Tchivounda (Chairman), Mr. Mohamed Bennouna, Mr. Derek W. Bowett, Mr. John de Saram, Mr. Salifou Fomba, Mr. Mehmet Güney, Mr. Kamil Idris, Mr. Andreas Jacovides, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Vaclav Mikulka, Mr. Edilbert Razafindralambo, Mr. Robert Rosenstock and Mr. Edmundo Vargas Carreño.

6. The Group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

7. At its 2379th meeting, on 3 May 1995, the Commission appointed a Drafting Committee which was

[1] Namely, Mr. Julio Barboza, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov.

[2] Namely, Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Vaclav Mikulka, Mr. Alain Pellet and Mr. Doudou Thiam.

composed of the following members for the three topics listed below: Mr. Alexander Yankov (Chairman) and (*a*) for the Draft Code of Crimes against the Peace and Security of Mankind: Mr. Husain Al-Baharna, Mr. James Crawford, Mr. Gudmundur Eiriksson, Mr. Qizhi He, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Igor I. Lukashuk, Mr. Guillaume Pambou-Tchivounda, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Alberto Szekely, Mr. Edmundo Vargas Carreño, Mr. Francisco Villagrán Kramer and Mr. Chusei Yamada, as well as Mr. Doudou Thiam in his capacity as Special Rapporteur for the topic; (*b*) for State responsibility: Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Julio Barboza, Mr. Derek W. Bowett, Mr. James Crawford, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Qizhi He, Mr. Igor I. Lukashuk, Mr. Alain Pellet, Mr. Edilbert Razafindralambo, Mr. Robert Rosenstock, Mr. Alberto Szekely and Mr. Chusei Yamada, as well as Mr. Gaetano Arangio-Ruiz in his capacity as Special Rapporteur for the topic; and (*c*) for International liability for injurious consequences arising out of acts not prohibited by international law: Mr. Husain Al-Baharna, Mr. Derek W. Bowett, Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Qizhi He, Mr. Igor I. Lukashuk, Mr. Edilbert Razafindralambo, Mr. Patrick Lipton Robinson, Mr. Robert Rosenstock, Mr. Alberto Szekely and Mr. Christian Tomuschat as well as Mr. Julio Barboza in his capacity as Special Rapporteur for the topic.

8. Mr. Francisco Villagrán Kramer participated in the work of the Drafting Committee in his capacity as Rapporteur of the Commission. He chaired the Committee in the absence of its Chairman.

D. Working Group on State succession and its impact on the nationality of natural and legal persons

9. At its 2393rd meeting, on 1 June 1995, the Commission decided to establish a working group on State succession and its impact on the nationality of natural and legal persons. It approved the following composition for the Working Group: Mr. Vaclav Mikulka (Chairman). Mr. Husain Al-Baharna, Mr. Awn Al-Khasawneh, Mr. Derek W. Bowett, Mr. James Crawford, Mr. Salifou Fomba, Mr. Kamil Idris, Mr. Igor I. Lukashuk, Mr. Robert Rosenstock, Mr. Alberto Szekely, Mr. Christian Tomuschat, Mr. Edmundo Vargas Carreño and Mr. Chusei Yamada. The Working Group was open to every member who wished to participate.

E. Working Group on the identification of dangerous activities under the topic "International liability for injurious consequences of acts not prohibited by international law"

10. At its 2393rd meeting, on 1 June 1995, the Commission established a working group on the identification of dangerous activities under the topic "International liability for injurious consequences of acts not prohibited by international law". At its 2397th meeting on 8 June 1995, it approved the following composition for the Working Group: Mr. Julio Barboza (Chairman), Mr. John de Saram, Mr. Gudmundur Eiriksson, Mr. Nabil Elaraby, Mr. Salifou Fomba, Mr. Igor I. Lukashuk, Mr. Robert Rosenstock, Mr. Alberto Szekely and Mr. Chusei Yamada. The Working Group was open to every member who wished to participate.

F. Secretariat

11. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, attended the session and represented the Secretary-General. Ms. Jacqueline Dauchy, 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. Mr. Andronico O. Adede, Deputy Director of the Codification Division, served as Deputy Secretary to the Commission; Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Mr. Mpazi Sinjela and Ms. Christiane Bourloyannis-Vrailas, Legal Officers, and Ms. Virginia Morris, Associate Legal Officer, served as Assistant Secretaries to the Commission.

G. Agenda

12. At its 2378th meeting, on 2 May 1995, the Commission adopted an agenda for its forty-seventh session consisting of the following items:

1. Filling of a casual vacancy (article 11 of the statute).
2. Organization of work of the session.
3. State responsibility.
4. Draft Code of Crimes against the Peace and Security of Mankind.
5. International liability for injurious consequences arising out of acts not prohibited by international law.
6. The law and practice relating to reservations to treaties.
7. State succession and its impact on the nationality of natural and legal persons.
8. Programme, procedures and working methods of the Commission, and its documentation.
9. Cooperation with other bodies.
10. Date and place of the forty-eighth session.
11. Other business.

13. The Commission considered all the items on its agenda. It held 48 public meetings (2378th to 2425th) and, in addition, the Drafting Committee of the Commission held 35 meetings, the Working Group on State succession and its impact on the nationality of natural and legal persons held 5 meetings, the Working Group on the identification of dangerous activities under the topic "International liability for injurious consequences of acts not prohibited by international law" held 3 meetings, the Enlarged Bureau of the Commission held 2 meetings and the Planning Group of the Enlarged Bureau held 4 meetings.

H. General description of the work of the Commission at its forty-seventh session

14. In the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind" (see chapter II),[3] the Commission considered the thirteenth report of the Special Rapporteur (A/CN.4/466),[4] Mr. Doudou Thiam, which was prepared for the second reading of the draft Code and focused on part two (Crimes against the peace and security of mankind). The draft Code had been adopted on first reading at its forty-third session.[5]

15. After considering the Special Rapporteur's thirteenth report, the Commission decided to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration as a matter of priority on second reading in the light of the proposals contained in the thirteenth report and of the comments and proposals made in the course of the debate in plenary, on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and at its discretion deal with all or part of the elements of the following draft articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism). The Commission further decided that consultations would continue as regards articles 25 (Illicit traffic in narcotic drugs) and 26 (Wilful and severe damage to the environment). As regards the latter article, the Commission subsequently decided to establish a working group that would meet at the beginning of the forty-eighth session to examine the possibility of covering in the draft Code the issue of wilful and severe damage to the environment (see para. 141 below).

16. The Commission received the texts of the draft articles adopted by the Drafting Committee on second reading, namely, for inclusion in part one, articles 1 (Scope and application of the present Code), 5 (Responsibility of States), 5 *bis* (Establishment of jurisdiction), 6 (Obligation to extradite or prosecute), 6 *bis* (Extradition of alleged offenders), 8 (Judicial guarantees), 9 (*Non bis in idem*), 10 (Non-retroactivity), 11 (Order of a Government or a superior), 12 (Responsibility of the superior), and 13 (Official position and responsibility); and, for inclusion in part two, articles 15 (Aggression) and 19 (Genocide).

17. The Commission noted that the recommendations of the Drafting Committee were of an interim character as some of the articles might call for review and should in any event be accompanied by commentaries. It accordingly decided to defer the final adoption of the above draft articles until after the completion of the remaining articles and to confine itself at the present session to taking note of the report of the Drafting Committee (see para. 143 below).

18. In the framework of the topic "State succession and its impact on the nationality of natural and legal persons" (see chapter III),[6] the Commission considered the first report of the Special Rapporteur, Mr. Vaclav Mikulka (A/CN.4/467).[7] At the conclusion of the discussions on the first report, the Commission decided to establish a working group on the topic. The Commission also decided, on the recommendation of the Special Rapporteur, to reconvene the Working Group at the next session to complete its task, enabling it to meet the request contained in paragraph 6 of General Assembly resolution 49/51 (see paras. 145 and 229 below).

19. In the framework of the topic "State responsibility" (see chapter IV),[8] the Commission considered the seventh report of the Special Rapporteur (A/CN.4/469 and Add.1 and 2),[9] Mr. Gaetano Arangio-Ruiz, dealing, on the one hand, with the question of the legal consequences of internationally wrongful acts characterized as crimes under article 19 of part one of the draft and, on the other hand, with the settlement of disputes relating to the legal consequences of an international crime. At the conclusion of its debate, the Commission decided to refer the draft articles contained therein to the Drafting Committee.

20. The Commission furthermore received from the Drafting Committee a set of seven articles on the settlement of disputes, constituting part three, and an annex thereto, namely articles 1 (Negotiation), 2 (Good offices and mediation), 3 (Conciliation), 4 (Task of the Conciliation Commission), 5 (Arbitration), 6 (Terms of reference of the Arbitral Tribunal) and 7 (Judicial settlement), and articles 1 and 2 of the annex entitled respectively "The Conciliation Commission" and "The Arbitral Tribunal". The Commission provisionally adopted the above-mentioned articles of part three and the annex thereto in an amended form for inclusion in the draft (see paras. 344 to 364 below).

21. As regards provisions on countermeasures, the Commission adopted the commentaries to articles 13 (Proportionality) and 14 (Prohibited countermeasures).

22. Concerning the topic "International liability for injurious consequences arising out of acts not prohibited by international law" (see chapter V),[10] the Commission had before it the eleventh report of the Special Rapporteur, Mr. Julio Barboza, (A/CN.4/468)[11] as well as his tenth report (A/CN.4/459)[12] which had been introduced at the previous session.

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[3] The topic was considered by the Commission at its 2379th to 2387th and 2408th to 2410th meetings held between 3 and 19 May and between 30 June and 4 July 1995.

[4] Reproduced in *Yearbook... 1995*, vol. II (Part One).

[5] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[6] The topic was considered at the 2385th, 2387th to 2391st, 2411th and 2413th meetings, held on 17 May, between 19 and 30 May and on 5 and 7 July 1995.

[7] See footnote 4 above.

[8] The topic was considered at the 2391st to 2398th, 2405th, 2406th, 2417th, 2420th and 2421st meetings held between 30 May and 9, 27 and 28 June and on 14 and 18 July 1995.

[9] See footnote 4 above.

[10] The topic was considered by the Commission at its 2397th to 2399th and 2413th to 2416th meetings, held between 8 and 13 June and between 7 and 13 July 1995.

[11] See footnote 4 above.

[12] See *Yearbook... 1994*, vol. II (Part One).

23. After considering the two reports, the Commission established a working group under the topic to deal with the identification of dangerous activities. The conclusions of the Working Group were endorsed by the Commission in an amended form.

24. The Commission furthermore received from the Drafting Committee four articles under the topic, namely articles A (Freedom of action and the limits thereto), B (Prevention) and D (Cooperation) and, as a working hypothesis, article C (Liability and reparation). It adopted the articles recommended by the Drafting Committee in an amended form (see chap. V, sect. C.2 below).

25. With respect to the topic "The law and practice relating to reservations to treaties",[13] the Commission had before it the first report of the Special Rapporteur, Mr. Alain Pellet (A/CN.4/470).[14] After considering the report, the Commission endorsed the conclusions drawn from the debate by the Special Rapporteur as to the orientation of the future work on the topic and agreed that these conclusions constituted the result of the preliminary study requested by General Assembly resolutions 48/31 and 49/51 (see para. 488 below).

26. Matters relating to the programme, procedures and working methods of the Commission were discussed in the framework of the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant decisions of the Commission, including the decision to propose "Diplomatic protection" as a new topic for inclusion in its agenda and to prepare a feasibility study on the topic provisionally entitled "Rights and duties of States for the protection of the environment", are to be found in chapter VII of the report, which also deals with cooperation with other bodies and with certain administrative and other matters.

[13] The topic was considered by the Commission at its 2400th to 2404th, 2406th, 2407th, 2412th and 2416th meetings held between 14 and 22 June and between 28 June and 13 July 1995.

[14] See footnote 4 above.

Chapter II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

27. The General Assembly, by its resolution 177 (II) of 21 November 1947, 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; and (*b*) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (*a*) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

28. On the basis of the reports of the Special Rapporteur, the Commission, at its second session, in 1950, adopted a formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[15] and submitted those principles, with commentaries, to the General Assembly; then at its sixth session, in 1954, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind,[16] and submitted them with commentaries, to the General Assembly.[17]

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

30. On the basis of the recommendations of the Special Committee, the General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

31. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of 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.[18]

32. At its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic.[19] The Commission, from its thirty-fifth session, in 1983, to its forty-third session, in 1991, received nine reports from the Special Rapporteur.[20]

33. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft Code of Crimes against the Peace and Security of Mankind.[21] At the same session, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations should be submitted to the Secretary-General by 1 January 1993.[22] The Commission also noted that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the draft Code of Crimes against the Peace and Security of Mankind; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had

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

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

[17] The texts of the 1954 draft Code and of the Nürnberg Principles are reproduced in *Yearbook . . . 1985*, vol. II (Part Two), paras. 18 and 45, respectively.

[18] Subsequently, in its resolution 42/151, the General Assembly endorsed the Commission's recommendation that the title of the topic in English should be amended to read: "Draft Code of Crimes against the Peace and Security of Mankind".

[19] For a detailed discussion of the historical background of the topic, see *Yearbook . . . 1983*, vol. II (Part Two), paras. 26 to 41.

[20] These reports are reproduced as follows:

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

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

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

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

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

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

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

Eighth report: *Yearbook . . . 1990*, vol. II (Part One), p. 27, document A/CN.4/430 and Add.1;

Ninth report: *Yearbook . . . 1991*, vol. II (Part One), p. 37, document A/CN.4/435 and Add.1.

[21] See *Yearbook . . . 1991*, vol. II (Part Two), para. 173.

[22] Ibid., para. 174.

assigned to it in paragraph 3 of resolution 45/41, which invited the Commission, in its work on the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism.[23]

34. At its forty-sixth session, the General Assembly in its resolution 46/54 of 9 December 1991 invited the Commission,

> ... within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report on the work of its forty-second session [1990][24] concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter.

35. At its forty-fourth and forty-fifth sessions, in 1992 and 1993, the Commission had before it the Special Rapporteur's tenth[25] and eleventh[26] reports on the topic, which were entirely devoted to the question of the possible establishment of an international criminal jurisdiction. The work carried out by the Commission at its forty-fourth, forty-fifth and forty-sixth sessions on that question culminated in the adoption, at the forty-sixth session in 1994, of a draft statute for an international criminal court which the Commission submitted to the General Assembly with the recommendation that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court.[27]

36. At its forty-sixth session in 1994, the Commission had before it the Special Rapporteur's twelfth report on the topic,[28] which was intended for the second reading of the draft Code and focused on the general part of the draft dealing with the definition of crimes against the peace and security of mankind, characterization and general principles. It also had before it the comments and observations received from Governments on the draft Code of Crimes against the Peace and Security of Mankind,[29] adopted on first reading by the International Law Commission at its forty-third session, in response to the request made by the Commission at its forty-third session.[30] After considering the twelfth report, the Commission decided to refer draft articles 1 to 14, as dealt with in that report, to the Drafting Committee.

B. Consideration of the topic at the present session

37. At the present session, the Commission had before it the thirteenth report of the Special Rapporteur on the topic (A/CN.4/466). The report was prepared for the second reading of the draft Code and focused on the crimes against the peace and security of mankind contained in part two.[31] The report was considered by the Commission at its 2379th to 2387th and 2408th to 2410th meetings held between 3 and 19 May and between 30 June and 4 July 1995.

38. The Special Rapporteur had indicated in his twelfth report[32] the intention to limit the list of crimes to be considered during the second reading of the Code to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. Accordingly, the Special Rapporteur had omitted from his thirteenth report 6 of the 12 crimes included on first reading, namely, the threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18), apartheid (art. 20), the recruitment, use, financing and training of mercenaries (art. 23), and wilful and severe damage to the environment (art. 26), in response to the strong opposition, criticisms or reservations of certain Governments with respect to those crimes.

39. In his thirteenth report, the Special Rapporteur reproduced the draft articles adopted on first reading containing the definitions of the remaining six crimes against the peace and security of mankind comprising part two, namely, aggression (art. 15), genocide (art. 19), systematic or mass violations of human rights (art. 21), exceptionally serious war crimes (art. 22), international terrorism (art. 24) and illicit traffic in narcotic drugs (art. 25). Each article was followed by comments from Governments and then by the Special Rapporteur's views and recommendations.

40. The Commission considered the Special Rapporteur's thirteenth report at its 2379th to 2386th meetings held from 3 to 18 May 1995.

1. Presentation by the Special Rapporteur of his thirteenth report

41. Introducing his thirteenth report, the Special Rapporteur indicated that, since the Commission was working on its second reading of the draft articles, he did not intend to launch a theoretical discussion. His remarks would focus on two types of proposed changes: first, on the content *ratione materiae* of the draft Code; and, secondly, on more specific changes in either the substance

[23] Ibid., para. 175. The Commission noted that it had already started to discharge this mandate and its work on this aspect of the topic was reflected in paragraphs 106 to 165 of its report (ibid.).

[24] *Yearbook ... 1990*, vol. II (Part Two), paras. 93-157.

[25] *Yearbook ... 1992*, vol. II (Part One), p. 51, document A/CN.4/442.

[26] *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/449.

[27] See *Yearbook ... 1994*, vol. II (Part Two), p. 26, para. 90.

[28] *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/460.

[29] *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/448 and Add.1.

[30] See footnotes 21 and 22 above.

[31] Part two, as adopted on first reading, included the following 12 crimes: aggression (art. 15), threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18), genocide (art. 19), apartheid (art. 20), systematic or mass violations of human rights (art. 21), exceptionally serious war crimes (art. 22), recruitment, use, financing and training of mercenaries (art. 23), international terrorism (art. 24), illicit traffic in narcotic drugs (art. 25), and wilful and severe damage to the environment (art. 26).

[32] See footnote 28 above.

or the form of the articles. Recalling the long-standing divergence of opinions within the Commission between the "maximalist" trend, favouring incorporation of a great number of offences, and the "minimalist" trend, favouring the narrowest possible scope of the Code, he had tried to restrict the content *ratione materiae* of the draft Code, at least provisionally, to six crimes whose designation as crimes against the peace and security of mankind could hardly be disputed. His decision to abandon some of the offences originally included had been motivated by the reservations, and even opposition, expressed by the Governments that had transmitted their comments on the draft Code as adopted on first reading, although noting that third world countries had generally not expressed their views.

42. Turning to more specific changes, the Special Rapporteur proposed a revised definition of aggression (art. 15) since the original wording, based on the Definition of Aggression contained in General Assembly resolution 3314 (XXIX), was viewed as too political and lacking the necessary legal precision and rigour. While noting suggested changes regarding genocide (art. 19), he preferred not to depart from the widely accepted Convention on the Prevention and Punishment of the Crime of Genocide. As regards systematic or mass violations of human rights (art. 21), he proposed reverting to the earlier title "Crimes against humanity" which was supported by the relevant doctrine and case law, corresponded to an expression used both in international law and in domestic law, and deleted the somewhat controversial "massive in nature" requirement, thereby recognizing the possibility of a crime against humanity perpetrated against a single victim based on the perpetrator's motives and its cruelty. Regarding war crimes (art. 22), he noted that the proposed non-exhaustive definition was drawn from the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[33] As regards international terrorism (art. 24), he felt that the Code should contain a general definition notwithstanding the difficulty of reaching consensus on such a definition or the elaboration of specific treaties in this area. With regard to illicit drug trafficking (art. 25), he emphasized its harmful effects on the health and well-being of mankind, its destabilizing effect on some countries and its interference with harmonious international relations.

2. Summary of the debate on the Special Rapporteur's thirteenth report

(a) *General remarks*

43. A number of members praised the Special Rapporteur's thirteenth report for its political wisdom, realism and pragmatism in taking into account the views of Governments in an effort to ensure the widest possible acceptance of the draft Code. Appreciation was also expressed to the Special Rapporteur for the concision, precision, clarity and timeliness of his thirteenth report.

44. There were different views concerning the restrictive approach to the list of crimes reflected in the thirteenth report in which the list had been reduced from 12 to 6 crimes. While some members favoured retaining only the most serious crimes with the gravest consequences, the "crimes of crimes", which were difficult to challenge as crimes against the peace and security of mankind, other members felt that the reductions were too drastic and relied too heavily on the views expressed by a limited number of Governments. Several members expressed regret that relatively few Governments had communicated their comments on the draft Code, which could not be regarded as representative of the international community, with different views being expressed as to the conclusions to be drawn therefrom. It was suggested that some guidance might also be obtained from the views expressed by Governments on the related subject of the draft statute for an international criminal court completed by the Commission at its previous session (see para. 35 above). While recognizing the role of Governments in the formulation of international law, attention was also drawn to the role of the Commission as an expert body of independent jurists in the progressive development and codification of international law.

45. As regards the topic in general, some members emphasized its continuing relevance in the light of the serious crimes being committed in various parts of the world, often with impunity; the importance of formulating a sufficiently precise code of international criminal law that could be applied uniformly by an international criminal court, in contrast to ad hoc tribunals, in accordance with the maxim *nullum crimen, nulla poena sine lege*; and the "creeping jurisdiction" of national courts resulting from the present gap in the international legal system. The view was also expressed that the Commission's completion of the Code, a project begun in the early days of the United Nations, during the present quinquennium would constitute a substantial contribution to the United Nations Decade of International Law[34] and a fitting tribute to the fiftieth anniversary of the United Nations. However, other members drew attention to the sensitive aspects of the topic in terms of the relations between States as well as the role of the Security Council and the General Assembly under the Charter of the United Nations in relation to an international criminal court. It was suggested that it was not for the Commission to determine definitively whether the Code was still useful and necessary in the light of recent events, whether the Code implied an international criminal court, or whether its application by national jurisdictions would be conducive to peace, security and justice.

46. As to the nature and purpose of the Code, there were different views as to whether it should take the form of a draft convention, a declaration or model principles enabling action by States in the absence of a detailed international criminal code or a permanent international criminal court. While the view was expressed that

[33] Hereinafter the "International Tribunal for the Former Yugoslavia". Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

[34] Proclaimed by the General Assembly in its resolution 44/23.

a general code of crimes in the form of a declaration could provide useful guidelines to the various organs of the international community, including States, the view was also expressed that a meaningful Code should take the form of a convention containing sufficiently precise provisions based on existing law to ensure its effective application in the prosecution of individuals. In this regard, it was suggested that the Commission should ensure the necessary coordination and harmonization of the Code and the draft statute for an international criminal court.

(b) *Observations concerning part one of the draft*

ARTICLE 1 (Definition)[35]

47. There were different views as to the usefulness of including a general conceptual definition of the crimes contained in the Code. Some members favoured such a definition to specify the nature of the crimes to be envisaged in the Code, to provide a common denominator for determining the inclusion of crimes, to provide a point of reference for the application of the Code by courts, and to ensure the necessary harmonization of national and international criminal law, particularly if the provision was amended to refer to "general principles of law". However, other members questioned the possibility of achieving a comprehensive conceptual definition comprising the essential objective components of the crimes and expressed concern regarding the risk of misinterpretation of such a definition. It was suggested that it might be more useful to identify the inherent characteristics of crimes against the peace and security of mankind, such as seriousness, massiveness and effects on the foundations of the international legal order, to provide objective criteria in determining the crimes to be included in the Code and to facilitate its application by any court.

ARTICLE 2 (Characterization)[36]

48. The view was expressed that it was important to avoid any misconception regarding the characterization of a crime which would be the exclusive concern of the judge in applying the Code. The view was also expressed that the first sentence of this provision was too strong, and perhaps incorrect, and should be omitted.

ARTICLE 3 (Responsibility and punishment)[37]

49. There were different views as to whether the principles of individual criminal responsibility should be addressed in general terms in the present article, in specific terms in relation to the definition of each of the crimes contained in part two, or possibly in both sections of the Code. The view was expressed that the present article should include a reference to intent since there seemed to be general agreement on the necessity of *mens rea* as an element of a crime and disagreement only as to whether this element was already implicit in the nature of the acts covered by the Code. The rules relating to complicity were described as being of greater significance to national criminal legislation than the Code which should focus on the punishment of the perpetrators of crimes against the peace and security of mankind.

ARTICLE 5 (Responsibility of States)[38]

50. The view was expressed that the provision should be retained given the importance of ensuring the international liability of a State for damage caused by its agents as a result of their criminal acts. Attention was also drawn to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide as presently providing the only legal basis for bringing action against States who were allegedly responsible for genocide.

(c) *Observations concerning part two of the draft*

51. There was a suggestion to amend the title of part two to read "Crimes against universal peace and humanity."

52. As regards the nature of the definitions of the crimes, several members emphasized the importance of formulating definitions with the necessary precision and rigour required for criminal law in accordance with the *nullum crimen sine lege* principle, with a further sugges-

[35] Draft article 1 provisionally adopted by the Commission on first reading reads as follows:

"*Article 1. Definition*

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

[36] Draft article 2 provisionally adopted by the Commission on first reading reads as follows:

"*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."

[37] Draft article 3 provisionally adopted by the Commission on first reading reads as follows:

"*Article 3. Responsibility and punishment*

"1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

"2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

"3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in articles . . .] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention."

[38] Draft article 5 provisionally adopted by the Commission on first reading reads as follows:

"*Article 5. Responsibility of States*

"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."

tion to avoid an excessively rigid or flexible interpretation of this principle.

53. Attention was drawn to the need to give further consideration to the differences in the definitions of the various crimes in terms of the individuals responsible therefor, for example leaders or organizers in the case of aggression, and the ways in which such individuals could incur criminal responsibility for particular crimes, such as by means of incitement in the case of genocide. In this regard, the view was expressed that the definitions of the crimes contained in part two should only refer to the principal author of a crime and leave the question of the responsibility and punishment of persons who planned or ordered the commission of a crime, as an accessory before the fact, to be addressed in the general principles contained in article 3.

54. Regarding the reference to penalties, the view was expressed that it was unnecessary to repeat, for each crime, that "on conviction thereof" an individual would be sentenced to punishment since the imposition of a sentence clearly implied that an individual had been found guilty of a crime. Some members suggested that it would be preferable to address the question of penalties in a general provision rather than in the definition of each crime, as discussed in paragraphs 122 to 125 below.

55. As to the range of crimes to be included in part two, some members favoured a restrictive list as proposed by the Special Rapporteur to ensure a meaningful code strictly confined to the most serious types of behaviour that posed a serious and immediate threat to the peace and security of the whole of mankind, as recognized by the international community; to give priority to the crimes whose prosecution was provided for by well-established rules of international law and customary rules whose application would not depend on the form of the future instrument; to exclude crimes on which there was insufficient existing practice or which were mainly of historical significance; to ensure the widest possible acceptance of the Code; to avoid undermining the success of the entire Code by engaging in an exercise resulting in yet another draft that would remain in the archives. There was a further suggestion to restrict the Code to crimes whose perpetrators were directly responsible by virtue of existing general international law, and primarily to the area covered by international crimes of States where individual criminal responsibility on the international plane was only one of the legal consequences of the unlawful conduct attributable to the State. Other members favoured an expanded list, as compared with the list proposed by the Special Rapporteur. A comprehensive code was viewed as a more effective tool for the strengthening of international law and international peace and security, for the protection of the fundamental interests of the international community in preserving life, human dignity and property rights and for achieving a more appropriate balance between political realism and legal idealism. It was stressed that some of the crimes which had been excluded from the list adopted on first reading were covered and defined by international instruments and fully qualified for inclusion in the Code. Those favouring a more comprehensive list of crimes also suggested that a restrictive list was no guarantee of acceptance by States, nor of consensus on its contents.

56. There was broad agreement on the usefulness of achieving generally agreed, objective, relevant criteria for determining not only serious international crimes, but those which qualified as crimes against the peace and security of mankind and should therefore be included in the Code. In this regard, several members referred to the criteria used by the Special Rapporteur in determining the reduced list of crimes, namely the extreme seriousness of the crimes and the general agreement of the international community regarding their character as a crime against the peace and security of mankind. The second criterion was described as an appropriate attempt to take into account the views of the "international community as a whole" which was considered to be theoretically justified because of its consistency with the closely related notions of *jus cogens* and of international crimes as defined in article 19 of part one of the draft on State responsibility.[39] However, this criterion was also questioned as being inconsistent with the role of the Commission in submitting its legal assessment of doctrine and State practice for subsequent review by States.

57. There were various suggestions concerning other relevant criteria that might be considered by the Commission in determining the list of crimes, including: acts committed by individuals which posed a serious and immediate threat to the peace and security of mankind, drawing upon the general definition contained in article 1; the highest threshold of gravity and the public interest; the gravity of the act itself, its consequences or both and the designation of the act as a crime by the international community as a whole, notwithstanding an element of ambiguity in the notion of consensus reflected in the second criterion; and the effect of the crime on the international community as a whole. It was also suggested that the crimes referred to in the draft statute for an international criminal court and the criteria used to determine those crimes might provide some useful guidance. In this regard, it was further suggested that it would be useful to establish a special mechanism to ensure the harmonization of the provisions of the draft Code and the draft statute with a view to achieving a more coherent and integrated structure.

58. There were different views as to the possibility and the desirability of using appropriate criteria to determine an exhaustive list of crimes against the peace and security of mankind and whether it should be possible to use the same criteria to add to this list, possibly by way of amendment, as a consequence of the necessary consensus existing at a later stage.

59. Some concerns were expressed by supporters of various approaches to the Code regarding the effect of excluding specific acts from the list of unquestionable crimes against the peace and security of mankind adopted on first reading. There were various suggestions for addressing these concerns, including: indicating that the exclusion of the crimes was without prejudice to the serious nature or the consequences of those crimes or to existing practice and doctrine with respect to those crimes.

[39] *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 *et seq.*

ARTICLE 15 (Aggression)[40]

60. The debate indicated broad agreement both as to the character of aggression as the quintessential crime against the peace and security of mankind and as to the difficulties of elaborating a sufficiently precise definition of aggression for purposes of individual criminal responsibility. While several members noted the significance of the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX), which had resulted in the resumption of the Commission's work on the Code, other members emphasized the political nature of this definition which was intended as a guide for the Security Council in the performance of its responsibilities under the Charter of the United Nations and not as a criminal statute to be applied by a court in determining individual criminal responsibility. The question was raised as to whether the Council had ever relied on the resolution in performing its functions.

61. The definition of aggression contained in the article, which was drawn from General Assembly resolution 3314 (XXIX) , was viewed as unsatisfactory by a number of members who felt that it was too political and too vague for purposes of determining individual criminal responsibility. However, other members felt that the definition, which represented a minimum of agreement, could be adapted for the purposes of the Code, noting in particular the listing of cases of aggression containing specific factual elements that could be incorporated in a definition of the crime. In this regard, attention was also drawn to the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) adopted by the member States of OAS which had been influenced by Assembly resolution 3314 (XXIX) and contained an article listing the constituent elements of aggression.

62. As regards paragraph 1 of the new text proposed by the Special Rapporteur,[41] it was suggested that the language contained in this provision should also be used in paragraph 1 of articles 21, 22, 24 and 25. The view was also expressed that the scope of criminal liability with respect to a "leader or organizer" was too narrow and should be expanded to include other decision makers in the national hierarchy with sufficient authority and power to initiate conduct constituting a crime of aggression.

63. The reference to "an act of aggression" in the same paragraph elicited different views concerning the importance of distinguishing between acts of aggression and wars of aggression, with attention being drawn to the differentiation between the two in General Assembly resolution 3314 (XXIX). Some members felt that the notion of a war of aggression indicated the level of magnitude required for the conduct to result in individual criminal responsibility, noting the use of the term in the

[40] Draft article 15 provisionally adopted by the Commission on first reading reads as follows:

"*Article 15. Aggression*

"1. An individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to . . .].

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

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

"4. Any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

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

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

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

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

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

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

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

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

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

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

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

[41] The new text of draft article 15 proposed by the Special Rapporteur reads as follows:

"*Article 15. Aggression*

"1. An individual who as leader or organizer is convicted of having planned or ordered the commission of an act of aggression shall be sentenced to . . .

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

Charter of the Nürnberg Tribunal[42] and the Nürnberg Principles.[43] A suggestion was made to reformulate the provision to read "For the purposes of the present Code, the massive use of armed force by a State against the sovereignty, territorial integrity or political independence of another State is deemed to constitute a war of aggression". However, other members rejected this distinction as artificial or spurious for the following reasons: the concept of war was a relative concept; wars of aggression inevitably included acts of aggression; the distinction between the seriousness and the legal consequences of the two was misleading and unsustainable in practice; the relevant criterion for purposes of the Code was whether the consequences of acts of aggression or wars of aggression were of sufficient gravity or magnitude to threaten the peace and security of mankind; the emphasis on wars of aggression was misplaced since declarations of war no longer existed in international relations; the term "war of aggression", which was used in the Charter of the Nürnberg Tribunal, was an anachronistic reference to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact); and acts of aggression, such as invasion or annexation of territory, were sufficiently serious to constitute crimes under the Code.

64. With regard to paragraph 2, the view was expressed that the present article was too broad and too vague in relying on the principle of the non-use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations which was a basic principle intended to regulate inter-State relations rather than to define the crime of aggression. Other members also expressed the view that the Charter provision covered a wide range of situations some of which were not sufficiently serious to constitute aggression, much less an international crime, referring to such examples as the pre-emptive use of force in self-defence, the rescue of hostages, and humanitarian intervention to put an end to genocide. The aim of the Commission, it was suggested, should be to identify the "hard core" of particularly heinous and serious acts for which individuals should be punishable by the international community and not to define the acts that constituted "aggression" in relations between States. There was also a suggestion to define aggression by reference to general international law, without further qualification, or else to qualify the reference to "armed force" in the new proposed paragraph 2 with wording such as "of a level of seriousness which constitutes an act of aggression under international law". Other members expressed the view that an act of aggression necessarily included an element of massive scale and that the term "use of armed force" implicitly contained the element of an organized attack for purposes of the definition of aggression.

65. The view was expressed that references to "sovereignty", "political independence" or "any other manner inconsistent with the Charter of the United Nations" had political connotations and should be replaced by a formulation referring more directly to the victim State, for example, "use of armed force against another State". The use of the term "sovereignty" was also questioned as lacking the necessary precision for criminal law and as not having any meaning apart from the territorial integrity or political independence of a State in the present context. While some members described the phrase "or in any other manner inconsistent with the Charter of the United Nations" as too vague or ambiguous for purposes of criminal law, others viewed the phrase as essential to avoid reducing the scope of the concept of aggression in the Code, as compared to the topic of State responsibility; undermining the rule of law by allowing a wider margin for the use of force; and reducing the area of individual criminal responsibility contrary to the narrowly construed exceptions to the general prohibition of the use of force.

66. Regarding paragraph 3, the view was expressed that it did not add anything of substance and could be deleted. However, there was also a suggestion to incorporate the gravity criterion in paragraph 2 by reformulating it to read:

> "2. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, evidence which is rebuttable in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."

67. As regards paragraph 4, it was suggested that the list of specific acts constituting aggression, regardless of a declaration of war, had some merit and should receive due attention. However, the view was also expressed that the provision did not add anything of substance and could be deleted.

68. Regarding paragraph 4 (*h*), the reference to the determination of an act of aggression by the Security Council elicited different views concerning the role of the Council and the effect of such a determination with respect to the definition of the crime of aggression and the determination of individual criminal responsibility. Several members emphasized the importance of clearly distinguishing between the functions of the Council and those of a judicial body, with references being made to the notion of separation of powers and the principle of the independence of the judiciary. In this regard, some members felt that the role of the Council envisaged in the draft Code and in the draft statute had been exaggerated since the action by the Council would not adversely affect the independence of the court in assessing the criminal responsibility of particular individuals. The Council action with respect to a State envisaged in the draft statute was described as relating only to the procedures or modalities for instituting judicial proceedings in contrast to the substantive law defining the crime and the role of the court in determining the criminal responsibility of particular individuals. Emphasis was placed on the distinction between the sanctions imposed on States by the Council and the criminal penalties imposed on individuals by a court.

[42] Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

[43] See footnote 17 above.

69. Other members expressed serious concerns that the Permanent Members of the Security Council could prevent a prior determination of an act of aggression by the use of the veto and thereby preclude the prosecution of the persons responsible for aggression resulting in their impunity contrary to elementary considerations of justice, including the principles of universality, objectivity, impartiality and the equality of all before the law. The view was expressed that the failure of the Council to determine an act of aggression in a specific case would not prevent other organs of the international community from exercising their own powers, subject to certain provisions such as Article 12 of the Charter. Attention was drawn to General Assembly resolution 377 (V), entitled "Uniting for peace", as possibly providing some useful guidance in this respect. In suggesting the deletion of paragraph 4 (*h*), the view was expressed that while the Commission should not call into question the provisions of the Charter or the role of the Council, the Charter did not say that a Council determination was binding on a domestic or international court and the intervention of the Council in the functioning of national or international criminal jurisdictions was unnecessary. In this regard, attention was drawn to the possibility of cases in which a court would find the accused not guilty, even though the Council had made a determination of aggression. It was further suggested that although the Charter took precedence over other treaties, the decisions of the Council did not prevail over international law and treaties, and that the Commission, which was not competent to amend the Charter, should concern itself with the law to be applied by the courts.

70. Some members found it difficult to envisage the trial of an individual for the crime of aggression in the absence of a prior determination by the Security Council of the existence of aggression within the present international legal framework established by the Charter of the United Nations. Without suggesting that this was an ideal solution, the view was expressed that it would be inconceivable for a national court to decide that a State—for it amounted to a State even if an individual was being tried—had committed a crime of aggression by using armed force against another State. It was further suggested that the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court and that a Council determination would alleviate the problem of defining what acts should be classified as crimes of aggression.

71. Regarding paragraphs 5 and 6, some members felt that these provisions were political in nature, did not add anything of substance and could be deleted.

72. As regards paragraph 7, while there was a suggestion to retain it as a valuable saving clause, there were also suggestions to delete it as too political in nature and thereby streamline the legal content of the definition.

73. With reference to the Special Rapporteur's proposal to limit the definition to the first two paragraphs, some members felt that this definition was too general for purposes of criminal law and had political connotations. It was suggested that a general definition accompanied by a non-exhaustive enumeration would provide a more flexible approach, it had proved its applicability in the Charter of the Nürnberg Tribunal, was consistent with the practice followed in the international conventions that defined international crimes and would allow the law to continue to evolve.

ARTICLE 16 (Threat of aggression)[44]

74. Many members endorsed the Special Rapporteur's proposal to delete the crime of the threat of aggression because of the nebulous character of the underlying concept and the lack of rigour required by criminal law. However, the view was also expressed that the threat of aggression should be retained in the Code.

ARTICLE 17 (Intervention)[45]

75. There was general agreement as to the importance of non-intervention as a fundamental principle of contemporary international law recognized in various international instruments; General Assembly resolutions, including resolution 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty and resolution 2625 (XXV), the annex to which contained the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations; and in the jurisprudence of ICJ, particularly in the *Corfu Channel* case[46] and the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).[47] However, the view was also expressed that the principle was of limited scope, owing in particular to the

[44] Draft article 16 provisionally adopted by the Commission on first reading reads as follows:

"*Article 16. Threat of aggression*

"1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to . . .].

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

[45] Draft article 17 provisionally adopted by the Commission on first reading reads as follows:

"*Article 17. Intervention*

"1. An individual who as leader or organizer commits or orders the commission of an act of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .].

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

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

[46] *Merits, Judgment, I.C.J. Reports 1949*, p. 4.

[47] Ibid., *1986*, p. 14.

decline in the number of situations qualifying as internal affairs and to the emergence of situations, affecting human rights in particular, in which the internal jurisdiction exception was unwarranted.

76. Some members favoured the Special Rapporteur's proposed deletion of article 17 because of the nebulous character of the underlying concept and lack of rigour required by criminal law. However, other members who supported its retention expressed the view that blatant acts of intervention were still a contemporary fact of life, often with the express or thinly disguised aim of destabilizing States in complete disregard of the massive suffering of the populations of the targeted States, and that concerns regarding the lack of precision required by criminal law missed the point that there had been hardly any other acts in the history of mankind which had caused so much misery to millions of underprivileged people and which were almost universally acknowledged to be crimes. There were various suggestions to incorporate some elements of the deleted text in other articles, such as those relating to aggression and terrorism. Attention was also drawn to the classification of intervention as a wrongful act entailing the international responsibility of States which would not be affected by the deletion of the present article.

ARTICLE 18 (Colonial domination and other forms of alien domination)[48]

77. Some members, while recognizing colonial domination and other forms of alien domination as abhorrent, favoured the Special Rapporteur's proposed deletion of the present article based on the virtual extinction of colonialism, the lack of a precise definition required for criminal law, and the unlikelihood of its acceptance in the Code. However, other members felt that colonial domination and foreign occupation were not a thing of the past; that there were still cases of the denial of the right to self-determination by the use of force; that the glaring disparity between the political and economic situation of the States of the North and that of the States of the South precluded any premature optimism as to the final disappearance of all forms of colonial or neo-colonial domination; that concerns regarding the necessary precision required by criminal law seemed to undermine the historical significance of this crime in terms of human suffering; that there was no guarantee that colonial domination was definitely a thing of the past and not something that could resurface at any time; and that its inclusion in the Code would constitute an important symbolic gesture and an important deterrent.

[48] Draft article 18 provisionally adopted by the Commission on first reading reads as follows:

"*Article 18. Colonial domination and other forms of alien domination*

"An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to . . .]."

ARTICLE 19 (Genocide)[49]

78. There was general agreement that the crime of genocide should be included in the Code and should be defined on the basis of the widely accepted Convention on the Prevention and Punishment of the Crime of Genocide.

79. Attention was drawn to the importance of the specific intent required for the crime of genocide in contrast to a general criminal intent in terms of the deliberate will to commit the crime or the awareness of the criminal nature of the act (*mens rea*). It was suggested that the Drafting Committee might consider using a formulation such as "acts committed with the aim of" or "acts manifestly aimed at destroying" to avoid any ambiguity on this important element of the crime.

80. With regard to paragraph 3 of the Special Rapporteur's new proposed text,[50] there was some question as to the inclusion of the crime of incitement to commit genocide in the Code. There was also a question as to whether the term "direct and public incitement" was intended to refer to an independent crime of "incitement", which would not require the actual commission of genocide, or to "abetment" as an accessory to a prin-

[49] Draft article 19 provisionally adopted by the Commission on first reading reads as follows:

"*Article 19. Genocide*

"1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced [to . . .].

"2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

"(*a*) Killing members of the group;

"(*b*) Causing serious bodily or mental harm to members of the group;

"(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"(*d*) Imposing measures intended to prevent births within the group;

"(*e*) Forcibly transferring children of the group to another group."

[50] The new text of draft article 19 proposed by the Special Rapporteur reads as follows:

"*Article 19. Genocide*

"1. An individual convicted of having committed or ordered the commission of an act of genocide shall be sentenced to . . .

"2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

"(*a*) Killing members of the group;

"(*b*) Causing serious bodily or mental harm to members of the group;

"(*c*) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"(*d*) Imposing measures intended to prevent births within the group;

"(*e*) Forcibly transferring children of the group to another group.

"3. An individual convicted of having engaged in direct and public incitement to commit genocide shall be sentenced to . . .

"4. An individual convicted of an attempt to commit genocide shall be sentenced to . . ."

cipal crime. In this regard, emphasis was placed on the exceptional nature of the independent crime of "incitement" as a consequence of the need to avoid encroaching on freedom of expression. However, attention was also drawn to recent events in Rwanda and the situation developing in Burundi as evidence of the need to include attempt and incitement to commit genocide as punishable offences.

81. As regards paragraph 4, the question was also raised as to whether attempt should be included as a separate element of the definition of the crime of genocide in the present article or whether it should be addressed in general terms in article 3. The designation of all acts constituting a particular crime was described as having the merit of not requiring the court to decide in each case whether or not the concepts set forth in article 3 were applicable. In this regard, attention was drawn to the relevant provisions contained in the Convention on the Prevention and Punishment of the Crime of Genocide and in the statutes of the ad hoc tribunals established by the Security Council. However, some members suggested that the notion of attempt required further consideration in the context of the draft articles as a whole and that a decision as to the applicability of this notion should be taken with respect to each crime once the definitive list of crimes had been established.

82. The view was expressed that the crime of complicity, which was explicitly referred to in the Convention on the Prevention and Punishment of the Crime of Genocide, should be included in the present article. It was suggested that the Commission's decision regarding the punishment of complicity as a crime under the Code, including acts of preparation and planning, would determine its similar decision regarding attempt which consisted of an effort to commit a crime amounting to more than mere preparation or planning.

83. There was a further suggestion that consideration should be given to the relationship between the Code and article IX of the Convention, which provided for the compulsory jurisdiction of ICJ in the case of disputes between contracting parties.

Article 20 (Apartheid)[51]

84. Some members endorsed the Special Rapporteur's proposed deletion of the crime of apartheid for various reasons, including: the fortunate disappearance of apartheid in South Africa; the imprecise definition of the crime, even with respect to South Africa; the broad definition of complicity extending to persons far beyond the frontiers of South Africa; as well as the specific territorial scope of the crime of apartheid with respect to South Africa and the absence of sufficient evidence of similar practices in other States.

85. Several members felt that, although apartheid as such had ceased to exist, the problem of "institutionalization of racial discrimination" still persisted in some parts of the world and that consideration should be given to the Special Rapporteur's proposal to include a general provision that would apply to any system of institutionalized racism bywhatever name in any State. It was suggested that consideration should be given to including not only racial discrimination, but also economic, political and cultural discrimination as a crime. It was also suggested that the continued existence of situations of institutionalized racial discrimination should be addressed as systematic violations of human rights rather than as a separate crime.

86. However, other members described the present article as central to the Code and felt that it should be retained to avoid disregarding the lessons of history, minimizing the seriousness of apartheid, and ignoring the many decisions of United Nations organs. The view was expressed that the disappearance of the symptoms of apartheid was no reason for apartheid to be excluded from the Code, which should include acts because they were criminal in nature and not exclude them because they were no longer likely to occur. In this regard, the view was also expressed that practices similar to apartheid were still occurring in various countries and could resurface in others at any time. It was considered desirable to include crimes such as apartheid and colonial domination in a Code conceived as a symbolic instrument which could be used by States to identify certain acts or activities. Attention was also drawn to the existence of separate legal instruments relating to apartheid and racial discrimination as a justification for maintaining the present article.

Article 21 (Systematic or mass violations of human rights)[52]

87. Particular importance was attributed to the protection of human rights and to ensuring the compatibility

[51] Draft article 20 provisionally adopted by the Commission on first reading reads as follows:

"*Article 20. Apartheid*

"1. An individual who as leader or organizer commits or orders the commission of the crime of apartheid shall, on conviction thereof, be sentenced [to . . .].

"2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

"(*a*) Denial to a member or members of a racial group of the right to life and liberty of person;

"(*b*) Deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

"(*c*) Any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

"(*d*) Any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

"(*e*) Exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

"(*f*) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."

[52] Draft article 21 provisionally adopted by the Commission on first reading reads as follows:

(*Continued on next page.*)

of the present article with international human rights law, which was described as one of the most significant achievements of the international community. The basic question was said to be the identification of the point at which human rights violations, which were essentially matters of domestic concern within the jurisdiction of national courts, became a matter of international concern that came within international jurisdiction. Some members expressed the view that the proposed new text of article 21[53] was generally acceptable, while recognizing the possibility of improvements in drafting.

88. The Special Rapporteur's proposal to replace the present title of article 21 with "Crimes against humanity" was welcomed by some members as a reflection of the original concept of the Code as well as the "wording used in the Charter of the Nürnberg Tribunal, the Nürnberg Principles and in some penal codes. However, other members preferred to retain the previous title to identify the criteria that distinguished the crimes covered by the present article from ordinary crimes, to distinguish systematic or mass violations of human rights from other crimes against humanity such as genocide, and to avoid creating the impression that crimes not mentioned in the present article were not crimes against humanity. Referring to the relevant precedents, the view was also expressed that the content and legal status of the concept of crimes against humanity as a norm of international law were not as clear as in the case of genocide and war crimes. In this regard, a preference was expressed for the definition of crimes against humanity contained in the statute of the International Tribunal for the Former Yugoslavia[54] which closely followed the Charter of the Nürnberg Tribunal and applied only in time of war. However, requiring a link between crimes against humanity and other crimes was also described as neither necessary nor desirable.

89. As regards the Special Rapporteur's proposal to consider as falling under the Code, in addition to individuals acting as agents or representatives of the State—those who acted in their individual capacity—there was no agreement within the Commission. While some members held that the Code should only deal with crimes committed by agents or representatives of the State or by individuals acting with the authorization; the support or the acquiescence of the State, other members favoured encompassing the conduct of individuals even if they had no link with the State. By way of illustration, reference was made to certain organizations or institutions unrelated to the State which committed crimes of the type envisaged in the article concerned.

90. As regards the Special Rapporteur's proposed deletion of the massive criterion in the definition of the present article, the view was expressed that a review of precedents would reveal that the determining factor was not the scale of violations but the existence of systematic persecution of a community or a section of a community. However, several members felt that this criterion was essential to distinguish the crimes covered by the Code from ordinary crimes under national law; that the concepts of "systematic" and "massive" violations were complementary elements of the crimes concerned; that the dual criteria would ensure wider support for the article and its universal applicability; and that the acts enumerated in the article would constitute crimes threatening international peace and security only when committed on a massive scale. Particular importance was attributed to maintaining the two criteria in the absence of a definition of the constituent elements of the crimes covered by the present article to ensure that the Code would apply only to acts of exceptional seriousness and of international concern. The view was expressed that three criteria, namely seriousness, massive nature, and violation of the international legal order, should be considered to distinguish between crimes against humanity and human rights violations which were subject to the machinery provided for in the relevant international instruments. Two other criteria were also suggested as relevant, namely the commission of a very serious act by a person who enjoyed the protection or authorization of a State and the institutionalization of human rights violations with the support of the State.

91. With regard to the crimes enumerated in the second paragraph, there was a suggestion to amend the first subparagraph to read "Wilful killing on a mass scale".

92. As regards the second subparagraph, some members considered the definition of torture appearing between square brackets to be useful, while other

(*Continued from preceding page.*)

"*Article 21. Systematic or mass violations of human rights*

"An individual who commits or orders the commission of any of the following violations of human rights:

"—Murder

"—Torture

"—Establishing or maintaining over persons a status of slavery, servitude or forced labour

"—Persecution on social, political, racial, religious or cultural grounds

"in a systematic manner or on a mass scale; or

"—Deportation or forcible transfer of population

"shall, on conviction thereof, be sentenced [to . . .].

[53] The new text of draft article 21 proposed by the Special Rapporteur reads as follows:

"*Article 21. Crimes against humanity*

"An individual who, as an agent or a representative of a State or as an individual, commits or orders the commission of a crime against humanity shall, on conviction thereof, be sentenced [to . . .].

"A crime against humanity means the systematic commission of any of the following acts:

"—Wilful killing;

"—Torture [i.e. intentionally inflicting on a person pain or acute physical or mental suffering for the purposes of, *inter alia*, obtaining information or confessions from him or from a third person, punishing him for an act which he or a third person has committed or is suspected of committing, intimidating or exerting pressure on him, intimidating or exerting pressure on a third person, or for any other reason grounded in some form of discrimination.

"This text does not include pain or suffering resulting solely from lawful punishment or inherent in or caused by such punishment.];

"—Reduction to slavery;

"—Persecution;

"—Deportation or forcible transfer of population;

"—All other inhumane acts."

[54] See footnote 33 above.

members questioned whether it was necessary and suggested that its inclusion might upset the balance of the draft article. There was a suggestion to extend the provision to cruel, inhuman or degrading treatment or punishment based on article 7 of the International Covenant on Civil and Political Rights. There was a further suggestion to consider the definition of torture in greater detail in the commentary to the article rather than in the text.

93. The reference to "persecution" in the fourth subparagraph was questioned as vague and overly broad. A preference was expressed for the earlier wording of "persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale". The view was expressed that even this language went beyond the Charter of the Nürnberg Tribunal, which required that such acts be in execution of or in connection with other crimes within its jurisdiction, and the statute of the International Tribunal for the Former Yugoslavia, which covered such acts only if they were committed in armed conflict.

94. While expressing support for the inclusion of "Deportation or forcible transfer of population" in the fifth subparagraph, some members felt the provision required greater clarity and precision to avoid including transfers of population that would be legally acceptable, for example, for reasons relating to the protection of the population, health considerations or economic development. The view was expressed that the provision should be limited to the deportation or forcible transfer of population on social, political, racial, religious or cultural grounds contrary to the relevant human rights instruments.

95. With regard to "other inhumane acts" covered by the sixth subparagraph, the view was expressed that the idea of providing a general category of such acts should be scrutinized very carefully. While some members felt that the phrase, which appeared in other similar instruments, should be retained, other members thought that it was too vague for the definition of a crime. There was also a suggestion to supplement the words "all other inhumane acts" by the phrase "perpetrated on a mass scale".

96. The view was expressed that forced disappearances, which constituted one of the most serious crimes of the second half of the twentieth century in some parts of the world, should be included as serious violations of human rights constituting crimes against the peace and security of mankind. While noting the difficulties involved in defining a crime in which the victims often disappeared without a trace, a proposed definition of enforced disappearances was submitted (A/CN.4/L.505)[55] based on the Inter-American Convention on Forced Disappearance of Persons and the Declaration on the Protection of All Persons from Enforced Disappearance contained in General Assembly resolution 47/133. Some members expressed their support for including the practice of systematic and forced disappearance of persons in the present article and for considering the proposed definition in the Drafting Committee.

97. As mentioned previously, several members felt that institutionalized racial discrimination should be included in article 21 as a consequence of the proposed deletion of article 20 concerning apartheid.

ARTICLE 22 (Exceptionally serious war crimes)[56]

98. Several members welcomed the Special Rapporteur's decision to revert to the traditional notion of war crimes and to abandon the idea of introducing the new concept of "exceptionally serious war crimes" which had given rise to concerns regarding its meaning and its

[55] The definition proposed by Mr. Vargas Carreño read as follows:

"*Article 21. Systematic or mass violations of human rights*

"1. An agent or representative of a State or anyone who acts with the authorization, support or acquiescence of a State and commits or orders the commission in a systematic or mass manner of any of the following acts:

"(*a*) Murder;

"(*b*) Enforced disappearance of persons. For the purposes of this Code, enforced disappearance shall be considered to be the act of unlawfully depriving a person of his freedom, in whatever way, followed by an absence of information or a refusal to acknowledge his deprivation of freedom or to give information on the whereabouts of that person, thereby impeding the exercise of all his rights;

"(*c*) Torture;

"shall, on conviction thereof, be sentenced to . . .

"2. An agent or representative of a State who in the exercise of his functions participates in the adoption of acts or legislative, executive, administrative or any other measures which, *de jure* or de facto, entail:

"(*a*) Establishing or maintaining over persons a status of slavery, servitude, or forced labour;

"(*b*) Institutionalization of racial discrimination;

"(*c*) Deportation or forcible transfer of population on social, political, racial, religious or cultural grounds;

"shall, on conviction thereof, be sentenced to . . ."

[56] Draft article 22 provisionally adopted by the Commission on first reading reads as follows:

Article 22. Exceptionally serious war crimes

"1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to . . .].

"2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

"(*a*) Acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

"(*b*) Establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

"(*c*) Use of unlawful weapons;

"(*d*) Employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

"(*e*) Large-scale destruction of civilian property;

"(*f*) Wilful attacks on property of exceptional religious, historical or cultural value."

implications for existing international humanitarian law.[57] However, there was also some concern about abandoning the new concept which had been intended to limit the scope of the present article to very serious violations that would meet the necessary criteria for inclusion in the Code.

99. Some members also endorsed the Special Rapporteur's approach, which closely followed the statute of the International Tribunal for the Former Yugoslavia, while attention was drawn to some drafting innovations in article 22 which might require further consideration. There was also some question about the wisdom of referring to a particular convention without regard to whether the State or States concerned were a party to that convention. In this regard, there was a suggestion to refer to "international humanitarian law" rather than particular conventions.

100. Noting the change in the title of the new article, attention was drawn to the need to make a corresponding change in the opening sentence of the text in the English version.

101. As regards paragraph 1, the view was expressed that it was sufficiently broad for purposes of the Code. However, there were also suggestions to expand the provision to include other international instruments and other violations. With regard to the international instruments, some members felt that Additional Protocol I to the Geneva Conventions of 1949 should be clearly incorporated in the present provision. While noting the inapplicability of the notion of "grave breaches" or "war crimes" to non-international armed conflicts, some members felt that common article 3 of the Geneva Conventions of 1949 as well as Additional Protocol II should also be included in this paragraph, citing the recently adopted statute of the International Tribunal for Rwanda.[58] However, there was also an indication of opposition to this suggestion. In terms of violations, there were suggestions to add "attacks against civilian populations" and "the establishment of settlers in an occupied territory and changes in the demographic composition of an occupied territory", the latter violation having appeared in the text adopted on first reading on the basis of article 85, paragraph 4, of Additional Protocol I.

102. Regarding paragraph 2, a preference was expressed for referring to "serious" violations of the laws or customs of war, a phrase the Commission had already incorporated in the draft statute for an international criminal court. The view was expressed that the recourse to a non-exhaustive list was perhaps the best approach. In this regard, it was suggested that paragraph 2 could be reformulated to clearly indicate that those crimes which were not explicitly listed in the paragraph must be as serious as those which were listed therein, for example, by using the phrase "Such violations of the laws or customs of war as are". However, some members felt that an exhaustive list would be more consistent with the principle of *nullum crimen sine lege* and would provide uniformity with respect to the two paragraphs of the present article, while recognizing the difficulty of elaborating such a list.

103. There were different views as to whether paragraphs 1 and 2 should be combined in a single article or appear as separate articles.

Article 23 (Recruitment, use, financing and training of mercenaries)[59]

104. Several members expressed support for the Special Rapporteur's decision to eliminate the crime of

[57] The new text of draft article 22 proposed by the Special Rapporteur reads as follows:

"*Article 22. War crimes*

"An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced to [. . .].

"For the purposes of this Code, a war crime means:

"1. Grave breaches of the Geneva Conventions of 1949, namely:

"(*a*) Wilful killing;

"(*b*) Torture or inhuman treatment, including biological experiments;

"(*c*) Wilfully causing great suffering or serious injury to body or health;

"(*d*) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

"(*e*) Compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

"(*f*) Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

"(*g*) Unlawful deportation or transfer or unlawful confinement of a civilian;

"(*h*) Taking civilians as hostages.

"2. Violations of the laws or customs of war, which include, but are not limited to:

"(*a*) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

"(*b*) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"(*c*) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

"(*d*) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

"(*e*) Plunder of public or private property."

[58] Security Council resolution 955 (1994) of 8 November 1994, annex.

[59] Draft article 23 provisionally adopted by the Commission on first reading reads as follows:

"*Article 23. Recruitment, use, financing and training of mercenaries*

"1. An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

"—recruitment, use, financing or training of mercenaries for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law

"shall, on conviction thereof, be sentenced [to . . .].

"2. A mercenary is any individual who:

(*Continued on next page.*)

recruitment of mercenaries. Some members felt that the acts originally dealt with in article 23 could be prosecuted as crimes linked to aggression, in so far as they involved the participation of agents of the State, or as acts of international terrorism. While noting the limited acceptance of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, some concern was expressed regarding the exclusion of the crime from the Code in the light of its historical significance, particularly in parts of Africa, and the ideological aspect of the crime as a means of preserving a model of colonialism.

ARTICLE 24 (International terrorism)[60]

105. While everyone recognized the danger of international terrorism, there were different views as to whether the crime of international terrorism could, at this stage, in view of the continuing problems relating to its definition, be included in the Code. Some members expressed serious doubts as to the possibility of elaborating a general definition with the necessary precision for criminal law. There were also different views as to whether the existing international instruments dealing with specific aspects of the problem would provide the necessary guidance for a general definition. In this regard, a distinction was drawn between the crimes that could be prosecuted based on general international law, including aggression, war crimes, genocide and other crimes against humanity, and the crimes that presupposed the existence of a convention for their prosecution, including international terrorism. The recent adoption by the General Assembly of the Declaration on Measures to Eliminate International Terrorism[61] was viewed as having resolved the impenetrable political obstacles but not the technical problems in achieving a general definition of terrorism.

106. There was also some question as to whether every terrorist act would constitute a crime against the peace and security of mankind or otherwise meet the criteria for the inclusion of crimes in the Code. The view was expressed that the exclusion of international terrorism from the Code could be regarded as inconsistent with Security Council resolution 748 (1992) of 31 March 1992, which stipulated that certain acts of terrorism constituted a threat to international peace and security. However, the view was also expressed that the question of the inclusion of international terrorism in the Code did not affect the ability of the Council to take measures in response to a specific situation affecting peace and security throughout the world. The view was further expressed that an international criminal court might provide a political solution to the problem of jurisdiction when acts of terrorism created serious tensions in international relations, but it would not resolve the question of the applicable law. It was suggested that international terrorism might constitute a crime against the peace and security of mankind when the terrorist acts were particularly grave and massive in character and that consideration could be given to its inclusion as a crime against humanity.

107. Those who favoured the inclusion of international terrorism as a separate article in the Code emphasized the seriousness of acts of terrorism, the universal recognition of such acts as crimes, the continuing occurrence of such acts, the need to formulate a general definition to facilitate the prosecution of the perpetrators of all such acts, and the enhanced deterrence to be derived from the characterization of international terrorism as a crime against the peace and security of mankind and its inclusion in the Code. In this regard, the view was expressed that it was necessary to identify the common features of the various forms of terrorism and to provide for the international prosecution of terrorism as a crime under the Code since little progress had been made in eradicating terrorism based on national prosecutions under the existing instruments dealing with specific terrorist acts. Other members also emphasized that the two approaches to the suppression of international terrorism should be viewed as complementary rather than mutually exclusive. In terms of the criteria for crimes against the peace and security of mankind, the view was expressed that international terrorism would qualify as such a crime because it endangered the survival of mankind.

(Continued from preceding page.)

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

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

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

"(*d*) Is not a member of the armed forces of a party to the conflict; and

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

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

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

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

"(ii) Undermining the territorial integrity of a State;

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

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

"(*d*) Has not been sent by a State on official duty; and

"(*e*) Is not a member of the armed forces of the State in whose territory the act is undertaken."

[60] Draft article 24 provisionally adopted by the Commission on first reading reads as follows:

"*Article 24. International terrorism*

"An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

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

"shall, on conviction thereof, be sentenced [to . . .]."

[61] General Assembly resolution 49/60, annex.

108. General remarks concerning the definition of international terrorism included the following: the definition should avoid any reference to subjective motives and to the objective of the terrorist act; the crime of terrorism should be defined in terms of its nature and effects and should include acts that were intended to spread or had the effect of spreading terror; the definition of terrorism should cover all of its manifestations by way of enumeration; three objective criteria, namely, seriousness, massive nature and violation of the international legal order should be used to determine the list of terrorist acts that would qualify as crimes against the peace and security of mankind.

109. As regards the Special Rapporteur's new proposed text,[62] some members felt that it was a marked improvement over the text adopted on first reading. However, a preference was also expressed for the text of the article adopted on first reading, with the possible addition of the reference to "acts of violence" used in the new text.

110. As regards paragraph 1, there were different views as to whether the perpetrators of international terrorism should include individuals as well as State agents and representatives. While some members welcomed the inclusion of individuals acting as such, others felt that the provision was too broad and required further qualification. In this regard, the view was expressed that the scope of the article should not be expanded to include a lone terrorist acting independently without any affiliation to a terrorist organization or group or any element of organized crime. The view was also expressed that State terrorism must certainly be included as a crime against the peace and security of mankind, but that the exact conditions in which an individual act of terrorism could be regarded as such a crime must be clearly specified, possibly in a separate paragraph.

111. As regards paragraph 2, the word "terror" was described as generally understood and therefore preferable to other expressions. However, there was also a suggestion to replace the word "terror" by "serious apprehension" to avoid defining terrorism in tautological terms. It was also suggested that the reference to acts directed against "another State" and the phrase "in order to compel the aforesaid State" should receive further consideration.

ARTICLE 25 (Illicit traffic in narcotic drugs)[63]

112. Some members felt that illicit drug trafficking should be included in the Code for the following reasons: illicit drug trafficking was a serious scourge that affected the sovereignty of small States; many small States were unable to prosecute perpetrators of such traffic when carried out on a large scale in their own territory; some States were virtually helpless in the face of illicit drug trafficking; "narco-terrorism" could have a destabilizing effect on some countries, notably those in the Caribbean; the international drug cartels could destroy small States and have a disastrous impact even on the larger States; and illicit drug trafficking endangered the survival of mankind while providing funding for other forms of crime, such as terrorism and subversion.

113. However, other members favouring its exclusion expressed the following views: illicit drug trafficking did not meet the criteria for a crime against the peace and security of mankind; it was unlikely to endanger international peace and security unless it was combined with other crimes; most States were opposed to its characterization as a crime against the peace and security of mankind; the prosecution of illicit traffic in narcotic drugs at the international level presupposed the existence of a convention in contrast to other crimes that could be prosecuted on the basis of general international law; the existing relevant conventions focused on suppression of drug trafficking rather than establishing penalties for it at the international level; the existing legal framework and international cooperation arrangements provided the necessary means and machinery for the suppression of illicit drug trafficking since most cases could be effectively prosecuted in the national courts; and increased international cooperation in law enforcement would be a more effective way to deal with the problem. The view was expressed that further consideration should be given to the relationship between the present article and existing conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provided methods for mutual assis-

[62] The new text of draft article 24 proposed by the Special Rapporteur reads as follows:

"*Article 24. International terrorism*

"1. An individual who, as an agent or a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced [to . . .].

"2. The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way."

[63] Draft article 25 provisionally adopted by the Commission on first reading reads as follows:

"*Article 25. Illicit traffic in narcotic drugs*

"1. An individual who commits or orders the commission of any of the following acts:

—undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context

"shall, on conviction thereof, be sentenced [to . . .].

"2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.

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

tance between States in the prosecution of offenders and prevention of money laundering, and on the relationship between the jurisdiction of national legal systems and the proposed international jurisdiction under the Code.

114. As regards the Special Rapporteur's new proposed text,[64] the view was expressed that it contained primarily drafting changes which could be considered along with the text adopted on first reading.

115. With regard to paragraph 1, the addition of the words "on a large scale . . . or in a transboundary context" to the text was endorsed by some members. There were also suggestions to limit the scope of the provision to the most serious cases of illicit drug trafficking, for example, cases of narco-terrorism that were linked to international terrorism or the activities of insurgent groups, which had a destabilizing effect on certain countries and clearly constituted a crime against the peace and security of mankind. The view was expressed that the basic element to be taken into account was the scale on which such traffic was carried out. The view was also expressed that illicit drug trafficking might constitute a crime against the peace and security of mankind when it was particularly grave and massive in character and that consideration could be given to its inclusion in the Code as a crime against humanity but not as a separate crime.

116. The use of the term "individuals" in the same paragraph elicited different views as to whether the provision should cover any individuals, State agents or representatives, or both.

117. The reference to specific penalties in that paragraph was considered to be appropriate since the article contained the constituent elements of various crimes comprising illicit drug trafficking, such as money laundering.

118. As regards paragraph 2, the view was expressed that the reference to internal law should be deleted to avoid making the crime more national than international in character.

ARTICLE 26 (Wilful and severe damage to the environment)[65]

119. Some members shared the Special Rapporteur's view that damage to the environment should not be included in the Code because it did not meet the criteria for a crime against the peace and security of mankind. The view was also expressed that since the Code was not intended to cover all crimes under international law committed by individuals, but only those that might threaten the peace and security of mankind, the exclusion of a crime did not rule out its consideration as a crime under international law.

120. However, other members felt that the article should be retained, with the Drafting Committee taking into account the observations of Governments. In this regard, the view was expressed that wilful and serious damage to the environment was a fact of life not just for the present, but for future generations. The view was also expressed that certain kinds of environmental damage would unquestionably threaten international peace and security, such as the deliberate detonation of nuclear explosives or pollution of entire rivers, and should be characterized as crimes against the peace and security of mankind, while recognizing that it may be necessary to narrow the scope of the present provision to limit it to such situations. Attention was drawn to certain criminal attempts to illicitly dump chemical or radioactive waste that was particularly harmful to the environment in the territory or in the territorial waters of developing countries as evidence that those States were most likely to suffer the adverse effects of a gap in the punishment of that type of crime. Attention was also drawn to the possibility of a terrorist group or organization obtaining the necessary materials, techniques and knowledge required to cause environmental damage equivalent in destruction to that of the Second World War. Furthermore, attention was drawn to the inclusion of wilful and severe damage to the environment in article 19 of part one of the draft on State responsibility[66] and the need to achieve some unity of purpose in the work produced by the Commission.

121. The view was also expressed that there was no need for a separate article on the subject since damage to the environment, such as wilful nuclear pollution or the poisoning of vital international watercourses, would, if it affected international peace and security, be punishable as an international crime under other rubrics of the Code such as aggression, war crimes and international terrorism. In this regard, attention was drawn to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

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[64] The new text of draft article 25 proposed by the Special Rapporteur reads as follows:

"Article 25. Illicit traffic in narcotic drugs

"1. An individual who commits or orders the commission of illicit traffic in narcotic drugs on a large scale or in a transboundary context shall, on conviction thereof, be sentenced [to . . .].

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

"3. For the purposes of paragraph 2, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property."

[65] Draft article 26 provisionally adopted by the Commission on first reading reads as follows:

"Article 26. Wilful and severe damage to the environment

"An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to . . .]."

[66] See footnote 39 above.

(d) *The question of penalties*

122. As regards penalties, the view was expressed that the Code would be an effective and complete legal instrument only if it included the three elements of crimes, penalties and jurisdiction. Several members noted that Governments, in their comments, had declined to specify penalties for each crime, which demonstrated the need for the Commission to be circumspect in prescribing them; shared the Special Rapporteur's view concerning the difficulty of the exercise; and endorsed his suggestion that a scale of penalties should be established, leaving it up to the courts to determine the applicable penalty in each case. This method, it was noted, had been followed in the statutes of international criminal tribunals adopted since 1945. In this regard, the statutes of the ad hoc tribunals were suggested as possible models for the provision to be included in the Code. However, there was also a suggestion to consider following the language of the Convention on the Prevention and Punishment of the Crime of Genocide by requiring States to provide "effective penalties for persons guilty of" crimes against the peace and security of mankind.

123. The view was expressed that it would be sufficient to incorporate one article setting out the minimum and maximum limits for all the crimes in the Code, with the severity of the penalties corresponding to the seriousness of the crimes and the court being left to exercise its discretion within those limits. It was suggested that in substance the applicable penalties should be established in accordance with the maximum penalties applicable in the State in which the crime had been committed or on the basis of such maximum penalties. However, it was also suggested that it would be impossible to establish rigid maximum and minimum sentences, given the numerous and varied types of war crimes and crimes against humanity, as compared to authorizing the imposition of exemplary punishments, including life imprisonment, for such serious crimes.

124. Some members emphasized that any provision on penalties should be made consistent with the corresponding provision in the draft statute for an international criminal court. It was suggested that it would be sufficient to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case, following article 47 of the draft statute[67] which precluded the death penalty. Support was expressed for stipulating a maximum penalty of life imprisonment considering the gravity of the crimes encompassed by the Code, subject to the discretion of the court to specify such other terms as the particular circumstances of a case might require. However, questions were raised regarding the legal basis for the absence of the death penalty from more recent instruments, whether that absence denoted significant progress in the human rights field, and the fate of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. In this regard, attention was drawn to the discrepancy regarding the inclusion of the death penalty between the statutes of the International Tribunal for the Former Yugoslavia[68] and that of the International Tribunal for Rwanda[69] and the national legislation applicable in the former Yugoslavia and of Rwanda.

125. The view was expressed that further consideration should be given not only to including a general provision on penalties, but also to addressing the aggravating or mitigating circumstances to be taken into consideration in determining an appropriate penalty in a particular case under article 14.

3. Summing-up of the debate by the Special Rapporteur

126. At the conclusion of the discussion of his thirteenth report, the Special Rapporteur summarized the main ideas that had emerged during the debate and gave his opinion on some of the points raised.

127. The Special Rapporteur noted that the limited number of replies by Governments to the draft articles adopted on first reading made it difficult for him to assess the degree of support which these draft articles commanded.

128. Regarding the reliance on existing treaties and conventions, the Special Rapporteur said that while members of the Commission had encouraged him to follow this approach from the very start of the drafting exercise, he had questioned its validity in the belief that progressive development of the law meant going beyond existing legal instruments. He also felt that the draft Code consisted primarily of crimes which constituted violations of *jus cogens* and, therefore, did not rely unduly on existing treaties.

129. Noting that some members of the Commission viewed the restrictive approach to the list of crimes as excessively prudent and apparently wanted him to advance the development of international law, even where there was no consensus within the Commission itself, he felt that the role of a Special Rapporteur was not to force certain solutions on the Commission, but rather to enable the members to reach agreement by faithfully reflecting the pros and cons of a particular hypothesis.

130. As to the draft articles themselves, he said that a consensus had clearly developed in favour of including at least four of them—those on aggression, genocide, war crimes and crimes against humanity.

131. While agreeing that the definition of aggression needed further refinement, he felt that the role of the Security Council had been overemphasized in that connection since the proposed definition deliberately avoided mentioning the Council or General Assembly resolution 3314 (XXIX). He further stated that the demarcation line between the Council's competence to determine whether an act of aggression had been committed and that of any court that applied the Code would

[67] *Yearbook... 1994*, vol. II (Part Two), p. 60.

[68] See footnote 33 above.

[69] See footnote 58 above.

emerge gradually, as specific cases were considered, but there was no way the Council could take over the functions of a court since it had no authority over individuals.

132. He noted that there was general agreement that the Code should include genocide and war crimes, which had been sufficiently codified in legislative texts.

133. As regards systematic or mass violations of human rights, he said that it was for the Commission to decide whether a single atrocity committed against a sole individual could be so shocking as to constitute an offence against mankind as a whole and, if so, to abandon the massive criterion and to revert to the broader term "crimes against humanity" initially proposed by the Special Rapporteur.

134. With regard to intervention, threat of aggression and recruitment of mercenaries, he felt that there seemed to be ample grounds for deleting the relevant articles since no strong arguments had been advanced in their favour. As regards intervention, he said that the view of some members who characterized it as a crime against the peace and security of mankind was not widely shared. Regarding the threat of aggression, the Special Rapporteur suggested abandoning the notion in view of the difficulty of producing a suitable definition that would be acceptable to Governments. As to recruitment of mercenaries, he felt that this could be linked to the crime of aggression.

135. As for the other four crimes—racial discrimination, colonial domination, international terrorism and illicit traffic in narcotic drugs—he noted that further consideration would be required to determine whether these controversial crimes should be retained.

136. Noting the historical relevance of the term "apartheid", he felt that serious consideration should be given to defining and including in the Code the crime of "institutionalized racial discrimination".

137. Similarly noting the historical relevance of colonial domination, he suggested that the Commission could either consider as sufficient its inclusion as an international crime in article 19 of part one of the draft on State responsibility[70] or endeavour to draft a better definition for purposes of the Code.

138. If the crime of international terrorism were to be retained in the Code, he felt that it would be necessary to draft a more precise definition.

139. Given the limited support for the inclusion of illicit drug trafficking as a crime against the peace and security of mankind, he felt that pending the formulation of a generally acceptable definition, the question had to be kept in abeyance.

[70] See footnote 39 above.

4. Action taken by the Commission at the current session

140. The Commission decided at its 2387th meeting to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration on second reading as a matter of priority in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary, on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and at its discretion deal with all or part of the elements of the following draft articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism). The Commission further decided that consultations would continue as regards articles 25 (Illicit traffic in narcotic drugs) and 26 (Wilful and severe damage to the environment).

141. With regard to article 26, the Commission decided at its 2404th meeting to establish a working group that would meet at the beginning of its forty-eighth session to examine the possibility of covering in the draft Code the issue of wilful and severe damage to the environment, while reaffirming the Commission's intention to complete the second reading of the draft Code at that session in any event.[71]

142. At the 2408th meeting of the Commission, the titles and texts of articles adopted on second reading by the Drafting Committee (A/CN.4/L.506 and Corr.1) were introduced by the Chairman of the Committee, who indicated that the Drafting Committee had devoted 17 meetings to the consideration of the articles referred to it and had adopted for inclusion in part one: articles 1 (Scope and application of the present Code), 5 (Responsibility of States), 5 *bis* (Establishment of jurisdiction), 6 (Obligation to extradite or prosecute), 6 *bis* (Extradition of alleged offenders), 8 (Judicial guarantees), 9 (*Non bis in idem*), 10 (Non-retroactivity), 11 (Order of a Government or a superior), 12 (Responsibility of the superior), and 13 (Official position and responsibility); and, for inclusion in part two: articles 15 (Aggression) and 19 (Genocide).

143. The Commission considered the report of the Drafting Committee at its 2409th and 2410th meetings. It noted that the report was of an interim character as some of the articles may call for review and should in any event be accompanied by commentaries. It accordingly decided to defer the final adoption of the above articles until after the completion of the remaining articles and to confine itself at the present session to taking note of the report of the Drafting Committee as reflected in the relevant summary record.

[71] See *Yearbook . . . 1995*, vol. I, 2404th meeting, paras. 51-53.

Chapter III

STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

A. Introduction

144. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons".[72] The General Assembly, in paragraph 7 of resolution 48/31, endorsed the Commission's decision on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly.

145. At its forty-sixth session, in 1994, the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic.[73] The General Assembly, in paragraph 6 of its resolution 49/51, endorsed the intention of the Commission to undertake work on the topic, on the understanding, once again, that the final form to be given to the work on this topic shall be decided after a preliminary study is presented to the Assembly, and requested the Secretary-General to invite Governments to submit by 1 March 1995 relevant materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.

B. Consideration of the topic at the present session

146. At the present session, the Commission had before it the first report of the Special Rapporteur on the topic (A/CN.4/467), which it considered at its 2385th and 2387th to 2391st meetings, held on 17 May and between 19 and 30 May 1995. A summary of the Commission's debate is to be found in subsection 1 below.

147. At its 2393rd meeting, on 1 June 1995, the Commission decided to establish a working group on this topic.[74] The Working Group was entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action.

148. The report of the Working Group, which is annexed to this report, was examined by the Commission at its 2411th and 2413th meetings, held on 5 and 7 July 1995. A summary of that debate is to be found in subsection 2 below. At the concluding stage of its consideration of the topic, the Commission took the decision reflected in subsection 3 below.

1. The first report of the Special Rapporteur

(a) *Presentation of the first report by the Special Rapporteur*

149. The Special Rapporteur pointed out that the topic under consideration stood at the point where two other topics previously considered by the Commission intersected, namely the question of nationality, including statelessness, and the question of State succession. The consideration of those questions had led to the adoption of the Convention on the Reduction of Statelessness, the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter referred to as the "1983 Vienna Convention"). In the opinion of the Special Rapporteur, however, the topic under consideration fell more within the branch of international law concerning nationality rather than within State succession. In comparison with the topic of "Nationality, including statelessness", it was both broader, since it covered all of the issues resulting from changes of nationality and not simply statelessness, and more limited, since it covered only changes of nationality resulting from State succession and thus having the character of collective naturalizations.

150. The Special Rapporteur emphasized that, in contrast to international treaties or debts, which entailed an international legal relation subject to transfer, nationality, being essentially a matter for internal law, was always inherent in character and excluded a priori any notion of "substitution" or "devolution".

151. With regard to the Commission's working method, the Special Rapporteur advocated a flexible approach, involving codification and progressive devel-

[72] *Yearbook . . . 1993*, vol. II (Part Two), p. 97, document A/48/10, para. 440.

[73] *Yearbook . . . 1994*, vol. II (Part Two), p. 179, document A/49/10, para. 382.

[74] For the composition of the Working Group, see paragraph 9 above.

opment of international law. As to the form which the outcome of the work on the topic might take, the Special Rapporteur recalled that the Commission had agreed to postpone a decision on that point and that the General Assembly would take its decision only after a preliminary study was submitted to it.

152. The Special Rapporteur considered that, in order to ensure uniformity of terminology, the Commission should continue to use the definitions it had formulated previously in the context of the 1978 and 1983 Vienna Conventions, particularly with regard to the basic concepts, defined in article 2 of both Conventions, and especially the definition of the expression "succession of States". As explained in paragraphs (3) and (4) of the commentary, the expression was used as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event, the word "responsibility" not being intended to convey any notion of "State responsibility".[75] The Commission had considered that expression preferable to such expressions as "replacement in the sovereignty in respect of territory". The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" were merely consequential upon the meaning given to the expression "succession of States".

153. Chapter I of the report, entitled "Current relevance of the topic", mentioned some of the international bodies that had concerned themselves with the problem of nationality in relation to recent territorial changes. It highlighted the importance of the problem from the point of view of the practical needs of the international community and spoke of international symposia and meetings whose records might benefit the Commission in its work on the topic.

154. Chapter II, on the concept and function of nationality, stressed the need to draw a clear distinction between the nationality of natural persons and that of legal persons. As to the nationality of natural persons, the various components of the concept of nationality had been identified by ICJ in the *Nottebohm* case. According to the definition given by the Court, nationality was

> a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.[76]

155. The Special Rapporteur emphasized that the concept of nationality could be defined in widely differing ways, depending on whether the problem was approached from the standpoint of internal law or international law. Seen from the standpoint of international law, to the extent that individuals were not direct subjects of international law, nationality was the medium through which they could normally enjoy benefits from international law, whereas, in internal law, the function of nationality was different and there could be various categories of "nationals", as had been the case in the federal States of Eastern Europe.

156. Legal persons needed a nationality for the purposes of the application of international law and, more particularly, of diplomatic protection, but the analogy between natural persons and legal persons should not be taken too far. It was the usual practice of States to specify the categories of legal persons they considered as having their nationality for the purposes of the application of a particular treaty or of a domestic law. Since a legal person could have links with several States, a balance had to be struck between various factors in order to determine its nationality. In the opinion of the Special Rapporteur, a study of the effects of State succession on the nationality of natural persons was more urgent and should take priority over the separate problem of the nationality of legal persons.

157. Chapter III, on the roles of internal law and international law, pointed out that the identification of a State's nationals fell within the internal law of that State, not within international law, including in the case of State succession. As confirmed by article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, by PCIJ in the advisory opinions with regard to the *Nationality Decrees issued in Tunis and Morocco*[77] and on the question concerning the *Acquisition of Polish Nationality*,[78] and the Judgment of ICJ in the *Nottebohm* case,[79] it was for the internal law of the predecessor State to determine who had lost its nationality and for the internal law of the successor State to determine who had acquired its nationality, following the change. The idea that, in exceptional cases, individuals could possess a nationality for international purposes in the absence of any applicable nationality law raised a particularly important question in the context of State succession, namely the existence of two distinct concepts of nationality—one under international law and another under internal law. The elements and function of the former still had to be clarified.

158. While the freedom of action of the State with regard to nationality was not absolute, international law introduced only two types of limitations, first, the delimitation of competence between States, and second, the obligations associated with the protection of human rights. International law could in no case substitute for internal legislation by indicating which individual was or was not a national. It was exercised through customary rules—still quite rudimentary—and treaty rules aimed at the harmonization of national legislations with a view to eliminating, *inter alia*, statelessness and dual nationality.[80] Those treaty rules could not only provide guidance

[75] *Yearbook . . . 1974*, vol. II (Part One), document A/9610/Rev.1, p. 175.

[76] *Nottebohm, Second phase, Judgment, I.C.J. Reports, 1955*, pp. 4 *et seq.*, at p. 23.

[77] *P.C.I.J. 1923, Series B, No. 4*, p. 24.

[78] Ibid., *No. 7*, p. 16.

[79] See footnote 76 above.

[80] Conventions cited by the Special Rapporteur included the Convention on Certain Questions relating to the Conflict of Nationality Laws, its Protocol relating to Military Obligations in Certain Cases of Dual Nationality, its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, the Convention relating to the Status of Stateless Persons, the Convention on the Reduction of Statelessness, and certain regional conventions.

for national legislators in search of solutions to problems arising from territorial change, but also, where the predecessor State was bound by them, be binding on successor States under the rules of international law applicable to State succession in respect of treaties.

159. The Convention on Certain Questions relating to the Conflict of Nationality Laws also mentioned "the principles of law generally recognized with regard to nationality" as being among the limitations to which the freedom of States was subjected in the area of nationality, but remained silent on the precise content of that concept, which the Commission might usefully try to spell out.

160. The limitations on the freedom of States in the area of nationality, discussed in chapter IV of the report of the Special Rapporteur, included, first of all, those stemming from the principle of effective nationality based on the concept of a genuine link[81] and then the limitations resulting from some obligations of States in the field of human rights. In that context, the report mentioned article 15 of the Universal Declaration of Human Rights[82] and articles 8 and 9 of the Convention on the Reduction of Statelessness. The Commission could, in the Special Rapporteur's opinion, study the precise limits of the discretionary power of the predecessor State to deprive the inhabitants of the territory it had lost of its nationality, as well as the question whether an obligation of the successor State to grant its nationality to those inhabitants could be deduced from the principles set out in the relevant conventions.

161. With regard to categories of succession, the subject of chapter V, the Special Rapporteur held the view that the problems of nationality arising in the context of different types of territorial change must be addressed case by case in order to establish whether the principles pertaining to universal succession applied *mutatis mutandis* to the effects of partial succession on nationality. He pointed out that the 1978 Vienna Convention differentiated between succession in respect of part of territory, newly independent States, and uniting and separation of States, but that the 1983 Vienna Convention subdivided those categories in the following manner: so far as succession in respect of part of territory was concerned, it dealt separately with the case where part of the territory of a State was transferred to another State, with the case where a dependent territory was integrated with a State other than the colonial State, and with the case where a part of the territory separated and united with another State; so far as the separation of States was concerned, the latter Convention differentiated between the separation of part or parts of the territory of a State and the dissolution of a State. In the Special Rapporteur's view, those categories were more appropriate for the purposes of the study of the impact of State succession on nationality, inasmuch as the continuity or discontinuity of the international personality of the predecessor State in cases of secession or dissolution of States had direct implications in the area of nationality, and the issues which arose in the first case were by nature rather different from those which arose in the second case. Moreover, in the case of a uniting of States, a distinction should be made between, on the one hand, the situation in which a State united freely with another State, so that it alone disappeared as a subject of international law—the "absorption" hypothesis—and, on the other, the situation in which the two predecessor States united to form a new subject of international law and therefore both disappeared as sovereign States.

162. The Special Rapporteur recommended, on the one hand, that the nationality issues which had arisen during the decolonization process should be studied only in so far as such study shed light on nationality issues common to all types of territorial change and, on the other, that only the case of a succession of States occurring in conformity with international law should be considered.

163. With regard to chapter VI, concerning the scope of the problem under consideration, the Special Rapporteur noted that, *ratione materiae*, a change of sovereignty affected all individuals susceptible of losing the nationality of the predecessor State and all individuals susceptible of obtaining or acquiring the nationality of the successor State—two categories of individuals that would not necessarily be identical. *Ratione materiae*, it should be determined to what extent the loss of the nationality of the predecessor State occurred automatically, as a logical consequence of the succession of States, and to what extent international law restricted the predecessor State's freedom of action in regard to withdrawal of its nationality. Acquisition of the nationality of the successor State could also be a source of problems, for instance, where two or more successor States came into being on the dissolution of a State and the range of individuals susceptible of acquiring the nationality of any one of them had to be defined. Questions arose such as whether an obligation to negotiate should be imposed on the States concerned, with a view to resolving nationality issues by mutual agreement or whether a right of option should be envisaged, as it recently had been by the Arbitration Commission of the Conference on Yugoslavia. Lastly, in the view of the Special Rapporteur, the scope of the study *ratione temporis* should exclude questions relating to changes of nationality that occurred prior to or following the date of the succession of States. It should not be forgotten, however, that successor States often took time to adopt their laws on nationality and that, in the interim period, problems concerning nationality could arise which, though not resulting directly from the change of sovereignty, none the less deserved the Commission's attention.

164. In regard to chapter VII, entitled "Continuity of nationality", the Special Rapporteur stressed that neither practice nor doctrine provided a clear answer to the question whether the rule of the continuity of nationality, which formed part of the regime of diplomatic protection, applied in the event of involuntary changes in nationality brought about by State succession. There were good reasons for answering that question in the negative. It should perhaps therefore be included in the scope of the topic under consideration.

[81] See, for instance, the Judgment of ICJ in the *Nottebohm* case (footnote 76 above).

[82] General Assembly resolution 217 A (III).

(b) *Summary of the debate*

(i) *General observations*

165. The Special Rapporteur was generally praised for his comprehensive, clear and stimulating first report on a complex topic.

166. Nationality, it was stated, stood at a crossroads between domestic law, private international law and public international law. It also stood, as pointed out by the Special Rapporteur, at the crossroads of three significant branches of international law: nationality law, the law of State succession and international human rights law. In that connection, it was considered important not to give undue weight to the law on nationality and to take due account of the humanitarian needs of the matter. A firm approach to the question was also recommended.

(ii) *Preliminary study requested by the General Assembly and outcome of the Commission's work on the topic*

167. The view was expressed that the preliminary study requested by the General Assembly should not be of an abstract and academic nature, but should rely on recent State practice and focus on the advantages and drawbacks of the actual solutions adopted by States. The Special Rapporteur, while acknowledging that national legislation should be closely examined in due course, cautioned the Commission against setting itself up as a court of State practice in the area of nationality.

168. Some members held that the Commission should present the General Assembly with a number of options and possible solutions, but there was also the view that it would be preferable to merely identify the problems as a first step. According to another view, the Special Rapporteur's first report as such should be regarded as constituting a preliminary study, on the understanding that the reactions of members should be reflected in the report of the Commission to the General Assembly.

169. Some members made preliminary remarks on the issue of the outcome of the work on the topic. It was felt that the elaboration of a treaty was a lengthy process which could not respond to the present and pressing need of certain States for criteria that should guide their conduct in the area under consideration. The point was further made that the outcome of the Commission's earlier work on State succession suggested the need for the utmost prudence before embarking on the elaboration of new instruments.

170. It was suggested that the Commission should draw up a list of principles to be laid down in agreements concluded between States. It was also proposed that the Commission should focus on general factors or criteria, which States would be free to adapt to specific cases. Another suggestion was to consider a series of presumptions, for instance, the presumption that every person has the right to a nationality, that every person has, in fact, a nationality, that no person should become stateless as a result of State succession, that a nationality acquired as a result of State succession is effective from the date of succession, and that the nationality of a person is that of the strongest attachment.

171. As to the method of work, the idea was expressed that the Commission might adopt a mixed approach in its consideration of the topic, in other words, it could base itself partly on *lex lata* and partly on *lex ferenda.*

(iii) *Terminology*

172. On the question whether the Commission should, as proposed by the Special Rapporteur, retain the definition of the term "succession of States" embodied in the 1978 and the 1983 Vienna Conventions, a view was expressed that, since nationality was a matter that fell essentially within the sovereignty of a State, a formula like "the replacement of one State by another in sovereignty in respect of territory" would be more appropriate. That proposal gave rise to objections. It was said, in this connection, that the definition under the 1978 and the 1983 Vienna Conventions, unlike the proposed substitute, had proved its worth, was in common use in inter-State practice, and was adapted to very different situations, including decolonization.

173. The question was also raised whether it might not be preferable to start out with special definitions suited to the topic under consideration.

(iv) *Categories of succession*

174. The point was made that the Commission should clearly set forth the various categories of State succession it would analyse. While it was argued that, for this purpose, the Commission should draw elements from both the 1978 and the 1983 Vienna Conventions, support was also expressed for the Special Rapporteur's recommendation that the Commission consider the existing categories of succession laid down in the 1983 Vienna Convention, but making a clear distinction between unification and absorption. That Convention, it was stated, was the right instrument to follow because, in principle, the problems of succession with respect to matters other than treaties which had an impact in both the internal and the international domain were in a certain sense closer to problems regarding nationality. It was also noted that the clear distinction made in the more detailed typology of the 1983 Vienna Convention between cases of State succession where the predecessor State disappeared and cases where such a State continued to exist was of some importance as far as nationality was concerned.

175. Agreement was also expressed with the Special Rapporteur's recommendation that, as had been the case with regard to its previous work on State succession, the Commission should leave aside cases of unlawful succession which presented additional problems outside the scope of the topic under consideration. It was nevertheless recognized that such exclusion did not rule out the possibility that particular solutions applicable in cases of lawful State succession might also be applicable in the

case of unlawful succession. The remark was made in this context that it was precisely in the latter case that criteria for State conduct were in need of elaboration in order to prevent human rights violations.

176. The Special Rapporteur's suggestion that, as the decolonization process had now been completed, the Commission should limit its study to issues of nationality that had arisen during that process only in so far as it was necessary to shed light on nationality issues common to all types of territorial change was supported by some members but questioned by others.

(v) *Treatment of natural persons and legal persons*

177. Several members agreed with the Special Rapporteur's recommendation that the Commission should deal separately with the nationality of natural persons and that of legal persons and should concentrate first on the former. It was argued, in particular, that natural persons—that is to say the population—constituted one of the essential elements on which the very existence of a State depended, that natural persons were more likely than legal persons to suffer in the event of a succession of States and that legal persons did not necessarily have the same nationality in all their legal relations.

178. There was also the view that, even if the Commission dealt first with the nationality of natural persons, it should not ignore legal persons. The point was made that, while some legal systems did not regulate the nationality of corporations internally, international law did, for its own purposes, attribute to such legal persons a nationality which was likely to be affected by State succession. It was further remarked that the problem of the nationality of legal persons was perhaps not so different from that of the nationality of natural persons and consequently that the Commission should, from the very beginning, seek to determine whether there were common principles applicable to the nationality of both legal and natural persons.

179. The point was also made that, because the relevant practice of States presented many common elements, the issue of the nationality of legal persons offered more fertile ground for codification in the traditional sense than that of the nationality of natural persons, which, due to the wide variety and sensitiveness of individual situations, required a case-by-case approach and would be more appropriately dealt with in the framework of a study.

(vi) *The question whether the Commission should address the issue of the rule of the continuity of nationality in the case of State succession*

180. Several members agreed that the consequences of State succession on the right to diplomatic protection merited some attention. In particular, it would be appropriate, it was said, to make the rule of continuity apply only to situations where a change of nationality came about through the free choice of an individual and not as a result of a transfer of territory. The Commission was, however, cautioned in that regard against the temptation to embark on consideration of the law of diplomatic protection in its entirety.

181. It was pointed out that the problem of continuity had two aspects: continuity in respect of acts occurring prior to the date of the succession; and continuity as between the date of succession and the date when issues of nationality were settled. With regard to the latter, it was felt that any subsequent resolution of such issues should be deemed to operate retroactively to the date of succession.

(vii) *Scope of the topic* ratione temporis

182. It was considered necessary to provide for a transitional regime to be applied while legislation on nationality was being prepared in a successor State or during negotiations with a view to agreement on the attribution of nationality following a succession of States or while the individual was exercising his right of option.

(viii) *Respective roles of internal law and international law in matters of nationality*

183. There was broad agreement with the Special Rapporteur's contention that, while nationality was essentially governed by internal law, international law imposed certain restrictions—albeit few—on the freedom of action of States and that it was precisely this limited role of international law in the specific context of State succession which was to be the focus of the Commission's work. It was pointed out, in this connection, that under international law it should be possible to question certain negative effects of internal law on nationality in the event of a succession of States, such as statelessness and dual nationality. Support was also expressed for the concept of nationality for international purposes discussed in the report.

184. There was, however, also a view that the role played by international law, including human rights law, should not be overemphasized, since both the literature and jurisprudence had recognized the exclusive character of the competence of the State in determining which individuals were its nationals.

185. With regard to the effects of international law on internal law in regard to nationality, the question was raised whether it would not be possible, in cases of extreme gravity, to claim, under international law, that acts carried out under internal law were null and void, such as the case where the decision to divest certain natural persons of their nationality was an element in the persecution of an ethnic minority.

(ix) *The principle of effective nationality*

186. Several members highlighted the importance of the principle of effective nationality. It was emphasized, in particular, that if a right to nationality was recognized there was still a need for a genuine link to be established between the person and the State of his nationality. The Commission, it was said, could help to pinpoint the

concept of a genuine link more than ICJ had done in the *Nottebohm* case[83] and, to that end, should be guided by the concept of "rules of attachment" or "criteria of attachment". It was also proposed that the criteria for establishing a genuine link for each different category of State succession should be studied. The remark was made in this context that an individual's emotional attachment to a particular country was an element that should not be overlooked.

187. There was also the view that, outside the framework of diplomatic protection, the principle of effective nationality lost its pertinence and scope, as was borne out, in particular, by the arbitral award in the *Flegenheimer* case[84] and judgment of the Court of Justice of the European Communities in case No. C-369/90.[85]

(x) *Human rights considerations*

188. A number of members stressed that the development of human rights law imposed new limits on the discretionary power of States with regard to nationality.

189. The principle of the right to a nationality was regarded as central to the work. A State succession, it was said, could not leave millions of people without a nationality, and it was therefore up to the international community to introduce rules whereby they would be recognized as having a nationality. Special emphasis was placed on article 15 of the Universal Declaration of Human Rights.[86] It was also noted that the International Covenant on Civil and Political Rights reflected a marked reluctance to recognize a right to nationality as a general rule but that, under article 24, paragraph 3, every child was guaranteed the right to acquire a nationality; that raised the question whether there was not a distinction between the rights of adults and those of children in the matter. For those who favoured a broad interpretation of human rights, the rights that children were recognized as having should, indeed, be extended to adults.

190. Other comments included (*a*) the remark that, if there was a human right to a nationality, there should be a concomitant obligation on States to negotiate so that the persons concerned could acquire a nationality—an obligation the Commission should stress; and (*b*) the observation that the relationship between the rights of minorities and nationality issues needed to be further explored.

191. In response to the suggestion that the Commission should address the problem of the existence, in certain States, of different categories of nationals, it was stated that the Commission should deal with the general concept of nationality and recall that international law imposed on all States obligations of non-discrimination, including in the area of nationality.

(xi) *The right of option*

192. The question was raised whether the right of option was recognized under contemporary international law and agreement was expressed, in this connection, with the Special Rapporteur's recommendation that the concept should be clarified. While the view was expressed that the Commission should, on the basis of State practice, endeavour to strengthen the right of option, it was also said that there could be no unrestricted free choice of nationality and that the factors which would indicate that a choice was bona fide should be identified and the State must respect and give effect to them by granting its nationality.

(c) *Comments of the Special Rapporteur following the discussion*

193. In his summing-up of the discussion, the Special Rapporteur observed that the obligation on States to negotiate—on which a consensus had emerged within the Commission—was not simply the counterpart of the right to a nationality but was also laid down in the 1983 Vienna Convention, which provided for the settlement of certain questions relating to succession by bilateral agreement and set forth certain general principles to be applied in that connection. As to the humanitarian aspect of the matter, the Special Rapporteur considered that it should not take precedence over other considerations. He also pointed out that it was not possible in the event of a collective change of nationality to apply automatically all the principles set forth in the human rights instruments in order to resolve individual cases. As to the final form of the Commission's work on the topic, he said that, if the Commission wished to lay down certain general principles for submission to States, a declaration would be the appropriate instrument, whereas if it concentrated on a specific area, for instance, statelessness, it could contemplate a more ambitious instrument or even an amendment or optional protocol to the Convention on the Reduction of Statelessness.

2. Consideration of the report of the Working Group on State succession and its impact on the nationality of natural and legal persons

194. At the 2411th meeting of the Commission, the Special Rapporteur and Chairman of the Working Group on State succession and its impact on the nationality of natural and legal persons introduced the report of the Working Group (A/CN.4/L.507).[87] He explained that the Working Group had focused on the obligation of successor and predecessor States to negotiate and to resolve by agreement problems of nationality in a case of State succession—an obligation which appeared as a corollary of the right of every individual to a nationality—and had proceeded from the obligation of the States concerned to prevent statelessness. A prior obligation was to consult in order to determine whether a change in the interna-

[83] See footnote 76 above.

[84] UNRIAA, vol. XIV (Sales No. 65.V.4), pp. 327 *et seq.*

[85] *Recueil de la jurisprudence de la Cour et du Tribunal de première instance, 1992-7*, judgment of 7 July 1992, *Mario Vicente Micheletti e.a.* v. *Delegación del Gobierno en Cantabria.*

[86] See footnote 82 above.

[87] For the text of the report of the Working Group, see the annex to the present document.

tional status of a territory had undesirable consequences with regard to nationality. Thus, the obligation to negotiate did not have an absolute character.

195. The negotiations should address not only the problem of statelessness but also other issues related to the acquisition or loss of nationality (separation of families, military obligations, pensions and other social security benefits and the right of residence).

196. The Working Group had classified the various types of State succession in three groups, namely cases of secession and transfer of part of a State's territory where the predecessor State continued to exist; cases of unification, including absorption where the predecessor State ceased to exist; and cases of dissolution where the predecessor State ceased to exist but more than one successor State emerged from the change. The specific circumstances of the natural persons whose nationality status would be affected had also been classified in a number of groups as indicated in paragraph 10 of the report. Paragraphs 11 to 20 contained the Working Group's conclusions on obligations and rights of predecessor and successor States. On the right of option, the Working Group's conclusions were reflected in paragraph 21 of the report.

197. As regards other criteria applicable to the withdrawal and granting of nationality, the Working Group had agreed that, while withdrawal of, or refusal to grant a specific nationality in hypotheses of State succession should not rest on ethnic, linguistic, religious, cultural or other criteria, a successor State should be allowed to take such criteria into consideration, in addition to criteria envisaged by the Working Group in paragraphs 12 to 21 of its report, for enlarging the circle of individuals entitled to acquire its nationality.

198. As to the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality, the Working Group had, on a very preliminary basis, formulated certain hypotheses as reflected in paragraph 29 of its report.

199. Finally, the Working Group had examined the question of continuity of nationality. Bearing in mind that the purpose of the rule of continuity was to prevent the abuse of diplomatic protection by individuals acquiring a new nationality in the hope of strengthening their claim thereby, the Working Group had agreed that the rule should not apply when the change of nationality was the result of State succession.

200. The Special Rapporteur added that the fact that the question of the nationality of legal persons had not been addressed by the Working Group at this stage should not be interpreted as reflecting unawareness on its part of the importance of the question.

201. In the course of the debate, the report of the Working Group was described as a concise and stimulating document of high calibre which reflected a great intellectual effort, provided a sound basis for further work, offered realistic solutions to a difficult problem and neatly categorized the issues and policies involved. The results achieved were viewed as more positive than might have been expected at such an early stage and in relation to a largely unexplored area and the remark was made that anyone reading the literature on nationality and State succession was bound to realize that the Working Group's efforts constituted a refreshing breakthrough.

202. Regret was, however, expressed by one member that the report should amount to little more than a summary of the Special Rapporteur's first report and failed to provide the concrete guidelines which the Commission needed to engage in practical work and move away from the realm of theory. Emphasis was placed on the need to provide concrete illustrations of the experience of States. Concern was expressed in this connection that too little attention had been paid to the hardships associated with colonial situations, from which useful lessons could be drawn, and that an unduly prominent place had been given to the experience of eastern European States. A comprehensive study of national legislation and State practice was viewed as all the more necessary as nationality involved economic, social, cultural and political aspects.

203. As regards the general approach to the work at hand, the remark was made that the topic involved both codification (inasmuch as fundamental human rights covered by *jus cogens* were involved) and progressive development (as far as matters of succession of States were concerned).

204. Some members noted that, instead of identifying "issues" and then proceeding to the formulation of recommendations to deal with such issues, the report listed a number of "obligations" which, in the view of the Working Group, should be assumed by States to avoid statelessness. The remark was made that the Working Group should have clarified the sources and rules of law underlying such a system of "obligations" and indicated, wherever it found current law to be inadequate, the ways towards progressive development consistent with realistic expectations. Regret was also expressed that no answer should have been provided to the question whether any of those "obligations" corresponded to provisions in treaties, whether in force or not, nor to the question of how relevant State practice could be ascertained. Concern was expressed that to speak of obligations at the current early stage, before State practice or *lex lata* was clear, might cause confusion; if the Working Group's intention was to suggest guidelines on the basis of which certain *lex lata* could be developed by States themselves, it should not be speaking about hard obligations and rights.

205. With respect to the scope of the topic, some members regretted that the report of the Working Group was not more explicit on the subject of legal persons. This subject was viewed as important in practical terms and interesting from the legal standpoint, and as being in much greater need of codification than was that of natural persons. The remark was made in this context that legal persons should not be allowed complete freedom to elect the nationality of the country in which they wished to carry out their activities. The members in question asked when the subject of legal persons would be taken up and noted that the Working Group, despite the terms of its mandate, had not provided a calendar of action.

Other members took the view that the question of legal persons was a separate and highly specific one which should only be considered at a later stage. There was also a view that this question did not need to be dealt with by the Commission inasmuch as multinational corporations had the means to take care of their own interests.

206. The question whether the issue of dual nationality should be addressed under the topic gave rise to different views. It was considered, on the one hand, as of particular interest to certain developing countries because it was tied in with decolonization and, on the other hand, as irrelevant to the present exercise, which aimed at preventing statelessness resulting from State succession.

207. With reference to the statement in paragraph 4 of the report of the Working Group that every person whose nationality might be affected by the change in the international status of the territory had the right to a nationality and that States had the obligation to prevent statelessness, the remark was made that the principle of the individual's right to a nationality would undoubtedly come to be incorporated in many national legislations. It was also said that if the basic principle that States, including new States, were under an obligation to avoid statelessness in situations of State succession was not at present a rule of international law, it should be the aim of the Commission to make it one.

208. The obligation to negotiate and to resolve problems by agreement (paragraphs 5 to 7 of the report) was viewed by some members as a good starting point. Attention was drawn to concrete cases of State succession where the various problems had been resolved by arrangements—arrived at through consultation and diplomatic exchanges—that were humane yet entirely consonant with the national interest. It was also said that the obligation to negotiate was very important not only as a means of preventing statelessness but also with regard to all matters pertaining to State succession inasmuch as, in the area of State succession, the will of States as well as any agreements between them had to prevail. Specific comments on paragraphs 5 to 7 included, concerning paragraph 5, the comment that the obligation to negotiate went further than the obligation to consult "in order to determine whether the change in the international status of the territory had undesirable consequences with respect to nationality" and that States had an obligation to do everything possible to stabilize the territories concerned by providing "safeguards" for the population; the observation that the issue of relations with third States was of particular importance and that the question arose whether the agreement referred to in paragraph 6 should be entered into by the predecessor State and the successor State alone or whether a third State closely concerned by a nationality problem should also be a party to such an agreement; and the remark that the issues listed in paragraph 7 (dual nationality, military obligations and right of residence) had no direct bearing on legal provisions regarding nationality and should not therefore be among the issues which States were supposed to negotiate between themselves.

209. As regards paragraph 8 and subsequent paragraphs (dealing with guidelines for the negotiation between States concerned), the general remark was made that care should be taken not to reverse the respective roles of the State and the individual.

210. With reference to the classification of persons affected by secession and transfer of part of a State's territory, contained in paragraph 10, concern was expressed that subparagraphs (*a*) and (*b*) seemed to confer on *jus soli* the status of a kind of peremptory norm of general international law, whereas subparagraph (*c*) dealing with acquisition of nationality on the basis of *jus sanguinis* was much more convoluted. The notion that persons had, by virtue of international law, the nationality of the territory in which they were born and could acquire a nationality by virtue of *jus sanguinis* could not, it was stated, be viewed as a rule of international law: instead nationality flowed from national laws within a general flexible framework posed by international law. The Commission was therefore invited to start from the premise that individuals had the nationality of the predecessor State and to avoid drawing firm distinctions about the way nationality was acquired.

211. The concept of "secondary nationality" referred to in paragraphs 10, subparagraphs (*e*) and (*f*), 11 (*d*) and 14 (*e*) was queried by several members. The remark was made that this notion could only apply in the context of federal States (even though it was alien to many such States) and that it was confusing: the notion that there could be different degrees of nationality under international law and that nationality could refer to different concepts was viewed as questionable. It was also stated that if a person lived in a new State B and had the secondary nationality of that State, there was no reason why State A should be prevented from withdrawing its nationality at the end of a given period, and that the obligations upon the predecessor State under paragraph 11 (*d*) were perhaps too stringent.

212. As regards the categories of persons to whom the right of option should be accorded, the view was expressed that the circle of such persons should be restricted or at the very least leave out persons who had secondary nationalities. According to another opinion, an additional category of persons should be added, perhaps under section B.2 (*a*) (iii) (Obligation of the predecessor and the successor States to grant a right of option), as follows: "Persons having acquired the nationality of a third State on the basis of the principle of *jus sanguinis* and residing in the successor State". Reservations were expressed on the reference in paragraph 14 (*a*) to "persons born in what had become the territory of the successor State and residing in . . . a third State" and the criterion of residence in a third State was viewed as irrelevant in the case in point. Several members felt that a reasonable time-limit should be envisaged for the exercise of the right of option and that a time-frame should also be provided for in connection with the issues discussed in paragraphs 15 and 22 of the report.

213. As regards the legal basis of a right of option, the view was expressed that, while the granting of such a right was desirable, the notion did not necessarily reflect *lex lata* and pertained to the progressive development of international law. The title of section B.2 (*c*) (ii) "Obligation of the successor States to grant a right of option"

was therefore viewed as misleading and furthermore inconsistent with the use of the word "should" in paragraph 21. The basis on which the nationality of the predecessor State had been initially acquired was furthermore considered as of doubtful relevance for the purpose of the right of option.

214. With respect to the question of the scope of the right of option, addressed in section B.3 of the report, several members cautioned against an unduly broad approach. The right of option, it was stated, dealt with a very precise matter, the possibility of making either a positive choice or renouncing a nationality acquired *ex lege*. Emphasis was also placed on the need not to reverse the roles: State succession was a matter for States and, notwithstanding legitimate human rights concerns, it was questionable whether the will of individuals could or should prevail in all cases over agreements between States as long as such agreements fulfilled a number of requirements. The view was also expressed that the last sentence of paragraph 23 which read "States should . . . not be able, as in the past, to attribute nationality by agreement *inter se* against an individual's will" raised the question of the device (plebiscite, questionnaire, etc.) through which States would be expected to consult individuals.

215. Some members, however, took the view that the right of option was anchored in the structure of international law and should, in the context of State succession, be considered as a fundamental human right similar to the right to freedom. It was also said that the right of option of the individual should not be subject to the right of the State to determine nationality and that the State should exercise its right in the interest of nation-building judiciously, bearing in mind, for instance, the principle of the unity of the family.

216. Section B.5 of the report, on the consequences of non-compliance with the principles applicable to the withdrawal or the granting of nationality, was viewed by several members as calling for further reflection. The remark was made that the focus should be on codification of issues pertaining to State succession and not on codification of issues relating to nationality and that, by veering off, as it did in paragraph 29 of its report, into issues of nationality, the Working Group was taking considerable risks, in particular by according third States the right to judge the actions of predecessor or successor States which had failed to comply with the principles applicable to the withdrawal or granting of nationality. No principle of international law, it was stated, enabled a third State to interfere in problems which a priori concerned the predecessor and successor States alone.

217. With reference to paragraph 30 of the report, the remark was made that although the principles governing international responsibility would apply automatically, they would not suffice, since they governed only inter-State relations.

218. As for section B.6, the distinction made in paragraph 31, subparagraphs (*a*), (*b*) and (*c*), was viewed as unnecessary since the Working Group's conclusion set out in paragraph 32 was that, in any event, the rule of continuity did not apply in the context of State succession.

219. One member observed that allowing a successor State, as provided in paragraph 27 of the report, to take into consideration ethnic, linguistic, religious, cultural or other similar criteria for the purpose of allowing more categories of individuals to acquire its nationality might lead to improper use of those criteria and open the way to discrimination. He further observed that, since the problem of nationality and particularly of statelessness was primarily of concern to the individual, who might be left in a difficult situation for many years if the traditional method of recourse to ICJ was followed, dispute settlement arrangements including arbitration, or, possibly, recourse to the Human Rights Committee should be envisaged with a view to reaching a decision within a reasonable period of time. The Commission was furthermore invited to use prudence in invoking the *Nottebohm*[88] precedent, which related to naturalization.

220. Responding to the comments made, the Special Rapporteur noted with satisfaction that the debate had confirmed a degree of consensus on the obligation to prevent statelessness in cases of State succession and the obligation of the States concerned to negotiate to that end. The report was preliminary in character and the Working Group intended to complete its mandate the following year. The question of legal persons had not been touched upon because the report of the Special Rapporteur did not contain enough material on the matter for a meaningful discussion. The working out of a calendar of action would, similarly, have to await the completion by the Working Group of the consideration of all the issues at hand. In this connection, the Special Rapporteur pointed out that the Working Group had had little time at its disposal during the current session and that it had none the less been able to propose preliminary conclusions or hypotheses in response to questions posed in the report of the Special Rapporteur.

221. While agreeing that not everything in the Working Group's report was *lex lata* and that using the term "obligations" when speaking of guidelines was inappropriate, the Special Rapporteur pointed out that not all the principles mentioned should be regarded as principles of a merely supplementary character from which the States concerned were free to derogate by mutual agreement. Thus the fundamental principle—preventing statelessness—could not be at the discretion of States: imposing on States an obligation to negotiate and allowing them to leave millions of persons stateless as a result of those negotiations was unacceptable. He agreed on the need to fix reasonable time-limits for the exercise of the right of option. As for dual nationality, it could not admittedly be prohibited, but the guidelines were not stringent in this respect and allowed States to choose their own policy.

222. The term "secondary nationality" had been used for lack of a better one: it referred not to nationalities that had international validity but to a link between a federated entity and the individual that was of relevance for domestic law. Difficulties in this area stemmed from the different degrees of "federalization" of States.

[88] See footnote 76 above.

223. The criticism relating to an alleged overemphasis on *jus soli* did not seem valid: while it was true that the criteria used by the Working Group to define the categories of persons listed in paragraph 10, subparagraphs (*a*) to (*c*), were those customarily accepted by the countries governed by *jus soli*, the fact of birth had systematically been considered in the Working Group in conjunction with the criterion of the place of habitual residence. Furthermore, the Working Group's conclusions gave a more prominent place to the fact of national residence than to the fact of birth.

224. With regard to the right of option, the view which the Working Group had intended to convey was that, in relation to the categories of persons identified in paragraph 21 of its report, it was no longer possible to defend the absolute freedom of the State to decide the question of nationality without any regard for the will of the individual concerned; that did not imply that the individual's will had to be taken into consideration in relation to all categories of persons whose nationality was affected by a succession of States.

225. The concern that the conclusions in paragraph 27 of the report (see para. 219 above) might open the way to discrimination required further study. Nevertheless, the conclusions of the Working Group were supported by some international jurisprudence.

226. As regards the objections to which section B.5 had given rise (see para. 216 above), the Special Rapporteur stressed that the Working Group was merely presenting working hypotheses which merited further study.

227. As for the comment on section B.6 reflected in paragraph 218 above, the Special Rapporteur indicated that the distinction in question had been made in order to show that the Working Group had reviewed carefully all the issues arising from the rule of continuity before coming to its conclusion.

228. The Special Rapporteur indicated that he intended to present at the next session a report which would consist of three sections: the first would build on the report of the Working Group, taking into account the practice and doctrine relating to the nationality of natural persons; the second would address the issue of legal persons; and the third would deal with the form which the outcome of the work could take (comprehensive report containing guidelines, draft declaration and optional protocol to the Convention on the Reduction of Statelessness).

3. Action by the Commission

229. The Commission decided, on the recommendation of the Special Rapporteur, to reconvene the Working Group at the next session to complete its task, which will enable it to meet the request contained in paragraph 6 of General Assembly resolution 49/51.

Chapter IV

STATE RESPONSIBILITY

A. Introduction

230. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft articles as follows: part one would concern the origin of international responsibility; part two would concern the content, forms and degrees of international responsibility; and a possible part three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility.[89]

231. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading part one of the draft articles, concerning "the origin of international responsibility".[90]

232. The Commission, at its thirty-second session, also began the consideration of part two of the draft articles, on the "Content, forms and degrees of international responsibility".

233. From its thirty-second session (1980) to its thirty-eighth session (1986), the Commission received seven reports from the Special Rapporteur, Mr. Willem Riphagen, with reference to parts two and three of the draft articles.[91] From that time on, the Commission assumed that a part three on the settlement of disputes and the implementation of international responsibility would be included in the draft articles.

234. From its fortieth (1988) to its forty-sixth (1994) sessions, the Commission received six reports[92] from the current Special Rapporteur, Mr. Gaetano Arangio-Ruiz, who was appointed at the thirty-ninth session in 1987.

235. At the conclusion of its forty-sixth session, the Commission had provisionally adopted for inclusion in part two of the draft: articles 1 to 5[93] and articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 *bis* (Guarantees of non-repetition),[94] 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures).[95] It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action.[96] Finally, it had referred to the Drafting Committee draft article 5 *bis* (proposed by the current Special Rapporteur for inclusion in part two)[97] and draft articles 1 to 6 of part three, and an annex thereto, concerning dispute settlement procedures,[98] also

[89] *Yearbook... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

[90] *Yearbook... 1980*, vol. II (Part Two), pp. 26-63.

[91] The seven reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook... 1980*, vol. II (Part One), p. 107, document A/CN.4/330;

Second report: *Yearbook... 1981*, vol. II (Part One), p. 79, document A/CN.4/344;

Third report: *Yearbook... 1982*, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2;

Fourth report: *Yearbook... 1983*, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;

Fifth report: *Yearbook... 1984*, vol. II (Part One), p. 1, document A/CN.4/380;

Sixth report: *Yearbook... 1985*, vol. II (Part One), p. 3, document A/CN.4/389;

Seventh report: *Yearbook... 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

[92] The six reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1;

Second report: *Yearbook... 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1;

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

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

Fifth report: *Yearbook... 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3; and

Sixth report: *Yearbook... 1994*, vol. II (Part One), document A/CN.4/461 and Add.1-3.

[93] For the text of articles 1 to 5 (para. 1), see *Yearbook... 1985*, vol. II (Part Two), pp. 24 *et seq.*

[94] For the text of article 1, paragraph 2, and articles 6, 6 *bis*, 7, 8, 10 and 10 *bis*, and commentaries thereto, see *Yearbook... 1993*, vol. II (Part Two), pp. 54 *et seq.*

[95] For the text of articles 11, 13 and 14, see *Yearbook... 1994*, vol. II (Part Two), pp. 151-154, footnote 454. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12.

[96] See *Yearbook... 1994*, vol. II (Part Two), p. 151-152, para. 352.

[97] For the text of draft article 5 *bis* as proposed by the Special Rapporteur, see footnote 130 below.

[98] For the text of draft articles 1 to 6 and the annex of part three proposed by the current Special Rapporteur, see *Yearbook... 1993*, vol. II (Part Two), pp. 43 *et seq.*, footnotes 116, 117, 121 to 123 and 125.

proposed by the current Special Rapporteur and to be considered by the Drafting Committee together with the proposals of the previous Special Rapporteur on the same subject.[99]

B. Consideration of the topic at the present session

236. At the present session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/469 and Add.1 and 2).[100] The report dealt, on the one hand, with the question of the legal consequences of internationally wrongful acts characterized as crimes under article 19 of part one of the draft[101] and, on the other hand, with the settlement of disputes relating to the legal consequences of an international crime. The first question was addressed in six new draft articles to be included in part two as articles 15 to 20[102] and the second in a new draft article 7 to be included in part three of the draft.[103]

237. After considering the seventh report of the Special Rapporteur, the Commission referred the articles contained therein to the Drafting Committee (see subsection 4 below).

238. The Commission furthermore received from the Drafting Committee a set of articles and an annex thereto for inclusion in part three of the draft concerning the settlement of disputes. It adopted those provisions on first reading (see subsection 5 and section C below).

1. Presentation by the Special Rapporteur of his seventh report

239. In his introduction, the Special Rapporteur stated that the seventh report dealt, on the one hand, with the special or supplementary consequences to be attached to internationally wrongful acts characterized as crimes in article 19 of part one of the draft (the normative aspect) and, on the other hand, with the machinery for the implementation of such consequences (the institutional aspect); both aspects called for a relatively high degree of progressive development. So far as the normative aspect was concerned, the report differentiated between substantive consequences (cessation and reparation) and instrumental consequences, each of those categories being divided into two subcategories, namely, special consequences (that is, aggravated forms of the consequences provided for in article 6 to 14 for delicts) and supplementary consequences (that is, new consequences additional to the first).[104]

240. So far as substantive consequences are concerned, it seemed that the obligations set forth in articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation) and 8 (Compensation) were incumbent on the perpetrator of a crime as well as on the perpetrator of a delict, the only difference being that, in the case of a crime, all States were injured States, whereas, in the case of a delict, that was only true if the obligation breached was an *erga omnes* obligation. In the case of restitution in kind, on the other hand, the *erga omnes* relationship resulting from the commission of a crime divested of any meaning the parallel drawn in the case of delicts by article 7, subparagraph (*c*), between the situation of the wrongdoing State and that of the injured States. What was needed was to require the wrongdoing State to restore as fully as possible a situation the preservation of which was in the "essential interest" of the international community, even if a heavy burden was thus placed on the wrongdoing State, the only limits being those deriving from the preservation of the existence of the State in question, the vital needs of its people and, in principle, its territorial integrity. Article 7 should be adapted to the case of crimes in one other respect, namely, the mitigation of the obligation of restitution in kind which was intended to safeguard the wrongdoing State's political independence and economic stability (subpara. (*d*)). According to the Special Rapporteur, it was not equitable to invoke the "economic stability" factor in the case of crimes, particularly if the crime enriched its perpetrator, the only limit to be imposed being that relating to the preservation of the vital needs of the people. So far as "political independence" was concerned, the Special Rapporteur considered that a distinction should be drawn between the existence of a State as a distinct sovereign entity—which would have to be preserved—and the freedom of organization of the State—which, perhaps, should not be sacrosanct, as, for instance, in the case of a despotic regime which was responsible for serious breaches of essential international obligations. Accordingly, the Special Rapporteur considered that the mitigations of the obligation of restitution contained in article 7, subparagraphs (*c*) and (*d*), should not be applicable in the case of a crime unless full compliance with that obligation would put in jeopardy either the existence of the wrongdoing State (and, perhaps, its territorial integrity) or the vital needs of its population. He also regarded as unsuited to the case of crimes the clause in article 10, paragraph 3, which ruled out any form of satisfaction that would "impair the dignity" of the wrongdoing State—a restriction that would be no more justified in the case of guarantees of non-repetition (art. 10 *bis*): a wrongdoing State responsible for a crime could not escape its obligations by invoking respect for a dignity it had itself offended. After all, in the case of crimes, demands for satisfaction and guarantees of non-repetition might affect not only the wrongdoing State's "dignity", but also its sovereignty, independence, domestic jurisdiction and liberty. It should therefore be made clear that a wrongdoing State could not benefit from mitigations

[99] For the text of draft articles 1 to 5 of part three and the annex thereto as proposed by the previous Special Rapporteur, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[100] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

[101] See footnote 39 above.

[102] For the text of these articles, see footnotes 104, 105, 109, 113, 114 and 117 below.

[103] For the text of this article see footnote 149 below.

[104] This approach is reflected in draft article 15 proposed by the Special Rapporteur which read as follows:

"Without prejudice [In addition] to the legal consequences entailed by an international delict under articles 6 to 14 of the present part, an international crime as defined in article 19 of part one entails the special or supplementary consequences set forth in articles 16 to 19 below."

deriving from principles or rules of international law relating to the protection of its sovereignty, domestic jurisdiction and freedom, the only limit being, once again, that which pertained to the safeguarding of its existence, the vital needs of its people and, in principle, its territorial integrity.[105]

241. The instrumental consequences of crimes were obviously aggravated, as compared to the consequences of delicts, by the fact that all States were entitled to resort to countermeasures against the wrongdoing State. On that point, the Special Rapporteur proposed that provisions based on articles 11[106] and 12, but duly adapted to the special nature of crimes, should be included in the draft. The adjustments in question related to the elimination of the twofold requirement of prior notice[107] and prior resort to available means for the settlement of disputes. The elimination of the latter requirement made it unnecessary to include a clause on the possibility of resort to "urgent, temporary measures as required to protect the rights of the injured State or limit the damage caused by an internationally wrongful act".[108] Such a clause would regain its full *raison d'être* in the case of crimes if, as the Special Rapporteur proposed (see para. 245 below), the lawfulness of the reaction to a crime by the injured States as a whole was made subject to the condition of a prior decision by an international body. In that context, the object of interim measures would, for example, be to secure immediate access to the victims for purposes of rescue or to prevent the continuation of a genocide, despatch humanitarian convoys, combat pollution, and so forth.[109]

242. As to the principle of proportionality, the Special Rapporteur proposed that the reference to "the effects . . . on the injured State", which appeared in article 13,[110] should be deleted from the corresponding provision concerning crimes, first, because that element of comparison gave undue weight to what was only one of the criteria for assessing the gravity of the act (a criticism that applied equally to delicts) and, secondly, because the effects of a crime—and indeed of a delict if the obligation breached was an *erga omnes* obligation—affected the community of States in varying degrees.[111]

243. It seemed that the prohibitions set forth in article 14, subparagraphs (*a*) and (*b*),[112] could apply without change to crimes, provided it was made clear that the prohibitions on the threat or use of force and on extreme economic or political measures did not apply either to the exercise of the right of self-defence or to measures decided on by the Security Council under Chapter VII of the Charter of the United Nations.[113] The prohibitions set forth in article 14, subparagraphs (*c*), (*d*) and (*e*), were equally applicable because of the importance of the "protected objects".

244. The supplementary consequences included a number of obligations which were incumbent on injured States[114] and the obligation on the wrongdoing State to

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[105] This approach found expression in draft article 16 proposed by the Special Rapporteur which read as follows:

"1. Where an internationally wrongful act of a State is an international crime, every State is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to demand that the State which is committing or has committed the crime should cease its wrongful conduct and provide full reparation in conformity with articles 6 to 10 *bis*, as modified by paragraphs 2 and 3 below.

"2. The right of every injured State to obtain restitution in kind as provided in article 7 shall not be subject to the limitations set forth in subparagraphs (*c*) and (*d*) of paragraph 1 of the said article, except where restitution in kind would jeopardize the existence of the wrongdoing State as an independent member of the international community, its territorial integrity or the vital needs of its people.

"3. Subject to the preservation of its existence as an independent member of the international community and to the safeguarding of its territorial integrity and the vital needs of its people, a State which has committed an international crime is not entitled to benefit from any limitations of its obligation to provide satisfaction and guarantees of non-repetition as envisaged in articles 10 and 10 *bis*, relating to the respect of its dignity, or from any rules or principles of international law relating to the protection of its sovereignty and liberty."

[106] See footnote 95 above.

[107] In the case of crimes, prior notice was, in the view of the Special Rapporteur, unnecessary if, as he proposed, the adoption of countermeasures against the State which perpetrated a crime had to be preceded by public debates and also dangerous to the extent that a notice addressed to the wrongdoing State could jeopardize the effectiveness of the countermeasures.

[108] See article 12, paragraph 1 (*a*), as originally proposed by the Special Rapporteur in his fourth report (*Yearbook . . . 1992*, vol. II (Part Two), p. 27, footnote 61).

[109] This approach found expression in paragraphs 1 and 2 of draft article 17 proposed by the Special Rapporteur which read as follows:

"1. Where the internationally wrongful act of a State is an international crime, every State whose demands under article 16 have not met with an adequate response from the State which has committed or is committing the crime is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to resort to countermeasures under the conditions and restrictions set forth in articles 11, 13 and 14 as modified by paragraphs 2 and 3 of the present article.

"2. The condition set forth in paragraph 5 of article 19 below does not apply to such urgent, interim measures as are required to protect the rights of an injured State or to limit the damage caused by the international crime.

"3. The requirement of proportionality set forth in article 13 shall apply to countermeasures taken by any State so that such measures shall not be out of proportion to the gravity of the international crime."

[110] See footnote 95 above.

[111] This approach is reflected in paragraph 3 of draft article 17 proposed by the Special Rapporteur (see footnote 109 above).

[112] See footnote 95 above.

[113] See in this connection draft article 20 proposed by the Special Rapporteur which read as follows:

"The provisions of the articles of the present part are without prejudice to:

"(*a*) Any measures decided upon by the Security Council of the United Nations in the exercise of its functions under the provisions of the Charter;

"(*b*) The inherent right of self-defence as provided in Article 51 of the Charter."

[114] Listed in paragraph 1 of draft article 18 proposed by the Special Rapporteur which read as follows:

"1. Where an internationally wrongful act is an international crime, all States shall, subject to the condition set forth in paragraph 5 of article 19 below:

"(*a*) Refrain from recognizing as legal or valid, under international or national law, the situation created by the international crime;

"(*b*) Abstain from any act or omission which may assist the wrongdoing State in maintaining the said situation;

(*Continued on next page.*)

accept fact-finding operations or observer missions on its territory.[115]

245. With regard to the institutional aspect, the seventh report identified the theoretically conceivable degrees of institutional involvement and described, from a more realistic point of view, a number of instances of organized reactions by the General Assembly and the Security Council to grave breaches of international obligations, while at the same time recognizing that those two organs were purely political organs and that their reactions had not been intended as specific reactions to breaches of the kind contemplated in article 19 of part one.[116] Since it did not seem realistic to entrust to international bodies all of the decisions and actions necessary for the implementation of the legal consequences of crimes, the seventh report advocated another approach whereby such bodies would be required to take a decision only as to the existence and attribution of an international crime. The possibility could be envisaged of entrusting that role to ICJ, which had the threefold advantage of possessing the necessary technical capacity, being reasonably representative and handing down its judgments with the reasons therefor in fact and law. But such a solution would be dangerous without an international institution like a department of public prosecution able to debar unsubstantiated allegations and also in view of the probable tendency of States, once ICJ had been vested with the necessary compulsory jurisdiction, to submit to the Court any issue of responsibility, even those involving a mere delict. The General Assembly, on its side, had the advantage of being representative and having broad competence *ratione materiae*, but the drawback was that it could not make a binding legal determination in the area of State responsibility. As for the Security Council, although it could, of course, take binding decisions in the area of international peace and security, it was not empowered to deal with the other areas referred to in article 19, paragraph 3, and it was not representative or technically capable of dealing with the legal issues of State responsibility. Furthermore, the Council, like the Assembly, was of an essentially political character and it did not seem to be in keeping with a sound conception of justice to entrust any of those bodies with an exclusive role in assessing issues of responsibility. The seventh report therefore proposed that the three organs should combine in taking any decision concerning the existence or attribution of a crime, each bringing into play the role that matched its own characteristics.[117] The procedure in the Court should, in the view of the Special Rapporteur, involve a judgment rather than an advisory opinion, for the reasons set out in the report. As to the regime applicable when a case was brought before the Court not on the basis of the jurisdictional link created by the future convention on State responsibility, but of conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide providing for the jurisdiction of the Court on the basis of a unilateral application, the Special Rapporteur referred to the text that he was proposing for paragraph 4 of article 19 of part two.

246. Summing up the characteristics of internationally wrongful acts classed as crimes in article 19 of part one, the Special Rapporteur emphasized that, as shown by the examples in the seventh report, such acts (*a*) infringed *erga omnes* rules, possibly *jus cogens* rules; (*b*) injured all States; (*c*) justified a generalized demand for cessation/reparation; and (*d*) possibly justified a generalized reaction by States or international bodies. The concept of a generalized reaction, underlying article 19 of part one

(*Footnote 114 continued.*)

"(*c*) Assist each other in carrying out their obligations under subparagraphs (*a*) and (*b*) and, in so far as possible, coordinate their 'respective reactions through available international bodies or ad hoc arrangements;

"(*d*) Refrain from hindering in any way, by act or omission, the exercise of the rights or powers provided for in articles 16 and 17;

"(*e*) Fully implement the *aut dedere aut judicare* principle, with respect to any individuals accused of crimes against the peace and security of mankind the commission of which has brought about the international crime of the State or contributed thereto;

"(*f*) Take part, jointly or individually, in any lawful measures decided or recommended by any international organization of which they are members against the State which has committed or is committing the international crime;

"(*g*) Facilitate, by all possible means, the adoption and implementation of any lawful measures intended to remedy any emergency situations caused by an international crime.

"2. Subject to the conditions set forth in paragraph 5 of article 19 below, the State which has committed or is committing an international crime shall not oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation."

[115] This approach is reflected in paragraph 2 of draft article 18 proposed by the Special Rapporteur (see footnote 114 above).

[116] See footnote 39 above.

[117] This approach is reflected in paragraphs 1, 2, 3 and 5 of draft article 19 proposed by the Special Rapporteur which read as follows:

"1. Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the Charter of the United Nations.

"2. If the General Assembly or the Security Council resolves by a qualified majority of the Members present and voting that the allegation is sufficiently substantiated to justify the grave concern of the international community, any Member State of the United Nations Party to the present Convention, including the State against which the claim is made, may bring the matter to the International Court of Justice by unilateral application for the Court to decide by a judgment whether the alleged international crime has been or is being committed by the accused State.

"3. The qualified majority referred to in the preceding paragraph shall be, in the General Assembly, a two-thirds majority of the members present and voting, and in the security council, nine members present and voting including permanent members, provided that any members directly concerned shall abstain from voting.

"4. In any case where the International Court of Justice is exercising its competence in a dispute between two or more Member States of the United Nations Parties to the present Convention, on the basis of a title of jurisdiction other than paragraph 2 of the present article, with regard to the existence of an international crime of State, any other Member State of the United Nations which is a Party to the present Convention shall be entitled to join, by unilateral application, the proceedings of the Court for the purpose of paragraph 5 of the present article.

"5. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfil the condition for the implementation, by any Member State of the United Nations Party to the present Convention, of the special or supplementary legal consequences of international crimes of States as contemplated in articles 16, 17 and 18 of the present part."

and ushered in by article 5 of part two (which entitled all injured States to demand cessation/reparation and resort to countermeasures), was viable only if the future convention made such a reaction subject to measures of control—and that was precisely the purpose of draft articles 15 to 20 of part two.[118] The Special Rapporteur also drew attention to the fact that the two-phase procedure provided for in draft article 19 did not involve any modification of the Charter of the United Nations or the Statute of ICJ and in no way affected the political role assigned by the Charter to the Security Council—and, to a lesser degree, to the General Assembly—in the maintenance of international peace and security, a field in which the decision would finally lie with the Council alone, but in the field of State responsibility, including cases of very serious violations of fundamental international obligations, the action of the injured States would be subordinate to a prior decision by the Court. As to the Council and the Assembly, for which paragraph 3 of article 19 sought to ensure impartiality as far as was possible, the role assigned to them by paragraph 2 of the same article fell under Chapter VI of the Charter. The Special Rapporteur emphasized in this connection that the Council's powers in the maintenance of international peace and security, as well as the right to self-defence provided for in Article 51 of the Charter, were duly preserved in article 20.

2. Consideration by the Commission of the Special Rapporteur's seventh report

247. The Commission considered the Special Rapporteur's seventh report at its 2391st to 2398th meetings, from 30 May to 9 June 1995. A summary of the discussion is to be found below.

(a) *General observations*

248. Appreciation was expressed to the Special Rapporteur for his seventh report, which was described as a most positive and valuable contribution to the law of State responsibility and as a model of legal argument which was bound to stimulate a productive and enriching debate. The Special Rapporteur was praised for his intellectual honesty and for placing the strengthening of the rule of law in international relations before the cold realism of the individual interests of States.

249. Some members, while globally endorsing the general orientation of the seventh report, which they viewed as responsive to the wishes of the Commission, queried some of its aspects. Many of the report's features, it was stated, were very attractive, but a number of them were distinctly problematical. The view was also expressed that the Special Rapporteur had relied almost exclusively on European doctrine.

250. Other members, while paying tribute to the Special Rapporteur's commendable intellectual efforts to abide faithfully by the past decisions of the Commission, queried the wisdom of those decisions and, by way of consequence, of the proposals contained in the seventh report. Those proposals were described as too broad to be realistic and as revolutionary and unattuned to States' sense of international law. Concern was expressed that the Special Rapporteur's scheme, despite its ingeniousness and boldness, could not be put into practice inasmuch as it could not affect the competence of United Nations organs as defined by the Charter of the United Nations.

251. A number of members insisted on the complexity of the topic in general and of the issues raised by the seventh report in particular. The view was expressed in this connection that, just as there had been reluctance to accept State responsibility as compatible with sovereignty, now there was equal reluctance to accept the concept of crimes of States in international law and that Governments were slow to accept more effective international law—in particular more effective machinery for its implementation. Attention was drawn to the difficulties involved in devising a legal system of State responsibility which was broadly compatible with the global legal or institutional balance secured under the Charter of the United Nations system and which preserved the international political and legal status quo, while introducing a legitimate dose of adaptability and innovation, so as to reconcile the desirable with the possible.

252. The issues involved, it was stated, posed methodological, technical and political difficulties. With regard to methodology, the Commission had, by departing from the order followed in article 19 of part one, made its task more difficult, for it would have been simpler to adapt to delicts the regime that was applicable for crimes, rather than follow the opposite approach. With regard to technique, the Commission had, by making the law on State responsibility multilateral, in keeping with the law on treaties and part one of the draft, altered the fundamental bases of machinery which, in essence, remained bipolar and had thus opened the door to many problems. The third kind of difficulty was that State crimes were internationally wrongful acts of an essentially political nature and it was very difficult to strike a proper balance between law and politics.

(b) *The concept of "State crime" as contained in article 19 of part one of the draft*

(i) *The distinction between "crimes" and "delicts"*

253. Some members contested the possibility of drawing a clear distinction between two categories of wrongful acts—"crimes" and "delicts"—in terms of their gravity. In their opinion, there was a continuum ranging from minor breaches to very serious breaches affecting the international community as a whole. Concern was expressed that the criterion of gravity necessarily implied entering the field of primary obligations in a set of rules intended to set out secondary obligations.

254. Other members considered that crimes were easily distinguishable from delicts in that they threatened the very foundations of the international community and

[118] Reproduced in footnotes 104, 105, 109, 113, 114 and 117 above.

called for a particular reaction: a breach of an international tariff clause could not, it was said, be placed on the same level as genocide or occupation of territory by another State. In the view of some of those members, a second criterion lay in the idea of fault and of criminal intent implicit in the concept of a crime. This criterion was rejected by several members for various reasons, as indicated in paragraph 265 below.

255. There was also a view that, although the distinction between delicts and crimes helped delineate the legal consequences of each category and struck a happy compromise between those who advocated a number of differentiated regimes—which would lead to fragmentation—and those who wished to encompass many breaches within a single legal regime, widespread delicts could, like crimes, threaten the very fabric of international society and elicit moral indignation.

(ii) *The legal and political basis of the concept of crimes*

256. Some members pointed out that particularly serious violations of international obligations such as genocide or aggression had become generally recognized as "crimes" when they were committed not only by individuals, but also by States. Such was, it was stated, the prevailing opinion of doctrine and the same conclusion could be inferred from the decision of ICJ in the *Barcelona Traction* case.[119]

257. Other members observed that the Nürnberg and Tokyo Tribunals had tried and punished individuals, that the international tribunals recently established by the Security Council did not have jurisdiction to try State crimes and that the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court were also intended solely for individuals. Accordingly, it was concluded that the proposal to impute crimes to States did not reflect modern State practice.

(iii) *Terminological and other aspects of article 19 of part one*

258. Some members endorsed the use of the word "crime" in article 19 of part one,[120] pointing out that this word had long been current in legal parlance and that its use would not gravely offend States. Among those members, some stressed that the term in question was merely intended to designate a particularly serious violation of international law and involved no criminal connotation whatsoever. For others, it was precisely because of its negative and condemnatory connotation and because it brought into the legal domain a moral and political element that the word "crime" was entirely appropriate to the acts concerned. In any event, it was pointed out, the word "delict" was also borrowed from the vocabulary of criminal law: the unfortunate impression was thus created that the Commission had an entirely punitive notion of international responsibility, but the terminology in question had become so commonplace that it would be counter-productive to modify it.

259. According to another view, the use of the word "crime" in article 19 was incorrect and confusing because, in many legal systems, the concept of crime marked the great divide between two entire areas of national law, i.e. a legal system intended to compensate for harm caused and a legal system intended to punish and characterized by unique features (great precision of substantial law, rigid procedures and special courts and systems of enforcement). Concern was expressed that the problem was not one of terminology, but stemmed from the fact that the present purpose of the draft remained not to compensate, but to punish.

(iv) *The concept of "State crime" in the light of the maxim* Societas delinquere non potest

260. Several members considered that it was widely accepted that States did not commit crimes. One of them pointed out that two of the three constituent elements of a State—namely, territory and population—obviously could not be imputed with responsibility for a crime and that, on the third element—organs of government—States had differing views. In any case, the State itself was exempted from criminal responsibility, for it alone was entitled to punish and could not punish itself. The view was also expressed that the State could become a tool in the hands of individuals with criminal motives and it was those individuals, not the tool they used, who should be held criminally responsible. In response to the argument that private companies could be found guilty of crimes under domestic law, the point was made that the analogy between private companies and States was extremely tenuous.

261. Other members stressed that the concept of criminal responsibility of legal persons was accepted in various legal systems and that the Nürnberg Tribunal had recognized a number of legal persons as criminals. Mention was made of the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order which invited Member States to give due consideration to making criminally responsible not only those persons who had acted on behalf of an institution or corporation, but also the institution or corporation itself.[121] The view was further expressed that States had a personality and that there was nothing unusual in the notion that States had the capacity to commit crimes.

262. The criminalization of States was also criticized by some members on account of its consequences. Concern was expressed that it might result in the punishment of an entire people—which would be particularly unfair where the State itself was the prime victim of the crime (as, for instance, in a case of genocide). The view was

[119] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

[120] See footnote 39 above.

[121] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. B, annex.

also expressed that, to use the legal fiction of "attribution" to make a State liable to compensate for damage caused by its officials was one thing, while casting the shadow of crime over the entire population of a State was quite another matter and one not sustainable either in fact or in reason. The Commission was urged not to encourage a trend to characterize certain States as "rogue" States, thereby offering powerful States a pretext to resort abusively to countermeasures or to interim measures—in other words, to self-help—either directly or in the guise of assistance to the alleged victim State.

263. Other members felt that it was preferable to designate a specific conduct of States as criminal and to regulate the consequences through judicial review and the introduction of substantive rules to spare the population of the criminal State extreme hardship rather than to leave the whole area unregulated, concealing the punitive element under the guise of restitution or guarantees against repetition. It was mentioned, in this connection, that some States had been subjected to penal consequences, sometimes exceeding those usually attached to crimes, without their actions being designated as crimes.

(v) *Relevance of the concept of fault in the present context*

264. According to some members, where crime existed, fault could not be far behind. The view was expressed in this connection that while, in the case of delicts, the responsibility of States was neither civil nor criminal, but international in nature, and set in motion by a factual occurrence—a breach of law, the concept of fault was perfectly relevant in the case of crimes and was one of the elements that distinguished a crime from a mere delict for it entailed an element of intent and deliberation.

265. Other members, as indicated in paragraph 254 above, disagreed with this view on the ground that wrongful intent was also present in a delict, albeit perhaps to a lesser extent. In their view, the distinction between crimes and delicts had to be drawn on the basis of the seriousness of the consequences and the extent of the material, legal and moral injury caused to another or other States and to the international community, whether organized or not.

266. Still other members expressed concern that the concept of fault would introduce a system of punishment into inter-State relations. They accordingly invited the Commission to stick by the basic decision taken many years ago when it had adopted article 3, subparagraph (*b*),[122] that is to say that the basis of the obligation to compensate in the whole field of State responsibility must rest exclusively on a State's breach of an international obligation, and to proceed on the premise that the purpose of the draft articles was to compensate for harm caused, the solution to breaches of great magnitude being then to ensure that the draft allowed for the imposition of compensation of equal magnitude.

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

(vi) *The question of the implementation of the concept of criminal responsibility of the State*

267. Some members took the view that international society was not currently structured to deal with "crimes". Others called on the Commission to explore, in a constructive spirit, the possibility offered by the present organization of international society. The views expressed in this connection are reflected in more detail in paragraphs 304 to 317 below.

(vii) *Possible alternatives to the concept of State crime*

268. Some members felt that there was no need to resort to the controversial concept of "State crime" to respond to the preoccupations underlying article 19 of part one. It was stated that, if the first objective was deterrence, the best way of achieving it was to attribute criminal responsibility to the individuals from the offending State who had decided to commit the wrongful act. The view was expressed in this connection that, by recognizing the possibility of the criminal responsibility of State leaders, the Commission had surely taken a step far more threatening to potential criminals in positions of power than the recognition of the criminal responsibility of States. The question was further raised whether it was possible to identify acts likely to be recognized by States as crimes or as extremely serious violations of *erga omnes* obligations that did not constitute a threat to peace and security or a breach of the peace and, as such, fell within the competence of the Security Council: if the answer was in the negative, the concept of State crime served no useful purpose and it was preferable to rely on the existing machinery which was beginning to work.

269. Other members took the view that neither the acknowledgement of the existence of individual criminal responsibility nor the fact that the Commission had, in its work on the draft Code of Crimes against the Peace and Security of Mankind, adopted the approach of dealing with individual criminal responsibility detracted from the validity of the concept of State responsibility for crimes. The concept of State crime, it was stated, was embodied in article 19 of part one, which had been adopted unopposed and it was hardly admissible continually to go back on past decisions.

(c) *The consequences of internationally wrongful acts characterized as crimes in article 19 of part one of the draft*

(i) *The relationship between the legal regime of the consequences of "crimes" and other existing or prospective legal regimes*

270. Emphasis was placed on the distinction to be made between State responsibility for crimes and individual criminal responsibility under the future Code of Crimes against the Peace and Security of Mankind. The view was expressed in this connection that (*a*) the range of crimes under the draft Code and the range of conduct that could be characterized as crimes under the draft on

State responsibility did not coincide; (*b*) that the international responsibility of States from the standpoint of the draft under consideration did not result from the criminal responsibility that might be incurred by individuals under the Code; and (*c*) that the international responsibility of States arising from acts or omissions characterized as international crimes did not require the crimes in question to be identified and precisely defined. It was none the less pointed out that all crimes against the peace and security of mankind were crimes under international law and entailed the criminal responsibility of the perpetrators and that there were certain consequences for the draft on State responsibility.[123] In order to draw a clear line between crimes under the Code and crimes under the future convention on State responsibility, it was suggested that the present draft should include a saving clause concerning any question that might arise as a result of responsibility incurred in the case of the commission of a crime against the peace and security of mankind.

271. Some members also wondered about the relationship between the draft under consideration and the system under the Charter of the United Nations for the maintenance of international peace and security. The following questions were raised in this connection. If, in the context of a "crime", a countermeasure was taken by a State against another State, would that constitute a threat to peace which could trigger an intervention by the Security Council? If only few States became parties to the possible future convention on the topic, would not the system that would be put in place itself represent a potential threat to international peace and security? If such a system were established, would it not be necessary to make it very clear that amendments to the Charter would have to be made or at least considered? Lastly, given the fact that the Charter contained not only institutional arrangements relating to the Council and the General Assembly, but also fundamental principles of contemporary international law (domestic jurisdiction, territorial integrity, political independence), would an amendment of those provisions also become necessary?

272. The question was also raised , given the imperative constitutional role of the Security Council in connection with the maintenance of international peace and security, whether there was anything left for the Commission to consider in connection with the topic under consideration[124] and whether there was any State conduct properly to be considered, given the tendency of the Council to be rather liberal in characterizing acts as constituting a threat to the peace. In reply, attention was drawn, in connection with the first point, to the many international instruments which had taken the precaution of preserving the competence of the Council—and there was nothing to prevent such a course being taken. As to the second point, it was recognized that the effect of subordinating the future convention to the provisions of the Charter on the maintenance of international peace and security, expressly recognized in article 4 of part two,[125] combined with the still embryonic tendency of the Security Council and the General Assembly to broaden the notion of a threat to the peace, was to restrict the scope of the law on responsibility for a crime. It was none the less commented that the Commission could usefully study fields in which there was controversy about the limits of the Council's competence.

(ii) *The concept of "injured State" for the purpose of the determination of the legal consequences of acts characterized as crimes in article 19 of part one*

273. Several members noted that, from the fact that a crime was a breach of an *erga omnes* obligation and from paragraph 3 of article 5 of part two,[126] the Special Rapporteur had logically drawn the conclusion that, in the case of crimes, all States were "injured States". In their view, however, this did not mean that all States had the same entitlements in terms of the substantive and instrumental consequences of a crime and article 5 needed to be revised accordingly. In this connection, it was recalled that, in the commentary to article 5, the Commission had clearly recognized that the legal consequences of an international crime required further elaboration and distinctions and that article 5, paragraph 3, did not prejudice the extent of the legal consequences which were attached to the commission of an international crime, a matter to be dealt with in the framework of part two of the draft.[127]

274. A number of members considered that, in view of the gravity of crimes and the severity of the special or supplementary consequences they entailed, very serious difficulties might arise from a universalization of the status of injured State. In this connection, it was stressed that such a universalization would take the form, as far as substantive consequences are concerned, of an unacceptable multiplicity of claims and enable all States, under the regime of State responsibility, to take the same type of action as could be taken by the Security Council in the discharge of its collective security responsibilities, with the consequential risk of conflict between States and the Council.

[123] Reference was made in this connection to paragraph 2 (*d*) of article 10 on satisfaction (footnote 94 above). In the case of crimes, it was stated, punishment was a necessity and the punishment could be inflicted not only by the State in question, but also internationally.

[124] The view was also expressed in this connection that, while not all international crimes necessarily endangered international peace and security, those which spontaneously came to mind did so.

[125] Which read as follows:

"The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security." (See footnote 93 above.)

Originally adopted as article 5, for the commentary, see *Yearbook . . . 1983*, vol. II (Part Two), p. 43. See also draft article 20 proposed by the Special Rapporteur and reproduced in footnote 113 above.

[126] Which read as follows:

"3. In addition, 'injured State' means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States." (See footnote 93 above.)

[127] See *Yearbook . . . 1985*, vol. II (Part Two), p. 27, para. (28).

275. Other members warned against overestimating the risks involved in a broad interpretation of the concept of "injured State" in the context of crimes. It was stressed, on the one hand, that the draft articles ruled out any use of armed force, which was governed by the relevant provisions of the Charter, and, on the other, that the competence of the Security Council with regard to the maintenance of peace and the evolving interpretation of the concept of "threat to peace" had the effect of transferring power to respond to quite a few of the most serious violations of international law to the international community. In this context, attention was drawn to article 4 of part two.[128]

276. According to a third view, the option to resort to countermeasures was open to all States in case of a breach of any *erga omnes* obligation: that, it was stated, confirmed that the concept of crimes served no useful purpose.

277. Attention was also drawn to another difficulty that might arise as a result of the universalization of the status of injured State if the regime for the consequences of crimes was to be embodied in a treaty. The view was expressed in this connection that, if one started from the premise that, when an international crime was committed, all States were injured States, any State, even one not bound by the future convention, could resort to countermeasures, the result being that the treaty would function for the entire community of nations, not just the States Parties. Furthermore, since the treaty would confer upon the General Assembly the power to take certain decisions by a two-thirds majority, such decisions might quite conceivably be made by non-party States. In the light of the above, the suggestion was made to have the part of the draft on crimes adopted as a separate instrument by the Assembly, it being understood that all Member States would subsequently be bound by it.

278. In response to a view expressed on the possibility of differentiating between various categories of injured States, the Special Rapporteur indicated that, if there were marked differences in certain cases (aggression, marine pollution of coastal waters, and the like), the same was not true in the case, for instance, of impairment of the global commons. In his opinion, the basic premise should be that, in the case of a crime, all States were legally injured, as clearly flowed from the concept of *erga omnes* obligations recognized by ICJ in the *Barcelona Traction* case.[129] He agreed that the draft article 5 *bis* he had proposed in his fourth report in 1992[130] offered only a partial reply to the question of the extent to which States were on an equal footing in terms of the right to claim cessation or reparation and to resort to countermeasures. He suggested the possible approach of recognizing that, while all injured States were equally entitled to demand cessation/reparation and eventually to take countermeasures, they were not necessarily entitled to demand for themselves or to take measures for their own material benefit, but they were entitled to act for the benefit of each injured State in so far as it was injured. In this context, he also drew attention to paragraph 1, subparagraphs (*c*), (*f*), and (*g*), of his proposed draft article 18.[131]

279. A number of members felt that the Special Rapporteur's essential postulate—that all States were injured by an international crime—was unfounded and that a clear differentiation between States directly injured and those acting as *defensores legis* was called for. The need to differentiate between directly and indirectly injured States was viewed as relevant both to the substantive and to the instrumental consequences of crimes.

280. As regards the substantive consequences, the view was expressed that, while all States injured by a crime should be entitled to demand that the author State desist from its unlawful course of action, those States which had not suffered material damage should not be entitled to obtain reparation to the same extent or in the same form as those which had. The view was expressed in this context that to allow 185 individual States to make specific demands for far-reaching guarantees of non-repetition would lead to a chaotic situation and that a decision by an appropriate organ of the international community was required.

281. As to the instrumental consequences of crimes, some members considered it appropriate to authorize all States, under the conditions provided for in article 17, to resort to countermeasures because the effect of acting as a deterrent and exerting pressure would thus be considerably increased. Disagreement was, however, expressed with the view that the implementation of such consequences should remain in the hands of States: the reaction to grave violations of international law was already, in the words of one member, a joint reaction by States and the United Nations and should continue to be so.

(iii) *The draft articles proposed by the Special Rapporteur for inclusion in part two*[132]

a. Draft article 15

282. Most of the members who commented on draft article 15 generally agreed with the Special Rapporteur that, since a crime as defined in article 19 of part one was a particularly serious breach of an international obligation essential for the protection of fundamental interests of the international community, it was quite normal and logical that it should entail all the consequences of delicts in addition to supplementary and aggravated consequences. The bracketed alternative "In addition" was therefore considered preferable to the phrase "Without prejudice".

[128] See footnote 125 above.

[129] See footnote 119 above.

[130] See footnote 92 above. Draft article 5 *bis* read as follows:

"Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles."

[131] See footnote 114 above.

[132] See footnote 118 above.

b. Draft article 16

283. Several members noted that the Special Rapporteur had analysed the substantive consequences of an international crime by going through the substantive consequences of a delict, namely, cessation, restitution, compensation, satisfaction and guarantees of non-repetition, and making the necessary adjustments—reflecting aggravated responsibility—in the text already adopted on first reading for delicts.[133]

284. The conclusions of the Special Rapporteur and his proposed modifications met with a wide measure of support. They also gave rise to reservations, however. The Commission was invited to bear in mind that the purpose of draft articles was not to punish, but to compensate for damage caused and to remember, in dealing with matters of fundamental importance to the relations between States in respect of which there was no clear guidance in treaties, general practice accepted as law or authoritative judicial or arbitral decisions, that there were fundamental principles of modern international law concerning the status, independence and integrity of all States set out in Article 2 of the Charter of the United Nations which must remain the legal parameters for the Commission's work. It was therefore considered essential to exclude any unduly excessive provision that would encroach on the rules and principles of international law relating to the protection of the sovereignty, independence and stability of the offending State.

285. The view was also expressed that, while the Special Rapporteur's proposed adjustments would not be inappropriate if it was decided to have a category of "crimes", they did not justify the existence of such a category and that a creative reading of paragraph 2 (*c*) of article 10 on satisfaction[134] (bearing in mind that article 13 on proportionality[135] would operate as a limitation), a loosening of the constraint imposed by paragraph 3 of article 10 through the inclusion therein of the phrase "subject to the gravity or breadth of the effects of the wrongful act" and the idea of exemplary damages had greater potential than the quantum leap proposed.

286. Concerning cessation, the few members who commented on the text proposed by the Special Rapporteur agreed with him that there was no reason to change article 6 or make it more stringent.[136] One of them, however, suggested that, in the case of a crime, the injured State should be able to request urgent action or support by the appropriate international institution, whether global or regional.

287. As regards restitution in kind, doubts were expressed as to its relevance in the context of crimes: the demand addressed to South Africa for an end to racial discrimination, cited as an example by the Special Rapporteur, was viewed as a demand for future action, not for restitution. The concept of restitution in full was furthermore queried in the light of the sad experience of the settlement reached under the Treaty of Versailles, which, it was stated, had become one of the causes of the Second World War. It was suggested that it should be stipulated that restitution in kind should be materially feasible and morally tolerable.

288. The proposed waiver of the mitigating factors provided for, in the case of delicts, by article 7,[137] was extensively discussed. Comments focused on the preservation of the independence of the State, of the vital needs of its population and of its territorial integrity.

289. As regards the first point, it was considered reasonable and logical that the consequences of a crime should not jeopardize the existence of the wrongdoing State. The opinion was, however, expressed that, in fact, the question did not arise because it was difficult to see how restitution in kind, namely the re-establishment of the pre-existing situation, might deprive a State of its status as an independent member of the international community or, for that matter, of part of its territory. On the other hand, the views expressed by the Special Rapporteur on the issue of political independence as opposed to political regime gave rise to reservations. Concern was expressed that, in the absence of a regime of international responsibility that had been worked out carefully enough, the distinction between political independence and freedom of organization would encourage highly subjective assessments. That distinction also gave rise to reservations on the grounds that any restriction on freedom to choose a political regime necessarily jeopardized political independence. It was suggested that emphasis should be placed less on the regime than on the leaders.

290. The limitations regarding the vital needs of the population did not give rise to objections. Reference was made in this context to the Security Council resolutions on Iraq, under which Iraq was required to pay only 30 per cent of its oil revenues to the United Nations Compensation Fund.[138] Some members nevertheless questioned whether it was possible to impose serious economic consequences on the wrongdoing State without endangering the vital interests of its population. In practice, it was stressed, the population, particularly in developing countries, was much more likely to be more painfully affected by the consequences of a crime than the individuals or groups of individuals who were in power and that was an added reason for aggravating the penalties laid down in the future Code of Crimes against the Peace and Security of Mankind. It was therefore considered essential to explain the meaning and scope of the expression "vital needs of the population" so that restitution in kind did not result in a massive violation of the fundamental political, social and economic rights of the population—which was what article 14 on prohibited countermeasures was designed to prevent.[139]

291. On the preservation of territorial integrity, the doubts expressed by the Special Rapporteur were shared by several members. The question was raised whether, in

[133] Article 19 of part one (see footnote 39 above).

[134] See footnote 94 above.

[135] See footnote 95 above.

[136] See footnote 94 above.

[137] Ibid.

[138] Established by Security Council resolution 692 (1991) of 20 May 1991.

[139] See footnote 95 above.

the case where a State committed genocide against part of its population claiming the exercise of the right to self-determination and the international community took action against that State, the exercise of the right of self-determination should be entirely ruled out for the victim population. In referring to that case, some members warned against the temptation of attaching more importance to the principle of territorial integrity than to other equally basic principles. Others considered that it was not for the Commission to ask that kind of question: it was pointed out, first, that it would be inconceivable for a judicial body to sever part of a State's territory on the basis that the right of self-determination justified it and, secondly, that such a severance could be decided only by the Security Council and, perhaps, the General Assembly for the purpose of maintaining international peace and security and that the Commission must not be concerned with the exercise by United Nations bodies of their constitutional powers.

292. It was also noted, with regard to restitution in kind, that paragraph 2 of article 16 failed to draw a distinction between directly and indirectly injured States. To cure this shortcoming, it was suggested that the words "where appropriate" be included in that paragraph after the word "obtain".

293. As regards compensation, several members disagreed with the Special Rapporteur's view that article 8[140] did not call for any adaptation. Thus, the view was expressed that, after major disasters like the Second World War, it was generally impossible for full compensation to be paid for all of the harm done and that the relevant article should be drafted accordingly. According to another trend, the question of "punitive" or aggravated damages deserved to be closely studied in the case of crimes. It was recalled in this context that punitive damages had been granted in the *S. S. "I'm alone"* case[141] and claimed in a number of other cases.[142]

294. The Special Rapporteur's approach was furthermore criticized on the ground that it did not differentiate between the directly injured State and other injured States. It was considered highly debatable that the latter, which, by definition, had sustained only "juridical damage", should be entitled to receive a sum of money as compensation.

295. With regard to satisfaction and guarantees of non-repetition, the Special Rapporteur's explanations and proposals were viewed by several members as logical and legitimate in letter and spirit. Reservations were, however, expressed on the waiver of the limitation relating to the dignity of the wrongdoing State. The view was expressed that the dignity of a wrongdoing State could only be impaired by prosecution before an international criminal court—a very remote possibility in present-day international society—and that any action short of such prosecution was likely to impair the dignity of innocent people and not of the guilty parties. Doubts were also voiced on the provision whereby a State which had committed an international crime was not entitled to benefit from any rules or principles of international law relating to the protection of its sovereignty and liberty. This provision, it was stated, would irreversibly undermine the reservation set forth in paragraph 3 of draft article 16, on the preservation of the existence of the State as an independent member of the international community and it was better to ensure that the persons responsible were punished and removed from power. In this context, emphasis was placed on the need to establish coordination, in connection with measures to be applied to the persons responsible, between the draft Code of Crimes against the Peace and Security of Mankind and the draft on State responsibility. A third criticism was that the Special Rapporteur's suggestions could not be dealt with in the context of a bilateral relationship between States of the sort to which his suggested rules were essentially confined.

296. Other comments on article 16 included the view that there did not seem to be any reason to make the presentation of a demand for cessation conditional upon a prior determination by ICJ under paragraph 5 of article 19 of part two.[143]

c. Draft article 17

297. Few members chose to comment on this article, one of the reasons mentioned being that the Commission had not yet adopted all the articles on the instrumental consequences of delicts.

298. Several members recalled their reservations on the admissibility of dealing in the draft articles on State responsibility with countermeasures. Concern was expressed that, too often, such measures legitimized power play and coercive measures rather than promoting the equity and justice essential for a new world order. The practice whereby the claimant State acquired the status of a judge in its own cause was viewed as particularly suspect and emphasis was placed on the need for a careful structuring of the restraints in the interests of sovereign equality, territorial integrity, political independence and the regulation of international relations on the basis of international law, equity and justice. The view was however expressed that, although the formulations worked out for delicts in articles 11 to 14[144] were too open, permissive and lax, they were suitable, or almost so, for crimes.

299. With regard to paragraph 2, the concept of "interim measures" gave rise to objections. It was said in particular that the difficulties inherent in that concept, which had been borrowed from Article 41 of the Statute of ICJ, had already been considered and that concept had been rejected twice by the Drafting Committee in the context of delicts.

[140] See footnote 94 above.

[141] Decisions of 30 June 1933 and 5 January 1935 (Canada *v.* United States of America) (UNRIAA, vol. III (Sales No. 1949.V.2), pp. 1609 *et seq.*, in particular, p. 1611).

[142] See, for example, the pleadings of the United States in the case concerning the *Aerial Incident of 3 July 1988* (*Islamic Republic of Iran* v. *United States of America*) (*Order of 13 December 1989, I.C.J. Reports 1989*, p. 132) and the pleadings of Nicaragua in the last phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Merits, Judgment, I.C.J. Reports 1986*, p. 14).

[143] See footnote 117 above.

[144] See footnotes 95 and 96 above.

300. As to paragraph 3, the arguments put forward by the Special Rapporteur in support of the deletion, in the case of "crimes", of the clause "the effects . . . on the injured State", as contained in article 13, were viewed as unconvincing. It was emphasized that there were precedents which militated in favour of the retention of the clause in the case of delicts, such as the *case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*,[145] and that the lack of precedent in relation to "crimes"—a newly invented concept—in itself indicated a dearth of interest on the part of States.

d. Draft article 18

301. General comments on the draft article included the observation that some of its provisions failed to make a distinction between the rights of the State whose individual rights were violated and the rights of other States and the view that some of the wording had more to do with the rules on the maintenance of international peace and security than with the law of State responsibility.

302. As regards paragraph 1, it was pointed out that the requirement of a prior decision of ICJ for the obligations listed to come into effect would have an adverse effect on the effectiveness and promptness of the reaction. The question was further asked why the obligation in subparagraph (*a*) should be subject to a decision of ICJ—an observation which was also made in relation to subparagraph (*b*). Also on subparagraph (*a*), the view was expressed that there did not appear to be any reason to confine nullity or non-recognition to international crimes: nullity seemed to apply to cases in which the internationally wrongful act took the form of legislation even if there was no allegation of criminal conduct and international practice was replete with examples of cases in which non-recognition was called for even though there had been no determination that a given line of conduct, though illegal, was criminal. This view was considered as also applicable to subparagraph (*b*) and, possibly, subparagraph (*c*). With reference to subparagraph (*c*), the question was asked whether all States would be under an obligation to cooperate in whatever countermeasure was decided by any one State as long as it was not a prohibited countermeasure and even if they deemed the countermeasure inadequate or excessive. This question was not just an academic one, because all injured States were entitled to address to the wrongdoing State very onerous demands of disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, adoption of laws affording adequate protection for minorities and establishment of a form of government not incompatible with fundamental freedoms, civil and political rights and self-determination. As regards subparagraph (*e*), the reference to the obligation fully to implement the *aut dedere aut judicare* principle was viewed as out of place. It was further suggested to replace the latter part from the word "individuals" by "individuals whose crimes gave rise to the international responsibility of the State". Subparagraph (*f*) was viewed as an unnecessary duplication of those provisions of the constituent acts of international organizations which conferred a power of decision on specific organs of the organization. It was at the same time criticized as going much too far in placing on States an obligation to comply with the "recommendations" of international organizations and the wishes of any particular political group.

303. With respect to paragraph 2, the view was expressed that demands for fact-finding operations or the sending of observer missions should not be left to the discretion of individual States, but should emanate from the international community.

e. Draft article 19

i. General observations on the institutional scheme proposed by the Special Rapporteur

304. The Special Rapporteur's institutional scheme, which consisted in a two-phase procedure in which the General Assembly or the Security Council would make a preliminary political assessment and ICJ a decisive pronouncement on the existence/attribution of an international crime, was viewed by a number of members as having many positive features. Those members, while recognizing that the proposed system was somewhat bold, considered that it would be reasonable to submit it to States with a view to the progressive development of international law and that the Commission would be discredited if, having taken nearly a quarter of a century to elaborate a draft on State responsibility, it did not include an institutional mechanism of the type proposed. According to one view, that mechanism was in fact modest in that it was designed to apply to crimes alone, and that was already a concession to the sacrosanct sovereignty of States. The Commission, it was stated, should not be overly concerned with realism lest it might become an accomplice of those States which refused to accept the jurisdiction of the competent international organs not only to evade the consequences of their acts, but also to retain complete freedom of action. The members in question considered that intervention by a political organ and then by a judicial organ provided a firm guarantee against arbitrary action. The view was expressed in this context that the idea of compulsory third-party involvement had found expression in a number of instruments and was therefore not revolutionary. Also in support of the Special Rapporteur's scheme, it was observed that, although the precondition of an expression of "concern" by the General Assembly or the Security Council and of a finding of "guilt" by a judicial body operated with regard to sanctions which all States could then take on their own authority, that did not affect the powers of the Security Council acting under Chapter VII of the Charter of the United Nations. Along the same lines, the Special Rapporteur's scheme was viewed as convincing and reasonable inasmuch as (*a*) it was part of the existing institutional framework; (*b*) it made the best possible use of the possibilities offered by the United Nations system; (*c*) it respected the competence of the United Nations bodies that were in a position to intervene; and (*d*) it was responsive to the need to ensure a rapid reaction to a crime in that (i) it gave States the

[145] UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 417.

possibility to apply such urgent interim measures as were required to protect the rights of an injured State or to limit the damage caused by the international crime (draft article 17, paragraph 2); (ii) it provided for an obligation of States to participate in action by an international organization and to facilitate action intended to remedy emergency situations (draft article 18); and (iii) it created no obstacle to the implementation by the injured States of the legal consequences flowing from delicts. The members in question, while aware that the proposed scheme was not without shortcomings and expressing readiness to consider alternative approaches, warned that the Commission could not at this stage expect more than imperfect solutions reflecting the international community's strengths and weaknesses.

305. Other members drew attention to what they considered as serious flaws in the Special Rapporteur's scheme. A first criticism related to the cumbersome nature of the system which might well paralyse the response to the "heinous wrongful act" and largely divest of their substance draft articles 16 to 18, which, paradoxically, made the response to crimes subject to far stricter conditions than the response to delicts. A second criticism related to the underlying assumption that States would accept the compulsory jurisdiction of ICJ for crimes under Article 36, paragraph 2, of the Statute of ICJ. Such an assumption, it was stated, was unrealistic, particularly with regard to articles of so vast a scope as those under consideration, and condemned the proposed system to being no more, at the present stage of development of international society, than an optional system. A third criticism concerned the extent to which the proposed procedures were compatible with the Charter of the United Nations. Detailed views on this point are reflected in paragraph 307 below. A fourth criticism related to the practical effects of the envisaged scheme: it was asked what incentive the injured State had to trigger a cumbersome procedure which would not end up in a decision on the merits or a solution to the crime, and whether it would not be contrary to the maxim *ex turpi causa non oritur actio* to allow the wrongdoing State to invoke that procedure, thus delaying resort to countermeasures directed against it. A fifth criticism related to the need to develop a complex and perplexing new system to deal with so-called "crimes" if it could be established that wrongful acts categorized as the most serious breaches constituted threats to the peace and could as such be dealt with by a mechanism already in place.

ii. The role assigned to the General Assembly, the Security Council and ICJ under the proposed scheme

The roles of the General Assembly and the Security Council

306. While the view was expressed that it was entirely possible to entrust the General Assembly or the Security Council with tasks which, though not expressly provided for in the Charter of the United Nations, were none the less in conformity with their general role, serious doubts were expressed on the proposed involvement of those two organs in the implementation of the special legal consequences deriving from crimes. While the great political value of the Assembly's recommendations was acknowledged, the possibility of incorporating them in an institutional procedure was queried. It was also recalled that there were many cases where the Assembly had passed over glaring violations in silence, mostly for political reasons. The question was furthermore asked whether action by the Assembly could result in the case having to be brought before the Court where the wrongdoing State was not a party to the future convention. As for the Council, its function was also viewed as purely political. Concern was expressed that the suggestion that the Council or the Assembly should consider whether a "crime" would justify the grave concern of the international community would mean that the Council or the Assembly would become involved in the legal field in that they would be enabled to exercise a de facto judicial function which was incumbent *ipso facto* on an international judicial body. The question therefore arose whether such a suggestion did not give rise to questions of compatibility with the Charter and it was pointed out that questions of interpretation or review of the Charter fell outside the Commission's mandate. Concern was also expressed about a system which would give the Assembly and the Council powers that were not set out in the Charter, namely, the power to establish the mandatory jurisdiction of the Court with respect to crimes: no comparable powers, it was stated, were conferred on United Nations organs by the Convention on the Prevention and Punishment of the Crime of Genocide or the International Convention on the Suppression and Punishment of the Crime of Apartheid, which the Special Rapporteur had cited in support of his proposed scheme. Lastly, a note of warning was sounded against overlapping jurisdictions which might entail the risk of slipping from the universe of reparations into that of sanctions.

307. Incompatibilities between the Special Rapporteur's scheme and specific provisions of the Charter of the United Nations were mentioned as follows:

(*a*) The possibility offered to accusing States to seize the Council and the Assembly at the same time was inconsistent with Article 12 of the Charter and entailed a risk of conflicts between the two organs which Article 12 was precisely designed to avert—conflicts which, notwithstanding the Special Rapporteur's view to the contrary, could not be settled by the Court, bearing in mind the spirit of the decision taken at San Francisco not to provide for some form of review of actions taken by the political organs of the United Nations;

(*b*) Under Articles 24 and 39 of the Charter, the role of the Security Council should be confined to determining the existence of any threat to the peace, breach of the peace or act of aggression;

(*c*) The requirements as to majority laid down in draft article 19, paragraph 2, were not in conformity with Articles 18 and 27 of the Charter: in the case of the General Assembly, it was for that body to determine, under Article 18, the questions for which a two-thirds majority was required. In the case of the Security Council, the concluding clause of draft article 19 which read "provided that any members directly concerned shall abstain from voting" was viewed as incompatible

with Article 27, paragraph 3, bearing in mind, *inter alia*, that the Security Council would often be acting under Article 39, which was in Chapter VII of the Charter: the view was expressed in this connection that a decision according to which a State was subjected to the jurisdiction of ICJ necessarily fell within the scope of Chapter VII, as did any decision relating to a threat to the peace (the type of situation which the concept of "crimes" was intended to cover), so that the permanent members, under Article 27, would be able to exercise their veto; the question then arose whether a State could bind itself, with regard to future determinations, not to use its veto power. The view was expressed in this context that the voting requirements provided for in paragraph 3 of draft article 19 were either consonant with the Charter—in which case they were unnecessary—or inconsistent with the Charter, in which case they could not be adopted, bearing in mind Article 103 of the Charter. It was also said that, even if the veto of a permanent member could be averted under Article 27, paragraph 3, the member's allies among the permanent members could act in its stead.

The role of the International Court of Justice

308. Some members welcomed the role assigned to the Court under the Special Rapporteur's scheme. While they recognized that the judicial phase would probably take time, they suggested various ways of expediting the procedure, such as increasing the number of judges, appointing an ad hoc chamber and making changes to the procedure. The possibility was also mentioned of having recourse to existing international courts either at the regional level (in the human rights field, for example) or within the framework of specific regimes, (in particular, that of the law of the sea).

309. Other members took the view that the Special Rapporteur's scheme placed too much reliance on the Court. The view was expressed that it took the Court an average of four years to give its judgment in any given case and that, since no less care or time would have to be given to a matter as serious as an allegation of a crime of State, procedural innovations of the type referred to above were highly unlikely to have any effect on the length of the proceedings—not to mention the fact that some of those innovations might require an amendment of the Statute. Concern was expressed that States could not reasonably be expected to defer their reaction to a crime for years. The increase in the workload of the Court that might result from the proposed scheme was viewed as compounding the problem.

310. Other comments concerning the role assigned to ICJ in the proposed scheme included the view that the Court had no adequate techniques for independent fact-finding—a serious handicap in the conduct of proceedings in which the accused State might not be willing to participate; and the observation that, for the determination of the existence/attribution of a crime, the advisory procedure—provided it ended in a binding opinion following the precedents of article 37, paragraph 2, of the Constitution of ILO and article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations—might be preferable to contentious proceedings which were complicated and time-consuming and might prejudice the authority of the Court if they stopped short of a final judgment in the case.

311. As regards the institution of proceedings before the Court under paragraph 2 of draft article 19, the question was raised whether there should be a differentiation between directly affected States and other States. In this context, it was recalled that ICJ had been reluctant to accept an *actio popularis*. In its judgment in the *South West Africa* cases (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*), the Court had ruled that

> the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (*c*), of its Statute.[146]

Concern was expressed that making the institution of proceedings depend, as proposed by the Special Rapporteur, on a complainant State which would have to shoulder the burden of prosecution was a chancy process and that, furthermore, a complainant State, which would, by definition, be far from unbiased, might not be the right prosecutor.

iii. Alternative approaches

312. It was suggested that, as a substitute for ICJ, an independent commission of jurists of the type found in the practice of the League of Nations, as well as a prosecutor, should be appointed by the political organ registering the initial concern: since the commission would be a subsidiary organ of the United Nations, no problem of compulsory jurisdiction would arise; since it would be convened on a full-time basis, it would be capable of acting rapidly; and since it would have at its side a prosecutor, it would have facilities for fact-finding and be able to conduct its proceedings with impartiality, professionalism and effectiveness. This suggestion was supported by some members, but gave rise to reservations on the part of others. Concern was expressed that a juridical body appointed directly by a political organ on a case-by-case basis might not be perceived as conducive to due process, so that political objections to the involvement of the General Assembly or the Security Council would not be overcome. The proliferation of dispute settlement procedures was also mentioned as a factor to be borne in mind. The view was further expressed that problems relating to the compulsory jurisdiction of the Court and to fact-finding could be taken care of if the political organs empowered the Court accordingly.

313. The Special Rapporteur, bearing in mind the reservations expressed on the scheme he had proposed, suggested another arrangement as follows: the General Assembly or the Security Council could appoint an ad hoc prosecuting body which would have the function of investigation/fact-finding and would expedite the proceedings; the President of ICJ could appoint an ad hoc chamber of five judges who would be assigned to the case once the Court had been seized following the deter-

[146] *Second Phase, Judgment, I.C.J. Reports, 1966*, p. 47.

mination by the political body. Such an approach should, in the view of the Special Rapporteur, allay the concern of those who feared excessive delays, particularly if they bore in mind the possibility open to injured States, under article 17, paragraph 2, to resort to emergency measures and their right to implement, without waiting for compliance with the condition laid down in article 19, the legal consequences applicable to delicts under articles 6 to 14.[147]

314. A number of other variants were proposed. Under one arrangement, the General Assembly, acting at the request of a State or *proprio motu*, would determine that a crime had been committed and adopt an appropriate resolution, which, although being merely recommendatory, would legitimize further action of States; the Security Council could, of course, adopt emergency measures under Chapter VI or VII of the Charter of the United Nations and it would be open to the States concerned to ask the Assembly to request from the Court an advisory opinion, which, as was already the case in disputes between organizations, would be legally binding. A further proposal was to leave any instances where the maintenance of international peace and security was at stake to the Council and to envisage for other situations a simpler system whereby any State intending to take action against an alleged wrongdoer would have to notify its intention to the States parties to the future convention, which could enjoin the State concerned to desist from its plans, after which the said State could bring the matter before ICJ. Other proposals sought (*a*) to replace judicial settlement by arbitration; (*b*) to give jurisdiction in matters of State responsibility to the international criminal court on which work was proceeding apace; or (*c*) to establish a new court to which aggrieved States could have direct access for the purpose of determining whether an international crime had been committed by a State.

315. Under a different approach, the mechanism proposed by the Special Rapporteur should be used a posteriori, in a simplified and lightened form, to justify or condemn the response to a crime, so that States could have the right, without prior determination of the existence of a crime, to implement the consequences flowing from any delict and the consequences specific to the crime. Accordingly, draft article 19 would be dropped and an appropriate provision on dispute settlement[148] would be included in part three; the objections based on the slowness of the judicial procedure would lose some of their force; and the system of prior political filtering would serve no further purpose. The "world prosecutor" mentioned during the discussions referred to in paragraph 312 above could be a useful auxiliary in that a posteriori procedure. The author of the proposal explained that the situation would be analogous to that provided for in article 66 of the Vienna Convention on the Law of Treaties in that any State party could seize the Court, the position of the applicant State being occupied either by the State which reacted to the crime or by the State which objected to the reaction, and the position of the defendant State, by the other State(s), which could, of course, be very numerous, even though, in the case of a massive reaction by the international community, the defendant State would probably not dare to bring the matter before the Court.

316. This approach was viewed by some members as opening up interesting prospects. Concern was, however, expressed by other members that it would allow States too much freedom to take the law into their own hands in an extremely sensitive area and might lead to international anarchy. It was also stressed that, in the event of intervention by the Court a posteriori, it was the State held to be criminal—perhaps wrongly so—that would bear the cost of procedural delays.

317. As indicated in paragraph 305 *in fine* above, there was also a view that the construction proposed in draft article 19 served no useful purpose if—as was likely to be the case in the light of the experience of the Security Council—the acts which the international community might plausibly consider to be crimes of States represented more often than not threats to international peace and security. Peripheral cases, it was added, could be dealt with as *erga omnes* violations, combined with some refinements of the concepts relating to directly or indirectly injured States.

iv. Other comments on draft article 19

318. As regards paragraph 4, it was asked why the option to join the proceedings of the Court was open only to States Members of the United Nations. The doubt was also expressed that that paragraph might open up possibilities of involvement other than those covered by Articles 62 and 63 of the Statute of ICJ and it was suggested that the nature of the jurisdictional link created by General Assembly or Security Council action should be examined closely to determine whether such a link solved all *locus standi* issues.

319. Paragraph 5 was viewed as unsatisfactory because, although an institution of the international community was involved, it provided only for a bilateral procedure.

(iv) *The draft article proposed by the Special Rapporteur for inclusion in part three*[149]

320. The few members who commented on this draft article (proposed by the Special Rapporteur as article 7) noted that providing in the case of crimes for binding

[147] See footnotes 94, 95 and 96 above.

[148] Which might read:

"Any one of the parties to a dispute concerning the application or the interpretation of articles 16 to 18 of part two may, by a written application, submit the dispute to the ICJ for a decision unless the parties by common assent agree to submit the dispute to arbitration."

[149] The proposed draft article read as follows:

"1. Any dispute which may arise between any States with respect to the legal consequences of a crime under articles 6 to 19 of part two shall be settled by arbitration on either party's proposal.

"2. Failing referral of the dispute to an arbitral tribunal within four months from either party's proposal, the dispute shall be referred unilaterally, by either party, to the International Court of Justice.

(*Continued on next page.*)

third-party dispute settlement might offer a way around the difficulties inherent in the requirement of a prior determination by a political body and subsequent involvement of a judicial organ, as envisaged in draft article 19. They therefore endorsed the spirit of draft article 7. It was, however, suggested that the provision should be modelled on article 66 of the Vienna Convention on the Law of Treaties.

(d) *The courses of action open to the Commission*

321. Concerning the seventh report, a number of members advocated referring the draft articles proposed by the Special Rapporteur therein for inclusion in part two of the draft to the Drafting Committee. In this context, the view was expressed that, if draft article 19 of part two proved too controversial, it could be abandoned and draft article 7 of part three strengthened and that, when draft articles 15 to 19 were considered, the Drafting Committee could review articles 11 to 13 and perhaps articles 6 to 10 to ensure the necessary consistency throughout the provisions on the consequences of internationally wrongful acts. It was pointed out, in support of referring the Special Rapporteur's proposals to the Drafting Committee, that, 20 years earlier, the Commission had adopted part one of the draft, including article 19, in a move which, in the words of one member, still represented the single most daring act of progressive development in its history and that the time had now come to draw the consequences of that decision. The difficulties encountered in fleshing out the concept of crime were, it was stated, no reason for abandoning the current endeavour, particularly as the deletion of article 19 would not solve the problem of differentiating between ordinary delicts and serious breaches of international obligations. Emphasis was also placed on the need to promote the progressive development of international law. In this connection, regret was expressed that the debate on the crucial topic of State responsibility had given rise, at a time when the United Nations was celebrating its fiftieth anniversary, to heated controversy which gave the impression that respect for international law was not as urgent a priority today as it had been in the aftermath of the Second World War. It was also emphasized that the formulation by the Drafting Committee, either at the present session or at the next session, of articles based on the Special Rapporteur's proposals would certainly not prevent the Commission from achieving the objective it had set itself, namely, to complete the first reading of the draft on State responsibility at its forty-eighth session, in 1996. Some of the members who were in favour of referring the draft articles to the Drafting Committee stressed that the Commission should allow Governments sufficient leeway and, in that connection, could submit to them not one single proposal, but alternatives or separate proposals.

(*Footnote 149 continued.*)

"3. The competence of the Court shall extend to any issues of fact or law under the present articles other than the question of existence and attribution previously decided under article 19 of part two."

322. Other members took the view that the work under way was based on vague notions which were a source of controversy and urged the Commission, before committing itself further, to ensure that those notions were endorsed by the international community. The progressive development of the law, it was said, did not call for revolutionary solutions, even if they were generous solutions, but required, on the contrary, a keen sense of reality. The opinion was also expressed that the issues which the Special Rapporteur attempted to solve could be—and were being—addressed in the context of threats to peace and security and that there was therefore no world order imperative that called for a study of the problems raised by the difficult and controversial question of crimes. Concern was expressed that the approach contemplated whereby the regime of international responsibility would be made into a regime that would be the counterpart of or complement to that under the Charter of the United Nations seemed to be too ambitious to meet with the acceptance of States and would have a chance of succeeding only in a world of greater political and economic integration, one where the participants were respected for their power not of coercion, but of persuasion, and where the national interest was in communion with the common interest. In view of the above, the members in question expressed the fear that further work on crimes would delay the completion of the first reading of the draft and supported the idea, put forward in the Sixth Committee at the last session of the General Assembly, that consideration of the question of the legal consequences of crimes should be deferred until the second reading, when both the questionable notion of "State crime" contained in article 19 of part one and its legal consequences could be dealt with at the same time.

3. Summing-up of the debate by the Special Rapporteur

323. Referring to differences of opinion on the concept of State crime, the Special Rapporteur suggested that the problem of terminology should be left aside for the time being, stressed that his proposals did not involve a punitive component, and emphasized that a distinction had to be made between crimes within the meaning of article 19 of part one of the draft and crimes against the peace and security of mankind, notwithstanding the fact that the punishment of the persons responsible was one of the sanctions to which a wrongdoing State could be liable.

324. With regard to the risk of a negative reaction by States to his proposals, the Special Rapporteur said that the Commission, which was composed of independent experts, did not have to anticipate the possible objections of States, but must contribute to the progressive development of international law by striking a fair balance between the ideal and what was possible. It might therefore propose several alternatives for the regime of State crimes.

325. He considered that there appeared to be a fairly wide measure of agreement on draft articles 15 to 18, although differences of opinion had been expressed on the question of territorial integrity (see para. 291 above) and some concepts, such as the vital needs of the population,

"exemplary" damages and compensation in the event of a crime, had been regarded as requiring further study.

326. With regard to the concept of injured State, the Special Rapporteur referred to three hypotheses. The first was that a crime caused roughly the same harm to all States (the crime being, for example, a serious alteration of the ozone layer). In that case, all States would be entitled to demand cessation, restitution in kind and guarantees of non-repetition, the only difference being the amount of compensation. That hypothesis might be covered by combining draft article 15 and article 8 of part two. The second hypothesis was that a crime did not affect any State in material terms (the crime being, for example, a violation by a State of the human rights of its nationals). In such a case, all States would have grounds for demanding cessation, restitution in kind for the benefit of the persons harmed, satisfaction and guarantees of non-repetition and for taking the necessary interim measures, but none could demand compensation. There again, it was not necessary to establish a special regime for crimes. The third hypothesis was that the crime (aggression, for example) affected the entire international community, but harmed one or more specific States in particular: they obviously had the right to demand more than the other injured States by way of restitution in kind, reparation and even satisfaction and guarantees of non-repetition in view of the greater amount of material or moral injury they had suffered, but no particular adaptation of the special or supplementary consequences referred to in draft articles 15 to 18 would be necessary. Similar considerations should hold true in the case where some States, more than others, were affected by a massive violation of human rights or a violation of the right to self-determination because of their geographical location or ties between their population and the victim population.

327. With regard to countermeasures, paragraph 2 of draft article 17 on urgent interim measures[150] was, of course, not intended to apply to all injured States in the same way: those States were all entitled immediately to take the necessary measures to obtain cessation and avoid irreparable damage, but only the most directly concerned were entitled to take urgent interim measures in order, for example, to protect their territorial integrity or their political independence, account duly being taken of the principle of proportionality.

328. As to paragraph 1, subparagraphs (*c*) and (*g*) of draft article 18 (see para. 302 above), which provided for a certain amount of cooperation and consultations between injured States, the Special Rapporteur explained that it had been based on the concern to achieve the desired objective while avoiding any excessive institutionalization that might make his proposals less acceptable.

329. As far as institutional machinery was concerned, the Special Rapporteur noted that, according to the prevailing viewpoint, the decision on the existence and attribution of a crime had to be taken by ICJ, but that approach had nevertheless given rise to objections relating, *inter alia*, to the fact that States were unlikely to accept the general compulsory jurisdiction of the Court. In this connection, the Special Rapporteur reiterated the views stated in paragraph 245 above and pointed out that, if the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were anything to go by, States were perhaps less reluctant than it might appear to accept the compulsory jurisdiction of the Court in particular areas such as that of crimes. In his view, the idea of setting up an ad hoc commission which would act as prosecutor or prosecuting body was interesting, but he stressed that a commission of jurists appointed on an ad hoc basis by a political body (see para. 312 above) would not offer the best guarantees of objectivity, continuity and consistency in the interpretation and enforcement of the law and might thus be less acceptable to States than applying to ICJ. He also referred to the proposal reflected in paragraph 315 above, but stressed that it was dangerous to rely on the unilateral evaluation of States and that, if verification took place a posteriori, it would be the State held to be criminal—perhaps wrongly so—that would bear the cost of procedural delays. Such delays, whose disadvantages must, moreover, not be overestimated in view of the possibility that States might resort to the urgent interim measures dealt with in paragraph 2 of draft article 17 and might, in any event, claim the rights resulting from the commission of a delict, could be avoided through, for example, the appointment of an ad hoc chamber of ICJ.

330. As to the compatibility of the proposed regime with the Charter of the United Nations, the Special Rapporteur stressed that there was no question of vesting the General Assembly or the Security Council with power to make a binding decision concerning the jurisdiction of the Court. That jurisdiction would derive from the convention itself, not from a resolution of the Assembly or the Council, which would only trigger the pre-existing jurisdictional link established between the States parties by the future convention through an arbitration clause.

331. Referring to the requirements for the adoption of the resolution in question (see para. 307 (*c*) above), the Special Rapporteur said that the General Assembly and the Security Council would still be in control of the implementation of Articles 18 and 27 of the Charter of the United Nations. The rules laid down in paragraph 3 of draft article 19 would come into play only for the purpose of the implementation of the future convention and the institution of the proceedings for which it provided. The paragraph in question was therefore not constitutionally incompatible with the Charter and the Drafting Committee might, if necessary, ensure that any possible ambiguity was removed.

332. With regard to the view that, because of the universalization of the status of injured State, the future convention would function for the entire community of nations and not just for the States parties, the Special Rapporteur pointed out that the problem also arose for the breach of any other *erga omnes* obligation. He also

[150] See footnote 109 above.

said that the right of all States to take countermeasures was governed by principles of general international law which the future convention would simply codify and clarify. As to the fear that the proposed solution would open the way to some form of *actio popularis* (see para. 311 above), the Special Rapporteur considered that the requirement of the adoption of a previous resolution by a political body would keep that possibility under reasonable control. In any case, the Court's negative decision in its judgment in the *South West Africa* cases (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*)[151] should not, in his opinion, be viewed as a felicitous precedent.

333. Referring to the criticism that the group of States which would become parties to the future convention might not be the same as the group of States in the General Assembly or the Security Council (see para. 277 above), the Special Rapporteur recognized that it was justified, but that its importance should not be overestimated, since (*a*) any accused State would be entitled to refer the matter unilaterally to ICJ; (*b*) "screening" by the Assembly would prevent abuses; and (*c*) the possible alternatives had even more disadvantages. He also pointed out that similar problems would arise in the case of any convention on the codification and development of international law. The solution of the adoption by the Assembly of a separate instrument (ibid.) was not viable because the Assembly had no power to adopt binding rules.

334. In connection with objections relating to Article 12 of the Charter of the United Nations (see para. 307 (*a*) above), the Special Rapporteur recalled that that Article had frequently been ignored or circumvented by the General Assembly and that many persons wondered whether it had not become obsolete. Where a matter was before the Assembly and the Security Council at the same time, Article 12, even taken literally, would simply preclude the Assembly from taking a decision, but would not prevent the Council from adopting the prior resolution provided for by paragraph 2 of draft article 19. Any failure by the two bodies to act would mean either that the alleged facts were not recognized by the international community they were supposed to represent as being sufficiently serious or that the international community considered it advisable to regard the matter as involving the maintenance of international peace and security rather than State responsibility.

335. Some members expressed the view that, since international crimes would usually involve a threat to peace, for the maintenance of which the Security Council was responsible, the Commission should confine itself to a *renvoi*, to the system of collective security. They considered that their view was confirmed by the current tendency in the Council to broaden the concept of "threat to peace" and based themselves on article 4 of part two.[152] The Special Rapporteur recognized that it was not the Commission's task to make binding interpretations of the Charter of the United Nations, but it could not give the General Assembly technical assistance for the progressive development and codification of international law if it backed away from every problem involving the interpretation of the Charter. In his view, the subject-matter of paragraphs 1 and 2 of draft article 19 involved the peaceful settlement of disputes, as dealt with in Chapter VI of the Charter, and it would be inaccurate to say that, where a crime might endanger international peace and security (or where it came under Article 39), it should be left exclusively to the Security Council. The identification of the rights and obligations violated, the attribution of the violation, and the determination of the consequences were governed by the law of State responsibility. In the Special Rapporteur's opinion, the establishment of a regime of international crimes and an institutional mechanism to implement it would not prejudice the constitutional functions of the Council, and his draft article 20[153] offered every guarantee in that regard. The Special Rapporteur nevertheless maintained that, despite the problematic wording of article 4 of part two, which tended to set aside the law of responsibility and replace it with the discretionary powers of the Council whenever the maintenance of peace was at stake, it was for the law of responsibility to say whether the alleged facts were an internationally wrongful act, whether that act could be characterized as a crime, what the consequences were and what mechanisms or procedures had to be used to settle disputes arising from the implementation of those consequences. The Special Rapporteur also noted that, even if article 19 of part one disappeared and the concept of threat to peace took the lead from the concept of crime, it would still be necessary to guarantee the integrity and effectiveness of the law of State responsibility, which was part of a general international law that no United Nations body—and especially not the Commission—could ignore or set aside.

336. In view of the foregoing, the Special Rapporteur recommended that the draft articles contained in his seventh report should be referred to the Drafting Committee together with the other proposals which had been made during the debate.

4. Action by the Commission concerning the draft articles proposed in the seventh report of the Special Rapporteur

337. The Special Rapporteur's recommendation as reflected in paragraph 336 above gave rise to objections on the part of those members who considered article 19 of part one as fundamentally flawed and found it illogical and counter-productive to assign to the Drafting Committee a mandate predicated on the acceptance of the highly controversial and deeply flawed concept of "State crime", which had no basis in State practice and violated the principle that a society or people could not be found delinquent. It was noted in this connection that individuals, not States, committed crimes. Concern was also voiced that the Special Rapporteur's scheme was unrealistic, unduly complex and difficult to implement and raised questions concerning the Charter of the United Nations. It was furthermore proposed that the Commission should defer the consideration of this question until the second reading when it would have an

[151] See footnote 146 above.

[152] See footnote 125 above.

[153] See footnote 113 above.

opportunity to examine jointly the issues raised by the concept of crime and the consequences to be drawn therefrom.

338. The contrary view was, however, that the objections referred to in paragraph 337 above were unconvincing for the following reasons: (*a*) article 19 of part one had been adopted unopposed on first reading and submitted for comments, together with the rest of part one, to Governments, some of which had approved of its content; (*b*) the task of the Commission and of the Drafting Committee was therefore, at the present stage, to study the consequences, if any of the notion of State crime and to report to the General Assembly on the results of its study; (*c*) only at the stage of the second reading should the Commission, in accordance with well established practice, review the articles adopted on first reading—including article 19 of part one in the light of the results of the work carried out on the consequences of internationally wrongful acts and on the basis of the observations of Governments; (*d*) asking the Drafting Committee to consider proposals based on the deletion of article 19 of part one or on the elimination of the concept of crime would be tantamount to giving the Committee a blank cheque since no specific proposal had so far been made in plenary along those lines; and (*e*) it would be an impossible task for the Drafting Committee to seek solutions to a problem the very existence of which would be continuously challenged through the calling in question of article 19 of part one.

339. At its 2406th meeting, on 28 June 1995, the Commission decided, by 18 votes to 6 to refer the draft articles proposed by the Special Rapporteur in his seventh report to the Drafting Committee for consideration in the light of the various proposals made and the views expressed in the Commission.

5. Action by the Commission on draft articles concerning countermeasures

340. As indicated in paragraph 235 above, the Commission, at its forty-sixth session, provisionally adopted articles 13 and 14 of part two of the draft. It also provisionally adopted article 11, on the understanding that the text of the article might have to be reviewed in the light of the text that would eventually be adopted for article 12. As for article 12, the Commission deferred action thereon.[154]

341. Pending action on article 12 and the submission of the relevant commentaries, the Commission decided not to formally submit articles on countermeasures to the General Assembly.[155]

342. At its current session, the Commission had before it draft commentaries to articles 11, 13 and 14. At its 2424th and 2425th meetings, on 21 July 1995, it adopted the commentaries to articles 13 and 14. It did not however consider the commentary to article 11 for lack of time.

343. The texts of articles 13 and 14 and of the commentaries thereto are set out in section C below.

6. Consideration by the Commission of the texts adopted by the Drafting Committee for inclusion in part three of the draft articles on State responsibility

(a) *Historical background*

344. Since the earliest days of its work on the topic of State responsibility, the Commission had considered the possibility of including in the draft articles a part three containing provisions relating to the implementation of international responsibility and the settlement of disputes. At its fourteenth session in 1962, the Commission decided to establish a Sub-Committee on State Responsibility to consider general aspects of the topic. Members of the Sub-Committee were requested to submit memoranda relating to the main aspects of the topic. Two of the members, namely Mr. Tsuruoka[156] and Mr. Paredes,[157] submitted memoranda in which they emphasized the importance of addressing dispute settlement procedures. However, the initial two-part programme of work for the topic of State responsibility that was proposed by the Sub-Committee and endorsed by the Commission at its fifteenth session in 1963 did not envisage a part three.[158]

345. At its twenty-first session in 1969, the Commission began its substantive work on the topic of State responsibility with its consideration of the first report[159] of the then Special Rapporteur for the topic, Mr. Ago. At that session, the Commission reviewed its plan of work on State responsibility and decided to consider at a later stage the possibility of undertaking a third phase of work covering certain problems concerning the implementation of the international responsibility of a State and questions concerning the settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility.[160] The Commission's plan to proceed with its work on the topic in successive stages, including the possibility of a third stage relating to dispute settlement, met with general approval in the Sixth Committee of the General Assembly during its consideration of the Commission's annual report.[161] At its subsequent sessions, the Commission consistently

[154] See *Yearbook . . . 1994*, vol. II (Part Two), pp. 151-152, paras. 351-352.

[155] Ibid., para. 353.

[156] Mr. Tsuruoka, submitted a working document in which he asserted that the principles to be included in a State responsibility convention would be ineffective and possibly remain inoperative in the absence of guarantees for their strict application (*Yearbook . . . 1963*, vol. II, pp. 247-250, document A/5509, annex I (document A/C7N.4/152, appendix II).

[157] Mr. Paredes submitted a memorandum entitled "An approach to State responsibility" in which he outlined detailed proposals relating to the settlement of disputes (ibid., pp. 244-246).

[158] Ibid., pp. 227 *et seq.*, annex I, document A/CN.4/152.

[159] *Yearbook . . . 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1.

[160] Ibid., p. 233, document A/7610/Rev.1, paras. 80-82.

[161] *Official Records of the General Assembly, Twenty-fourth Session*, annexes, agenda items 86 and 94 (*b*), document A/7746, paras. 86-89.

confirmed its intention to consider a possible part three of the draft articles.

346. At its thirty-seventh session in 1985, the Commission began its consideration of a possible part three concerning the settlement of disputes based on the sixth report[162] of the then Special Rapporteur for the topic, Mr. Riphagen. While some members advised caution in the elaboration of dispute settlement provisions in the light of the hesitancy of States to accept third-party procedures, such provisions were generally considered to be necessary for the implementation of the first two parts of the draft articles given the likelihood of disputes relating to State responsibility as well as the possible escalation of such disputes as a consequence of countermeasures.[163]

347. At its thirty-eighth session in 1986, the Commission had before it the seventh report[164] of the then Special Rapporteur for the topic, Mr. Riphagen, which contained draft articles for part three and the related annex. The Commission considered the proposed draft articles in plenary and subsequently referred them to the Drafting Committee.[165] Since the time of the referral to the Drafting Committee of the proposed draft articles comprising part three and the annex, the Commission has assumed that provisions relating to the settlement of disputes would be included in the draft articles on State responsibility.[166]

348. At its forty-fifth session in 1993, the Commission continued its consideration of issues relating to implementation and dispute settlement procedures based on the fifth report of the current Special Rapporteur for the topic, Mr. Arangio-Ruiz.[167] The Commission considered the new proposed draft articles comprising part three and the annex thereto and referred them to the Drafting Committee,[168] which also had pending before it the proposals of the previous Special Rapporteur on the same subject.

(b) *Consideration at the current session of the texts adopted by the Drafting Committee*

349. At the 2417th meeting of the Commission, on 14 July 1995, the Chairman of the Drafting Committee introduced part three of the draft articles on State responsibility proposed by the Drafting Committee.

350. The general approach reflected in those articles was by and large approved by the Commission.

351. The discussion focused on three points, namely the relationship between the dispute settlement obligations under the future convention on State responsibility and the dispute settlement obligations originating, for the participating States, in other pre-existing or subsequent instruments; the scope of the scheme recommended by the Drafting Committee; and article 7 as proposed by the Drafting Committee.

(i) *The relationship between the dispute settlement obligations under the future convention on State responsibility and the dispute settlement obligations originating, for the participating States, in other pre-existing or subsequent instruments*

352. The Special Rapporteur recalled that following his predecessor, Mr. Riphagen, in part, he had envisaged different dispute settlement obligations depending on whether compliance with such obligations would be meant, under the future convention on State responsibility, to precede or to follow the taking of countermeasures. The first set of obligations, which would not derive from the convention, was contemplated in draft article 12 as proposed by the Special Rapporteur in his fourth report. According to this article, no countermeasures could be taken by an injured State prior to:

(*a*) The exhaustion of all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it is a party; and

(*b*) Appropriate and timely communication of its intention.[169]

Such conditions would not apply, however, in the case of urgent measures of protection and whenever the wrongdoing State did not cooperate in good faith in the choice and implementation of the available settlement procedures. Thus, draft article 12, as envisaged by the Special Rapporteur, would not create any new dispute settlement obligations. It would merely rely on dispute settlement obligations originating in sources other than the convention and undertaken before or after the entry into force thereof.

353. In contrast, part three, as proposed by the Special Rapporteur in his fifth report,[170] was meant to establish new dispute settlement obligations for State parties in relation to disputes that arose after the taking of countermeasures. The proposed procedures envisaged conciliation, arbitration or judicial settlement to be resorted to unilaterally by either party for the settlement of any dispute which had arisen following the adoption of countermeasures and which was not settled by resort to the procedures referred to in paragraph 1 (*a*) of article 12 or submitted to a binding third-party settlement procedure within a reasonable time-limit. In the Special Rapporteur's view, the two sets of dispute settlement proposals contemplated in article 12 and part three should have been considered by the Drafting Committee jointly in view of the close interrelationship and possible interaction between them.

354. Indeed, he further commented that the parties to a future convention on State responsibility could be bound by all kinds of dispute settlement obligations deriving either from multilateral treaties (such as the Charter of the United Nations or regional instruments), bilateral treaties, arbitration clauses or unilateral declarations of

[162] See footnote 91 above.

[163] *Yearbook... 1985*, vol. II (Part Two), p. 24, paras. 159-161.

[164] See footnote 91 above.

[165] *Yearbook... 1986*, vol. II (Part Two), pp. 36-37, paras. 41-46.

[166] *Yearbook... 1992*, vol. II (Part Two), p. 17, para. 108.

[167] See footnote 92 above.

[168] *Yearbook... 1993*, vol. II (Part Two), p. 35, paras. 205-206.

[169] *Yearbook... 1992*, vol. II (Part Two), p. 27, footnote 61.

[170] See footnote 92 above.

acceptance of the Optional Clause of Article 36 of the Statute of ICJ. As had rightly been pointed out by a number of members in the course of the present session, the problem of the coexistence of the dispute settlement obligations to be envisaged in part three with any other dispute settlement obligations of the participating States, whether undertaken prior or subsequent to their participation in the convention, obviously arose regardless of the solutions originally proposed by the Special Rapporteur in paragraph 1 (*a*) of draft article 12. The Special Rapporteur found it therefore doubly regrettable that, due to the need to give priority to other topics at the forty-fifth through forty-seventh sessions (1993-1995), the Drafting Committee had been unable to elaborate all the dispute settlement provisions simultaneously in such a way as to be able to take account of any interaction between the dispute settlement obligations arising from the future convention on State responsibility, on the one hand, and dispute settlement obligations deriving from any other source (including other codification conventions), on the other hand.

355. Some members stressed that the approach advocated by the Special Rapporteur and reflected in the draft article 12 he had proposed in his fourth report had met with objections in the Commission and had been rejected twice by the Drafting Committee. The view had been expressed at the time that it was unjust to favour the wrongdoing State by requiring, as a pre-condition, the exhaustion of all amicable procedures available under general international law. Such an approach had been viewed as inconsistent with the clearest precedent in that area, the *case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France,*[171] and as likely to penalize States which had agreed to the largest possible number of dispute settlement procedures.

356. Attention had also been drawn, at the time when the Special Rapporteur's draft article 12 had been discussed, to the practical drawbacks of the approach reflected in paragraph 1 (*a*) of that provision. It had been pointed out in particular that dispute settlement procedures were slow and time-consuming. For instance, negotiations—which were likely to be the first procedure to be applied—could last six months and a subsequent resort to ICJ could take another two years; the injured State could not realistically be expected to defer the taking of countermeasures for two and a half years. Attention had also been drawn to the risk that a wrongdoing State could resort to dilatory tactics and pursue negotiations indefinitely.

357. The device resorted to by the Special Rapporteur to remedy the above drawbacks, namely allowing resort to interim measures of protection, had also given rise to reservations inasmuch as it might weaken the fundamental rule set forth in Article 33 of the Charter of the United Nations. The question had also been raised whether it was appropriate to except interim measures of protection from the general regime, particularly as countermeasures could themselves be equated with measures of protection in view of their temporary character and their object, namely the protection of a right, and as it would be very difficult in practice to distinguish between the two types of measures.

(ii) *The scope of the mechanism recommended by the Drafting Committee*

358. According to one view, the proposed mechanism, while it could in the abstract be regarded as irreproachable, was in actual fact too ambitious to be endorsed by States and it thus posed a threat to the acceptability of the entire draft; it also went against the principle of free choice of means, since it provided for compulsory recourse to conciliation and went so far, in paragraph 2 of article 5,[172] as to impose compulsory arbitration in the event of recourse to countermeasures. The latter provision, it was said, was intended to counterbalance the articles on countermeasures, but it ultimately encouraged powerful States, in the event of a dispute with weaker States, to resort to countermeasures and so compel weaker States to go to arbitration—a means of settlement which was in any event very costly. The proposed system was described as being especially bold in that it was intended to apply to virtually all international disputes, since any dispute could, in the final analysis, be reduced to a dispute about responsibility. It was further said that it would have been preferable for the draft not to be accompanied by a part three—which would have been in keeping with the Commission's habitual practice—or to submit it only on an optional basis.

359. Most members considered that these criticisms were groundless. They were of the view that the Commission would be failing in its task of engaging in progressive development if it did not include in the draft a mechanism for the settlement of disputes and that, in any event, it was not a question of legislating but of elaborating a draft convention to which States would be free to decide whether or not to accede. It was pointed out in this context that many treaties provided for a compulsory means of settlement and that the principle of free choice of means was in no way prejudiced. The argument that paragraph 2 of article 5 encouraged States to resort to countermeasures in order to impose arbitration was deemed unconvincing, for under the provision in question the State that was the victim of the countermeasures was free to decide whether to resort to arbitration. It was said in particular that, far from having an adverse impact, paragraph 2 of article 5 was a necessary counterpart to the realistic decision not to prohibit countermeasures and afforded weaker States a safeguard against arbitrary action.

360. Other members endorsed, with some reluctance, the approach recommended by the Drafting Committee. While acknowledging that the approach in question might seem too far reaching to Governments, they considered that the Commission could legitimately propose it to them, particularly at the stage of first reading. They noted that a mechanism that forced the parties to a dispute to go to arbitration safeguarded the equality of

[171] See footnote 145 above.

[172] For the text of article 5, see sect. C below.

States at all levels of the dispute. They none the less thought it indispensable to revert at a later stage to the issue of the relationship between the mechanism recommended by the Drafting Committee and the mechanisms provided for in other instruments and to include provisions on that point in part three of the draft. The problem, it was said, could not be dismissed by recourse to *lex specialis*.

(iii) *Article 7 as proposed by the Drafting Committee*

361. Article 7, whereby ICJ had competence in the event of a challenge to the validity of an arbitral award, was also criticized because, contrary to the Model Rules on Arbitral Procedure,[173] it was silent about the grounds on which the validity of an award could be challenged and, accordingly, made arbitral awards open to appeal before the Court, despite well-established practices in international law.

362. Those criticisms were deemed to be groundless, since the point at issue would be the validity, not the substance, of the arbitral award. Article 7, it was said, responded to a practical need, for in reality one party could very easily refuse to comply with an arbitral award it found unsatisfactory by improperly invoking grounds for nullity. It was also stated that the grounds for nullity mentioned in the Model Rules on Arbitral Procedure could be listed in the commentary.

(c) *Action by the Commission*

363. At the 2421st meeting of the Commission, on 18 July 1995, the Chairman of the Drafting Committee reported on changes of form that he intended to make, in the light of the debate, to the texts recommended by the Committee. He suggested that the comments and proposals of a more substantive character which had been made and which would be reflected in the relevant summary records, should be taken into account in the commentaries or duly studied at the stage of second reading. It was agreed that the problem discussed at the end of paragraph 360 above would be tackled in due course.

364. By 17 votes to 1, with 2 abstentions, the Commission adopted the texts recommended by the Drafting Committee, in the amended version proposed by the Chairman of the Committee. The text of the articles adopted and the commentaries thereto are set out in section C below.

[173] Adopted by the Commission at its tenth session in 1958 and submitted the same year to the General Assembly. By its resolution 1262 (XIII), the General Assembly brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use, in such cases and to such extent as they considered appropriate, in drawing up treaties of arbitration or compromise. The text of the Model Rules on Arbitral Procedure is reproduced in *Yearbook... 1958*, vol. II, pp. 83-86, document A/3859, para. 22.

C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session

PART TWO

CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY

Article 13. Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Commentary

(1) The relevance of proportionality in the regime of countermeasures is widely recognized in both doctrine and jurisprudence. The notion of proportionality was already present more or less explicitly in seventeenth, eighteenth and nineteenth century doctrine.[174] Most twentieth century authors, although not all of them,[175] are of the opinion that a State resorting to countermeasures should adhere to the principle of proportionality.[176]

(2) The prevailing doctrinal view thus recognizes the principle of proportionality as a general requirement for the legitimacy of countermeasures or reprisals.[177] Proportionality is a crucial element in determining the law-

[174] This notion was clearly implied in the doctrinal position taken, for example, by Grotius, Vattel and Phillimore, that goods seized by way of reprisal were lawfully appropriated by the injured sovereign, "so far as is necessary to satisfy the original debt that caused, and the expenses incurred by the Reprisal; the residue is to be returned to the Government of the subjects against whom reprisals have been put in force" (R. Phillimore, *Commentaries upon International Law*, vol. III, 3rd ed. (London, Butterworths, 1885), p. 32). See also H. Grotius, *De jure belli ac pacis, libri tres* [1646], *The Classics of International Law*, J. B. Scott, ed. (Oxford, Clarendon Press, 1925), p. 629; and E. de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (London, 1797), p. 283.

[175] D. Anzilotti considered the rule of proportionality as merely a moral norm (*Corso di diritto internazionale*, vol. I, 3rd ed. (Rome, Athenaeum, 1928), p. 167). K. Strupp did not believe in the existence of rules establishing proportions which had to be observed in the exercise of reprisals ("Das völkerrechtliche Delikt" in F. Stier-Somlo, ed., *Handbuch des Völkerrechts*, vol. III (Stuttgart, Kohlhammer, 1920), pp. 568-569).

[176] In this regard, L. Oppenheim takes the position that "[r]eprisals, be they positive or negative, must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation" (*International Law: A Treatise*, 7th ed., H. Lauterpacht, ed., vol. II (London, 1952), p. 141). In P. Guggenheim's words "[d]as moderne Völkerrecht weist sodann eine Verpflichtung zur 'Proportionalität' der Repressalie auf" (*Lehrbuch des Völkerrechts*, vol. II (Verlag für Recht und Gesellschaft, Basle), 1951, p. 585).

[177] The distinguished authors who share this view include: M. Bourquin, "Règles générales du droit de la paix", *Recueil des cours...*, *1931-I* (Paris, Sirey, 1932), vol. 35, p. 223; H. Kelsen, *Principles of International Law*, 2nd ed. rev. and ed. by R. W. Tucker (New York, Holt, Rinehart and Winston, 1966), p. 21; G. Morelli,

fulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States. It takes into account situations of inequality in terms of economic power, political power, and so forth, which may be relevant in determining the type of countermeasures to be applied and their degree of intensity. The principle of proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State using such measures.

(3) The principle of proportionality has assumed a more precise content in the present century following the First World War, a development concomitant with the outlawing of the use of force. There is no uniformity, however, in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed.

(4) Article 13 lays down the rule of proportionality in providing that a countermeasure "shall not be out of proportion" to the relevant criteria. It adopts the "negative" formulation used, for instance, in the awards in the *Portuguese Colonies* case (Naulilaa incident) and the *case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*.[178] The text does not specify the degree of proportionality or the extent to which a countermeasure might be disproportionate. While the assessment of the proportionality of a countermeasure must certainly involve consideration of all elements deemed to be relevant in the specific circumstances, the use of expressions such as "manifestly disproportionate" could have the effect of suggesting that some disproportion was acceptable and thus introducing an element of excessive uncertainty and subjectivity in the construction and application of the principle.[179] A countermeasure which is disproportionate, no matter what the extent, should be prohibited to avoid giving the injured State a degree of leeway that might lead to abuse.

(5) Notwithstanding the need for legal certainty, the Commission has opted for a flexible concept of the principle of proportionality. Reference to equivalence or proportionality in the narrow sense by either the reacting State or by the State against which measures are being taken is unusual in State practice.[180] The task of assessing the proportionality of the countermeasure as against the corresponding wrongful act is complicated to some extent by the fact that it requires weighing lawful measures in relation to an unlawful act. A flexible concept of proportionality seems to emerge from the *Air Service Agreement* award, according to which "[i]t is generally agreed that all countermeasures must, in the first instance, have *some degree of equivalence** with the alleged breach" and "[i]t has been observed, generally, that judging the 'proportionality' of countermeasures is not an easy task and can at best *be accomplished by approximation**".[181] On the basis of this flexible concept, the arbitrators concluded that "[t]he measures taken by the United States do not appear to be *clearly disproportionate** when compared to those taken by France".[182]

(6) As regards the relevant criteria, considering the need to ensure that the adoption of countermeasures does not lead to any inequitable results, proportionality should be assessed taking into account not only the purely "quantitative" element of damage caused, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Therefore, the degree of gravity[183] and the effects[184] of the wrongful act should be taken into account

Nozioni di diritto internazionale, 7th ed. (Padua, CEDAM, 1967), p. 262; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 21; O. Schachter, "International law in theory and practice—General course in public international law", *Collected Courses of The Hague Academy of International Law, 1982-V* (Dordrecht, Nijhoff, 1985), vol. 178, p. 178; P. Reuter, *Droit international public*, 6th ed. (Paris, Presses universitaires de France, 1983), p. 463; I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 219; C. Tomuschat, "Repressalie und Retorsion, Zu einigen Aspekten ihrer innerstaatlichen Durchführung", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 33, No. 1 (March 1973), pp. 179-222, and especially p. 192; K. Skubiszewski, "Use of force by States. Collective security. Law of war and neutrality", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), pp. 753-4; B. Graefrath and P. Steiniger, "Kodification der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), vol. 27, No. 8, 1973, pp. 225-228, article 9 (2), at p. 228; D. W. Bowett, "Economic coercion and reprisals by States", *Virginia Journal of International Law* (Charlottesville), vol. 13, No. 1, 1972, p. 10.

[178] According to the award in the *Portuguese Colonies* case (Naulilaa incident)

> "même si l'on admettait que le droit des gens n'exige pas que la représaille se mesure approximativement à l'offense, on devrait certainement considérer comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivées" (UNRIAA, vol. II (Sales No. 1949.V.1), p. 1028).

In the *Air Service Agreement* award the arbitrators held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France" ((footnote 145 above), para. 83 of the award). The negative formulation also appears in section 905, paragraph (1) (*b*), of the *Restatement of the Law, Third*, according to which an injured State "may resort to countermeasures that might otherwise be unlawful, if such measures . . . *are not out of proportion** to the violation and the injury suffered" (*Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), p. 381). According to draft article 9, paragraph 2, proposed by W. Riphagen, "[t]he exercise of [the right to resort to reprisals] by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed" (sixth report, see footnote 91 above).

[179] The same holds true for the expressions *hors de toute proportion* used in the award in the *Portuguese Colonies* case (Naulilaa incident) and "clearly disproportionate" used in the *Air Service Agreement* award.

[180] See the fourth report of the Special Rapporteur (footnote 92 above), p. 22, para. 54.

[181] See footnote 145 above.

[182] Ibid.

[183] In the award in the *Portuguese Colonies* case (Naulilaa incident), the notion of proportionality was linked to the act which motivated the reprisals (see footnote 175). This view is supported by Guggenheim, op. cit. (footnote 176 above), pp. 585-586; Kelsen, op. cit. (footnote 177 above), p. 21; S. K. Kapoor, *A Textbook of International Law* (Allahabad, 1985), p. 625; and A. P. Sereni, *Diritto internazionale*, vol. III, *Relazione internazionale* (Milan, Giuffrè, 1962), p. 1559.

[184] Reference to proportionality in relation to the damage suffered is found in, among others, J. C. Venezia, "La notion de représailles en droit international public", RGDIP (Paris), vol. 64, No. 3 (July-September 1960), p. 476; A. De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (Milan, Giuffrè, 1985), p. 263; O. Y. Elagab, *The Legality of Non-forcible Counter-*

(*Continued on next page.*)

in determining the type and the intensity of the countermeasure to be applied. This dual criterion is consistent with the position emerging from the resolution adopted by the International Law Institute.[185]

(7) The rule of proportionality set forth in article 13 requires that a specific countermeasure be proportionate first to the degree of gravity of the wrongful act and secondly, to the effects of that wrongful act on the injured State. The use of the word "degree" in the formulation of the first criterion indicates that the text encompasses wrongful acts of varying degrees of gravity. It would be insufficient, however, to limit the test of proportionality to a simple comparison between the countermeasure and the wrongful act because the effects of a wrongful act on the injured State are not necessarily in proportion to the degree of gravity of the wrongful act.

(8) The requirement that a countermeasure should also be proportionate to the effects of the wrongful act on the injured State should not be restrictively interpreted to rule out the taking of countermeasures against a State violating its international obligations relating to the human rights of its nationals on the ground that such violation did not entail material damage to the injured State. Such an interpretation could have a negative effect on the development and enforcement of human rights law and would not be consistent with the broad concept of injury adopted by the Commission in article 5.

(9) The concluding phrase "on the injured State" is not intended to narrow the scope of the article and unduly restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, for example violations of human rights. At the same time, a legally injured State, as compared to a materially injured State, could be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.

(10) Proportionality is concerned with the relationship between the alleged wrongful act and the countermeasure. The purpose of countermeasures, namely to induce the wrongdoing State to comply with its obligations under articles 6 to 10 *bis*, is of relevance in deciding whether and to what extent a countermeasure is lawful. This issue, however, is different from that of proportionality which is addressed in article 11.

Article 14. Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(*a*) The threat or use of force as prohibited by the Charter of the United Nations;

(*b*) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(*c*) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(*d*) Any conduct which derogates from basic human rights; or

(*e*) Any other conduct in contravention of a peremptory norm of general international law.

Commentary

(1) As indicated in the introductory phrase of article 14, an injured State is precluded from resorting to certain types of conduct by way of countermeasures. The notion of prohibited countermeasures is the result of the continuing validity of certain general restrictions on the freedom of States notwithstanding the special character of the relationship between the injured State and the wrongdoing State. Subparagraphs (*a*) to (*e*) identify the broad areas where non-compliance with applicable norms by way of countermeasures is impermissible and circumscribe the limitations on the measures available to an injured State with respect to each of these areas. Although some of the prohibited countermeasures addressed in subparagraphs (*a*) to (*d*) are covered by peremptory norms referred to in subparagraph (*e*), it was considered preferable to deal with them separately in view of the importance acquired, in particular, in contemporary international society by the prohibition of the use of force and the protection of human rights.

(2) *Subparagraph* (a) prohibits resort, by way of countermeasures, to the threat or use of force as provided for under the Charter of the United Nations. The trend towards the restriction of resort to force which started with the Covenant of the League of Nations and the Kellogg-Briand Pact has culminated in the expressed prohibition of force contained in Article 2, paragraph 4, of the Charter. The obvious relevance of this prohibition to the use of force by an injured State in the pursuit of its rights is consistent with the intention of the framers of

(*Footnote 184 continued.*)

measures in International Law (Oxford, Clarendon Press, 1988), p. 94; L. Fisler Damrosch, "Retaliation or arbitration or both? The 1978 United States-France aviation dispute", AJIL, vol. 74, No. 4 (October 1980), p. 796; K. Zemanek, "The unilateral enforcement of international obligations", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 47, 1987, p. 87; and in the reports of two previous Special Rapporteurs, R. Ago (*Yearbook . . . 1979*, vol. II (Part One), p. 40, document A/CN.4/318 and Add.1-4, para. 82) and W. Riphagen (*Yearbook . . . 1985*, vol. II (Part One), p. 3, document A/CN.4/389, draft art. 9, para. 2 and commentary thereto at p. 11).

[185] The position of the International Law Institute seems to require that the measure be proportional to the gravity of the offence and to the damage suffered. According to article 6, paragraph 2, of the Institute's 1934 resolution, the acting State must *Proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi* (*Annuaire de l'Institut de droit international, 1934* (Paris), vol. 38, p. 709). See the more recent award in the *Air Service Agreement* case in which the arbitrators held that "it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach" (footnote 145 above). See also the proposal made by the previous Special Rapporteur (art. 9, para. 2) (footnote 184 above); and *Restatement of the Law, Third* (footnote 178 above), section 905 (1) (*b*).

the Charter.[186] The consequent prohibition of armed reprisals or countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force."[187] That armed reprisals are recognized as prohibited is further evidenced by the fact that States resorting to force attempt to demonstrate the lawfulness of their conduct by characterizing it as an act of self-defence rather than as a reprisal.

(3) The prohibition of armed reprisals or countermeasures as a consequence of Article 2, paragraph 4, of the Charter is also consistent with the decidedly prevailing doctrinal view;[188] as well as a number of authoritative pronouncements of international judicial[189] and political bodies.[190] The contrary trend, aimed at justifying the noted practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence, does not find any plausible legal justification and is considered unacceptable by the Commission.[191] Indeed, armed reprisals do not present those requirements of immediacy and necessity which would only justify a plea of self-defence.[192] According to a prevailing view in the litera-

[186] The framers of the Charter intended to condemn the use of force even if resorted to in the pursuit on one's rights, as reflected in the proceedings of the San Francisco Conference. See P. Lamberti Zanardi, *La legittima difesa nel diritto internazionale* (Milan, Giuffrè, 1972), pp. 143 *et seq.*, and R. Taoka, *The Right of Self-defence in International Law* (Osaka, Osaka University of Economics and Law, 1978), pp. 105 *et seq.*

[187] General Assembly resolution 2625 (XXV), annex, sixth paragraph of the first principle. See R. Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations: A survey", AJIL, vol. 65, No. 5 (October 1971), pp. 713 *et seq.*, in particular p. 726. ICJ indirectly condemned armed reprisals in asserting the customary nature of the Declaration's provisions condemning the use of force in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see footnote 142 above), pp. 89-91, paras. 188, 190 and 191. The Final Act of the Conference on Security and Cooperation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration of Principles embodied in the first "Basket" of that Final Act reads: "Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force . . ." (*Final Act of the Conference on Security and Cooperation in Europe*, signed at Helsinki on 1 August 1975 (Lausanne, Imprimeries Réunies, [n.d.])).

[188] The contemporary doctrine is almost unanimous in characterizing the prohibition of armed reprisals as having acquired the status of a general or customary rule of international law. See I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), pp. 110 *et seq.*, and in particular pp. 281-282; P. Reuter, *Droit international public*, 6th ed. (Paris, Presses universitaires de France, 1983), pp. 510 *et seq.*, and in particular pp. 517-518; A. Cassese, *Il diritto internazionale nel mondo contemporaneo* (Bologna, Mulino, 1984), p. 160; H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1986), p. 192 and pp. 493 *et seq.*, particularly p. 508; B. Conforti, *Diritto internazionale,* 3rd ed. (Napoli, Editoriale Scientifica, 1987), p. 356; C. Dominicé, "Observations sur les droits de l'Etat victime d'un fait internationalement illicite", *Droit international 2* (Paris, Pedone, 1982), p. 62; F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (Milan, Giuffrè, 1983), pp. 273-279; Venezia, loc. cit. (see footnote 184 above), pp. 465 *et seq.*, in particular p. 494; O. Schachter, "The right of States to use armed force", *Michigan Law Review*, vol. 82, Nos. 5 and 6 (April/May 1984), pp. 1620-1646; J. Salmon, "Les circonstances excluant l'illicéité", *Responsabilité internationale* (Paris, Pedone, 1987-1988), p. 186; and the fourth report of the Special Rapporteur, Mr. Riphagen (see footnote 91 above), para. 81. The minority who doubt the customary nature of the prohibition are equally firm in recognizing the presence of a unanimous condemnation of armed reprisals in Article 2, paragraph 4, of the Charter as reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (see footnote 187 above). See, for example, J. Kunz, "Sanctions in international law", AJIL, vol. 54, No. 2 (April 1960), pp. 325 *et seq.*; Morelli, op. cit. (footnote 177 above), p. 352 and pp. 361 *et seq.*; G. Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *Collected Courses of The Hague Academy of International Law, 1972-III* (Leiden, Sijthoff, 1974), vol. 137, p. 536. It is also significant that the majority of the recent monographic studies on reprisals are expressly confined to measures not involving the use of force. See, in particular, De Guttry, op. cit. (see footnote 184 above); E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, New York, Transnational Publishers, 1984); and Elagab, op. cit. (ibid.). These authors obviously assume that "the prohibition to resort to reprisals involving armed force had acquired the rank status of a rule of general international law" De Guttry, op. cit., p. 11). See also the *Restatement of the Law, Third* (footnote 178 above), section 905 of which states that "[t]he threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to subsection (1)". The subsection in question specifies that "a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (*a*) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (*b*) are not out of proportion to the violation and the injury suffered" ((ibid.), p. 380).

[189] The condemnation of armed reprisals and the consolidation of the prohibition into a general rule are supported by the statement of ICJ in the *Corfu Channel (Merits)* case with respect to the recovering of the mines from the Corfu Channel by the British Navy ("Operation Retail") (*I.C.J. Reports 1949*, p. 35, see also *Yearbook . . . 1979*, vol. II (Part One) (footnote 181 above), p. 42, para. 89) and, more recently, by the decision of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see footnote 142 above), p. 127, paras. 248-249.

[190] See, for example, Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962 and 188 (1964) of 9 April 1964.

[191] The authors representing this minority trend maintain that some forms of unilateral resort to force either have survived the sweeping prohibition of Article 2, paragraph 4, of the Charter to the extent that they are not used against the territorial integrity or political independence of any State or contrary to the purposes of the United Nations but rather to restore an injured State's rights, or have become a justifiable reaction under the concepts of armed reprisals or self-defence based on the realities of persistent State practice and the failure of the collective security system established by the Charter to function as envisaged in practice. They include E. S. Colbert, *Retaliation in International Law* (New York, King's Crown Press, 1948); J. Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (London, Stevens, 1958), especially pp. 92 *et seq.*; R. A. Falk, "The Beirut raid and the international law of retaliation", AJIL, vol. 63, No. 3 (July 1969), pp. 415-443; D. W. Bowett, "Reprisals involving recourse to armed force", ibid., vol. 66, No. 1 (January 1972), pp. 1-36; R. W. Tucker, "Reprisals and self-defense: the customary law", ibid., vol. 66, No. 3 (July 1972), pp. 586-596; R. B. Lillich, "Forcible self-help under international law", *United States Naval War College—International Law Studies* (vol. 62): *Readings in International Law from the Naval War College Review 1947-1977* (vol. II), *The Use of Force, Human Rights and General International Legal Issues*, texts compiled by R. B. Lillich and J. N. Moore (Newport, Rhode Island, Naval War College Press, 1980), p. 129; D. Levenfeld, "Israeli counter-Fedayeen tactics in Lebanon: Self-defense and reprisal under modern international law", *Columbia Journal of Transnational Law* (New York), vol. 21, No. 1 (1982), p. 148; Y. Dinstein, *War, Aggression and Self-defence* (Cambridge, Grotius, 1988), pp. 202 *et seq.* For a critical review of the literature, see R. Barsotti, "Armed reprisals", *The Current Legal Regulation of the Use of Force* (Dordrecht, Nijhoff, 1986), pp. 81 *et seq.*

[192] As recalled in the fifth report of the Special Rapporteur (footnote 92 above), the Commission has expressed itself clearly on the concept of self-defence.

ture which is consistent with international jurisprudence, the prohibition of armed reprisals or countermeasures has acquired the status of a customary rule of international law of a peremptory character.

(4) The prohibition of the threat or use of force by way of countermeasures is set forth in terms of a general reference to the Charter rather than to the specific provisions of Article 2, paragraph 4. Furthermore, the Commission opted for a general reference to the Charter as one source, but not the exclusive source, of the prohibition in question which is also part of general international law and has been characterized as such by ICJ.

(5) *Subparagraph* (b) restricts the extent to which an injured State may resort to economic or political coercion by way of countermeasures. A great variety of forms of economic or political measures are frequently resorted to and are considered admissible as countermeasures against internationally wrongful acts.[193] Their admissibility, however, is not totally exempt from restriction since extreme economic or political measures may have consequences as serious as those arising from the use of armed force.

(6) There are divergent views in the literature concerning the possible relevance of the condemnation of the use of force, under Article 2, paragraph 4 of the Charter or general international law, in determining the lawfulness of economic or political coercion as a form of countermeasure. According to the most widely accepted interpretation, the prohibition of the use of force is limited to military force and, therefore, objectionable forms of economic or political coercion could only be condemned under a distinct rule prohibiting intervention or particular forms thereof.[194] Noting the absence of any other Charter provision condemning individual coercive measures, some authors maintain that Article 2, paragraph 4 applies notonly to armed reprisals but also to economic coercion measures.[195] In their view, such measures do not differ in aim or result from the resort to armed force when the consequences of those measures are in effect the economic "strangulation" of the target State.

(7) The consideration of relevant State practice is particularly important in light of the divergent doctrinal views. During the San Francisco Conference, the Latin American States put forward a proposal to extend the condemnation contained in Article 2, paragraph 4, of the Charter to the use of economic or political force.[196] The defeat of this proposal may have been due to the broad definition of economic or political force rather than categorical opposition to any prohibition of actions of this nature. More recently, there were unsuccessful attempts to link a condemnation of economic or political coercion to the prohibition of the threat or use of force in the context of both the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the resolution on the Definition of Aggression.[197]

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[193] The admissibility of economic countermeasures is recognized by the Commission in paragraph (5) of the commentary to article 30 of part one which states "that modern international law does not normally place any obstacles of principle in the way of the application of certain forms of reaction to an internationally wrongful act (economic reprisals, for example)" (*Yearbook . . . 1979*, vol. II (Part Two), p. 116).

[194] According to this interpretation, the prohibition contained in Article 2, paragraph 4, should be logically understood to "embrace also measures of economic or political pressure applied either to such extent and with such intensity as to be an equivalent of an armed aggression *or*, in any case—failing such an extreme—in order to force the will of the victim State and secure undue advantages" for the acting State (G. Arangio-Ruiz, "Human rights and non-intervention in the Helsinki Final Act", *Collected Courses of The Hague Academy of International Law, 1977-IV* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1980), vol. 157, p. 267). A similar position is taken by Cassese, op. cit. (footnote 188 above), p. 163. See also C.H. Waldock, "The regulation of the use of force by individual States in international law", *Recueil des cours . . ., 1952-II* (Paris, Sirey, 1953), vol. 81, pp. 493-494; Oppenheim, op. cit. (footnote 176 above), p. 153; Bowett, "Economic coercion . . .", loc. cit. (footnote 177 above), p. 1; R. Lillich, "The status of economic coercion under international law: United Nations norms", *Conference on Transnational Economic Boycotts and Coercion, 19-20 February 1976, University of Texas Law School*, R. M. Mersky, ed. (Dobbs Ferry, New York, Oceana Publications, 1978), vol. I, pp. 116-117; A. Beirlaen, "Economic coercion and justifying circumstances", *Belgian Review of International Law*, vol. XVIII (1984-1985), p. 67; M. Virally, "Commentaire du paragraphe 4 de l'Article 2 de la Charte", *La Charte des Nations Unies*, 2nd ed. rev. and enl., J. P. Cot and A. Pellet, eds. (Paris, Economica, 1990), pp. 120-121; C. Leben, "Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale", *Annuaire français de droit international, 1982* (Paris), vol. XXVIII, pp. 63-69; P. Malanczuk, "Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Commission's draft articles on State responsibility", *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma, eds. (New York, Oceana Publications, 1987), vol. 45, p. 737; Elagab, op. cit. (footnote 184 above), p. 201; I. Seidl-Hohenveldern, "International economic law", *Collected Courses of The Hague Academy of International Law, 1986-III* (Dordrecht, Nijhoff, 1987), vol. 198, pp. 200-201; *Restatement of the Law, Third* (footnote 178 above), p. 383; L. A. Sicilianos, *Les réactions décentralisées à l'illicite—Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et jurisprudence, 1990), pp. 248-253.

[195] See, in particular, J. Žourek, "La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée?", in *Mélanges offerts à Henri Rolin* (Paris, Pedone, 1964), pp. 530 *et seq.*; and M. Obradovic, "Prohibition of the threat or use of force", *Principles of International Law concerning Friendly Relations and Cooperation*, pp. 76 *et seq.*, M. Sahovic, ed. (Belgrade, Institute of International Politics and Economics and Dobbs Ferry, New York, Oceana Publications, 1972), pp. 76 *et seq.* Following the Arab oil embargo of 1973, this position was also supported by some Western authors. In this regard, see J. J. Paust and A. P. Blaustein, "The Arab oil weapon: A threat to international peace", AJIL, vol. 68, No. 3 (July 1974), pp. 420 *et seq.*

[196] See *Documents of the United Nations Conference on International Organization* (San Francisco, 1945), vol. VI, pp. 558-559 for the text of the amendment proposed by Brazil, and pp. 334-335 for the discussion in Commission I of 4 June 1945.

[197] General Assembly resolution 3314 (XXIX). Some countries attempted to achieve this link during the lengthy negotiations concerning the definition of aggression. See the proposal put forward by Bolivia according to which

> ". . . unilateral action to deprive a State of the economic resources derived from the fair practice of international trade, or to endanger its basic economy thus jeopardizing the security of that State rendering it incapable of acting in its own defence and cooperating in the collective defence of peace"

should have been considered a form of aggression. (Draft resolution submitted to the Sixth Committee of the General Assembly at its sixth session (A/C.6/L.211).) Here again the Western States opposed an express provision on economic coercion mainly due to the extremely flexible formulation proposed: see the statement by the representative of the United Kingdom of Great Britain and Northern Ireland (*Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 54, document A/2211, para. 447). See also the more recent state-

(8) Although State practice does not appear to warrant the conclusion that certain forms of economic or political coercion are equivalent to forms of armed aggression, this practice reveals a separate and distinct trend restricting the extent to which States may resort to economic or political measures.[198] The General Assembly clearly condemns not only armed intervention but also "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements" in its Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.[199] The Declaration further provides that

> 2. No State may use or encourage the use of economic, political or any type of measures to coerce another State *to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind* *...

Similarly, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations proclaims that

> No State may use or encourage the use of economical, political or any other type of measure to coerce another State *in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind* *...

(9) State practice at the regional level also provides support for the prohibition of extreme economic or political coercion. The Charter establishing OAS contains a broad formulation of the principle of non-intervention[200] and, in its article 16, expressly prohibits "the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind". A similar prohibition is contained in another significant regional instrument, the Final Act of the Conference on Security and Cooperation in Europe, under the specific title of non-intervention.[201]

(10) All of these international and regional instruments condemn resort to economic or political coercion when it infringes the principle of non-intervention. Thus, there appear to be different regimes prohibiting the use of force, on the one hand, and the use of extreme economic or political coercion, on the other, by way of countermeasures.[202] In contrast with the general prohibition of armed countermeasures in any circumstances, the prohibition against economic or political coercion is limited to those measures that are aimed at unacceptable ends such as the subordination of the exercise of the sovereign rights of the target State or securing advantages of any kind. Therefore, the condemnation of coercive measures, other than those involving the threat of use of force, only extends to measures of an economic or political nature which are likely to result in very serious if not disastrous consequences for the State concerned.[203]

(11) That the seriousness of the potential consequences of the non-forcible coercive measures should be taken into account in determining their prohibited character is confirmed by other elements of State practice. In the numerous cases in which economic measures have been resorted to, the complaints of the targeted States have been based not so much on the nature of the act *per se* but rather on the alleged resulting "economic strangulation" or other catastrophic effects.[204]

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ment of El Salvador expressing dissatisfaction with the proposed definition of aggression for its failure to include indirect economic aggression (ibid., *Twenty-ninth Session, Plenary Meetings*, vol. I, 2239th meeting, para. 157). The Special Committee on the Question of Defining Aggression declared that a provision in that sense would have been an obstacle to the adoption of the resolution by consensus (ibid., *Supplement No. 19* (A/9619 and Corr.1)).

[198] See Arangio-Ruiz, "Human rights and non-intervention ...", loc. cit. (footnote 194 above), p. 267; Bowett, "Economic coercion ...", loc. cit. (footnote 177 above), pp. 2-3; Y. Blum, "Economic boycotts in international law", *Conference on Transnational Economic Boycotts and Coercion* (footnote 194 above), p. 96; Malanczuk, loc. cit. (ibid.), p. 737; Beirlaen, loc. cit. (ibid.), p. 67; I. Seidl-Hohenveldern, "The United Nations and economic coercion", *Belgian Review of International Law* (1984-1985), p. 11; and Salmon, loc. cit. (footnote 188 above), p. 186. See also L. Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (Paris, Pedone, 1993), pp. 149-151.

[199] General Assembly resolution 2131 (XX) adopted by 109 votes to none, with one abstention, the relevant provisions of which were later incorporated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (see footnote 187 above).

[200] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 324). According to the principle of non-intervention set forth in article 15, there is no "right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State". It is further stated that this principle prohibits "not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements". For a bibliography on the principle of non-intervention in the Americas, see C. Rousseau, *Droit international public*, rev. ed. (Paris, Sirey, 1980), vol. IV, pp. 53 *et seq.*

[201] According to Principle VI, all States will "in all circumstances refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind" (see footnote 187 above). See Arangio-Ruiz, "Human rights and non-intervention ...", loc. cit. (footnote 194 above), pp. 274 *et seq.*

[202] This is consistent with the jurisprudence of ICJ which recognized the unlawfulness of economic measures in the context of the principle of non-intervention in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see footnote 142 above), pp. 108 *et seq.*, particularly para. 209.

[203] These consequences are not necessarily different from those that may occur as a result of the unlawful use of force. This has led some authors to question the distinction between the two prohibitions in a meaningful and practical sense. For a discussion of this question in relation to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, see Arangio-Ruiz, "The normative role of the General Assembly ...", loc. cit. (footnote 188 above), pp. 528-530.

[204] This was the position taken by Bolivia with regard to the sea dumping of tin by the former Soviet Union in 1958 (see M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order—The Legal Regulation of International Coercion* (New Haven and London, Yale University Press, 1961), p. 194, footnote 165) and by Cuba with regard to the drastic reduction of United States sugar imports in 1960. Cuba qualified this action as a "constant aggression for political purposes against the fundamental interests of the Cuban economy" (AJIL, vol. 55, No. 3 (July 1961), pp. 822 *et seq.*).

(*Continued on next page.*)

(12) The prohibition of economic or political coercion by way of countermeasures contained in subparagraph (*b*) is based on the extreme nature of the measures as determined by the seriousness of their potential consequences in terms of endangering "the territorial integrity or political independence" of the State concerned. By incorporating this phrase taken from Article 2, paragraph 4, of the Charter, the Commission recognizes that forcible and non-forcible measures may have equally serious effects, while avoiding the controversial question of whether that provision of the Charter should be interpreted as referring only to the use of armed force or as encompassing other forms of unlawful coercion. The Commission is aware that if formulated too broadly, subparagraph (*b*) might amount to a quasi-prohibition of countermeasures. It has therefore narrowed the scope of the text first by limiting prohibited conduct to "extreme economic or political coercion" and second by using the term "designed" which connotes a hostile or punitive intent and excludes conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State.

(13) *Subparagraph (c)* limits the extent to which an injured State may resort, by way of countermeasures, to conduct that is contrary to diplomatic or consular law. An injured State could envisage action at three levels. To declare a diplomatic envoy *persona non grata*, the termination or suspension of diplomatic relations and the recalling of ambassadors are pure acts of retortion, not requiring any specific justification. At a second level, measures may be taken affecting diplomatic rights or privileges, not prejudicing the inviolability of diplomatic or consular agents or of premises, archives and documents. Such measures may be lawful as countermeasures if all requirements set forth in the present articles are met. However, the inviolability of diplomatic or consular agents as well as of premises, archives and documents is an absolute rule from which no derogation is permitted.

(14) The scope of prohibited countermeasures is delineated to those rules of diplomatic law which are designed to guarantee the physical safety and inviolability of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.[205] This minimum guarantee of protection is essential to the communication and interaction between States in times of crisis as well as under normal conditions. In situations involving an unlawful act, which are by definition conflictual in nature, it is particularly important to preserve the channels of diplomacy, on the one hand, and to protect highly vulnerable persons and premises from countermeasures, on the other.

(15) While the State practice concerning the restrictions on the ability of an injured State to derogate by way of countermeasures from obligations affecting the treatment of diplomatic envoys is relatively scarce,[206] there is widespread support in the doctrine for the prohibition of reprisals or countermeasures against persons enjoying protection as a matter of diplomatic law.[207]

(*Footnote 204 continued.*)

Those cases did not however involve countermeasures in a strict sense inasmuch as it is not clear whether the State adopting the measure was reacting against a prior unlawful act. However, even if a prior unlawful act was missing, the statements referred to appear to be relevant, because they highlight the conditions under which the use of economic force is considered unlawful. One must bear in mind that, in economic matters, the line between retortion and reprisal is not always clear since the rights and duties are usually conventional and their interpretation is often debated. Some Latin American countries, including Argentina, alleged before the Security Council that the trade sanctions resorted to by Western countries following the outbreak of the Falkland Islands (Malvinas) crisis qualified as acts of "economic aggression carried out in blatant violation of all international law". According to Argentina, the measures adopted by the European Community would amount to an economic aggression openly violating the principles of international law and the law of the United Nations (see A. De Guttry, "Le contromisure adottate nei confronti dell'Argentina da parte delle Comunità Europee e dei terzi Stati ed il problema della loro liceità internazionale", *La questione delle Falkland-Malvinas nel diritto internazionale*, N. Ronzitti, ed. (Milan, Giuffrè, 1984), p. 35. See also the statements by Venezuela (*Official Records of the Security Council, Thirty-seventh Year*, 2362nd meeting, paras. 48-108); Ecuador (ibid., 2360th meeting, paras. 194 *et seq.*); El Salvador (ibid., 2363rd meeting, paras. 104-119); and Nicaragua (ibid., paras. 26-48). The Soviet Union accused the United States of "using trade as a weapon against our country" with regard to the measures adopted following the Polish crisis in 1981-1982 (Statement by the Minister of Foreign Trade of the Union of Soviet Socialist Republics, reported in *Financial Times*, 17 November 1982, p. 1). In this case, the United States, which traditionally opposes a broad interpretation of Article 2, paragraph 4, of the Charter, maintained that it was not seeking "to bring the Soviet Union to its knees economically" (statement by Thomas N. T. Niles, Deputy Assistant Secretary, in hearing before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs, *United States House of Representatives, 97th Congress, Second session, 10 August 1982* (Washington, D.C., U.S. Government Printing Office, 1982), p. 8) and further declared during the debates in the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations that the pressure exercised by the Soviet Union on Poland, which led to the declaration of martial law in the latter country, was tantamount to an unlawful resort to force (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 41* (A/37/41), para. 50). Some States have also characterized the measures adopted by South Africa towards neighbouring countries purportedly for giving shelter to members of the African National Congress of South Africa as unlawful economic coercion used to influence another country's conduct (see the statements by Yugoslavia, Madagascar and Thailand (*Official Records of the Security Council, Forty-first Year*, 2660th meeting)).

[205] See, for example, articles 22, 24, 29, 44 and 45 of the Vienna Convention on Diplomatic Relations. De Guttry is of the view that the unlawfulness of reprisals against diplomatic envoys covers essentially measures directed against the physical persons of diplomats, such measures consisting essentially but not exclusively, in a breach of the rule of personal inviolability. In his view, the *raison d'être* of the restriction is the necessity to safeguard, in any circumstances, the special protection which is reserved to diplomatic envoys in view of the particular tasks they perform (*Le rappresaglie . . .*, op. cit. (footnote 181 above), pp. 282-283).

[206] For example, in 1966, Ghana arrested the members of the delegation of Guinea to the OAU Conference, including the Foreign Minister. The arrest, which took place on board an aircraft of an American airliner in transit at Accra, was justified by the Government of Ghana as a means to secure reparation for a number of wrongful acts committed by Guinea, including a raid on the premises of the Ghanaian Embassy at Conakry and the arrest of the Ambassador with his wife (*Keesing's Contemporary Archives* (London, Longman), vol. XV (1965-1966), pp. 21738-21740).

[207] For example, Oppenheim states that:

"... individuals enjoying the privilege of extra-territoriality while abroad such as heads of States and diplomatic envoys, may not be made the object of reprisals, although this has occasionally been done in practice." (Oppenheim, op. cit. (footnote 176 above), p. 140).

This opinion was expressed by Grotius, op. cit. (footnote 174 above). According to T. Twiss, diplomatic agents

"cannot be the subjects of reprisals, either in their persons or in their property, on the part of the Nation which has received them in character of envoys (*legati*), for they have entrusted themselves

While some authors believe that this prohibition is derived from the primary rules concerning the protection of diplomatic envoys which they characterize as peremptory norms,[208] others find its basis in the particular nature of diplomatic law as a "self-contained" regime,[209] as recognized by ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[210] A few authors, however, question the existence of a rule of general international law condemning otherwise not unlawful acts of coercion directed against diplomatic envoys.[211]

(16) An explicit reference to multilateral diplomacy was considered to be unnecessary since representatives to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations, no retaliatory step taken by a host State to their detriment could ever qualify as a countermeasure since it would involve non-compliance—not with an obligation owed to the wrongdoing State—but with an obligation owed to a third party, namely the international organization concerned.

(17) *Subparagraph (d)* prohibits the resort, by way of countermeasures, to conduct derogating from basic human rights. This prohibition, which is dictated by fundamental humanitarian considerations, initially developed in the context of the law of war since such considerations were most frequently sacrificed as a result of the exceptional circumstances existing in time of war.[212] As early as 1880, the Institute of International Law attempted to regulate reprisals in its Manual on the laws and customs of war on land which provided that such measures "must conform in all cases to the laws of humanity and morality".[213] The human suffering caused by reprisals during the First World War led to the adoption of a rule prohibiting reprisals against prisoners of war in the Convention relative to the Treatment of Prisoners of War of 1929.[214] Since the Second World War, reprisals against protected persons or property have also been unanimously prohibited by the Geneva Conventions of 12 August 1949[215] as well as Additional Protocol I thereto of 1977.[216] Furthermore, the absolute character of this prohibition is indicated in the Vienna Convention on the Law of Treaties which expressly provides that the termination or suspension of a treaty in response to a material violation shall not be resorted to with regard "to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".[217]

(18) In addition to the prohibition of certain belligerent reprisals, the development of international humani-

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and their property in good faith to its protection" (*The Law of Nations (considered as Independent Political Communities)*, rev. ed., Oxford, Clarendon Press, 1884, p. 39).

See also P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962), p. 22; Tomuschat, op. cit. (footnote 177 above), p. 187; and C. Dominicé, "Représailles et droit diplomatique", in *Recht als Prozess und Gefüge, Festschrift für Hans Huber* (Bern, 1981), p. 547.

[208] Discussing the criteria used in the ICJ judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran* (Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3), B.V.A. Röling stated that it

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

The same opinion is held by Dominicé, who wonders: *Que deviendraient les relations diplomatiques, en effet, si l'État qui, fût-ce à juste titre, prétend être victime d'un fait illicite, pouvait séquestrer un agent diplomatique ou pénétrer dans les locaux d'une mission en s'appuyant sur la doctrine des représailles?* ("Observations . . .", op. cit. (footnote 188 above), p. 63). Sicilianos states *il y a certainement un noyau irréductible du droit diplomatique ayant un caractère impératif—l'inviolabilité de la personne des agents diplomatiques, l'inviolabilité des locaux et des archives—qui est de ce fait réfractaire aux contre-mesures. Il y a en revanche d'autres obligations qui ne semblent pas s'imposer forcément en toute hypothèse et qui pourraient, certes avec toute la précaution voulue, faire l'objet de contre-mesures proportionnées* (op. cit. (footnote 194 above), p. 351).

[209] Lattanzi, op. cit. (footnote 188 above), pp. 317-318; Elagab, op. cit. (footnote 184 above), pp. 116 *et seq.*

[210] In this regard, the Court expressed the following view:

> "[t]he rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the missions and specifies the means at the disposal of the receiving State to counter any such abuse" (*I.C.J. Reports 1980* (see footnote 208 above), p. 40, para. 86).

[211] See Anzilotti, op. cit. (footnote 175 above), p. 167, and more recently, Conforti, op. cit. (footnote 188 above), pp. 360-361.

[212] The development of humanitarian limitations to the right of adopting reprisals is thoroughly illustrated by Lattanzi, op. cit. (footnote 188 above), pp. 295-302.

[213] Manual adopted at Oxford, September 9, 1880, see *Resolutions of the Institute of International Law dealing with the Law of Nations*, J. B. Scott, ed. (New York, Oxford University Press, 1916), p. 42, art. 86.

[214] Article 2 of the Convention. There is no similar provision in the Geneva Convention for the Amelioration of the Wounded and Sick in Armies in the Field of 1929. However, it has been suggested that this omission was due to an oversight and that, in any event, the Convention implicitly prohibits reprisals by requiring respect for the Convention "in all circumstances" under article 25.

> "The fact that this prohibition was not also inserted in 1929 in the Convention dealing with the wounded and sick—not explicitly, that is to say, for it follows by implication from the principle of the respect to which they are entitled—can only have been due to an oversight. The public conscience having disavowed reprisals against prisoners of war, that disavowal is a fortiori applicable to reprisals against military personnel who, like the wounded and sick, are defenceless and entitled to protection." (J. S. Pictet, *The Geneva Conventions of 12 August 1949, Commentary: Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field* (Geneva, International Committee of the Red Cross, 1952), vol. I, p. 344).

[215] Article 46 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,; article 47 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; article 13, paragraph 3, of the Geneva Convention relative to the Treatment of Prisoners of War; article 33, paragraph 3, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

[216] Article 20 of Additional Protocol I.

[217] Article 60, paragraph 5. The doctrine indicates that this limitation applies to the various instruments relating to humanitarian law as

(*Continued on next page.*)

tarian law is also significant in its recognition of the existence of imprescriptible and inviolable rights conferred on individuals by international law.[218] The requirement of humane treatment based on the principle of respect for the human personality[219] extends to internal armed conflicts by virtue of common article 3 of the Geneva Conventions of 1949 as well as Additional Protocol II thereto of 1977. According to the commentary to the first Geneva Convention of 1949, this common provision "makes it absolutely clear that the object of the Convention is a purely humanitarian one . . . and merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself".[220] Thus, common article 3 prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts[221] as well as any other reprisal incompatible with the absolute requirement of humane treatment.[222] The requirement of humane treatment in non-international armed conflicts applies to all protected persons without discrimination, including foreign nationals notwithstanding the absence of a specific reference to nationality in the non-discrimination clause contained in paragraph 1 of common article 3.[223]

(19) The recognition of essential rules of humanity and inviolable rights which led to the prohibition of reprisals in time of international or internal armed conflict led to similar restrictions on reprisals in time of peace.[224] The general character of the humanitarian limitation on reprisals was recognized in the award in the *Portuguese Colonies* case (Naulilaa incident) which stated that a lawful reprisal must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[225] Similarly, the International Law Association in its 1934 resolution stated in paragraph 4 of article 6 that in the exercise of reprisals a State must *s'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique*.[226] More specifically, the debates in the Assembly of the League of Nations on the implementation of article 16 of the Covenant emphasized that the economic measures to be applied in case of aggression should not endanger humanitarian relations.[227]

(20) The inhumane consequences of a reprisal may be the direct result of measures taken by a State against foreign nationals[228] within its territory or the indirect result

(*Footnote 217 continued.*)

well as human rights law. On the inapplicability of the principle of reciprocity in case of violations of human rights treaty obligations, see Lattanzi, op. cit. (footnote 188 above), pp. 302 *et seq.*; Sicilianos, op. cit. (footnote 194 above), pp. 352-358. Schachter is of the opinion that the "treaties covered by this paragraph clearly include the Geneva Conventions of 1949, the various human rights treaties, and conventions on the status of refugees, genocide and slavery" (Schachter, "International Law in Theory . . ." loc. cit. (footnote 177 above), p. 181). The inviolability of these rules by way of reprisal is also maintained by K. Zemanek, "Responsibility of States: General principles", *Encyclopedia of Public International Law* (Amsterdam, North-Holland) vol. 10 (1987), p. 371.

[218] See Pictet, op. cit. (footnote 214 above), p. 82, commentary to article 7, which states as follows:

> "In the development of international law the Geneva Convention occupies a prominent place. For the first time, with the exception of the provisions of the Congress of Vienna dealing with the slave-trade, which were themselves still strongly coloured by political aspirations, a set of international regulations was devoted, no longer to State interests, but solely to the protection of the individual. The initiators of the 1864 and following Conventions wished to safeguard the dignity of the human person, in the profound conviction that imprescriptible and inviolable rights were attached to it even when hostilities were at their height."

[219] "The principle of respect for human personality, which is at the root of all the Geneva Conventions, was not a product of the Conventions. It is older than they are and independent of them." (Pictet, op. cit. (footnote 214 above), p. 39.)

[220] Pictet, op. cit. (ibid.), p. 60.

[221] The first paragraph of common article 3 provides as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> "(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> "To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> "(*a*) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
>
> "(*b*) taking of hostages;
>
> "(*c*) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> "(*d*) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

[222] See, for example, Pictet, op. cit. (footnote 214 above), pp. 54-55, which states as follows:

> "Reprisals . . . do not appear here in the list of prohibited acts. Does that mean that reprisals, while formally prohibited under Article 46, are allowed in the case of non-international conflicts, that being the only case dealt with in Article 3? As we have seen, the acts referred to under items (*a*) to (*d*) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the 'humane treatment' demanded unconditionally in the first clause of sub-paragraph (1)."

[223] See Pictet (ibid.), p. 56, stating as follows:

> "To treat aliens in a civil war in a manner incompatible with humanitarian requirements, or to believe that one was justified in letting them die of hunger or in torturing them, on the grounds that the criterion of nationality had been omitted, would be the very negation of the spirit of the Geneva Conventions."

[224] See Lattanzi, op. cit. (footnote 188 above), pp. 293-302; similarly De Guttry, *Le rappresaglie* . . ., op. cit. (footnote 184 above), pp. 268-271. After explaining that resort to one or the other of the possible coercive measures depends on the choice of States, Anzilotti noted that States are not absolutely free in their choice. He listed a number of actions condemned by the laws of warfare, although constituting a *minus* as compared to warfare itself, and concluded that these actions were to be condemned a fortiori in peacetime (op. cit. (footnote 172 above), pp. 166-167).

[225] UNRIAA (see footnote 178 above), p. 1026.

[226] *Annuaire de l'Institut de droit international* (see footnote 185 above), p. 709.

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

[228] In this regard, the comment to section 905 of the *Restatement of the Law, Third*, expresses the view that "Self-help measures against the offending State may not include measures against the State's nationals that are contrary to the principles governing human rights and *the treatment of foreign nationals**" (see footnote 178 above).

of measures aimed at the wrongdoing State. The following cases, while purely illustrative and cited without prejudice to the positions of the States concerned, may be considered as examples of humanitarian limitations on measures with direct consequences for foreign nationals in the territory of the acting State. As early as 1888, following the violation by the United States of America of the 1880 treaty on the immigration of Chinese nationals (the "Chinese Exclusion Act"), China, while suspending performance of its treaty obligations towards the United States, decided nevertheless to respect, for reasons of humanity, the rights of United States nationals under Chinese jurisdiction.[229] More recently, during the Falkland Islands (Malvinas) crisis, the United Kingdom froze Argentine assets in the country, but with the specific exception of the funds which would normally be necessary for "living, medical, educational and similar expenses of residents of the Argentine Republic in the United Kingdom" and for "[p]ayments to meet travel expenditures by residents of the Argentine Republic leaving the United Kingdom".[230]

(21) With regard to humanitarian limitations on measures with indirect consequences on the nationals of the target State, mention may be made of the following examples, which again are cited without prejudice to the positions of the States concerned. After the killing of 85 young people on 15 May 1979, in Bangui on 18 April 1979 by the personal security forces of Emperor Bokassa, ruler of the Central African Empire, France, in retaliation, suspended a financial cooperation agreement[231] with that country, but excluded from the measure financial assistance in the fields of education, food and medicine.[232] In declaring, in 1986, a total blockade of trade relations with the Libyan Arab Jamahiriya, the United States of America prohibited the export "to Libya of any goods, technology (including technical data or other information) or services from the United States except publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes".[233] Following the murder of an Italian researcher in Somalia, the Foreign Affairs Committee of the Italian Parliament approved, on 1 August 1990, the suspension of any activities in Somalia "not directly aimed at humanitarian assistance".[234]

(22) The fact that humanitarian considerations are taken into account by States even in applying measures of mere retortion, in view of the fact that they consider the interest infringed not to be legally protected, makes the restriction for humanitarian reasons even more significant than it would be if it were limited to reprisals.[235] The general applicability of this restriction is also a consequence of the character of countermeasures as essentially a matter between the States concerned and of the need to ensure that such measures have minimal effects on private parties in order to avoid collective punishment.[236]

(23) The humanitarian constraint on the ability of an injured State to resort to countermeasures is essentially determined by the fundamental requirements of humane treatment. As a result of its unprecedented development in recent years, the law of human rights provides a minimum standard of humane treatment by identifying certain inviolable human rights which may not be suspended or derogated from even in time of war or other public emergency.[237] In this regard, the International Covenant on Civil and Political Rights recognizes the inviolability of certain rights by excluding them from the scope of application of the clause authorizing States parties to derogate from their obligations under the Covenant in case of "public emergency which threatens the life of the nation".[238] The Covenant excludes deroga-

[229] *Foreign Relations of the United States*, 1889, p. 132.

[230] Notice issued by the Bank of England on 13 April 1982 (*British Year Book of International Law*, vol. 53 (1982), p. 511).

[231] Some authors are of the view that humanitarian considerations prevent an injured State from terminating or suspending any part of a treaty providing forms of economic assistance to the offending State with a view to improving the conditions of a part of the latter's population: see Cassese, op. cit. (footnote 188 above), p. 271; and Boisson de Chazournes, op. cit. (footnote 198 above), p. 153. Similarly, Elagab, (op. cit. (footnote 184 above), p. 194) is of the opinion that consideration should be given to the "concept of dependence and reliance" by examining whether and to what extent measures have as their object commodities or services that are vital to the well-being of the State against which the measures are directed. This consideration would be of particular importance in the case of measures directed against developing countries. However, not all authors favour such a broad interpretation of the humanitarian restriction on countermeasures. For example, see Conforti, op. cit. (footnote 188 above), p. 360.

[232] "Chronique. . .", RGDIP (1980), pp. 361 *et seq.*

[233] Executive Order No. 12543 dated 7 January 1986, sect. 1, reproduced in AJIL, vol. 80, No. 3 (July 1986), p. 630. A very similar provision is contained in Executive Order No. 12722, under which the United States took measures against Iraq following the invasion of Kuwait (sect. 2 (*b*) (AJIL, vol. 84, No. 4 (October 1990), p. 903)).

[234] As reported in *La Repubblica*, 2 August 1990, p. 14.

[235] The prohibition of reprisals in time of war contained in the Geneva Conventions of 1949 does not necessarily extend to measures of retortion. See, for example, the commentary to article 46 of the first Geneva Convention which, after recognizing the apparent desirability of prohibiting such measures, states as follows:

> "What matters most, however, is that there should be no infringement of the rules of the Convention, that is to say, no interference with the rights of the persons protected, considered as a minimum. In the case of benefits which go beyond this minimum, it is admissible that a belligerent should not agree to accord them except on a basis of reciprocity. There might even be a risk of discouraging the granting of such benefits, if it were insisted that they should in no case be subject to retortion. It therefore appears more prudent to conclude that Article 46 applies only to reprisals as defined at the beginning of the commentary on the present Article." (Pictet, op. cit. (footnote 214 above), p. 347.)

[236] The collective punishment aspect of prohibited reprisals is discussed indirectly in the commentary to common article 3 of Geneva Convention, as follows: "The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish." (Ibid., p. 54.)

[237] See, *inter alia*, Morelli, op. cit. (footnote 177 above), p. 362; Reuter, op. cit. (ibid.), p. 463; Riphagen, fourth report (see footnote 91 above), p. 17, paras. 88-89; Dominicé, "Observations . . .", loc. cit. (footnote 188 above), p. 62; E. Zoller, "Quelques réflexions sur les contre-mesures en droit international public", *Droit et libertés à la fin du XX^e siècle. Études offertes à Claude-Albert Colliard*, (Paris, Pedone, 1984), p. 376; O. Schachter, "Self-help in international law: U.S. action in the Iranian hostages crisis", *Journal of International Affairs* (New York), vol. 37 (1983-1984), pp. 231-233; and De Guttry, *Le rappresaglie . . .*, op. cit. (footnote 184 above), p. 271.

[238] Article 4 of the International Covenant on Civil and Political Rights.

tions from article 6 on the right to life, article 7 on the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, article 8 on the right not to be held in slavery or in servitude, article 11 on the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, article 15 on the right flowing from the principle *nullum crimen sine lege, nulla poena sine lege*, article 16 on the right to recognition as a person before the law, and article 18 on the right to freedom of thought, conscience and religion. Regional human rights instruments, such as the American Convention on Human Rights[239] and the Convention on the Protection of Human Rights and Fundamental Freedoms,[240] as well as doctrine[241] provide further support for the notion of essential or core human rights from which no derogation is permissible, although there are some differences in the enumeration of such rights.

(24) The phrase "basic human rights" limits the scope of the text to the "core" of human rights which may not be derogated by way of countermeasures or otherwise. The Commission preferred the phrase "basic human rights", chosen by ICJ in its judgment in the *Barcelona Traction* case,[242] to the phrase "fundamental human rights" which appears in Article 1, paragraph 3, of the Charter of the United Nations and the interpretation of which might be undesirably influenced by its use in the present context. Furthermore, the Commission used the phrase "derogate from" rather than "not in conformity with" to avoid duplicating the idea of prohibition which is the essence of article 14.

(25) *Subparagraph (e)* concerns the general restriction on the right of an injured State to resort to countermeasures resulting from the legal necessity to comply with a peremptory norm of international law. The Commission has implicitly recognized the existence of this restriction in part one of the project: first, by including among the circumstances precluding wrongfulness the fact that the act constitutes a measure legitimate under international law in consequence of an internationally wrongful act (art. 30);[243] secondly, when it has stressed the inviolability of peremptory norms even when there is the consent of the State in favour of which the infringed obligation exists (art. 29, para. 2); and thirdly, in case of a state of necessity (art. 33, para. 2 (*a*)). This is consistent with the Vienna Convention on the Law of Treaties which recognizes the unique character of a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Furthermore, the peremptory norm restriction on the ability of an injured State to resort to countermeasures is widely recognized in the contemporary doctrine since the Second World War.[244]

(26) The formulation and structure of subparagraph (*e*) are intended to indicate its non-exhaustive character and to avoid undesirable *a contrario* interpretations. Thus, the phrase "any other conduct" is intended to indicate that some types of conduct covered by subparagraphs (*a*) to (*d*), notably the threat or use of force, depart from peremptory norms but does not specify whether all the types of conduct listed in those subparagraphs depart from such norms. The Commission is aware that subparagraph (*e*) may not be strictly necessary since, by definition, *jus cogens* rules may not be departed from by way of countermeasures or otherwise. The Commission, however, felt that a reference to *jus cogens* would ensure the gradual adjustment of the articles in accordance with the evolution of the law in this area and would therefore serve a useful purpose.

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[239] Article 27 of the American Convention on Human Rights prohibits the suspension of certain rights, even in time of war or public emergency, namely the right to juridical personality (art. 3), the right to life (art. 4), the right to humane treatment (art. 5), freedom from slavery (art. 6), the right not to be subjected to *ex post facto* laws (art. 9), freedom of conscience and religion (art. 12), the rights of the family (art. 17), the rights of the child (art. 19), the right to nationality (art. 20), the right to participate in government (art. 23), "or of the other judicial guarantees essential for the protection of such rights".

[240] Article 15 of the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) prohibits derogations, even in time of war or other public emergency, from article 2 on the right to life, article 3 on the right not to be subjected to torture, other inhuman or degrading treatment, article 4, paragraph 1, on the right not to be subjected to slavery or servitude, or article 7 on the principle *nullum crimen sine lege, nulla poena sine lege*.

[241] For a discussion of non-derogable rights as a matter of conventional law, see Lattanzi, op. cit. (footnote 188 above), pp. 15 *et seq.* According to T. Buergenthal, "an international consensus on core rights is to be found in the concept of 'gross violations of human rights' and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations". ("Codification and implementation of international human rights", *Human Dignity: The Internationalization of Human Rights*, L. Henkin, ed. (New York, Aspen Institute for Humanistic Studies, 1979), p. 17.) In M. El Kouhene's opinion there is an "absolute minimum of the rights of a human being" (*minimum irréductible des droits de la personne humaine*) which comprises at least the right to life, the right not to be subjected to torture or degrading treatment and the right not to be reduced to slavery or servitude (*Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme* (Dordrecht, Nijhoff, 1986), p. 109). C. Medina Quiroga also believes that some human rights qualify as "core rights" (*The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (Dordrecht, Martinus Nijhoff Publishers, 1988), p. 13). T. Meron does not exclude the possibility of distinguishing various categories of human rights, although he warns that "except in a few cases (e.g., the right to life or to freedom from torture), to choose which rights are more important than other rights is exceedingly difficult" ("On a hierarchy of international human rights", AJIL, vol. 80, No. 1 (January 1986), p. 4). The most essential among human rights may be those the promotion and observance of which are the object of customary international law.

[242] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32.

[243] See G. Gaja, "*Jus cogens* beyond the Vienna Convention", *Collected Courses of The Hague Academy of International Law, 1981-III* (The Hague, Nijhoff, 1982), vol. 172, p. 297.

[244] Lattanzi, op. cit. (footnote 188 above), pp. 306 *et seq.*; Reuter, op. cit. (ibid.), p. 463; K. Zemanek, "La responsabilité des États pour faits internationalement illicites, ainsi que pour faits internationalement licites", *Responsabilité internationale* (Paris, Pedone, 1987-1988), p. 84; Gaja, op. cit. (footnote 243 above), p. 297; D. Alland, "International responsibility and sanctions: self-defence and countermeasures in the ILC codification of rules governing international responsibility", *United Nations Codification of State Responsibility*, M. Spinedi and B. Simma, eds. (New York, Oceana Publications, 1987), p. 185; Elagab, op. cit. (footnote 184 above), p. 99; and Sicilianos, op. cit. (footnote 194 above), pp. 340-344.

PART THREE[245]

SETTLEMENT OF DISPUTES

Article 1. Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Commentary

(1) Article 1 provides for negotiations as a possible first step in the general dispute settlement system. The broad reference to "a dispute regarding the interpretation or application of the present articles" indicates that this provision is part of the general dispute settlement provisions. The consideration of negotiation in the first article of part three identifies this method of dispute settlement as the first step in the general dispute settlement system. Negotiation is often the first step in any dispute settlement process either as a means of settling the dispute or reaching agreement on an appropriate dispute settlement procedure or implementing a pre-existing dispute settlement arrangement, for example, by determining the factual issues and the legal issues that constitute the dispute that is to be resolved. The term "negotiation" is used in the broadest possible meaning and encompasses the phase of consultations.

(2) Article 1 provides for negotiation at the request of any party to a dispute relating to the interpretation or the application of the present articles. This article recognizes that such a dispute may arise "between two or more States Parties to the present articles". The phrase "upon the request of any of them" is used to indicate that the negotiations may be instituted upon the unilateral request of either an injured State or an allegedly wrongdoing State.

(3) The compulsory nature of the negotiation procedure is indicated by the use of the phrase "they shall". The request by one party to the dispute gives rise to the obligation on the part of all parties to the dispute to participate in the negotiations in good faith with a view to settling the dispute. The initiation of the negotiations by "request", a formality that is not usually required for negotiations, is intended to avoid any ambiguity as to the event that gives rise to the obligations of all parties to endeavour to resolve it by negotiation. The phrase "seek to settle it amicably by negotiation" indicates that the obligation to negotiate is one of means rather than result. The parties to the dispute are obligated only to negotiate and not to settle the dispute by means of negotiation. The term "amicably" is used to indicate the conditions that should prevail between the parties in conducting the negotiations with a view to reaching an agreed settlement of their dispute.

(4) The procedural obligation to negotiate provided for in article 1 represents a possible restriction on the freedom of choice of the parties to the dispute with respect to settlement procedures in the absence of a more rigorous agreed procedure. However, the parties retain complete control over the compulsory negotiation procedure because of the absence of any third party participation. Furthermore, the results of the negotiations are binding on the parties only to the extent that they agree on a settlement or on a settlement procedure.

Article 2. Good offices and mediation

Any State Party to the present articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Commentary

(1) Article 2 provides for good offices or mediation as a possible further step in the general dispute settlement system. This provision applies to the same broad category of disputes as contemplated in the preceding article.

(2) There are two ways in which the good offices or mediation procedure envisaged in the article 2 may be initiated. First, a State which meets the two criteria required to perform the role of the third party in these procedures "may, upon its own initiative . . . tender its good offices or offer to mediate". The State must be a party to the articles on State responsibility. Any State which is a party to a convention has an interest in the resolution of disputes relating to the interpretation or the application of its provisions. In addition, the third State must not be a party to the dispute. The objectivity and impartiality of the third party is essential to the effective performance of its role in facilitating the resolution of the dispute between the parties. The recognition of the right of such a State to offer to assist the parties in resolving their dispute is intended to avoid the possibility of such an offer being viewed by the parties as an inappropriate attempt to intervene in their dispute. Secondly, any party to the dispute may request the good offices or mediation procedure envisaged in article 2. The third-party procedure initiated by the request of a party to the dispute may be conducted by any State which meets the two criteria.

[245] The Commission recognizes that the adoption of the articles contained in part three and the annex is without prejudice to its future work on any related aspects of the subject-matter. The Commission recognizes, in particular, the need to consider the problem of the co-existence of dispute settlement obligations under part three of the draft on State responsibility with any dispute settlement obligations originating in any other instruments preceding or following the coming into force of a future convention on State responsibility. The Commission adopted the draft articles contained in part three and the annex on the basis of these understandings with respect to its future work.

The Commission also recognizes that in resuming work on dispute settlement, it should also consider the proposal contained in the Special Rapporteur's seventh report concerning the settlement of disputes relating to the internationally wrongful acts characterized as State crimes under article 19 of part one of the draft (see footnote 39 above).

(3) The second step in the general dispute settlement system is consensual in nature with respect to both the initiation of the procedure and the settlement of the dispute at the conclusion of the procedure. While either the injured State or the wrongdoing State may request good offices or mediation, this third-party dispute settlement procedure can be initiated only with the agreement of the parties to the dispute. In this regard, article 2 is consistent with the freedom of choice principle with respect to dispute settlement procedures. Furthermore, the role of the third party is limited "to facilitating an amicable resolution of the dispute". The resolution of the dispute as a consequence of this procedure will depend upon the agreement of the parties to the dispute. The term "amicable" is used to indicate the conditions that should prevail between the parties in seeking to achieve an agreed settlement of their dispute by means of the agreed third-party procedure.

(4) It is not necessary for the parties to the dispute to have either initiated or completed the compulsory negotiations envisaged in article 1 before agreeing to good offices or mediation under article 2. The parties may agree to attempt to resolve their dispute with the participation of a third party under either of these procedures without any party to the dispute having initiated the compulsory negotiations provided for in article 1. Even if such negotiations have been initiated, the parties may decide that the dispute is unlikely to be resolved by negotiation and agree to proceed to a third-party procedure such as those envisaged in article 2. The good offices or mediation procedure may also be viewed as auxiliary to the negotiations of the parties since the purpose of these third-party procedures is to facilitate an agreed settlement of the dispute by the parties.

Article 3. Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third-party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the Annex to the present articles.

Commentary

(1) Article 3 provides for conciliation as a possible third step in the general dispute settlement system. This article applies to the same broad category of disputes as the two preceding articles. Similarly, the Revised General Act for the Pacific Settlement of International Disputes provides in article 1 for conciliation in the event that the parties to a dispute are unable to resolve it by means of diplomacy.

(2) The present provision is intended to address situations in which a dispute has not been resolved within a reasonable period by the compulsory negotiations envisaged in article 1 and no binding third-party dispute settlement procedure has been instituted. Any party to the dispute may initiate unilaterally the conciliation procedure provided for in article 3 if two conditions are met. First, the parties to the dispute have failed to reach an agreed settlement of their dispute by whatever means three months after the request for negotiations under article 1. Secondly, the parties have failed to actually institute and submit their dispute to a binding third-party settlement procedure by the end of the same period.

(3) The first condition is intended to give the parties to the dispute a reasonable opportunity to settle their differences without the intervention of a third party. The conciliation procedure provided for in article 3 cannot be activated until the parties have attempted to resolve their dispute by means of negotiation for a reasonable period. The Revised General Act for the Pacific Settlement of International Disputes provides for a similar approach.

(4) The second condition is intended to give preference to the freedom of choice of the parties with respect to the selection of a more rigorous binding third-party procedure to settle their dispute. There are two ways in which the parties may institute such a procedure. The parties may institute a binding third-party procedure on the basis of a prior agreement or arrangement, for example, a general dispute settlement agreement, an applicable treaty containing a specific dispute settlement provision, or the prior acceptance by the parties of the optional clause contained in Article 36 of the Statute of ICJ. The parties may also institute such a procedure pursuant to an agreement adopted subsequent to the dispute for the specific purpose of resolving that dispute. The phrase "has been instituted" is very important. It is intended to ensure that the dispute has actually been submitted to a binding third-party procedure in one way or the other.

(5) Article 3 permits a party to unilaterally initiate conciliation to avoid the possibility of lengthy negotiations being used as a pretext by one of the parties to delay the settlement of the dispute. Three months was considered to provide the parties with a sufficient period to determine whether it could be resolved by means of negotiation, and, if not, to institute a binding third-party procedure of their choice. Both parties may agree to continue the negotiations if neither party decides to unilaterally institute the conciliation procedure envisaged in this article.

(6) The injured State or the allegedly wrongdoing State may submit the dispute to conciliation under article 3 without the consent of any other party to the dispute if the necessary conditions are met. The compulsory nature of the conciliation procedure provided for in the article constitutes a step forward in the area of dispute settlement procedures by providing for the participation of a third party in the settlement of the dispute without the consent of all of the parties to the dispute. However, the results of the conciliation are binding on the parties only to the extent that they reach an agreed settlement.

(7) The constitution and the task of the Conciliation Commission are determined by the annex and the succeeding article for the purpose of ensuring that the compulsory conciliation procedure envisaged in article 3 is not delayed or precluded by the failure of the parties to agree on such matters.

Article 4. Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Commentary

(1) Article 4 sets forth the task of the Conciliation Commission provided for in the preceding article. *Paragraph 1* defines in broad terms the general task entrusted to the Conciliation Commission, namely (*a*) to elucidate the questions of law or fact that are disputed by the parties; (*b*) to collect the information required to shed light on those questions by means of inquiry or otherwise; and (*c*) to endeavour to bring the parties to an agreed settlement of their dispute. This paragraph is similar to paragraph 1 of article 15 of the Revised General Act for the Pacific Settlement of International Disputes and article 15 of the European Convention for the Peaceful Settlement of Disputes. The remaining paragraphs address in greater detail the performance of this general task in four possible stages.

(2) *Paragraph 2* addresses the information-gathering stage of the conciliation procedure. The starting-point for the work of the Conciliation Commission is the ascertainment of the position of the parties to the dispute and the identification of the areas of agreement or disagreement. The parties have an obligation to provide the Conciliation Commission with "a statement of their position regarding the dispute and of the facts upon which that position is based" as the first step in the information gathering stage. The Conciliation Commission may require additional information for a proper determination of the relevant facts that are at issue between the parties. Thus, the parties have an obligation to "provide the Commission with any further information or evidence as the Commission may request". The Conciliation Commission may also use a variety of means such as inquiry to gather any other information that may be required to propose a recommended settlement to the parties.

(3) The Conciliation Commission may consider it necessary to conduct independent fact-finding to gather relevant information concerning the dispute. This may include fact-finding within the territory of one or more parties to the dispute depending on the particular facts that are at issue. The parties have an obligation to "assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical". The Conciliation Commission would need to consult with the party to make the necessary practical arrangements for carrying out this fact-finding. The obligation of a State party to a dispute to permit fact-finding within its territory is a significant advancement over the present stage of development of the law relating to the peaceful settlement of disputes which generally requires the consent of the State. The Commission was of the view that the parties should permit fact-finding within their territories where necessary to resolve the dispute. The Commission also recognized that there may be exceptional cases in which it would be impractical for a State to permit such fact-finding. In such a case, the party must provide the Conciliation Commission with an explanation of the exceptional reasons for refusing to permit the fact-finding. This requirement is intended to enable the Conciliation Commission to determine whether the refusal is merely an attempt to obstruct the settlement process. The Conciliation Commission may draw appropriate inferences with respect to the disputed facts from the refusal of a party to the dispute to permit fact-finding within its territory.[246]

(4) *Paragraph 3* addresses the second stage in the conciliation procedure. After completing the initial information-gathering stage, the Conciliation Commission "may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations". These preliminary proposals may serve to expedite the dispute settlement process if the parties agree to the proposed settlement. This optional stage is

[246] This is consistent with the decision of ICJ in the *Corfu Channel* case in which the Court stated as follows:

> "On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."

Corfu Channel (footnote 189 above), p. 18.

also intended to provide the Conciliation Commission with an opportunity to obtain the views of the parties with respect to its proposed solution and, if it is not acceptable, to prepare a revised final recommendation in a further effort to achieve a settlement. The Conciliation Commission is not required to submit, nor are the parties entitled to request, any preliminary proposals.

(5) Paragraph 3 is also intended to allow the Conciliation Commission to make preliminary proposals in the nature of interim measures. These measures may, for example, call upon the parties to the dispute to refrain from any action that might cause irreparable harm or further complicate the task of settling the dispute. The Conciliation Commission may propose, on its own initiative and at its discretion, any appropriate interim measures with a view to facilitating a settlement of the dispute. The parties are not entitled to request such measures. The interim measures would be recommendatory in nature in accordance with the non-binding character of the conciliation procedure. The Vienna Convention on the Law of Treaties also provides in paragraph 4 of the annex thereto that the Conciliation Commission envisaged in the annex "may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement".

(6) *Paragraph 4* concerns the third stage in the conciliation procedure. After gathering the necessary information and consulting the parties regarding any preliminary proposals, the Conciliation Commission is required to submit to the parties a report containing its recommendations for settling the dispute not later than three months after it has been constituted. This was considered to provide the Conciliation Commission with a reasonable period for completing its task. Furthermore, this relatively short period would not substantially delay the initiation of other dispute settlement procedures if the dispute could not be resolved by conciliation. The Conciliation Commission may specify in its report a period in which the parties are to respond to its recommendations. The parties may respond favourably to the recommendations resulting in an agreed settlement of the dispute. The parties may also respond by indicating that they have certain difficulties with the recommendation. The Conciliation Commission would have an opportunity in the latter instance to consider the views of the parties in making a further attempt to resolve the dispute, as provided for in paragraph 5 of this article. The Conciliation Commission may impose time-limits on the parties for the submission of their observations on its recommendations to avoid unreasonable delay in the dispute settlement process. The use of the term "recommendations" is consistent with the non-binding character of the conciliation procedure.

(7) *Paragraph 5* provides for a possible fourth stage in the conciliation procedure if the parties' response to the Conciliation Commission's recommendations has not resulted in an agreed settlement of the dispute. This final stage is intended to give the Conciliation Commission one last opportunity to bring the parties to the dispute to an agreed settlement. In view of the response of the parties, the Conciliation Commission may conclude that, with some adjustments, its recommendation may provide a basis for an agreed settlement. Thus, the Conciliation Commission may submit to the parties "a final report containing its own evaluation of the dispute and its recommendations for settlement". This is intended to enable the Conciliation Commission to provide the parties with its own assessment of the situation with a view to facilitating an agreed settlement of the dispute rather than its evaluation of the appropriateness of the parties' responses to its recommendations. However, the Conciliation Commission may conclude that submitting a final report would not serve any useful purpose and therefore decide not to submit such a report. For example, the response of the parties may indicate that the Conciliation Commission's recommendations or any variation thereof do not provide a basis for an agreed settlement or the parties may have agreed to initiate another dispute settlement procedure.

Article 5. Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

Commentary

(1) Article 5 provides for two types of arbitration, namely, (*a*) voluntary arbitration by agreement of the parties to the dispute in the context of the general dispute settlement system, and (*b*) compulsory arbitration at the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures as a special regime for settling disputes involving the use of countermeasures.

(2) *Paragraph 1* provides for arbitration by agreement of the parties to the dispute as a potential step in the general dispute settlement system. It is intended primarily to address situations in which the dispute has not been resolved within a reasonable period as a result of any of the first three steps in the general dispute settlement system provided for in articles 1, 2 and 3 or by any other means. The paragraph provides that the parties may agree to submit their dispute to arbitration in two situations: (*a*) the conciliation procedure envisaged in article 3 has not been instituted, or (*b*) the conciliation procedure has been instituted but the parties have failed to reach an agreed settlement of their dispute six months after the Conciliation Commission's non-binding report. The Revised General Act for the Pacific Settlement of International Disputes also provides in article 21 for the possibility of arbitration in the event that a prior concili-

ation procedure has failed to result in the parties' agreed settlement of their dispute.

(3) Paragraph 1 is intended to provide for the possibility of a binding third-party dispute settlement procedure as an effective means of settling disputes between States parties to the present articles within the framework of the general dispute settlement system. The parties may prefer first to attempt to settle their dispute by means of negotiations without the participation of a third party or by means of a non-binding third-party procedure before submitting their dispute to a binding third-party procedure. However, the parties may also prefer to expedite the dispute settlement process by agreeing to submit their dispute to arbitration or judicial settlement without first attempting to resolve the dispute by other means. Similarly, the parties to the dispute may by agreement determine the terms of reference and the constitution of the arbitral tribunal. In the absence of such an agreement, the parties may submit their dispute to an arbitral tribunal which is constituted in conformity with the annex and which has the terms of reference provided for in the succeeding article. These residual provisions are intended to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters and that the agreement of the parties to settle their dispute by means of arbitration can be effectively implemented. Nothing would prevent the parties to a dispute from having recourse to any other tribunal by mutual agreement, including in the case envisaged in article 5, paragraph 2.

(4) *Paragraph 2* establishes a special regime of compulsory arbitration if a dispute arises in which the injured State has taken countermeasures. In such a case, the allegedly wrongdoing State which is the object of the countermeasures has the right to initiate unilaterally compulsory arbitration. The injured State for its part does not have the right to unilaterally institute the arbitral proceedings. Rather it is bound after having taken countermeasures to submit to arbitration. The exceptional nature of the special dispute settlement regime for disputes involving the use of countermeasures is indicated by the phrase "In cases, however". Thus, the allegedly wrongdoing State may institute the arbitral proceedings without attempting to first resolve the dispute by any of the other means envisaged in the general dispute settlement system. The phrase "at any time" is used to avoid any ambiguity in this regard.

(5) The countermeasure is the event that triggers the unilateral right of the allegedly wrongdoing State to institute compulsory arbitration. However, the scope of the arbitral proceedings extends not only to the lawfulness of the countermeasure, but also to the underlying dispute which led the injured State to take the countermeasure. This dispute, in its turn, may include not only issues relating to the secondary rules contained in the draft articles on State responsibility, but also the primary rules that are alleged to have been violated. As a practical matter, it would be difficult for an arbitral tribunal to determine the lawfulness of countermeasures without considering such related questions as whether a primary rule has been violated and whether the violation is attributable to the allegedly wrongdoing State. The broader approach to the scope of the arbitral proceedings would also promote a more complete, efficient and effective settlement of the dispute by resolving all of the related issues. There were different views in the Commission as to whether the draft articles on State responsibility should contain such far-reaching dispute settlement provisions.

(6) The terms of reference and the constitution of the arbitral tribunal for purposes of the compulsory arbitration are determined by the succeeding article and the annex to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters.

Article 6. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the Annex to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Commentary

(1) Article 6 defines the general terms of reference of the Arbitral Tribunal referred to in article 5 and article 7, paragraph 2.

(2) *Paragraph 1* provides that the Arbitral Tribunal shall decide "any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles". The first criterion recognizes that the dispute referred to the Arbitral Tribunal is determined by the issues of fact or law that are identified by the parties to the dispute as the subject of their disagreement. The second criterion is standard language used in the dispute settlement provisions contained in international agreements. The Commission recognized that this criterion required a degree of flexibility in the context of the present articles to ensure a resolution of the dispute between the parties. The Arbitral Tribunal may need to consider various factual and legal issues in order to resolve a dispute concerning the interpretation or the application of the provisions of the present articles, including those relating to countermeasures. For example, the Arbitral Tribunal may need to consider issues regarding the primary rules of international law relied on by the parties, the alleged violations of these rules, the attribution of any such violation to the allegedly wrongdoing State, the lawfulness of any countermeasures and the consequences of a violation of international law by either party with respect to any initial wrongful act or any unlawful countermeasures. The phrase "any issue" is used to cover all issues of fact or

law that may need to be decided by the Arbitral Tribunal to settle the dispute between the parties relating to the present articles.

(3) Paragraph 1 also provides that the Arbitral Tribunal shall decide any relevant issues "with binding effect" in conformity with the customary binding nature of arbitral awards. The Arbitral Tribunal may also need to issue binding interim or protective measures to facilitate a resolution of the dispute between the parties, including ordering the cessation of the wrongful act and the suspension of countermeasures. These measures would be of an interim nature pending the final resolution of the dispute by means of the arbitral award. The Arbitral Tribunal has the inherent power to issue such binding interim or protective measures as may be necessary to ensure the effective performance of the task with which it has been entrusted, namely the resolution of the dispute between the parties. This is consistent with the binding nature of this third-party dispute settlement procedure. The Commission considered that the powers and procedures of an arbitral tribunal, including the power to order interim measures, were generally understood and did not need to be elaborated in the paragraph.

(4) This provision provides that the Arbitral Tribunal must submit its decision to the parties "within six months from the date of completion of the parties' written and oral pleadings and submissions". The Commission deemed it useful to provide a time-limit for the completion of the work of the Arbitral Tribunal and considers that six months from the date of the final submissions of the parties is a reasonable period for doing so.

(5) *Paragraph 2* provides that the Arbitral Tribunal "shall be entitled to resort to any fact-finding it deems necessary for the determination of the case". This paragraph recognizes the importance of an arbitral tribunal being able to resort to fact-finding when it considers this to be necessary to determine the facts at issue between the parties. The Arbitral Tribunal is entitled to engage in "any fact-finding" that it considers to be necessary to resolve the disputed factual issues, including fact-finding within the territory of a party to the dispute. Although the parties are not obligated to permit such fact-finding under this paragraph, the Commission considered that they should be encouraged to do so to facilitate the work of the Arbitral Tribunal and the settlement of their dispute. Furthermore, the Arbitral Tribunal should be permitted to draw appropriate inferences from a party's refusal to permit such fact-finding, as discussed in relation to article 4.

Article 7. Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

Commentary

(1) Article 7 addresses the situation that may arise following an arbitration if one of the parties to the dispute should challenge the validity of the resulting arbitral award. This situation may arise with respect to a dispute that is submitted to arbitration by agreement under the general dispute settlement system or by the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures under the special dispute settlement system set forth in the articles. This article is intended to discourage a party to any dispute from asserting frivolous claims of nullity as a means of avoiding compliance with an unfavourable arbitral award. It is also intended to prevent a party to a dispute involving the use of countermeasures from undermining the special dispute settlement regime with respect to those disputes by ignoring the results of the compulsory arbitration based on spurious assertions of nullity. If the parties fail to institute another procedure for settling the dispute relating to the validity of the award, the article provides for a mechanism for resolving this dispute by instituting proceedings before ICJ at the unilateral request of any party. There were different views as to whether these situations should be addressed in part three. Some members expressed concern about adding an additional layer to the dispute settlement process by introducing a role for ICJ in relation to arbitral proceedings. The Commission decided to include this article—not to provide for an appeal procedure—but to ensure the effectiveness of the arbitration envisaged in article 5 as a means of settling disputes between States parties to the present articles. This provision is similar to articles 36 and 37 of the Model Rules on Arbitral Procedure.[247]

(2) *Paragraph 1* is intended to ensure the availability of an effective mechanism for resolving questions relating to the validity of an arbitral award. This paragraph provides that any party to the dispute may, by making a timely request, unilaterally refer a dispute relating to the validity of an arbitral award to ICJ if two conditions are met. First, any party to the dispute has challenged the validity of the arbitral award. Second, the parties have failed to agree to submit the dispute concerning the validity of the arbitral award to another tribunal within three months of the date of the award. The timeliness of the challenge of the validity of an arbitral award and the corresponding request for a judicial determination of its validity may vary depending on the particular grounds for nullity, as recognized in the Model Rules on Arbitral Procedure.[248]

[247] See footnote 173 above.

[248] Article 36 of the Model Rules on Arbitral Procedure (ibid.) permits a party to challenge the validity of an arbitral award within six months of the rendering of the award on the following two grounds: (*a*) the tribunal has exceeded its powers or (*b*) the tribunal has failed to state the reasons for the award or seriously departed from a funda-

(3) The competence of ICJ in the judicial proceedings envisaged in paragraph 1 would be limited to either (*a*) confirming the validity of the arbitral award in the absence of any grounds for nullity or (*b*) declaring the total or partial nullity of the award on specified grounds. The Commission noted that the possible grounds for challenging the validity of an arbitral award were set forth in article 35 of the Model Rules on Arbitral Procedure.[249] The Court would not be competent to review the factual or the legal determinations of the arbitral tribunal as such or the merits of the award. Thus, paragraph 1 provides for a limited judicial proceeding concerning the validity of an arbitral award and not an appellate or a general review proceeding with respect to the merits of the award. There have been two such proceedings before ICJ.[250] The arbitral award would remain final and binding on the parties to the dispute in the absence of a declaration of nullity. A decision of ICJ confirming the validity of an arbitral award would not provide a basis for recourse to the Security Council in the event of non-compliance with the arbitral award under Article 94 of the Charter of the United Nations since the obligations with respect to the settlement of the dispute are incumbent upon the parties by virtue of the arbitral award rather than the judicial decision confirming its validity.

(4) *Paragraph 2* addresses the situation in which the arbitral proceeding has failed to resolve the dispute between the parties as a consequence of a subsequent judicial proceeding declaring the invalidity of all or part of the arbitral award. Paragraph 2 provides that any party to the dispute may unilaterally submit the dispute consisting of the unresolved issues to a new arbitration in conformity with article 6. This arbitral proceeding could be viewed as the continuation or the completion of the voluntary arbitration agreed to by the parties or the compulsory arbitration initiated by the allegedly wrongdoing State against which countermeasures were taken under paragraphs 1 and 2, respectively, of article 5. The term "new" is used to indicate that the dispute consisting of the unresolved issues is to be settled by a new arbitral tribunal constituted in conformity with the annex and with the terms of reference provided for in article 6. This is intended to ensure the availability of an effective procedure for resolving the continuing dispute between the parties without any unnecessary delay.

ANNEX

Article 1. The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 3 of part three by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(*a*) The State or States constituting one of the parties to the dispute shall appoint:

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

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

(*b*) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(*c*) The 4 conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(*d*) The 4 conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(*e*) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(*f*) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

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mental rule of procedure. The same article provides that a party may also challenge the validity of the arbitral award within 6 months of the discovery of relevant information and in any event within 10 years of the rendering of the award on the following 2 grounds: (*a*) corruption on the part of a member of the tribunal or (*b*) the nullity of the undertaking to arbitrate or the *compromis*.

[249] Article 35 of the Model Rules on Arbitral Procedure (ibid.) provides as follows:

"The validity of an award may be challenged by either party on one or more of the following grounds:

"(*a*) That the tribunal has exceeded its powers;

"(*b*) That there was corruption on the part of a member of the tribunal;

"(*c*) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

"(*d*) That the undertaking to arbitrate or the *compromis* is a nullity."

[250] See the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192, and the case concerning the *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53.

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

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Commentary

(1) Article 1 of the annex provides for the constitution and the procedure of the Conciliation Commission envisaged in article 3 of part three.

(2) *Paragraph 1* provides for a list of conciliators consisting of qualified jurists to be drawn up and maintained by the Secretary-General of the United Nations. Such a list is intended to facilitate the constitution of a conciliation commission without unnecessary delay following the initiation of this procedure under article 3 of part three. Paragraph 1 is similar to paragraph 1 of the annex to the Vienna Convention on the Law of Treaties.

(3) *Paragraph 2* establishes the procedure by which a party to the dispute may unilaterally initiate the compulsory conciliation provided for in article 3 of part three, namely by submitting a request to the Secretary-General leading to the constitution of the Conciliation Commission. Paragraph 2, which is self-explanatory, sets out the procedure for the constitution of the Conciliation Commission and the selection of its Chairman. This provision is similar to paragraph 2 of the annex to the Vienna Convention on the Law of Treaties.

(4) *Paragraph 3* provides for the continuation of the compulsory conciliation envisaged notwithstanding the failure of a party or parties to the dispute to participate in the procedure. Paragraph 3 is similar to article 12 of annex V of the United Nations Convention on the Law of the Sea.

(5) *Paragraph 4* addresses the situation in which there is a disagreement between the parties as to the competence of the Conciliation Commission. It provides that the Conciliation Commission shall decide any such question. This is a generally recognized principle with respect to third-party dispute settlement procedures. The paragraph is similar to article 13 of annex V of the United Nations Convention on the Law of the Sea.

(6) *Paragraph 5* provides that the Conciliation Commission shall determine its own procedure. It further provides that the Commission shall take "decisions" by a majority vote of the five members. The term "decisions" must be viewed in the light of the non-binding character of the conciliation procedure under which the Conciliation Commission's decisions are recommendatory in nature. Paragraph 5 is similar to paragraph 3 of the annex to the Vienna Convention on the Law of Treaties.

(7) Part three recognizes that disputes may arise involving more than two State parties to the articles on State responsibility. *Paragraph 6* indicates that the provisions relating to the constitution of the Conciliation Commission shall apply to multilateral disputes to the extent possible. It is similar to article 3, subparagraph (*h*), of annex V of the United Nations Convention on the Law of the Sea.

Article 2. The Arbitral Tribunal

1. The Arbitral Tribunal referred to in articles 5 and 7, paragraph 2, of part three shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of, a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

Commentary

(1) Article 2 of the annex provides for the constitution and the procedure of the Arbitral Tribunal envisaged in article 5 of part three.

(2) *Paragraph 1* provides that the Arbitral Tribunal shall consist of five members, including the Chairman, appointed in conformity with the procedure set forth in the paragraph. This provision, which is self-explanatory, is similar to article 22 of the Revised General Act for the Pacific Settlement of Disputes and article 3 of annex VII to the United Nations Convention on the Law of the Sea. The Commission did not consider it necessary to provide for the maintenance of a list of potential arbitrators, as provided for in the latter instrument.

(3) *Paragraph 2* addresses the situation in which there is a failure to appoint one or more members of the Arbitral Tribunal by the procedure envisaged in paragraph 1 within a reasonable period of time. Three months following the request for the constitution of the Arbitral Tribunal was considered to provide a sufficient period for the appointment of its members. In such a case, the President, Vice-President or the senior member of ICJ would appoint the remaining members of the Arbitral Tribunal, as envisaged in paragraph 2. The paragraph is intended to avoid any unreasonable delay in the constitution of the arbitral tribunal by providing an effective means for the appointment of its members by an objective and impartial third party in the event that the procedure envisaged in paragraph 1 fails to result in the appointment of all five members. The appointments made under paragraph 2 may result in one—but not more than one—member of the Arbitral Tribunal being a national of a party to the dispute in accordance with paragraph 1. The additional conditions provided for in paragraph 2 are further attempts to ensure the impartiality of the members appointed by the procedure envisaged therein. Paragraph 2 is similar to article 3 of annex VII to the United Nations Convention on the Law of the Sea and article 3 of the Model Rules on Arbitral Procedure.

(4) *Paragraph 3* provides for the appointment of a member of the Arbitral Tribunal in the event of a vacancy by the same procedure provided for the initial appointment. The phrase "within the shortest possible time" is intended to avoid any unnecessary delay in the arbitral procedure. It is similar to article 24 of the Revised General Act for the Pacific Settlement of Disputes and article 3, subparagraph (*f*), of annex VII of the United Nations Convention on the Law of the Sea.

(5) *Paragraph 4* recognizes the obligation of the parties to agree on the specific subject-matter of the dispute to be submitted to arbitration, once the Arbitral Tribunal has been established, if they have not already done so. The paragraph is consistent with the customary practice in arbitration. It is similar to article 25 of the Revised General Act for the Pacific Settlement of Disputes.

(6) *Paragraph 5* enables the Tribunal to determine the dispute based on the application for arbitration if the parties have failed to agree as envisaged in paragraph 4 three months after the constitution of the Arbitral Tribunal. Paragraph 5 is intended to avoid any unnecessary delay in the commencement of the arbitral procedure once the Tribunal has been constituted. Paragraphs 4 and 5 are similar to article 8 of the Model Rules on Arbitral Procedure.

(7) *Paragraph 6* provides for the continuation of the arbitral procedure in the event of the failure of a party to participate in the procedure. This provision is intended to ensure that the dispute is effectively resolved by means of arbitration notwithstanding any attempt by a party to obstruct the dispute settlement process. It is similar to article 9 of annex VII to the United Nations Convention on the Law of the Sea. Article 1, paragraph 3, of the annex contains a similar provision with respect to conciliation.

(8) *Paragraph 7* indicates that the Arbitral Tribunal shall determine its own procedure unless the parties have otherwise agreed with respect to its procedure. Decisions of the Tribunal are to be taken by a majority vote. This provision is similar to article 5 of annex VII to the United Nations Convention on the Law of the Sea and article 12 of the Model Rules on Arbitral Procedure.

(9) It has not been felt necessary to lay down, in relation to the Arbitral Tribunal, all the rules provided for in article 1 of the annex concerning the Conciliation Commission. In the view of the Commission, those rules are well established in the case of arbitration and are of a customary character.

Chapter V

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

A. Introduction

365. 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 Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.[251]

366. From its thirty-second (1980) to its thirty-sixth session (1984), the Commission received and considered five reports from the Special Rapporteur.[252] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the Commission at its thirty-fourth session, in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the Commission at its thirty-sixth session, in 1984.[253] They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

367. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, among other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline[254] and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".[255]

368. At its thirty-seventh session, in 1985, the Commission appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received eight reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-fourth session (1992).[256] At its fortieth session, in 1988, the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for chapter I (General Provisions) and chapter II (Principles).[257] At its forty-first session, in 1989, the Commission referred to the Drafting Committee a revised version of those articles which had already been referred to the Drafting Committee at the previous session, having reduced them to nine.[258]

369. At its forty-fourth session, in 1992, the Commission established a working group to consider some of the general issues relating to the scope, the approach to be

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[251] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group see *Yearbook . . . 1978*, vol. II (Part Two), pp. 150-152.

[252] 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.

[253] The texts of draft articles 1 to 5 submitted by the previous Special Rapporteur are reproduced in *Yearbook . . . 1984*, vol. II (Part Two), para. 237.

[254] The replies to the questionnaire appear in *Yearbook . . . 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

[255] *Yearbook . . . 1985*, vol. II (Part One), *Addendum*, document A/CN.4/384.

[256] The eight reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook . . . 1985*, vol. II (Part One), p. 97, document A/CN.4/394;

Second report: *Yearbook . . . 1986*, vol. II (Part One), p. 145, document A/CN.4/402;

Third report: *Yearbook . . . 1987*, vol. II (Part One), p. 47, document A/CN.4/405;

Fourth report: *Yearbook . . . 1988*, vol. II (Part One), p. 251, document A/CN.4/413;

Fifth report: *Yearbook . . . 1989*, vol. II (Part One), p. 131, document A/CN.4/423;

Sixth report: *Yearbook . . . 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1;

Seventh report: *Yearbook . . . 1991*, vol. II (Part One), p. 71, document A/CN.4/437;

Eighth report: *Yearbook . . . 1992*, vol. II (Part One), p. 59, document A/CN.4/443.

[257] For the texts, see *Yearbook . . . 1988*, vol. II (Part Two), p. 9.

[258] For the texts, see *Yearbook . . . 1989*, vol. II (Part Two), para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in the annex to his sixth report (see footnote 256 above), pp. 105-109; see also *Yearbook . . . 1990*, vol. II (Part Two), para. 471.

taken and the possible direction of the future work on the topic.[259] On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992, took a number of decisions.[260]

370. At its forty-fifth session, in 1993, the Commission considered the ninth report of the Special Rapporteur[261] devoted to the issue of prevention and referred draft article 10 (Non-discrimination),[262] which the Commission had examined at its forty-second session (1990), and articles 11 to 20 *bis*[263] to the Drafting Committee. The Drafting Committee provisionally adopted articles 1 (Scope of the present articles), 2 (Use of terms), 11 (Prior authorization), 12 (Risk assessment) and 14 (Measures to minimize the risk).[264] However, the Commission took no action on the articles, in keeping with its policy of not adopting articles not accompanied by commentaries. The Commission agreed to defer action on the proposed draft articles to its next session.[265]

371. At its forty-sixth session, in 1994, the Commission had before it the tenth report of the Special Rapporteur[266] addressing three issues: prevention *ex post facto*, State liability and civil liability.[267] The Commission decided to defer consideration of the report to the present session and instead concentrate work on the articles of this topic already before the Drafting Committee. At the same session, the Commission provisionally adopted on first reading the following draft articles with commentaries thereto:[268] article 1 (Scope of the present articles); subparagraphs (*a*), (*b*) and (*c*) of article 2 (Use of terms); article 11 (Prior authorization); article 12 (Risk assessment); article 13 (Pre-existing activities); article 14 (Measures to prevent or minimize the risk); article 14 *bis* [20 *bis*] (Non-transference of risk); article 15 (Notification and information), article 16 (Exchange of information); article 16 *bis* (Information to the public); article 17 (National security and industrial secrets); article 18 (Consultations on preventive measures); article 19 (Rights of the State likely to be affected); and article 20 (Factors involved in an equitable balance of interests). The texts of the articles are reproduced in section C.1 below.

B. Consideration of the topic at the present session

1. Draft articles adopted by the Drafting Committee at the forty-seventh session of the Commission

372. At its 2413th to 2415th meetings held on 7, 11 and 13 July 1995, the Commission considered and provisionally adopted the following articles which had been referred to the Drafting Committee at its fortieth and forty-first sessions in 1988 and 1989: article A [6] (Freedom of action and the limits thereto); article B [8 and 9] (Prevention); article C [9 and 10] (Liability and compensation) and article D [7] (Cooperation). The numbers in square brackets were the original numbers given to those articles by the Special Rapporteur in his fourth and fifth reports.[269] The texts of the articles and the commentaries thereto are reproduced in section C.2 below.

2. The tenth and eleventh reports of the Special Rapporteur

373. At the present session, the Commission had before it the Special Rapporteur's eleventh report (A/CN.4/468)[270] which was introduced at the Commission's 2397th meeting, held on 8 June 1995. The Commission decided to consider the report, together with the tenth report,[271] at its next session. The Commission, however, allocated a few meetings during which members of the Commission who wished to make preliminary observations on the two reports would be able to do so. At the 2397th to 2399th meetings, held on 8, 9 and 13 June 1995, some members of the Commission expressed preliminary views on both reports; a summary of those views is contained in section 3 below.

374. The Commission also had before it a study, prepared by the Secretariat pursuant to a request by the General Assembly contained in paragraph 5 of its resolution 49/51, entitled "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law" (A/CN.4/471).[272]

375. The eleventh report dealt, in the articles on this topic, with the role of harm. In the report, it was characterized as the condition *sine qua non* of any liability and compensation which may be due. The focus of the report, however, was on harm to the environment. Other forms of harm, namely harm to persons and property, had already been discussed in previous reports, including the eighth report.[273] The question of harm to the environment had not been sufficiently developed.

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[259] See *Yearbook . . . 1992*, vol. II (Part Two), paras. 341-343.

[260] Ibid., paras. 344-349.

[261] *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/450.

[262] Article 10, submitted by the Special Rapporteur in his sixth report, read as follows:

"*Article 10. Non-discrimination*

"States Parties shall treat the effects of an activity arising in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of the present articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by activities referred to in article 1."

[263] For the texts of the articles, see *Yearbook . . . 1993*, vol. II (Part Two), footnotes 62, 64, 68, 69, 70, 73, 74, 77, 79, 80 and 82, respectively.

[264] Document A/CN.4/L.487.

[265] See *Yearbook . . . 1993*, vol. II (Part Two), p. 22, document A/48/10, para. 106.

[266] *Yearbook . . . 1994*, vol. II (Part One), document A/CN.4/459.

[267] A summary of the tenth report is contained in *Yearbook . . . 1994*, vol. II (Part Two), paras. 364 to 379.

[268] See footnote 282 below.

[269] See document A/CN.4/413 (footnote 256 above), para. 17, and document A/CN.4/423 (ibid.), para. 16.

[270] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

[271] See footnote 266 above.

[272] See footnote 270 above.

[273] Document A/CN.4/443 (see footnote 256 above), paras. 10-20.

376. The eleventh report referred to the increasing recognition of the importance of the environment in terms of its economic and health values as well as its non-material value to civilization. The recognition is evidenced not only by the very large number of treaties, designed in general to prevent harm to the environment, but also by inclusion of harm to the environment within the general definition of harm.[274] Furthermore, the concept of harm to the environment has been incorporated into the domestic laws of a number of States including Brazil, Finland, Germany, Norway, Sweden, and the United States of America. The Special Rapporteur, therefore, proposed to incorporate in the definition of harm, harm to the environment.

377. In order to define harm to the environment, one needs a definition of the environment itself. Indeed, the definition of environment will determine the scope of harm to the environment. At the present, however, there is no universally accepted concept of environment; elements considered to be part of the environment in the definition of environment in some conventions are not found in others. A restricted concept of environment limits harm to the environment exclusively to resources such as air, soil, water, fauna and flora and their interactions. A broader concept covers landscape and what is called "environmental values" of usefulness or pleasure produced by the environment. Thus, one speaks of "service values" and "non-service values"; the former would, for example, include a fish stock that would permit a service such as commercial or recreational fishing, while the latter would include the aesthetic aspects of the landscape, to which the population attaches value and the loss of which can cause them displeasure, annoyance or distress. The broad definition also includes property forming part of the cultural heritage.

378. In the view of the Special Rapporteur, any definition of the environment should exclude those parts that are already included in the traditional definition of harm and enjoy protection under international law, that is to say, anything that causes physical harm to persons or their health, whether directly or as a result of environmental damage. This approach has been taken in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. The Special Rapporteur expressed uncertainty as to the inclusion of "the cultural environment" in the definition of the environment. While admitting its importance, he felt that it should not be included in the definition of the environment for the purposes of compensation because these types of property are already protected by the general concept of harm.

379. Similarly, the Special Rapporteur felt that "landscapes" should not be included as "elements" or "components" in the definition of environment. They should be considered "values" of the environment which are treasured by the population. This loss should therefore be compensated.

380. With respect to reparation of harm to the environment, the report raised two questions: first, who shall be deemed to be the injured party and secondly, what does such harm consist of? In the view of the Special Rapporteur, since environment *per se* is not susceptible to private ownership, but belongs to the community as a whole, the State whose environment has been damaged should be the party entitled to reparation. States may grant their rights in this regard to government agencies or non-governmental welfare organizations. Reference in this context was made to the same domestic legislation in the United States where government agencies and Indian tribes are enabled by statute to act as trustees in matters relating to certain environmental damages.

381. As regards reparation to the environment, the Special Rapporteur made a distinction between the requirement of reparation in the draft articles on State responsibility and that in this topic. The rules of reparation in the former were to be in conformity with the principle enunciated by the decision in the *Chorzów Factory* case (Merits),[275] namely reparation should wipe out the consequences of the wrongful act and re-establish the situation which would, in all probability, have existed had that act not been committed. In his view, the rules of reparation in this topic did not follow the *Chorzów* rule, since this topic involved activities which were not prohibited by international law. None the less, the *Chorzów* rule also provided guidance in this field because of its reasonableness and the fairness it embodied.

382. Many existing civil liability conventions seem to have ignored certain forms of reparation such as *naturalis restitutio*, focusing, instead, on monetary compensation. However, as regards damage to the environment, the most common form of reparation provided for in the existing conventions seems to be almost the same as *naturalis restitutio*, as represented by the restoration of the damaged elements of the environment. Members of an endangered or destroyed species can be reintroduced into an ecosystem where enough members of the species exist elsewhere. Equivalent compensation, on the other hand, would primarily be directed, in the case of total destruction of a certain component, to the introduction of an equivalent component; only if that were not possible, would monetary compensation be required. The existing civil liability conventions also include in the concept of damage, the costs of preventive measures and any damage or loss caused by these measures. The

[274] See, for example, article 2, paragraph 7 (*d*), of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; article 1, paragraph 1 (*c*), of the Convention on the Transboundary Effects of Industrial Accidents; article 1, paragraph 20, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; article 8, paragraph 2, subparagraphs (*a*), (*b*) and (*d*), of the Convention on the Regulation of Antarctic Mineral Resource Activities; and article 9, subparagraphs (*c*) and (*d*), of the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels. See also the directives on responsibility and liability regarding transboundary water pollution prepared by the ECE Task Force on Responsibility and Liability, the draft articles of a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and their Disposal (UNEP/CHW.3/4) and Security Council resolution 687 (1991) of 3 April 1991 which states that "Iraq . . . is liable under international law for any direct loss, damage—including environmental damage and the depletion of natural resources—. . . as a result of its unlawful invasion and occupation of Kuwait".

[275] Judgment of 13 September 1928, *P.C.I.J., Series A, No. 17*, p. 47.

Special Rapporteur found this approach to be reasonable and appropriate for the present topic as well.

383. The Special Rapporteur explained that, in his view, the most appropriate remedy for harm to the environment was the restoration of the environment. The remedy was more desirable in view of the difficulties in making any assessment of harm to the environment *per se*. Nevertheless, there are situations in which partial or total restoration of the environment is impossible and monetary compensation has to be assessed. He noted that a number of models may be adopted for that purpose. One is to assess the costs of restoration, the other includes the market value that the environmental damage has rendered inassessable, hedonic pricing[276] or contingent valuation methodology.[277]

384. In the light of the above explanations, the Special Rapporteur proposed a text for the definition of harm.[278]

3. Preliminary comments by some members of the Commission on the tenth and eleventh reports

385. A few members of the Commission expressed preliminary views on the tenth and eleventh reports of the Special Rapporteur. They found the reports well researched, presenting an approach which reflected a judicious combination of codification and progressive development of international law in the area.

386. As regards the tenth report, setting forth a regime of liability, it was noted that the Special Rapporteur had examined the questions of civil liability together with the responsibility of the State. This approach was generally supported, particularly the fact that the draft articles identified circumstances in which States may have subsidiary or residual liability. In this context, it was noted that the Special Rapporteur had rightly distinguished four major areas: the role of the operator; the role of risk capital; the international mechanism for risk insurance and financing; and the liability of the operator.

387. It was also noted that the articles rightly dealt with both issues of substantive law of liability and questions of procedure. The Special Rapporteur's view that the issue of civil liability must also be examined in connection with the responsibility of the State was generally supported. It was also observed that there were other common issues between the two topics such as grounds for exoneration from liability and enforcement of judgements.

388. In terms of structure, it was suggested that the draft articles could be divided into two separate chapters, one concerning the rule of liability *per se* and the other concerning procedure. With regard to the latter, it was observed that, in general, many States prescribed that the competent court was the court at the place where the harm occurred. However, support was expressed for the proposal by the Special Rapporteur of not confining the competence of the court to the State where the harm occurred, alone, but allowing some leeway to seek options, including the court of the affected State.

389. As regards the issue of prevention *ex post facto*, the comment was made that the Special Rapporteur's original proposal of including prevention *ex post facto* in the chapter on prevention and not on reparation was prudent and reasonable. It was noted that the concept of "response measures", as discussed by the Special Rapporteur, was now found in several agreements, and his proposal represented the progressive development of the law on that subject. In that connection, the comment was made that placing heavier and wider obligations of prevention on States and operators engaging in activities that entailed a risk of causing transboundary harm would certainly have the effect of reducing the likelihood of such harm.

390. It was further noted that a clear concept of harm was essential in any serious discussion on a regime of liability. It was also stated that the Commission must consider the implications of imposing liability for wrongful acts when a State failed to fulfil its obligations of prevention, in relation to the articles on State responsibility.

391. The eleventh report of the Special Rapporteur was welcomed. It was noted that the Commission's work must reflect the recent international trend, which was rapidly gaining pace, towards preserving the natural world.

392. Overall, the view of the Special Rapporteur on the evaluation and restoration of damaged natural resources was endorsed. The comment was made that in the proposed definition for harm, in the paragraph concerning remedial action for harm to the environment, the Special Rapporteur recognized the right to sue by the State or by the bodies which it designated under its

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[276] Hedonic pricing methods take the market value added to the value of private ownership with designated environmental amenities and seek to transpose such values to public resources with comparable amenities.

[277] This method has been developed to measure the value by asking people how much they would be willing to pay, for example through a tax increase, to protect a natural resource from harm. This method has been criticized, it may be noted, for it does not reflect real economic behaviour and cannot therefore be relied upon.

[278] The proposed text reads as follows:

" 'Harm' means:

"(*a*) Loss of life, personal injury or impairment of the health or physical integrity of persons;

"(*b*) Damage to property or loss of profit;

"(*c*) Harm to the environment, including:

"(i) The cost of reasonable measures taken or to be taken to restore or replace destroyed or damaged natural resources or, where reasonable, to introduce the equivalent of these resources into the environment;

"(ii) The cost of preventive measures and of any further damage caused by such measures;

"(iii) The compensation that may be granted by a judge in accordance with the principles of equity and justice if the measures indicated in subparagraph (i) were impossible, unreasonable or insufficient to achieve a situation acceptably close to the *status quo ante*. Such compensation should be used to improve the environment of the affected region.

"The environment includes ecosystems and natural, biotic and abiotic resources, such as air, water, soil, fauna and flora and the interaction among these factors.

"The affected State or the bodies which it designates under its domestic law shall have the right of action for reparation of environmental damage."

domestic laws. It was stated that this issue, while important, went beyond the ordinary meaning of the definition and could perhaps be placed in another part, on regulation of the conduct of the State or operator.

393. It was noted that the Special Rapporteur had referred, in his eleventh report, to "non-governmental welfare organizations" and to "the competence of certain public authorities" as "the bodies" designated by the State. However, it was not clear why the bodies designated by the State were entitled to have recourse to the right of action. The question was raised as to whether individuals had *locus standi* to make a claim for harm to the environment where a State or the institution designated by the State refused to bring a claim.

394. As to the definition of the "environment", concern was expressed about the wisdom of excluding the human factor. It was stated that, beginning with the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[279] the human factor had been present in a great many instruments. As an example, article 1, paragraph 4, of the United Nations Convention on the Law of the Sea was cited.

395. In that connection, it was further stated that paragraphs 6, 8, 9 and 16 of the report appeared to suggest that, since human life was protected by law in a number of domains, it should not be covered by instruments on the environment. According to this view, when work had first begun on an instrument for environmental protection several decades ago, the title used had been "protection of the human environment". Human beings had thus been placed at the very centre of the issue from the outset. It therefore seemed questionable that human beings should now be entirely excluded from consideration in an instrument on liability for environmental damage.

396. It was stated that the definition of harm must be reasonably comprehensive without being overburdened with detail. In a preliminary stage, it ought to cover the following elements: loss of life, personal injury or other impairment of health, loss of or damage to property within the affected State, as well as impairment of the natural resources and human or cultural environment of that affected State.

397. It was pointed out that the basis of obligation to compensate for transboundary harm not prohibited by international law was of the utmost importance to the topic. In this regard it was observed that, where the obligation to compensate was set out clearly in a treaty, there should be no legal difficulty in determining the basis for the obligation. Difficulties arose however, where there was no such treaty. In such cases, it was difficult to determine which law was applicable. It was felt that, taking into account the humanitarian consideration, it should not be impossible to find a basis for an obligation to compensate, at least in cases of very hazardous activities. This was a field in which, in many national systems of law, the obligation to compensate no longer entailed that the injured party had to prove that there had been a failure to take all precautions at source to prevent the harm from taking place. It was noted that there was a view that in many cases the solution might be a claim for compensation at the level of private international law, but doubt was expressed as to whether that was possible if the States concerned were both geographically distant and had different national legal systems. Logistical difficulties were also mentioned as factors against litigation abroad.

398. Consequently, it was felt that there was a need to consider elaborating rules applicable between States under public international law, without prohibiting individual claimants from instituting proceedings under private international law if they so desired.

399. The view was expressed that the Commission should focus its attention on the definition of the word "harm" and avoid spending time on other questions that could be considered at a later stage, notably: the necessity that the harm for which a particular claim for compensation was made should not be remote, but a reasonably direct consequence of the activity in the State of origin; and the standards to be utilized in determining the amount of compensation payable in particular cases; and who would be entitled to submit claims. Reference was made to the prospects of catastrophic harm which might require a different approach to compensation. However, the Commission, it was noted, should, at least in principle, adhere to the fundamental idea that the primary purpose of compensation was to restore the situation to what it was prior to the harm.

400. The comment was further made that some statements in chapter I, section B, of the report seemed to blur the distinction between "harm" and "damage", nor was the distinction made very clear in the proposed definition of harm;[280] the words "harm" and "damage" were used interchangeably. It was admitted that it was also the case in no less authoritative an instrument than the United Nations Convention on the Law of the Sea. There the words "harm" and "harmful" were used only in article 1, paragraph 1, subparagraph (4), and article 206. Everywhere else in that instrument the term "damage" was used. It was felt that the concept of harm should be clearly defined since it was essential to any serious discussion on a regime of liability.

401. Reference was made to chapter I, section C, of the report stating that the *Chorzów* rule of *restitutio in integrum* was strictly applicable to breaches of what were called primary rules and that it is not being as rigorously respected in this field as in that of wrongful acts. It was felt that the *Chorzów* rule must also serve as an indicator of the degree to which reparation must be made for damage to the environment. Thus, subject to treaty obligations, reparation should seek as far as possible to restore the *status quo ante*.

402. It was noted that the topic presented particularly difficult issues for developing States. Since developing States did not have the technology to carry out dangerous or ultra-hazardous activities and were more likely to be affected by them, they would generally favour a

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

[280] See footnote 278 above.

regime of strict controls, but as engaging in those acts was imperative for development, they must perhaps agree to a somewhat less strict regime. Likewise in favour of a strict regime of controls were developing States located near other States (whether slightly developed, almost developed or fully developed), in which activities of that nature took place and which felt directly threatened by those acts, as well as island States whose economies were primarily dependent on tourism and for whom the integrity of the natural environment was of the utmost importance.

403. The comment was further made that developed States might favour a liberal regime since they generally engaged in such activities. But it must be borne in mind that some of those States were less developed than others and therefore engaged in such activities to a lesser degree and might therefore prefer a stricter regime. It was thus noted that the dichotomy established between developed and developing States for the purposes of discussing this subject was at best only relevant as a generalization. Otherwise it might be misleading. Ultimately, it was stated that the Commission must find a solution on the basis of State practice, an examination of relevant international conventions and proposals which developed international law.

404. With respect to the definition of harm proposed by the Special Rapporteur the suggestion was made to introduce subparagraphs (i), (ii) and (iii) of subparagraph (*c*) with a phrase such as: "in assessing reparation for harm to the environment, due account may be taken of". In order to stress the relevance of the *Chorzów* rule in the field, it was proposed to make even more explicit the text of paragraph (*c*) (i) by inserting the words "the *status quo ante*" after "restore". It was felt that the phrase "where reasonable" in subparagraph (*c*) (i) did not sufficiently capture the circumstances in which the equivalent of resources not restored or replaced might be introduced into the environment. Subparagraph (*c*) (iii) was found insufficiently stringent, and it was proposed to replace it with the following wording: "the reasonable compensation in cases where the measures indicated in subparagraph (*c*) (i) were impossible or insufficient to achieve a situation acceptably close to the *status quo ante*".

4. Establishment of a working group on the identification of dangerous activities

405. At its 2393rd meeting, on 1 June 1995, the Commission decided to establish a working group on the identification of dangerous activities under the topic "International liability for injurious consequences of acts not prohibited by international law".[281]

406. The Working Group was entrusted with the mandate of identifying the activities which came within the scope of the topic.

407. The Working Group held three meetings between 23 June and 5 July 1995. It had before it a document prepared by the Secretariat (see paragraph 374 above), presenting an overview of the ways in which the scope of multilateral treaties dealing with transboundary harm and with liability and prevention had been defined in terms of the activities or substances to which they applied.

408. At its 2416th meeting, on 13 July 1995, the Commission considered the report of the Working Group. In the light of that report, the Commission agreed that it must in its future work have a clear view of the kind of activities to which the draft articles on the topic apply. The definition of the scope of the topic, as provided in articles 1 and 2, may, in itself, not be sufficient for the next stage of the work. The Commission, however, is of the view that it can work on the basis that the types of activities listed in various conventions dealing with issues of transboundary harm come within the scope of the topic as defined in articles 1 and 2. Examples include the Convention on Environmental Impact Assessment in a Transboundary Context, the Convention on Transboundary Effects of Industrial Accidents and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. The Commission recognizes that at some point more specificity may be required in the articles, on the types of activities falling within the ambit of the topic. That specification, however, will depend on the provisions on prevention which have been adopted by the Commission and the nature of the obligations on liability which the Commission will be developing. One way of achieving that specification would be to prepare a list of activities through a method which the Commission could recommend at a later stage of work.

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law

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

[CHAPTER I. GENERAL PROVISIONS][282]

Article 1. Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2. Use of terms

For the purposes of the present articles:

(*a*) "Risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

[281] For the composition of the Working Group see para. 10 above.

[282] The designation of the chapter is provisional. For the commentaries to draft articles 1, 2, subparagraphs (*a*), (*b*) and (*c*), 11 to 14 *bis* [20 *bis*], 15 to 16 *bis* and 17 to 20, see *Yearbook... 1994*, vol. II (Part Two), pp. 160 *et seq.*

(*b*) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(*c*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

[CHAPTER II. PREVENTION][283]

Article 11. Prior authorization[284]

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

Article 12. Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Article 13. Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

Article 14. Measures to prevent or minimize the risk[285]

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Article 14 bis *[20* bis*]. Non-transference of risk*

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Article 15. Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 16. Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

Article 16 bis. *Information to the public*

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 17. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18. Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Article 19. Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 20. Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(*a*) The degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(*b*) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for

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[283] Ibid.

[284] The present numbering is provisional and follows that proposed by the Special Rapporteur in his reports.

[285] The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm.

the State of origin in relation to the potential harm for the States likely to be affected;

(c) The risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) The economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) The degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) The standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article A [6]. Freedom of action and the limits thereto[286]

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Article B [8 and 9]. Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Article C [9 and 10]. Liability and reparation[287]

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Article D [7]. Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

2. Texts of draft articles A [6], B [8 and 9], C 9 and 10] and D [7] with commentaries thereto, provisionally adopted by the Commission at its forty-seventh session

Article A [6]. Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Commentary

(1) This article sets forth the principle that constitutes the basis for the entire topic. It is inspired by principle 21 of the Declaration of the United Nations Conference on the Human Environment[288] and principle 2 of the Rio Declaration on Environment and Development.[289] Both principles affirm the sovereign right of States to exploit their own resources, in accordance with the Charter of the United Nations and the principles of international law.

(2) The adopted drafting generalizes principle 21, since article A is not limited only to activities directed to the exploitation of resources, but encompasses within its meaning all activities developed in the territory or otherwise under the jurisdiction or control of a State. On the other hand, the limitations referring to the freedom of a State to carry on or authorize such activities are made more specific than in principle 21, since such limitations are constituted by the general obligation that a State has to prevent or minimize the risk of causing significant transboundary harm as well as the specific State obligations owed to other States in that regard.[290]

(3) The activities to which this article applies are defined in article 1. The present article speaks of "the risk of causing significant transboundary harm", while the other two principles—principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration on Environment and Development—speak of causing transboundary damage. In practical terms, however, preven-

[286] Articles A, B, C and D deal with general principles. The placement of these articles will be determined once all the articles on the topic have been adopted on first reading.

[287] As is clear from the phrase "[i]n accordance with the present articles" the substantive content of this article is left to later elaboration of the articles on liability. At this stage, the article is a working hypothesis of the Commission.

[288] Principle 21 of the Declaration of the United Nations Conference on the Human Environment reads as follows:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (See footnote 279 above).

[289] Principle 2 of the Rio Declaration on Environment and Development reads as follows:

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

Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol.I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

This principle has also been enunciated in article 193 of the United Nations Convention on the Law of the Sea. That article reads as follows:

"States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment."

[290] The Commission may, at some point, add further limitations to article 1 in the form of a list of activities or a list of substances manipulated by such activities.

tion or minimization of the "risk" of causing harm is the first step in preventing the harm itself.

(4) In that sense, the principle expressed in this article goes further in the protection of the affected State's rights and interests and is specifically applicable to hazardous activities, that is, activities which involve a risk of causing transboundary harm.

(5) The general obligation to prevent transboundary harm is well established in international law,[291] but article A recognizes a general obligation for the State of origin to prevent or minimize the risk of causing transboundary harm, which means that the State must ensure that the operator of an activity as defined by articles 1 and 2 takes all adequate precautions so that transboundary harm will not take place, or if that is impossible due to the nature of the activity, then the State of origin must take all necessary steps, to make the operator take such measures as are necessary to minimize the risk.

(6) Article 10 of the Legal Principles for Environmental Protection and Sustainable Development, which was drafted by the Experts Group of Environmental Law of the World Commission on Environment and Development, is consistent with the content of the preceding paragraph. Article 10 provides that:

> States shall, without prejudice to the principles laid down in Articles 11 and 12, prevent or abate any transboundary environmental interference or a *significant risk thereof** which causes substantial harm—i.e. harm which is not minor or insignificant.[292]

(7) The commentary to article 10 of the Legal Principles for Environmental Protection and Sustainable Development provides that:

> Subject to certain qualifications to be dealt with below, Article 10 lays down the well-established basic principle governing transboundary environmental interferences . . . which causes, *or entails a significant risk of causing*,* substantial harm in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction.[293]

(8) The commentary to that article further provides that this principle is an implicit consequence of the duty not to cause transboundary harm:

> It should be noted that the principle formulated above does not merely state that States are obliged to prevent or abate transboundary environmental interferences which *actually* cause substantial harm, but also that they are obliged to prevent or abate activities which entail a *significant risk* of causing such harm abroad. The second statement states as a matter of fact *explicitly* what must already be deemed to be *implicit* in the duty to prevent transboundary environmental interferences *actually* causing substantial harm and serves to exclude any misunderstanding on this point.[294]

(9) Making explicit what is implicit in the abovementioned general obligation of prevention is already an important advance in the law referring to transboundary harm, since it gives clear foundation to all other obligations of prevention, and particularly to those of notification, exchange of information and consultation, which originate in the right of the presumably affected State—corresponding to this general obligation of prevention—to participate in the general process of prevention.

(10) The article has two parts. The first part affirms the freedom of action by States and the second part addresses the limitations to that freedom. The first part provides that the freedom of States to conduct or permit activities in their territory or under their jurisdiction or control is not unlimited. This is another way of stating that the freedom of States in such matters is limited. The Commission, however, felt that it would be more appropriate to state the principle in a positive form, which presupposes the freedom of action of States, rather than in a negative form which would have emphasized the limitation of such freedom.

(11) The second part of the article enumerates two limitations to such State freedom. First, such freedom is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm. Secondly, such freedom is subject to any specific obligations owed to other States in that regard. The words "in that regard" refer to preventing or minimizing the risk of causing significant transboundary harm.

(12) The first limitation to the freedom of States to carry on or permit activities referred to in article 1 is set by the general obligation of States to prevent or minimize the risk of causing significant transboundary harm. The general obligation stipulated under this article should be understood as establishing an obligation of conduct. The article does not require that a State guarantee the absence of any transboundary harm, but that it takes all the measures required to prevent or minimize such harm. This understanding is also consistent with the specific obligations stipulated in various articles on prevention.

(13) The meaning and the scope of the obligation of due diligence have been explained in paragraphs (4) to (13) of the commentary to article B [8 and 9].

Article B [8 and 9]. Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Commentary

(1) This article, together with article D [7] (Cooperation) provides the theoretical foundation for the articles on prevention. The articles set out specific and detailed obligations of States to prevent or minimize significant transboundary harm. The article is short and concise. It provides that States shall take all appropriate measures to prevent or minimize the risk of significant

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[291] This general obligation of States has its foundation in international practice. See general commentary to the draft articles adopted by the Commission at its forty-sixth session, and also commentary to article 1 (see footnote 282 above).

[292] *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1987), p. 75.

[293] Ibid.

[294] Ibid., p. 78. However, "[w]hile activities creating a significant risk of causing substantial harm must in principle be prevented or abated, it may well be that, in the case of certain dangerous activities, the unlawfulness will be taken away when all possible precautionary measures have been taken to preclude the materialization of the risk *and the benefits created by the activity must be deemed to far outweigh the benefits to be obtained by eliminating the risk* which would require putting an end to the activity itself." (Ibid., p. 79.)

transboundary harm. The word "measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm.

(2) This article incorporates a number of elements contained in article 14 (Measures to prevent or minimize risk) which was provisionally adopted at the forty-sixth session.[295] At the appropriate time, article 14 will be brought into harmony with the present article and will deal exclusively with implementation, following, for example, the model in the Convention on Environmental Impact Assessment in a Transboundary Context. A new article 14 could read:

> "States shall take all legislative, administrative or other action to implement the provisions of these articles (on prevention, etc.)."

(3) Article B, then, sets up the principle of prevention that concerns every State regarding activities under article 1. Article 14 specifies the modalities whereby the State of origin may discharge the obligations of prevention which have been established in pursuance of the present principle. Those modalities include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State has adopted.

(4) The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under the present articles.

(5) An obligation of due diligence as the standard basis for the protection of the environment from harm, can be deduced from a number of international conventions[296] as well as from the resolutions and reports of international conferences and organizations.[297] The obligation of due diligence was recently discussed in a dispute between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries.[298]

(6) In the "*Alabama*" case, the tribunal examined two different definitions of due diligence submitted by the parties. The United States of America defined due diligence as:

> [A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, . . .'[299]

(7) Great Britain defined due diligence as "such care as Governments ordinarily employ in their domestic concerns".[300] The tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by Great Britain. The tribunal stated that

> [t]he British Case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient.[301]

(8) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of *Donoghue* v. *Stevenson* as follows:

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question.[302]

(9) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus States are under an obligation to take unilateral measures to prevent or minimize the risk of significant transboundary harm by activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, secondly, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

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[295] Paragraphs (4) to (13) of the commentary to this article are taken from the commentary to article 14. When article 14 is redrafted appropriate adjustments will be made.

[296] See, for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea; articles I, II and VII, paragraph 2, of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; article 2 of the Vienna Convention for the Protection of the Ozone Layer; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resource Activities; article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context; and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[297] See principle 21 of the World Charter for Nature (General Assembly resolution 37/7, annex); and principle VI of the Draft principles of conduct for the guidance of States concerning weather modification prepared by WMO and UNEP (M. L. Nash, *Digest of United States Practice in International Law* (United States Government Printing Office, Washington, D.C., 1978), p. 1205).

[298] See *The New York Times*, 11, 12 and 13 November 1986, pp. A 1, A 8 and A 3, respectively. See also A. C. Kiss, " 'Tchernobale' ou la pollution accidentelle du Rhin par des produits chimiques", *Annuaire français de droit international* (Paris), vol. 33 (1987), pp. 719-727.

[299] The Geneva Arbitration (The "*Alabama*" case) (United States of America *v.* Great Britain), decision of 14 September 1872 (J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. I), pp. 572-573.

[300] Ibid., p. 612.

[301] Ibid.

[302] United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council* (London, 1932), p. 580.

(10) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climatic conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

(11) The Commission takes note of principle 11 of the Rio Declaration on Environment and Development which states:

> States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.[303]

(12) Similar language is found in principle 23 of the Stockholm Declaration. That principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community".[304] It is the view of the Commission that the level of economic development of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's level of economic development cannot be used to discharge a State from its obligation under these articles.

(13) The obligation of the State is, first, to attempt to design policies and to implement them with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize such harm. In the view of the Commission, the word "minimize" should be understood in this context as meaning to pursue the aim of reducing to the "lowest point" the possibility of harm.

Article C [9 and 10]. Liability and reparation

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Commentary

(1) This article forms the basis for the future articles addressing issues of liability and reparation. It has been adopted as a working hypothesis because the draft articles on liability have not yet been adopted by the Commission.

(2) The obligation set forth in the article must, then, be understood in the context of whatever articles the Commission will adopt on liability in the future. The words "in accordance with the present articles" are intended to convey the understanding that the principles of liability and of reparation are treaty based and subject to the terms and conditions set forth in the present and future articles on the topic.

(3) The principle contained in article C is not altogether new to the Commission. At its fortieth session, in 1988, the Commission stated the following:

> There *was general agreement** that the principles set out by the Special Rapporteur in paragraph 86 of his fourth report (A/CN.4/413) *were relevant to the topic and were acceptable in their general outline.** Those principles were:
>
> (*a*) The articles must ensure to each State as much freedom of choice within its territory as is compatible with the rights and interests of other States;
>
> (*b*) The protection of such rights and interests requires the adoption of measures of prevention and, *if injury nevertheless occurs, measures of reparation*;*
>
> (*c*) In so far as may be consistent with those two principles, an innocent victim *should not be left to bear his loss or injury.**[305]

(4) The principle of liability and reparation is a necessary corollary and complement to article A. That article obliges States to prevent or minimize the risk from activities that are not prohibited by international law. Article C, on the other hand, establishes an obligation to make reparation whenever significant transboundary harm occurs. The article thus rejects a regime which would permit the conduct of activities hazardous to other States without any form of reparation when harm occurs.

(5) Since the Commission has not yet agreed on a specific regime of liability, the article on the principle of liability is without prejudice to the question of: (*a*) the entity that is liable and must make reparation; (*b*) the forms and the extent of reparation; (*c*) the harm that is subject to reparation; and (*d*) the basis of liability. This explains the marked difference in the structure of this article and those of articles A [6], B [8 and 9] and D [7]. Unlike those provisions, which identify outright who bears the obligation, this article only establishes—as a working hypothesis—that there is liability and an obligation to make reparation.

(6) As regards the basis of liability, it can only be advanced that such basis is not perforce the violation of an international obligation. The Commission, when addressing the whole framework of liability and its specific articles, will take note of a variety of possibilities. For example, whether liability should be based on a causal relationship or on the breach of the obligation of due

[303] See footnote 289 above.

[304] See footnote 279 above.

[305] *Yearbook . . . 1988*, vol. II (Part Two), para. 82.

diligence or whether both of these bases could be used depending upon the party or parties to which liability is attributable.

(7) In fact, in international practice there are several ways of remedying the transboundary damage caused by a hazardous activity to persons or property, or the environment. One is the absolute liability of the State, as in the Convention on International Liability for Damage Caused by Space Objects, the only case of absolute State liability. Another way is to channel liability through the operator, and leave the State out of the picture, as in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. Still another is to assign to the State some subsidiary liability for that amount of compensation not satisfied by the operator, such as the Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage.

(8) The way in which the principle has been drafted does not pre-empt any possibility regarding the future work of the Commission, nor rules out any form of liability from being embraced. Indeed, a type of alternative may be considered suitable which would make the State responsible only in cases where due diligence is breached, in a way similar to that of article 7 of the draft articles on the law of the non-navigational uses of international watercourses.[306]

(9) In including this article within the set of fundamental principles of the topic, the Commission takes careful note of principle 22 of the Stockholm Declaration[307] and principle 13 of the Rio Declaration on Environment and Development[308] in which States are encouraged to cooperate in developing further international law regarding liability and compensation for environmental damage caused by activities within their jurisdiction or control to areas beyond their national jurisdiction. These principles demonstrate the aspirations and preferences of the international community.

(10) It must be noted that in the English version, "reparation" is used instead of "compensation", which is the word usually associated with "liability". The Commission found, however, that the concept of compensation within the meaning of part two, article 8, of the draft articles on State responsibility,[309] that is to say as the payment of a sum of money, is hardly applicable to some instances of remedying environmental harm, where restoration is the best solution. Restoration, which is an attempt of returning to the *status quo ante*, may be considered as a form of *restitutio naturalis* and certainly not of compensation. Also in the field of environmental harm, the introduction into a damaged ecosystem, by way of reparation, of certain equivalent components to those diminished or destroyed is not monetary compensation, although it may be considered a form of reparation by equivalent. Such a solution is envisaged in certain instruments.[310] "Reparation", then, must be understood in its most general meaning, as including some of the categories of consequences that the same term has in part two, article 6 *bis*, of the draft articles on State responsibility.[311]

(11) The Commission takes note of treaty practice by which States have either identified a particular activity or substances with injurious transboundary consequences and have established a liability regime for the transboundary harm. Activities involving oil transportation, oil pollution and nuclear energy or material are prime targets of these treaties.[312] Some conventions address the question of liability resulting from activities other than those involving oil or nuclear energy or material.[313] Many other treaties refer to the issue of liability without any further clarification as to the substantive or procedural rules of liability. These treaties, while recognizing the relevance of the liability principle to the operation of the treaty, do not resolve the issue. They seem to rely on the existence in international law of liability rules, or to expect that such rules will be developed.[314] Yet other treaties indicate that another instrument will be developed by the parties addressing the question of liability which might arise under the treaties.[315]

(12) The concept of liability has also been developed to a limited extent in State practice. For example, in the *Trail Smelter* case, the smelter company was permitted to continue its activities, but the tribunal established a permanent regime which called, under certain condi-

[306] *Yearbook... 1994*, vol. II (Part Two), p. 102.

[307] See footnote 279 above.

[308] See footnote 289 above.

[309] See footnote 94 above.

[310] See for example, article 2, paragraph 8, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

[311] See footnote 94 above.

[312] See in particular the International Convention on Civil Liability for Oil Pollution Damage of 1969; the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources; the Convention on Third Party Liability in the Field of Nuclear Energy; the Convention on the Liability of Operators of Nuclear Ships; the Vienna Convention on Civil Liability for Nuclear Damage; the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material; and the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD).

[313] See the Convention on International Liability for Damage Caused by Space Objects and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

[314] See in this context the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution; the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the Convention for the Protection of the Mediterranean Sea against Pollution; the Convention on the Protection of the Marine Environment of the Baltic Sea Area; the Convention on the Protection of the Black Sea Against Pollution; the Convention on the Transboundary Effects of Industrial Accidents; and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[315] See for example, the Convention on the Regulation of Antarctic Mineral Resource Activities, which makes the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal provides in article 12 that State parties shall develop a protocol on liability and compensation. See also the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa which also provides that States parties to the Convention shall develop a protocol on liability and compensation.

tions, for compensation for injury to the United States interests arising from fume emission even if the smelting activities conformed fully to the permanent regime as defined in the decision:

> The Tribunal is of the opinion that the prescribed régime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.
>
> *But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur,** and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers to Question No. 4 . . . : (*a*) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of Smelter to comply with the regulations herein prescribed or *notwithstanding the maintenance of the régime,** an indemnity shall be paid for such damage but only when *and if the two Governments shall make arrangements for the disposition of claims for indemnity** . . .[316]

(13) In the award in the *Lake Lanoux* case,[317] on the other hand, the tribunal, responding to Spain's allegation that the French projects would entail an abnormal risk to Spanish interests, stated as a general matter that responsibility would not arise as long as all possible precautions against the occurrence of an injurious event had been taken.[318] The tribunal made a brief reference to the question of dangerous activities, by stating: "It has not been clearly affirmed that the proposed works [by France] would entail an abnormal risk in neighbourly relations or in the utilization of the waters." This passage may be interpreted as meaning that the tribunal was of the opinion that abnormally dangerous activities constituted a special problem, and that, if Spain had established that the proposed French project would entail an abnormal risk of transboundary harm to Spain, the decision of the tribunal might have been different.

(14) In the *Nuclear Tests* case, ICJ duly recited Australia's statement of its concerns that

> . . . the atmospheric nuclear explosions carried out by France in the Pacific have caused wide-spread radio-active fall-out on Australian territory and elsewhere in the southern hemisphere, have given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radio-active material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere creates anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace could not be undone.[319]

(15) In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that

> . . . if the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States.[320]

(16) He further stated that

> . . . [i]n the present state of international law, the 'apprehension' of a State, or 'anxiety', 'the risk of atomic radiation', do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests.
>
> Those who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of the law.[321]

(17) The Commission also takes note of a number of incidents in which, without admitting any liability, compensation was paid to the victims of significant transboundary harm. In this context, reference is made to the following cases.

(18) The series of United States of America nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area. They injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated 4 January 1955, the United States Government, completely avoiding any reference to legal liability, agreed to pay compensation for harm caused by the tests. [322]

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[316] UNRIAA, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.* at p. 1980.

[317] Original French text of the award in UNRIAA, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*; translation in *International Law Reports, 1957* (London), vol. 24 (1961), pp. 101 *et seq.*

[318] The tribunal stated:

> "The question was lightly touched upon in the Spanish Counter memorial (p. 86), which underlined the 'extraordinary complexity' of procedures for control, their 'very onerous' character, and the 'risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel'. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of article 9." (Ibid., pp. 123-124, para. 6 of the award.)

[319] *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 99 *et seq.* at p.104. The Court did not rule on merits of the case.

[320] Ibid., p. 132.

[321] Ibid.

[322] The note stated that:

> ". . . The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained.
>
> ". . . the Government of the United States of America hereby tenders, *ex gratia*, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.
>
> ". . .
>
> "It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, nationals, or juridical entities . . . for any and all injuries, losses, or damages arising out of the said nuclear tests."
>
> *The Department of State Bulletin* (Washington, D.C.), vol. XXXII, No. 812 (17 January 1955), pp. 90-91.

(19) In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States, the latter agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate . . .".[323] The report disclosed that in February 1960, a complaint against the United States had been lodged with the high court of the Trust Territory with a view to obtaining US$ 8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that enactment of bill No. H.R.1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people".[324] On 22 August 1964, President Johnson signed into law an act whereby the United States assumed "compassionate responsibility to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on March 1, 1954", and there was authorized to be appropriated $950,000 to be paid in equal amounts to the affected inhabitants of Rongelap.[325] According to another report, in June 1982 the Reagan Administration was prepared to pay US$ 100 million to the Government of the Marshall Islands in settlement of all claims against the United States by islanders whose health and property had been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963.[326]

(20) In 1948, a munitions factory in Arcisate, in Italy, near the Swiss border, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border.[327]

(21) In 1971, the Liberian tanker "*Juliana*" ran aground and split apart off Niigata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. The Liberian Government (the flag State) offered 200 million yen to the fishermen for damage, which they accepted.[328] In this affair, the Liberian Government accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

(22) Following the accidental spill of 12,000 gallons of crude oil into the sea at Cherry Point, in the State of Washington, and the resultant pollution of Canadian beaches, the Canadian Government addressed a note to the United States Department of State in which it expressed its grave concern about this "ominous incident" and noted that "the government wishes to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, will be paid by those legally responsible".[329] Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

> We are especially concerned to ensure observance of the principle established in the 1938 Trail smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the Trail smelter case and we would expect that the same principle would be implemented in the present situation. Indeed, this principle has already received acceptance by a considerable number of states and hopefully it will be adopted at the Stockholm conference as a fundamental rule of international environmental law.[330]

(23) Canada, referring to the precedent of the *Trail Smelter* case, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations.

(24) In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of that canton and some 10,000 litres of milk per month had to be destroyed.[331] The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage.

(25) During negotiations between the United States and Canada regarding a plan for oil prospecting in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused in the United States by the activities of the private corporation that was to undertake the prospecting.[332] Although the private corporation was

[323] M. M. Whiteman, *Digest of International Law* (Washington, D.C.), vol. 4, p. 567.

[324] Ibid.

[325] Ibid.

[326] *The International Herald Tribune*, 15 June 1982, p. 5.

[327] P. Guggenheim, "La pratique suisse (1956)", *Annuaire suisse de droit international* (Zurich), vol. XIV (1957), p. 169.

[328] *The Times* (London), 1 October 1974; RGDIP (Paris), vol. 80 (1975), p. 842.

[329] *The Canadian Yearbook of International Law, 1973* (Vancouver, B.C.), vol. XI (1973), pp. 333-334.

[330] Ibid., p. 334.

[331] L. Caflisch, "La pratique suisse en matière de droit international public 1973", *Annuaire suisse de droit international* (Zurich), vol. XXX (1974), p. 147. The facts about the case and the diplomatic negotiations that followed are difficult to ascertain.

[332] *International Canada* (Toronto), vol. 7, No. 3 (1976), pp. 84-85.

to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove inadequate.[333]

(26) In connection with the construction of a highway in Mexico, in proximity to the United States border, the United States Government, considering that, notwithstanding the technical changes that had been made in the project at its request, the highway did not offer sufficient guarantees for the security of property situated in United States territory, reserved its rights in the event of damage resulting from the construction of the highway. In a note addressed on 29 July 1959 to the Mexican Minister of Foreign Relations, the United States Ambassador to Mexico concluded:

> In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway.[334]

(27) In the case of the Rose Street canal, both the United States and Mexico reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State.[335]

(28) In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka, Canada reserved its rights to compensation in the event of damage.[336]

(29) The Commission notes that treaty practice shows a clear tendency in imposing no-fault (*sine delicto*) liability for extraterritorial harm on the operators of activities or their insurers.[337] This is standard practice in treaties primarily concerned with commercial activities. Some conventions, regulating activities undertaken mostly by private operators, impose certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries the operator causes either for the whole compensation or that portion of it not satisfied by the operator.[338]

(30) On the other hand, the Convention on International Liability for Damage Caused by Space Objects of 1972 holds the launching State absolutely liable for transboundary damage. This Convention is unique because, at the time of its conclusion, it was anticipated that the activities being regulated, because of their nature, would be conducted only by States. The Convention is further unique in that it allows the injured party the choice as to whether to pursue a claim for compensation through domestic courts or to make a direct claim against the State through diplomatic channels.

(31) The Commission finds it striking that the trend of requiring compensation is pragmatic rather than theoretically grounded in a consistent theory of liability. Liability of private operators, their insurers, and possibly States takes many forms in special circumstances.

Article D [7]. Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

Commentary

(1) In the view of the Commission, the principle of cooperation between States is essential in designing and implementing effective policies to prevent or minimize the risk of causing significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration[339] and principle 7 of the Rio Declaration on Environment and Development[340] recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation have been stipulated in articles that are already adopted on prevention, in particular article 15 (Notification and information), article 16 (Exchange of information), article 16 *bis* (Information to the public), article 17 (National security and industrial secrets), article 18 (Consultations on preventive measures) and article 19 (Rights of the State likely to be affected). They envisage the participation of the affected State, which is indispensable to enhance the effectiveness of any preventive action. The affected State may know better than anybody else which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem.

(2) The article requires States concerned to cooperate in good faith. Article 2, paragraph 2, of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The Vienna

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[333] Ibid.

[334] Whiteman, op. cit. (footnote 323 above), vol. 6, p. 262.

[335] Ibid., pp. 264-265.

[336] *International Canada* (Toronto), vol. 2, (1971), pp. 97 and 185.

[337] See for example, in the area of oil pollution, the International Convention on Civil Liability for Oil Pollution Damage; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources; the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage. In the area of nuclear energy and material, see the Convention on Third Party Liability in the Field of Nuclear Energy; the Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy; the Convention on the Liability of Operators of Nuclear Ships; the Vienna Convention on Civil Liability for Nuclear Damage; the Convention relating to civil liability in the field of maritime carriage of nuclear material; and in the area of other activities, the Convention on International Liability for Damage Caused by Space Objects and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment.

[338] See for example, article III of the Convention on the Liability of Operators of Nuclear Ships, and article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities.

[339] See footnote 279 above.

[340] See footnote 289 above.

Convention on the Law of Treaties and the Vienna Convention on Succession of States in Respect of Treaties declare in their preambles that the principle of good faith is universally recognized. In addition article 26 and article 31, paragraph 1, of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the structure of treaties. The decision of ICJ in the *Nuclear Tests* case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."[341] This dictum of the Court implies that good faith applies also to unilateral acts.[342] Indeed the principle of good faith covers "the entire structure of international relations".[343]

(3) The arbitration tribunal established in 1985 between Canada and France on disputes concerning filleting within the Gulf of St. Lawrence by "*La Bretagne*", held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively.[344]

(4) The words "States concerned", in the article, refer to the State of origin and the affected State or States. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, they have no legal obligation to do so.

(5) The article provides that States shall as necessary seek the assistance of any international organization in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words "as necessary" are intended to take account of a number of possibilities, including those in the following paragraphs.

(6) First, assistance from international organizations may not be appropriate or necessary in every case involving the prevention or minimization of transboundary harm. For example, the State of origin or the affected State may, themselves, be technologically advanced and have as much or even more technical capability than international organizations to prevent or minimize significant transboundary harm. Obviously, in such cases, there is no obligation to seek assistance from international organizations.

(7) Secondly, the term "international organizations" is intended to refer to organizations that are relevant and in a position to assist in such matters. Even with the increasing number of international organizations, it cannot be assumed that there will necessarily be an international organization with the capabilities necessary for a particular instance.

(8) Thirdly, even if there are relevant international organizations, their constitutions may bar them from responding to such requests from States. For example, some organizations may be required (or permitted) to respond to requests for assistance only from their member States, or they may labour under other constitutional impediments. Obviously, the article does not purport to create any obligation for international organizations to respond to requests for assistance under this article.

(9) Fourthly, requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not discharge the obligation of individual States to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, and so forth.

(10) The latter part of the article speaks of minimizing the effects "both in affected States and in States of origin". It anticipates situations in which, due to an accident, there is, in addition to significant transboundary harm, massive harm in the State of origin itself. These words are, therefore, intended to present the idea that, in many ways, significant harm is likely to be a nuisance for all the States concerned, harming the State of origin as well as the other States. Hence, transboundary harm should, to the extent possible, be looked at as a problem requiring common endeavours and mutual cooperation to minimize its negative consequences. These words, of course, do not intend to impose any financial costs on the affected State for minimizing harm or clean-up operation in the State or origin.

(11) The expression "affected State" means the State in the territory or otherwise under the jurisdiction or control of which the significant transboundary harm has occurred. This expression will eventually be moved to article 2 (Use of terms).

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[341] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 268.

[342] See M. Virally, "Review essay: Good faith in public international law", AJIL, vol. 77, No. 1 (January 1983), p. 130.

[343] See R. Rosenstock, "The Declaration of Principles . . .", loc. cit. (footnote 187 above), p. 734.

[344] *Dispute concerning Filleting within the Gulf of St Lawrence ("La Bretagne") (Canada* v. *France)* (ILR, vol. 82 (1990), pp. 590 *et seq.*, at p. 614).

Chapter VI

THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

A. Introduction

409. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "The law and practice relating to reservations to treaties".[345] The General Assembly, in paragraph 7 of resolution 48/31, endorsed the decision of the Commission on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly.

410. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[346]

B. Consideration of the topic at the present session

411. At the present session, the Commission had before it the first report of the Special Rapporteur on the topic (A/CN.4/470). The Commission considered the report at its 2400th to 2404th, 2406th to 2407th, 2412th and 2416th meetings held from 14 to 22 June, 28 to 29 June, and on 6 and 13 July 1995.

1. The first report of the Special Rapporteur

412. In introducing his first report, the Special Rapporteur stated that the question of reservations to treaties was not *terra incognita* for the Commission, which had already studied it on four occasions, first in 1951 in connection with the topic of the law of treaties, and later within the framework of the work which had led to the adoption of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"), the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention").

413. The Special Rapporteur, like his predecessors, believed that the question of reservations to treaties was probably one of the most difficult in the whole of public international law. The first problem which is of a technical nature is that of having to reconcile two imperatives: the need to maintain the essential elements of the treaty on the one hand, and the need to facilitate as far as possible, accession to multilateral treaties of general interest. There was also the problem of political ulterior motives behind what appeared to be technical considerations for making reservations. However, with the completion of political decolonization and the end of the cold war, the question of reservations could now be tackled in a more serene manner. The Special Rapporteur furthermore referred to problems of a doctrinal nature as regards in particular the question of the "validity" of reservations. The term, "validity" of reservations, he observed, could be interpreted as covering two separate questions: the "permissibility" of reservations, on the one hand, and their "opposability", on the other.[347] The doctrinal differences between the "permissibility" and the "opposability" of reservations in that area, he noted, were so marked as to make it possible to speak of a school of "permissibility" on one hand, as against a school of "opposability" on the other.

414. More recently, the Special Rapporteur noted, there has been a revival of this controversy by international human rights bodies, in particular, the Human Rights Committee, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, by their adoption of a bold new stand on the special problems of reservations to human rights treaties. Those developments, welcomed by some States but strongly criticized by others, added to the complexity of the topic to such a point that the question arose whether a uniform legal regime governing reservations to treaties was necessary or possible.

415. The report under consideration comprised three chapters; chapter I dealt with the Commission's previous work on the topic of reservations, chapter II contained a brief inventory of the problems of the topic, and chapter III dealt with the possible scope and form of the Commission's future work on the topic. According to the Special Rapporteur, chapter I was intended to act as a

[345] See footnote 72 above.

[346] *Yearbook... 1994*, vol. II (Part Two), p. 179, para. 381.

[347] For the meaning of "permissibility" and "opposability" of reservations see para. 417 below.

refresher of the essential stages in the topic's long history, starting in 1950 with the report by the Special Rapporteur, Mr. James L. Brierly,[348] and ending with the adoption of the 1986 Vienna Convention. The most important stages in that process, it was noted, had been the Advisory Opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*;[349] the first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur,[350] which had led the Commission to adopt the flexible system provided for in article 2, paragraph 1 (*d*) and articles 19 to 23 of the 1969 Vienna Convention—subsequently supplemented by the 1978 Vienna Convention—and in the relevant articles of the 1986 Vienna Convention, which essentially reproduced the corresponding passages of the 1969 Vienna Convention. In his review of those milestone events, the Special Rapporteur realized that work had been difficult and that a balance had to be struck between widely differing doctrinal and political opinions and that solutions had been arrived at, in many cases, only at the cost of deliberate ambiguities. However, the general trend was clearly in favour of an increasingly strong assertion of the right of States to formulate reservations to the detriment of the right of other contracting States to oppose such reservations, even if the right of other contracting States to oppose, on an individual basis, the entry into force of the treaty between themselves and the reserving State was maintained. Moreover, the 1978 Vienna Convention by express referral to it, and the 1986 Vienna Convention, virtually by reproducing it, had the effect of strengthening the system established by the 1969 Vienna Convention, even though the latter Convention, which given its many ambiguities and gaps, had little that was "systematic" about it.

416. In his study of the problems involved, which is the subject of chapter II of his first report, the Special Rapporteur had relied on the limited information available to him about State practice, the practice of the Secretary-General of the United Nations as depositary and on information supplied by several international organizations of the United Nations system as well as from the Council of Europe and OAS.

417. The Special Rapporteur indicated in particular, that information on reservations to treaties had particularly been found lacking in so far as State practice was concerned. He hoped to prepare a questionnaire to be addressed to Governments for information and that members of the Commission might also assist him with any information available to them about the practice in their own or in other countries relating to this topic. In chapter II of the report, the Special Rapporteur had drawn up a long list of questions which he thought posed problems and asked for any suggestions on the order in hierarchical importance in which these problems might be placed. Many of these problems could be related to the counter-contradiction between the schools of "permissibility" and of "opposability", the adherents of the "permissibility" school considering that a reservation contrary to the object and purpose of the treaty was in itself void, irrespective of the reactions of the co-contracting States, while those of the "opposability" school, on the other hand, thought that the only test as to the validity of a reservation consisted of the objections of the other States.[351]

418. Therefore, according to the Special Rapporteur, if the "permissibility" doctrine was right, the nullity of a reservation incompatible with the object and purpose of the treaty could be invoked before an international or even a national tribunal even if the State claiming the nullity of the reservation had not itself made any objection to it, whereas, if the "opposability" doctrine was right, a State could not avail itself of a reservation contrary to the object and purpose of the treaty even if the other contracting State had accepted it.

419. In his first report, the Special Rapporteur had raised other questions of a particularly thorny nature. The first one of these was the effect of an impermissible reservation. Did it entail nullity of the expression of consent of the reserving State to be bound, or only nullity concerning the reservation itself? He noted that the case-law of international human rights protection bodies showed that the answers to those questions had considerable practical effects.[352]

420. Another difficult question that the Special Rapporteur pointed out, concerned objections to reservations. Should a State, in formulating an objection, be guided by the principle of the reservation's compatibility with the object and purpose of the treaty, or could it exercise discretion in the matter? There too, he observed, one encountered the conflict between "permissibility" and "opposability". He also wondered what the effects would be of an objection to a reservation if, as article 21, paragraph 3, common to the 1969 and 1986 Vienna Conventions permitted, the State objecting to the reservation had not opposed the entry into force of the treaty between itself and the reserving State?

421. Another group of difficult questions encountered by the Special Rapporteur related to interpretative declarations. How could such declarations be distinguished from reservations in the strict sense of the term and, in the case of genuine interpretative declarations, what were their legal effects?

422. Furthermore, according to the Special Rapporteur, the effect of reservations and objections on the entry into force of the treaty was far from clear.

423. The Special Rapporteur also noted that the 1978 Vienna Convention was silent on the fate of objections to reservations in the event of State succession. He wondered whether the successor State "inherited" the objections formulated by the predecessor State and whether it

[348] *Yearbook... 1950*, vol. II, p. 222, document A/CN.4/23.

[349] *I.C.J. Reports 1951*, p. 15.

[350] *Yearbook... 1962*, vol. II, p. 27, document A/CN.4/144.

[351] For the importance of the practical consequences of those conflicting positions see the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decisions of 30 June 1977 and 14 March 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271)

[352] The *Belilos* case adjudicated by the European Court of Human Rights posed a number of practical problems for the Swiss Government. See European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *Judgment of 29 April 1988* (Registry of the Court, Council of Europe, Strasbourg, 1988).

could formulate new objections itself. The replies provided by State practice, were, it seemed, always uncertain.

424. Still another fundamental question raised by the Special Rapporteur was whether there were areas in which the existing regime of reservations and objections to reservations was not satisfactory. He had in mind in particular the human rights treaties where the main consensual element that permeated the whole regime laid down under articles 19 to 23 of the 1969 Vienna Convention was challenged not only by certain writers but also by international bodies concerned with the protection of human rights.[353] If the system provided for under the 1969 Vienna Convention was not satisfactory, he inquired in what way it should then be modified or whether it should be abandoned altogether in the case of human rights treaties. He noted that, regardless of the question of the constituent instruments of international organizations or provisions codifying customary rules, there were perhaps other areas—for instance, environment and disarmament treaties—which should be recognized as calling for special treatment.

425. Lastly, the Special Rapporteur considered that it would be appropriate at some stage in the work on the topic to raise the question of "rival" techniques of reservation, whereby States parties to the same treaty could modify their respective obligations by means of additional protocols, bilateral arrangements or optional declarations concerning the application of a particular provision.

426. The Special Rapporteur stressed that he had not at the present stage attempted to provide answers to these questions. The main thing was to identify all the problems properly, and that this was his sole ambition at the current session.

427. Chapter III of the report dealt with the scope and form of the future work of the Commission on the topic. On that point the Special Rapporteur called on the Commission to take a clear stand at the current session.

428. With regard to the scope of the future work and the form it would take, the Special Rapporteur emphasized the fact that there had been much written not only by scholars, but by the Commission itself. Three conventions had been adopted and despite or perhaps because of their ambiguities they had proved their worth. He therefore considered that it would be improper to call into question the work of the Commission's predecessors, to which States were, on the whole, attached. He expressed a firm conviction that what had been achieved should be preserved, regardless of possible ambiguities. Moreover, in his view, the rules on reservations set forth in the 1969, 1978 and 1986 Vienna Conventions operated fairly well. The potential abuses had not occurred and, even if States did not always respect the rules, they at least regarded them as a useful guide. It seemed, at least prima facie, that those rules had now acquired customary force. It was therefore his fervent hope that the Commission would not start to question what had been achieved but that it would instead seek to determine such new rules as might be necessary to complement the rules set forth in the above-mentioned Conventions without throwing out the old ones, which in his view were certainly not obsolete.

429. Additionally, he said that, if the Commission were to adopt norms that were incompatible with articles 19 to 23 of the 1969 and 1986 Vienna Conventions or even with article 20 of the 1978 Vienna Convention, States which had ratified, or would in the future ratify, those Conventions would be placed in an extremely delicate position: some of them would have accepted the existing rules and would be bound by them, others would be bound by the new rules that would be incompatible with the rules already adopted; and yet others could even be bound by both, depending on their partners.

430. In the light of the above, the Special Rapporteur suggested that the existing articles of the 1969, 1978 and 1986 Vienna Conventions should be treated, as a matter of principle, as well established during the course of work on the topic. Where possible and desirable, ambiguities should be removed and an attempt should also be made to fill any gaps, if only to avoid any anarchical developments.

431. As for the form that should be given to the Commission's work, the Special Rapporteur suggested a number of possibilities open to the Commission. This included the treaty approach, which could itself take two different forms; one possibility would be to draft a convention on reservations that would reproduce in their entirety the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions subject only to clarification and completion where necessary. The mere fact of repeating the existing rules would preclude any likelihood of incompatibility. The other possibility would be to adopt one or three draft protocols that would supplement, but not conflict with, the existing 1969, 1978 and 1986 Vienna Conventions. In both cases, the Commission would be following the tried and tested method of submitting draft articles together with commentaries.

432. Apart from drafting treaties, the Special Rapporteur suggested other possibilities, including the drawing up of a guide on the practice of States and international organizations in the matter of reservations. Such a guide could take the form of an article-by-article commentary to provisions on reservations in the three Conventions, prepared in the light of developments since 1969 and designed to preserve what had been achieved, along with the necessary clarifications and additions.

433. A complementary approach would be for the Commission to propose model clauses from which inspiration could be drawn when negotiating a treaty, depending on the particular requirements of the treaty. This approach, if followed, according to the Special Rapporteur, would make for flexibility and would be of great use to States. In the opinion of the Special Rapporteur, model clauses had two advantages. First, by proposing a variety of clauses of derogation, it would counterbalance the general trend towards more precision by providing for more flexibility. Secondly, there were at the present time fairly strong centrifugal forces which were reflected in

[353] That dispute had been reopened with some force with general comment No. 24 of the Human Rights Committee adopted on 2 November 1994 (CCPR/C/21/Rev.1/Add.6, in particular, para. 18).

the challenging of existing rules in certain areas. That was particularly true in the area of human rights. There was no certainty that the problem which arose concerning the human rights conventions could be resolved simply by interpreting the existing rules. Model clauses for human rights treaties would, in his view, probably provide a viable solution for the future. Although it would be difficult, if not impossible to draw up an exhaustive list of all the clauses relating to reservations set forth in the existing multilateral conventions, a catalogue of such clauses could be made on the basis of a sufficiently representative sample of the various areas covered by treaties such as those on human rights, disarmament, international trade and so on. The drafting of model clauses would thus be a useful complement to the Commission's basic task on this question.

434. The last problem raised by the Special Rapporteur concerned the title of the topic. He did not find the title of the topic, namely, "The law and practice relating to reservations to treaties" to be a satisfactory one. It had, in his view, an academic ring to it. Moreover, it gave the impression that the law and the practice were distinct and could be detached from each other. He proposed a more neutral, and probably more accurate, title such as "Reservations to treaties".

435. In conclusion, the Special Rapporteur sought urgent assistance and orientation from the Commission on the following questions:

(*a*) Did the Commission agree to change the title of the topic to "Reservations to treaties"?

(*b*) Did it agree not to challenge the rules contained in article 2, paragraph 1 (*d*), and articles 19 to 23 of the 1969 and 1986 Vienna Conventions and article 20 of the 1978 Vienna Convention and to consider them as presently formulated and to clarify and complete them only as necessary?

(*c*) Should the result of the Commission's work take the form of a draft convention, a draft protocol(s), a guide to practice, a systematic commentary or something else?

(*d*) Was the Commission in favour of drafting model clauses that could be proposed to States for incorporation in future multilateral conventions in keeping with the field in which those conventions would be concluded?

He also called for comments from members of the Commission on the problem areas discussed in chapter II.

2. Summary of the debate

(a) *General observations*

436. Members of the Commission paid tribute to the Special Rapporteur for his well-articulated first report, which reflected the calibre of his scholarship and his masterly grasp of the subject-matter. The report provided the background to the question, gave a review of the problems posed and made a number of suggestions as to how the Commission might deal with those problems. Moreover, it was easy to read and it provided the basic information needed at this preliminary stage. Some members called for the updating of the study of the practice of the Secretary-General in respect of reservations to multilateral conventions. They also believed that it would be most helpful at an early stage to ask the principal depositaries of treaties within and outside the United Nations system for information on their experience, in particular, how they resolved in practice some of the uncertainties and inconsistencies that the Commission would have to examine, and what main problems States met in relation to reservations.

437. The question of reservations to treaties was, according to some members, one of the most controversial issues in contemporary international law. The many differences both of a doctrinal and a political nature, have however, been significantly reduced over a long process of compromises between the traditional approach and that which favoured more freedom with regard to the formulation of reservations. The final text of the 1969 Vienna Convention pertaining to reservations was based on proposals made by the Commission, which had abandoned the unanimity rule in favour of a more flexible system. One member insisted on the Inter-American origin of this new system. The Commission believed at the time that a more flexible system would result in an increase in the number of parties to multilateral treaties and correspondingly also in the number of reservations made to those treaties. According to some members, it was in order to achieve a balance between the opposing views on reservations to treaties, that the relevant provisions in the Conventions were couched in ambiguous terms and contained many gaps that required being clarified and filled.

438. According to some members, although the cold war and the process of political decolonization had ended, this had not diminished the significance of reservations to multilateral treaties. Each one of the numerous States in the world formed a complex socio-political entity with specific interests of its own; but the rules established by treaties were the same for all parties. The idea of reservations to treaties was to ensure the consistency of international law so far as essentials were concerned while, on the other hand, offering States a possibility of safeguarding their special interest subject to specific conditions. Moreover, the entitlement to make reservations and to become party to a convention subject to such reservations, was a sovereign right enjoyed by every State under international law.

439. All members shared the view of the Special Rapporteur that there was no reason, in principle, to reopen the text that had emerged from the second session of the United Nations Conference on the Law of Treaties.[354] They agreed that the Commission should simply try to fill the gaps and remove ambiguities while retaining the versatility and flexibility of the key articles of the 1969, 1978 and 1986 Vienna Conventions. However, a few

[354] See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6).

members expressed some doubts as to the possibility of preserving in their entirety the existing rules.

440. Some members expressed the view that the three Conventions had not clarified the ambiguities inherent in the question of reservations and that many questions and problems remained unanswered. Sometimes, the solutions afforded by practice and jurisprudence had merely complicated the issue or, at best, papered over it. In their view, that was not surprising, since reservations to treaties now formed an integral part of the contemporary international legal order in the world that was witnessing an unprecedented trend towards the codification and progressive development of the rules of international law affecting many areas of life throughout the world, the oceans, outer space and the global environment itself. The general framework for the regime of reservations was introduced in article 19, subparagraphs (*a*) and (*b*), of the 1969 Vienna Convention which, in subparagraph (*c*), also provided a safety net by laying down the concept of incompatibility with the object and purpose of the treaty. To a large extent, and in so far as the realities of the 1960s had permitted, the regime under the Convention had managed to reconcile two fundamental requirements: the importance of attracting the widest possible participation in treaties, and the need to recognize that in certain cases—whether due to religion, culture, deep-seated traditions, or even to political expediency—a State would be willing to be bound by most of the obligations under a treaty if its position on a specific issue was preserved. In a sense, it was observed, reservation was the price paid for broader participation.

441. The view was also expressed by one member that it would be unrealistic to expect Governments not to insist on the protection of their national interests after the adoption of a treaty, in the form of reservations, as they often did in the final stages before the adoption of a treaty in statements for the record—for inclusion in the *travaux préparatoires*. It also seemed reasonable to assume that Governments, when fully aware of all the issues and, having made up their minds to become parties to a treaty, would not wish to disengage themselves from the central core of obligations within a treaty. Moreover, there was no statistical or other basis for assuming that reserving States acted in bad faith. Indeed, in practice, States that were making non-permissible reservations might well be under the misapprehension that the reservations were in fact permissible or might not in fact have looked into what are or are not permissible reservations under the treaty.

442. The view was expressed that while the drafters of the definition of the term "reservation" in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention had exercised great care, an important element was missing from the definition. By virtue of a reservation, it was stated, a State party could only reduce the scope of its obligation towards other State parties and under no circumstances unilaterally increase rights set forth in the treaty. States therefore made use of reservations in order to evade or avert certain burdensome obligations, but not to arrogate new rights or more extensive rights than those provided by the treaty concerned.

443. It was however pointed out in this connection that it was not at all clear that a reservation could only reduce the obligations, and never increase the rights of its author. An example was cited of the arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic with regard to the Channel Islands,[355] in which France had entered a reservation to article 6 of the Convention on the Continental Shelf to the effect that those islands were covered by the special circumstances defined in the said article. According to the United Kingdom, however, France's "reservation" had in fact been an interpretative declaration and not a reservation as such. The arbitral tribunal had ruled that it had been a reservation. That reservation, by allowing France not to apply the median line, but another boundary line based on the special circumstances, had in fact increased the rights of its author.

444. With regard to interpretative declarations, some members observed that it was not always easy to draw a distinction between reservations and interpretative declarations. In general, a reservation specified the scope of the declaration accepting the treaty's obligations, whereas interpretative declarations did not affect that scope, which was determined by the sole content of the treaty. An interpretative declaration's sole purpose was to influence the process of treaty interpretation without, however, committing other States parties to it.

445. Other members stated that States tended to resort to "interpretative declarations" in order to try to amend a treaty at the time of ratification or to bypass the prohibition of reservations to a treaty. In such hypotheses, case-law showed that such "interpretative declarations" must be taken to be reservations if they were consistent with the definition in the convention concerned. Some conventions did not permit the making of reservations. In such cases, States were permitted to make declarations or certain "understandings" at the time of ratification. The practice of ILO in this regard was cited.

446. Although each State was free to make an "interpretative declaration" at the time of its ratification of an international convention, the depositary, for example, in the case of ILO, the Director-General, would assess the meaning and scope of the declaration according to the following criteria: the terms of the convention, the *travaux préparatoires*, and the practice of the ILO monitoring bodies, more especially the Committee of Experts on the Application of Conventions and Recommendations. If the declaration did not meet those criteria, the ratification would be rejected. In that case, it would be considered that the "interpretative declaration" was in fact equivalent to a reservation, which was incompatible with the object and purpose of the Convention.

447. Some members expressed the view that interpretative declarations were widely, but wrongly used, by the parties to a treaty. In their view, no less than one third of such declarations were disguised reservations, since under the terms of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, reservations excluded or modified the legal effect of certain provisions of the treaty in their

[355] See footnote 351 above.

application to the declarant State. Even where a Convention expressly provided for a distinction between a reservation and an interpretative declaration, the parties to the Convention did not respect the distinction. For instance, it was noted that article 309 of the United Nations Convention on the Law of the Sea prohibited reservations unless they were expressly permitted under other articles in that Convention. Article 310, however, provided that article 309 did not preclude a State from making a declaration

> . . . with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations . . . do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

It was apparent that the effect of some of the reservations to the Convention was to exclude or modify the legal effect of its provisions in relation to the declarant State. While it could be said that the use of the word "purport", as used in article 310, prevented a declaration from being a reservation simply because the alleged intent of the declarant State was that the declaration should not modify the legal effects of the Convention in relation to that State, the real meaning of the term "purport" was irrelevant if its actual effect was to alter the legal effect of the Convention in relation to the declarant State.

448. Other members stated that they could not accept the view expressed by the Commission in its commentary to article 2 of the draft articles on the law of treaties[356] to the effect that a declaration made by a State could in some cases amount to a reservation. A reservation, it was said, was a legal act whose effects were determined by law, whereas a declaration was a political act without any legal effects under the law of treaties. At the same time a declaration fell within the category of "State practice" and for that reason could, if accepted, introduce changes in standards of international law (*opinio juris*).

449. Some members observed that the three Vienna Conventions were silent on the question of the distinction between reservations and interpretative declarations. According to them, it was not known, for example, when, by whom and by what majority of contracting parties was a declaration to be considered a genuine reservation. The point was also made that it was extremely difficult to make a distinction between "qualified interpretative declarations" and "interpretative declarations". These unresolved issues relating to declarations and their legal effects thus required further examination, especially since States seemed to resort to them with increasing frequency.

450. The view was also expressed that the choice between interpretative statements and reservations by a State was often a function of what was possible for given States in light of their domestic law which they were unable or unwilling to change given the prevailing political, economic and social conditions.

451. Several members commented on the question of the validity of reservations. According to some members the expression "validity of reservations" was neutral and comprehensive enough to encompass both the "permissibility" and "opposability" of a reservation.

452. For some members, a reservation prohibited by a treaty or contrary to the treaty's object and purpose, even if accepted by all the other parties, was considered impermissible. That approach, it was said, was consistent with the terms of article 19 of the 1969 Vienna Convention. Moreover, the "flexible" system followed in that Convention was adopted following the advisory opinion rendered by ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in 1951.[357]

453. Some members expressed the view that it ought to be relatively easy to ascertain whether an attempt was being made to evade a clear-cut prohibition on reservations contained in the instrument in question, such as the United Nations Convention on the Law of the Sea or the Marrakesh Agreement Establishing the World Trade Organization.[358] It was, however, considered to be much more difficult to assess whether a particular reservation was incompatible with the object and purpose of a treaty. In order to make that determination, agreement had to be reached on what constituted the "core" provisions of the treaty, without which a treaty would lose its essential thrust.

454. As to a determination whether the requirements of compatibility of a reservation with the object and purpose had been met, the view was expressed that it was not possible from a proper reading of articles 19 and 20 of the 1969 Vienna Convention to conclude that such a determination can be made whether the requirement of compatibility under article 19, subparagraph (*c*), had been met. Sometimes, parties might not settle the issue by themselves. In that case they require recourse to a dispute settlement body to make the determination. In that event, any party could make an objection to any reservation since the question whether the requirements of article 19 had been met would have to be determined either mutually by the parties or perhaps, ultimately, by a dispute settlement mechanism.

455. Notwithstanding the existence of peaceful settlement mechanisms, part of the problem, however, stemmed from the fact that, since the adoption of the 1969 Vienna Convention, dispute settlement mechanisms have rarely been used to resolve problems relating to reservations.

456. According to some members, the term "permissibility" must not be allowed to disguise the fact that ultimately, a determination as to "permissibility" of a reservation would have to be made either by agreement between the parties or by a dispute settlement body. A reservation which was regarded by one party as potentially incompatible with the object and purpose of a treaty, in their view, might not be so regarded by another party. In the circumstance, it would be preferable to speak of a reservation that met the requirements for formulation under article 19.

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[356] *Yearbook . . . 1966*, vol. II, pp. 189-190.

[357] See footnote 349 above.

[358] GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (Sales No. GATT/1994-4), pp. 5 *et seq.*

457. Several members concluded however that, although the "permissibility" school was probably right in theory, the "opposability" school more accurately described the actual practice of States.

458. Other members referred to the problems left unresolved by the 1978 Vienna Convention. According to one member, article 20 of the Convention did not cover all categories of succession, such as cession of a part of a territory or unifying or dissolution of a State. The fact that the 1978 Vienna Convention contained a provision on reservations for newly independent States but none for other categories reflected a certain philosophy. The essential rule in the case of a newly independent State was the *tabula rasa* rule, set forth in article 16 of the Convention under which "a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates". The act of notification of succession by which a newly independent State established its status as a party to any multilateral treaty had some elements in common with an act whereby a State expressed its consent to be bound by a treaty. In their view, it therefore appeared entirely logical that the Convention should give a newly independent State the right to formulate its own reservations in respect of a treaty, while at the same time proceeding on the principle that reservations made by the predecessor State should be maintained except in the event of the indication of a contrary intention by the successor State.

459. As for cases of cession of State territory, the situation, it was said, was not the same. For such cases, the principle of variability of the territorial limits of a treaty applied and, consequently, the problem of succession in respect of treaties did not arise (except in the case of treaties establishing frontiers and other territorial regimes). In such cases, however, the rule of continuity applied *ipso jure* and the treaty was maintained in the form in which it had existed at the date of succession.

460. Similarly, it was said, in cases of the uniting or dissolution of States, articles 31 and 34 of the 1978 Convention confirmed the rule of continuity *ipso jure*. In such cases, no expression of the will of the successor State was required in order to bring the continuity rule into operation and therefore no new reservations were called for. As for the withdrawal of the reservations of the predecessor State, the relevant rules of the law of treaties codified in the 1969 Vienna Convention were applicable and, accordingly, there was no need for new rules to be formulated in the context of the topic under consideration.

461. However, several members commented that the problems related to State succession in matters of reservations and objections to treaties should have a low degree of priority in the future work of the Commission.

462. With reference to the question of reservations to human rights conventions, some members expressed the view that the issue of the relative incompatibility between the concept of reservations, based on reciprocity, and human rights treaties was of such importance that it might warrant exceptional treatment by the Commission. In this connection, the view was expressed that no reservations should be made to human rights treaties. According to some members, derogation may only be made, but for a short period of time, if due to economic difficulties a State was unable to fulfil its obligations under that treaty.

463. A suggestion was made that the Commission might be guided by the ILO practice with regard to human rights instruments. According to other members, a mechanism of the type envisaged in general comment No. 24 of the Human Rights Committee[359] might also be adopted by the Commission.

464. Some members made reference to reservations to bilateral treaties. They drew attention to the statement contained in paragraph (1) of the introduction to the commentary to article 20 of the draft articles on the law of treaties[360] to the effect that a reservation to a bilateral treaty amounted to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. That view had been supported by the participants in the United Nations Conferences on the Law of Treaties, and the resulting Conventions did not refer to the possibility of reservations to bilateral treaties, although they did not expressly prohibit them.

465. According to some members, in a bilateral relationship, either the two parties agreed on the actual scope of their mutual obligations and rights or they did not. For that reason, it was said, reservations to bilateral treaties should be excluded from the Commission's work, or the Commission should confine its work to reservations to multilateral treaties as a first stage, and could take up reservations to bilateral treaties later if it was deemed necessary.

466. In the same vein, reference was made with respect to article 20, paragraph 2, of the 1969 Vienna Convention, which deals with treaties whose reservations required the consent of all States parties. It was suggested that the Commission should leave aside the study of this question, because of the limited number of States parties involved and because the nature of the treaty's object and purpose made it essential that all the parties give their consent.

467. With regard to the final form of the work on the topic, several members favoured the approach of drafting guidelines and model clauses. This approach, it was said, was a reasonable objective through which the Commission would be enabled to examine and to fully appreciate the technicalities involved. This approach, at least at the initial stage, would not prejudge the outcome of the final draft; if at a later stage the Commission decided otherwise, it would still be possible to transform the guidelines into a draft protocol or draft convention.

468. Several members did not favour the adoption of a mere study. In their view, apart from the fact that embarking on the preparation of such a guide would be quite inconsistent with the proposed change of title, they

[359] See footnote 353 above.

[360] *Yearbook . . . 1962*, vol. II, p. 157, document A/5209, at pp. 176-177.

could not find any reference to preparing studies in the Commission's statute in which articles 16 and 20 spoke only of "draft" or "final drafts" in connection with both the progressive development and codification of international law.

469. Several members favoured the elaboration of draft protocols to existing conventions. Others felt that the drafting of protocols or of a "consolidated" set of articles in a separate instrument might turn out to be as risky as revising the text of the Vienna Conventions and cautioned against taking that approach. Moreover, it was said, if the articles that could take the form of a protocol did not meet with general approval, there would be two systems of reservations: one with and one without a protocol. The parties to a treaty and the parties to an additional protocol might not be the same, and many States would then find themselves at cross purposes, thus creating more confusion.

470. Several members expressed the view that while there were a number of options open to the Commission about the final outcome of its work, it was however too early to make any firm prediction on that score and they preferred to wait until the work was advanced enough before making that determination.

471. As for the proposal of the Special Rapporteur to change the title of the topic, all members who spoke on this question expressed their agreement as a matter of principle. Several members cited previous precedents within the Commission when , for example, the draft convention on succession of States in respect of matters other than treaties was later changed to the "Vienna Convention on Succession of States in respect of State Property, Archives and Debt". The proposed change, it was said, should of course not alter the substance of the topic.

472. Some members, while sympathizing with the Special Rapporteur's view that the title of the topic should be changed to "Reservations to treaties", expressed caution towards making such a change. Since the title had been established by the General Assembly, any change would lead to unpredictable debate in the Sixth Committee in which an incorrect impression might be gained that the proposed change reflected a shift in the Commission's substantive approach to the topic.

(b) *Summing-up by the Special Rapporteur*

473. In his summing-up, the Special Rapporteur stated that five main substantial issues had received wide commentary from the members of the Commission; namely: (*a*) the definition of reservations; (*b*) the quarrel between the "permissibility" and the "opposability" schools; (*c*) settlement of disputes; (*d*) succession of States; and (*e*) whether or not there should be a special regime for reservations to human rights treaties.

474. As regards the definition of reservations, the Special Rapporteur stated that some members thought that there existed a gap in the definition as provided in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention in the sense that that provision did not specify that a reservation could not for the author State provide the means to obtain rights that were not provided for by the treaty. In the Special Rapporteur's view, this was not a problem of definition. The question was whether a State could obtain rights through reservations which were not provided in the treaty. The answer to that question was not obvious. The Special Rapporteur indicated that an in-depth inquiry into that question would be made, in principle, in his next report.

475. The Special Rapporteur stated that the question relating to the two schools of thought—the "permissibility" and "opposability" schools, had generated wide debate in the Commission. The Special Rapporteur believed that an in-depth analysis of the related problems would be indispensable and indicated that one of his future reports would deal fully with this issue.

476. On the question of settlement of disputes, the Special Rapporteur stated that while the debate in the Commission had recalled that monitoring mechanisms were often provided by human rights bodies, the problem remained widely open in other fields. In his view, drafting of model rules for inclusion in future human rights instruments would be helpful in this respect.

477. Regarding the question of succession of States, the Special Rapporteur stated that most members did not believe that there was any urgent need to consider this issue; but that time allowing, the issue should be considered by the Commission at a later stage.

478. As to whether or not to set up a special regime for human rights treaties, the Special Rapporteur stated that the debate in the Commission had not been conclusive, some members had felt that States should be permitted to derogate from those conventions, while others expressed the opposite view. While some members held the view, for example, that human rights treaties were not based on reciprocity, others considered reciprocity to be at the heart of all treaties. According to the Special Rapporteur, therefore, in the light of these apparent contradictions, he believed that drafting of model clauses to be included in such treaties as well as in treaties in the field of the environment and disarmament could prove most useful to States.

479. Turning to the answers given by members to the questions he had posed (see para. 435 above), the Special Rapporteur, starting first with the title of the topic, stated that while some members had expressed procedural fears for such a change all members had supported his proposal to change the title of the topic to "Reservations to treaties".

480. With regard to bilateral treaties, the Special Rapporteur stated that he could in principle accept the views expressed by members that bilateral treaties should be excluded from the scope of the topic, subject to a more in-depth study which he intended to carry out, in principle in his next report.

481. Concerning the rules contained in article 2, paragraph 1 (*d*), and articles 19 to 23 of the 1969 and 1986 Vienna Conventions, and article 20 of the 1978 Vienna Convention, the Special Rapporteur stated that with minor nuances, all agreed that the rules contained in those

provisions were invaluable and should be preserved as far as possible. The Commission's task should therefore merely be to fill the gaps and to clarify any ambiguities inherent in them.

482. As to whether the Commission should embark on drafting model clauses for insertion in future conventions, according to the Special Rapporteur, the Commission was almost unanimous in its affirmative response, and he shared the view that such a way of proceeding would be most helpful.

483. Regarding the form that the future work should take—whether the Commission should draft a convention, an additional protocol or guidelines, the Special Rapporteur stated that the response from the debate had not been conclusive. While most members seemed to prefer the drafting of guidelines, others favoured the drafting of an additional protocol. Still other members expressed preference for the drafting of a convention or articles which could later be transformed into a convention. A proposal was also made for the drafting of a restatement of the law on the topic.

484. While the Special Rapporteur believed that drafting of a single instrument would be of great value to States, such an approach would however, in his view, make the system of reservations more rigid. A more flexible approach seemed to be the drafting of guidelines. If the General Assembly expressed an interest for something with more binding force, the guidelines could then be transformed into a convention or into protocols.

485. Regarding the questionnaire to be sent to States and international organizations, even though some members saw no utility in doing so, the Special Rapporteur considered it useful to send such a questionnaire in order to determine the actual practice of States and international organizations in this area. A useful proposal was also made to send a questionnaire to the principal depositaries of treaties.

486. As to the time-frame for concluding work on the topic, the Special Rapporteur indicated that the study of the topic should be concluded within five years.

487. At the end of his statement, the Special Rapporteur summarized as follows the conclusions he had drawn from the Commission's discussion of the topic under consideration:

(*a*) The Commission considers that the title of the topic should be amended to read "Reservations to treaties";

(*b*) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(*c*) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(*d*) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.

3. General conclusions

488. These conclusions constitute, in the view of the Commission, the result of the preliminary study requested by General Assembly resolutions 48/31 and 49/51. The Commission understood that the model clauses on reservations, to be inserted in multilateral treaties, would be designed to minimize disputes in the future.

489. At its 2416th meeting on 13 July 1995, the Commission, in accordance with its earlier practice,[361] authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions. This questionnaire will be sent through the Secretariat to its addresses.

[361] See *Yearbook... 1983*, vol. II (Part Two), para. 286.

Chapter VII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

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

490. At its 2378th meeting, on 2 May 1995, the Commission noted that, in paragraph 8 of resolution 49/51, the General Assembly had requested it:

(*a*) To consider thoroughly:

(i) The planning of its activities and programme 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 that the staggering of the consideration of some topics might contribute, *inter alia*, to a more effective consideration of its report in the Sixth Committee;

(*b*) To continue to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

491. The Commission agreed that this request should be taken up under item 8 of its agenda, entitled "Programme, procedures and working methods of the Commission, and its documentation", and that this agenda item should be considered in the Planning Group of the Enlarged Bureau.

492. The Planning Group held four meetings. It had before it the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session, entitled "Other decisions and conclusions of the Commission".[362] Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, addressed the Planning Group at its first meeting.

1. Planning of the activities for the remainder of the quinquennium

493. The current programme of work consists of the following topics: State responsibility; draft Code of Crimes against the Peace and Security of Mankind; international liability for injurious consequences arising out of acts not prohibited by international law; the law and practice relating to reservations to treaties; and State succession and its impact on the nationality of natural and legal persons.

494. In accordance with paragraph 8 (*a*) (i) of General Assembly resolution 49/51, the Commission considered the planning of its activities for the last year of the current term of office, bearing in mind, as requested by the resolution, the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics.

495. The Commission recognizes that it is impossible to adopt a rigid schedule, but finds it useful to set goals in planning its activities.

496. Taking into account the progress of the work achieved on the topics in the current programme, as well as the possibilities of making further progress, and bearing in mind the different degrees of complexity of the various topics, the Commission intends to attach priority at the next session to the draft Code of Crimes against the Peace and Security of Mankind and to the draft articles on State responsibility, the goal being to complete, by the end of the current term of office, the second reading of the draft articles on the draft Code and the first reading of the draft articles on State responsibility. Since the second reading of the draft Code is already at quite an advanced stage, the Commission agreed that most of the time should be set aside at the next session for the topic of State responsibility and that a maximum of time should be allocated in the Drafting Committee to considering the draft articles on State responsibility that are pending before it and completing the second reading of the draft Code. With reference to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission intends to make every effort to complete by 1996 the first reading of the draft articles on activities that risk causing transboundary harm. As regards the topic "State succession and its impact on the nationality of natural and legal persons", the Commission agreed that the Working Group established at the present session would be reconvened at the next session for the purpose of continuing its work; the Commission will then be in a position to submit to the General Assembly various options as to the form which the outcome of its work on the topic should take, thereby responding to the request contained in paragraph 6 of Assembly resolution 49/51. The schedule of work will be established in the light of the Assembly's reaction. As to the topic of "The law and practice relating to reservations to treaties", the Commission expects that its work will be completed within a period of five years and lead to a guide to practice, containing, where necessary, model clauses. On this topic and on the topic of "State succession and its impact on the nationality of natural and legal

[362] A/CN.4/464/Add.2, paras. 90-98.

persons'', the Commission intends to make all possible progress at its next session.

497. The Commission agreed that, in order to meet the goals it has set for itself as described in paragraph 496 above, it should, as an exceptional arrangement, allow for at least three weeks of concentrated work in the Drafting Committee at the beginning of the forty-eighth session.

2. Long-term programme of work

498. Bearing in mind that some of the topics on its agenda had reached an advanced stage and that it was therefore time to give some thought to the programme of work for the next five-year term of office, the Commission re-established the Working Group on the long-term programme of work established at its forty-fourth session, in 1992.[363]

499. The Working Group, which was open-ended, was chaired by Mr. Derek Bowett.

500. In the report which it submitted to the Planning Group, the Working Group stated that it had reviewed a number of topics[364] and had reached certain conclusions.

501. The Commission endorsed the Working Group's recommendation in favour of the topic of ''Diplomatic protection'' and decided, subject to the approval of the General Assembly, that the topic would be included in its agenda. It noted that work on this topic would complement the Commission's work on State responsibility and should be of interest to all Member States. It could *inter alia* cover the content and scope of the rule of exhaustion of local remedies, the rule of nationality of claims as applied to both natural and legal persons, including its relation to so-called ''functional'' protection, and problems of stateless persons and dual nationals; and it could address the effect of dispute settlement clauses on domestic remedies and on the exercise of diplomatic protection.

502. The Commission also endorsed the recommendation of the Working Group that work in the nature of a ''feasibility study'' should begin on a topic concerning the law of the environment. The Commission has since its forty-fifth session, in 1993, considered sympathetically topics such as ''Global commons'' and ''Rights and duties of States for the protection of the environment'', and the newly-suggested topic of ''shared (or transboundary) resources'' also has environmental implications. The Commission believes that some preliminary work would be needed before the precise topic, and its content, could be determined, and for this reason, as regards this topic, it believes that more preparatory work should be undertaken.

503. The Commission notes significant progressive development of international law in the various sectors in the field of the environment since the Stockholm Declaration.[365] The sector by sector approach so far adopted in the conclusion of various treaties nevertheless involves the risk of losing sight of the need for an integrated approach to the prevention of continuing deterioration of the global environment. The Commission accordingly envisages taking up the subject of international environmental law. However, as the subject is substantive, wide and complex, it desires to be authorized, as a first step, to conduct an extensive feasibility study of the topic entitled provisionally ''Rights and duties of States for the protection of the environment'', so that it would be in a position, after such a study, to recommend to the General Assembly the exact scope and content of the future topic. The feasibility study would encompass general principles, substantive and procedural rules, and measures for the implementation of obligations for the protection of the global environment. The Commission intends to focus more on the field of duties *erga omnes* where the real complainant of deterioration of the environment is the international community at large rather than individual States, and thus the study would include the topic of ''Global commons'' as well. It would also deal with the environmental aspect of the utilization of ''shared (or transboundary) resources''. The Commission intends to avoid duplication of the work being carried out by it under the topic of ''International liability for injurious consequences arising out of acts not prohibited by international law''.

3. Working methods

504. At its preceding session, the Commission expressed the intention to review the conditions under which the commentaries are discussed and adopted, with a view to the possible formulation of guidelines on the matter. For lack of time, the Commission was not able to discuss all aspects of the question. It agreed, however, that it was desirable that the commentaries to draft articles be taken up as soon as possible in the course of each session in order to receive the requisite degree of attention and, in any case, to be discussed separately rather than in the framework of the adoption of the Commission's report to the General Assembly.

505. At the present session, the Commission took up the matter again.

506. With reference to the content of commentaries, the Commission bears in mind article 20 of its statute, which reads as follows:

Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrines;

[363] See *Yearbook . . . 1992*, vol. II (Part Two), p. 54, document A/47/10, para. 368.

[364] Namely, the topics identified at the forty-sixth session, in 1993 (see *Yearbook . . . 1993*, vol. II (Part Two), p. 96, document A/48/10, para. 427; and the following three topics: diplomatic protection, shared (or transboundary) resources and international recognition.

[365] See footnote 279 above.

(*b*) Conclusions relevant to:

(i) The extent of agreement on each point in the practice of States and in doctrine;

(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

507. The Commission is aware that the content and length of the commentaries accompanying draft articles depend partly on the nature of the topic and the extent of the "precedents and other relevant data, including treaties, judicial decisions and doctrine". It emphasizes in this connection that commentaries perform a function different from that of the reports by the special rapporteurs and that the reports are easily accessible, since they are reproduced in the Commission's *Yearbooks*.

508. The Commission also considers it desirable for the commentaries to the draft articles on the various topics to be as uniform as possible in presentation and length. It encourages its special rapporteurs to pay due attention to this matter.

4. Duration of the next session

509. The Commission wishes to reiterate its view that the requirements of the work for the progressive development of international law and its codification and the magnitude and complexity of the subjects on its agenda make it desirable that the usual duration of the session be maintained. The Commission also wishes to emphasize that it made full use of the time and services made available to it during its current session.

B. Cooperation with other bodies

510. The Commission was represented at the January 1995 session of the Asian-African Legal Consultative Committee, in Doha, by Mr. Francisco Villagrán Kramer who attended the session as an observer 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. Tang Chengyuan. Mr. Tang Chengyuan addressed the Commission at its 2391st meeting on 30 May 1995 and his statement is recorded in the summary record of that meeting.

511. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Eduardo Vío Grossi. Mr. Vío Grossi addressed the Commission at its 2407th meeting on 29 June 1995 and his statement is recorded in the summary record of that meeting.

C. Date and place of the forty-eighth session

512. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 6 May 1996 and conclude on 26 July 1996.

D. Representation at the fiftieth session of the General Assembly

513. The Commission decided that it should be represented at the fiftieth session of the General Assembly by its Chairman, Mr. Pemmaraju Sreenivasa Rao.

E. International Law Seminar

514. Pursuant to General Assembly resolution 49/51, the United Nations Office at Geneva organized, during the current session of the Commission, the thirty-first session of the International Law Seminar. The Seminar is intended for postgraduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

515. A Selection Committee under the chairmanship of Professor Nguyen-Huu Tru (The Graduate Institute of International Studies, Geneva) met on 16 March 1995 and, after having considered some 80 applications for participation in the Seminar, selected 24 candidates of different nationalities, mostly from developing countries. Twenty-three of the selected candidates were able to participate in the Seminar.[366]

516. The session was held at the Palais des Nations from 22 May to 9 June 1995 under the direction of Mr. Markus G. Schmidt, United Nations Office at Geneva. It was opened by the Chairman of the Commission, Mr. Pemmaraju Sreenivasa Rao. During the three weeks of the session, the participants attended the meetings of the Commission and lectures specifically organized for them.

517. Several lectures were given by members of the Commission as follows: Mr. Guillaume Pambou-Tchivounda: "The International Criminal Court"; Mr. John de Saram: "Realities of the process of international codification"; Mr. Alexander Yankov: "Evolution of the process of codification and progressive development of international law".

518. In addition, lectures were given by: Mr. Marco Sassoli (Legal Adviser, ICRC): "Contemporary challenges to international humanitarian law"; Mr. W. Lang (Permanent Representative of Austria to the United Nations Office at Geneva): "Trade and environment"; Mr. José Ayala Lasso (United Nations High Commissioner for Human Rights): "Mandate and activities of

[366] The list of participants in the thirty-first session of the International Law Seminar is as follows: Mr. Chimiddorj Battomor (Mongolia); Ms. Teresa Blanco Gumero (El Salvador); Ms. Kathy-Ann Brown (Jamaica); Ms. Elena Conde Pérez (Spain); Ms. Dace Dobraja (Latvia); Mr. Amidou Garane (Burkina Faso); Mr. Ariel Gonzalez (Argentina); Mr. Taïsaku Ikeshima (Japan); Mr. Didace Kiganahe (Burundi); Ms. Elisabeth Kornfeind (Austria); Ms. Andreja Metelko-Zgombic (Croatia); Mr. Saleh Najem (Libyan Arab Jamahiriya); Ms. Catherine Okou (Côte d'Ivoire); Mr. Serge Pannatier (Switzerland); Mr. Alejandro Pastori (Uruguay); Ms. Gaile Ramoutar (Trinidad and Tobago); Mr. Timothy Reilly (Australia); Ms. Devi Rema (India); Mr. Lambert Shumbusho (Rwanda); Ms. Simona Takova (Bulgaria); Mr. Boubacar Tankoano (Niger); Mr. Bounkham Theuambounmy (Lao People's Democratic Republic); and Ms. Glaucia Yoshiura (Brazil).

the High Commissioner for Human Rights''; Mr. Bertie Ramcharan (Political Adviser to the Co-Chairmen of the International Conference on the Former Yugoslavia): ''The International Conference on the Former Yugoslavia''; Ms. Merle S. Opelz (Head, IAEA Office in Geneva): ''The results of the latest Non-Proliferation Treaty Review Conference''.

519. Following a lecture given by Mr. Francisco Villagrán Kramer on ''The state of international law in the context of unilateral acts'' and by Mr. Christian Tomuschat on ''The consequences of international crimes'', two Working Groups were created to deal with those topics under the tutorship of the two speakers. Each Working Group elaborated a paper on its topic which was presented orally at the discussion meeting, at which conclusions were reached. Mr. Villagrán Kramer and Mr. Tomuschat noted the high quality of the papers presented by the Working Groups.

520. As has become a tradition for the Seminar, the participants enjoyed the hospitality of the Republic and Canton of Geneva following a guided visit of the Alabama and Council Rooms by Mr. Jérôme Koechlin, Head of Protocol.

521. At the end of the session, Mr. Pemmaraju Sreenivasa Rao, Chairman of the Commission, and Mr. Markus Schmidt, on behalf of the United Nations Office at Geneva, addressed the participants. Mr. Serge Pannatier addressed the Commission on behalf of the participants. In the course of this brief ceremony, each of the participants was presented with a certificate attesting to his or her participation in the thirty-first session of the Seminar.

522. Voluntary contributions from Member States to the United Nations Trust Fund for the International Law Seminar permit the granting of fellowships, in particular to participants from developing countries. The Commission noted with particular appreciation that the Governments of Austria, Denmark, Finland, France, Germany, Ireland, Norway, Switzerland and the United Kingdom of Great Britain and Northern Ireland had made voluntary contributions to the Fund. Thanks to those contributions it was possible to award a sufficient number of fellowships in order to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, full fellowships (travel and subsistence allowance) were awarded to nine participants and partial fellowships (subsistence only) to six participants. Of the 690 participants, representing 152 nationalities, who have taken part in the Seminar since its inception in 1964, fellowships have been awarded to 374.

523. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, 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. As all the available funds are exhausted, the Commission recommends that the General Assembly should again appeal to States which can do so to make the voluntary contributions that are needed for the holding of the Seminar in 1996 with as broad a participation as possible.

524. The Commission noted with satisfaction that in 1995 comprehensive interpretation services had been made available to the Seminar and it expressed the hope that the same full services and facilities would be made available to the Seminar at the next session, despite existing financial constraints.

Annex

REPORT OF THE WORKING GROUP ON STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

A. Introduction

1. At its 2393rd meeting, on 1 June 1995, the International Law Commission decided to establish a Working Group on the topic entitled "State succession and its impact on the nationality of natural and legal persons".[1]

2. The terms of reference of the Working Group were to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action.

3. The Working Group held five meetings between 12 and 20 June 1995. As a result of the discussions, it agreed on a number of preliminary conclusions, which are presented in section B below.

B. Preliminary conclusions of the Working Group

4. The Working Group based its discussion on the fundamental premise that, in situations resulting from State succession, every person whose nationality may be affected by the change in the international status of the territory has the right to a nationality and that States have the obligation to prevent statelessness.

1. Obligation to negotiate and to resolve problems by agreement

5. The Working Group agreed that States concerned[2] should have, first of all, the obligation to consult in order to determine whether a change in the international status of the territory had any undesirable consequences with respect to nationality. In the affirmative, States should have the obligation to negotiate in order to resolve such problems.

6. Depending on the category of State succession,[3] an agreement should thus be concluded between the predecessor State and the successor State or States—in case the predecessor State continued to exist—or between the various successor States—in case the predecessor State ceased to exist.

7. Statelessness was considered to be the most serious and undesirable potential consequence of State succession on nationality. The Working Group therefore believed that States should be under an obligation to negotiate in order to prevent statelessness. It further recommended that States also address the following potential effects of State succession during the negotiation: dual nationality; the problem of the separation of families as a result of the attribution of different nationalities to their members; and other issues, such as military obligations, pensions and other social security benefits and the right of residence.

8. The Working Group considered the effects of various types of State succession on the rights and obligations of States concerned with regard to the nationality of different categories of individuals and, as a result, formulated a number of principles which should serve as guidelines for the negotiation between States concerned.

2. Withdrawal and granting of nationality

(a) *Secession and transfer of part of a State's territory*

9. Secession and transfer of part of a State's territory are cases of State succession where the predecessor State continues to exist. They therefore raise the questions of whether the predecessor State has the right or, in some cases, the obligation, to withdraw its nationality from certain individuals, and whether the successor State has the obligation to grant its nationality to certain individuals.

10. The Working Group distinguished the following categories of persons:

[1] For the composition of the Working Group, see chap. I, para. 9, above.

[2] "States concerned" means the predecessor State(s) and/or the successor State(s), as the case may be.

[3] The categories of State succession considered by the Working Group are the following: secession; transfer of part of a State's territory; unification—including absorption; and dissolution.

(*a*) Persons born in what had become the territory of the successor State;

(*b*) Persons born in what remained as the territory of the predecessor State;

(*c*) Persons born abroad but having acquired the nationality of the predecessor State prior to the succession by the application of the principle of *jus sanguinis*;

(*d*) Persons naturalized in the predecessor State prior to the succession.

In the case of persons who, prior to the succession, were nationals of a federal State and had been granted a secondary nationality of a component unit, the Working Group considered it useful, in addition, when appropriate, to distinguish two other categories:

(*e*) Persons having the secondary nationality of an entity that remained part of the predecessor State; and

(*f*) Persons having the secondary nationality of an entity that became part of a successor State.

Each of these categories was further subdivided according to the place of habitual residence of the individual concerned, namely the predecessor State, the successor State or a third State.

(i) *Obligation of the predecessor State not to withdraw its nationality*

11. The Working Group concluded that a number of the above categories of individuals were not affected by State succession as far as nationality was concerned. The Working Group was of the view that, in principle, the predecessor State should have the obligation not to withdraw its nationality from these categories of persons, which were the following:

(*a*) Persons born in what remained as the territory of the predecessor State and residing either in the predecessor State or in a third State;

(*b*) Persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of *jus sanguinis* and residing either in the predecessor State or in a third State;

(*c*) Persons naturalized in the predecessor State and residing either in the predecessor State or in a third State; and

(*d*) Persons having the secondary nationality of an entity that remained part of the predecessor State, irrespective of the place of their habitual residence.

(ii) *Right of the predecessor State to withdraw its nationality—obligation of the successor State to grant its nationality*

12. The Working Group concluded that the predecessor State should be entitled to withdraw its nationality from the following categories of persons, provided that such withdrawal of nationality did not result in statelessness:

(*a*) Persons born in what had become the territory of the successor State and residing in the successor State; and

(*b*) Persons having the secondary nationality of an entity that became part of a successor State and residing either in the successor State or in a third State.

13. The Working Group considered that the corollary of the right of the predecessor State to withdraw its nationality should be the obligation of the successor State to grant its nationality to the above categories of persons. However, until a person had thus acquired the nationality of the successor State, the predecessor State should have the obligation not to withdraw its nationality from such persons, so that the person would not become stateless.

(iii) *Obligation of the predecessor and the successor States to grant a right of option*

14. The Working Group concluded that the following categories of individuals should be granted a right of option between the nationality of the predecessor State and the nationality of the successor State:

(*a*) Persons born in what had become the territory of the successor State and residing either in the predecessor State or a third State;

(*b*) Persons born in what had remained as the territory of the predecessor State and residing in the successor State;

(*c*) Persons born abroad but having acquired the nationality of the predecessor State on the basis of the principle of *jus sanguinis* and residing in the successor State;

(*d*) Persons naturalized in the predecessor State and residing in the successor State; and

(*e*) Persons having the secondary nationality of an entity that became part of a successor State and residing in the predecessor State.

15. The Working Group considered that, on the one hand, the predecessor State should have the obligation not to withdraw its nationality from an individual unless he/she had opted for the nationality of the successor State and until he/she had acquired such nationality. On the other hand, in the case where an individual had opted for the nationality of the successor State, that State should have the obligation to grant its nationality to, and the predecessor State the obligation to withdraw its nationality from, such an individual.

(b) *Unification, including absorption*

16. Unification, including absorption, is a case of State succession in which the loss of the predecessor State's nationality is an inevitable result of the disappearance of that State. Thus, the main question is whether the successor State has the obligation to grant its nationality to all individuals affected by such a loss.

17. The Working Group considered that the successor State should have the obligation to grant its nationality to the following categories of persons:

(*a*) Nationals of a predecessor State—no matter how that nationality had been acquired—residing in the successor State; and

(*b*) Nationals of a predecessor State residing in a third State, unless they also had the nationality of a third State. (The successor State could, however, grant its nationality to such persons subject to their agreement.)

(c) *Dissolution*

18. Dissolution is a case of State succession where the predecessor State ceases to exist and therefore the loss of such State's nationality is automatic. It raises, however, the question of whether, and if so, to which individuals affected by the change, the successor States have the obligation to grant their nationality.

(i) *Obligation of the successor States to grant their nationality*

19. The Working Group concluded that each of the successor States should have the obligation to grant its nationality to the following categories of persons:

(*a*) Persons born in what became the territory of that particular successor State and residing in that successor State or in a third State;

(*b*) Persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of *jus sanguinis* and residing in the particular successor State;

(*c*) Persons naturalized in the predecessor State and residing in the particular successor State; and

(*d*) Persons having the secondary nationality of an entity that became part of that particular successor State and residing in that successor State or in a third State.

20. The Working Group considered that a successor State should have no obligation to grant its nationality to a person under categories (*a*) and (*d*) above who resided in a third State and also had the nationality of a third State. Moreover, a successor State should not be entitled to impose its nationality on such an individual against his/her will.

(ii) *Obligation of the successor States to grant a right of option*

21. The Working Group concluded that the successor States should grant a right of option to the following categories of persons:

(*a*) Persons born in what became the territory of successor State A and residing in successor State B; and

(*b*) Persons having the secondary nationality of an entity that became part of successor State A and residing in successor State B; and,

unless they had the nationality of a third State:

(*c*) Persons born abroad but having acquired the nationality of the predecessor State through the application of the principle of *jus sanguinis* and residing in a third State; and

(*d*) Persons naturalized in the predecessor State and residing in a third State.

22. The Working Group considered that once the right of option had been exercised, the State for the nationality of which an individual had opted should have the obligation to grant such nationality.

3. Right of option

23. The Working Group agreed that, at this preliminary stage, the term "right of option" was used in a broad sense, covering both the possibility of "opting in"—that is to say, making a positive choice—and "opting out"—that is to say, renouncing a nationality acquired *ex lege*. The expression of the will of the individual was a consideration, which, with the development of human rights law, had become paramount. States should therefore not be able, as in the past, to attribute nationality by agreement *inter se* against an individual's will.

24. The Working Group stressed that the States concerned should grant an effective right of option. They should therefore have the obligation to provide individuals concerned with all relevant information on the benefits and drawbacks attaching to the exercise of a particular option—including in areas relating to the right of residence and social security benefits—so that these persons would be able to make an informed choice.

4. Other criteria applicable to the withdrawal and grant of nationality

25. The Working Group considered the question of whether, in addition to the criteria mentioned under subsection 2 above, there were other criteria that played a role with respect to the withdrawal or granting of nationality.

26. The Working Group agreed, on the one hand, that a predecessor State should be prohibited from withdrawing its nationality on the basis of ethnic, linguistic, religious, cultural or other similar criteria, since this would amount to discrimination. Similarly, the successor State should be prohibited from refusing to grant its nationality—which it would otherwise have the obligation to grant—on the basis of such criteria.

27. The Working Group considered, on the other hand, that, as a condition for enlarging the scope of individuals entitled to acquire its nationality, a successor State should be allowed to take into consideration additional criteria, including the criteria enumerated in paragraph 26 above.

5. Consequences of non-compliance by States with the principles applicable to the withdrawal or the grant of nationality

28. The Working Group considered the consequences of non-compliance by States with the principles set out in subsections 2 to 4 above.

29. The Working Group concluded that a number of hypotheses merited further study. First, that a third State should be entitled to consider an individual as a national of a predecessor State when that State has withdrawn its nationality from such individual in violation of the above principles and the individual has become stateless as a result of such withdrawal; secondly, that a third State should not have the obligation to give effect to the grant by a successor State of its nationality in violation of the above principles, unless the refusal to give effect would result in treating the individual concerned as a de facto stateless person; and thirdly, that a third State should be entitled to consider an individual as a national of a successor State with which he has effective links when that State has failed to grant its nationality to such an individual in violation of the above principles and the individual has become stateless as a result of such a failure. Thus, for example, a third State would be entitled to accord to an individual the rights or status he/she would enjoy in the territory of the third State by virtue of being a national of a predecessor or a successor State, as the case may be, despite the fact that the predecessor State has withdrawn, or the successor State has refused to grant, its nationality.

30. Moreover, the Working Group agreed that further study was necessary in order to clarify the question of the international responsibility of a predecessor or a successor State for its failure to comply with the above principles, or, as the case may be, with its obligations deriving from an international agreement with other States concerned.

6. Continuity of nationality

31. The Working Group considered the question of whether the rule of continuity of nationality as a precondition for the exercise of diplomatic protection should apply in the context of State succession, and if so, to what extent. For this purpose, it distinguished the following three situations:

(*a*) *Ex lege* change of nationality;

(*b*) Change of nationality resulting from the exercise of the right of option between the nationalities of two successor States;

(*c*) Change of nationality resulting from the exercise of the right of option between the nationalities of the predecessor and successor States.

32. Bearing in mind that the purpose of the rule of continuity was to prevent the abuse of diplomatic protection by individuals acquiring a new nationality in the hope of strengthening their claim thereby, the Working Group agreed that this rule should not apply when the change of nationality was the result of State succession in any of the above situations.