AN OVERVIEW OF ARTICLES ADOPTED:

A. Scope and Application:

Article 1 outlines the scope and application of the present Code. This article recognizes that the crimes against the peace and security of mankind are punishable universally. It states that these crimes are punishable under international law, whether or not punishable under national law. Some members, however, noted that the text did not contain the precise definition of crimes against the peace and security of mankind. The members also noted the difficulties in formulating a definition. The enumeration contained in Part II on the other hand, contained all the unrefutable elements of crimes against peace and security of mankind.

Individual responsibility for the commission of crime against the peace and security of mankind finds a place in Article 2. 'Intent' constitutes one of the major elements of such a crime. The principles of 'respondent superior' is also a major component of 'individual responsibility'. Any order given or attempts to commit such a crime (knowingly, directly or indirectly) entails individual responsibility. Although Article 6 of the Draft Code outlines the circumstances in which a superior is responsible for the crime, the elements of individual responsibility also presuppose some of these aspects. For this reason, the Commission noted that Article 2 was the first in a series of articles addressing the question of individual criminal responsibility. Article 3 stipulates 'Punishment' to the individual who would be responsible for the crime. Without referring to the quantum or nature of punishment, this Article merely states "The punishment shall be commensurate with the character and gravity of the crime".

B. Responsibility of States:

Article 4 is crucial in the sense that it seeks to delineate the 'individual responsibility' and the 'responsibility of States'. In other words, this article seeks to lay down the principle that the fact that an individual had acted pursuant to an order of a government or a superior does not absolve him or her of criminal responsibility but, it was noted that, it could be considered in mitigation of punishment. Article 5, entitled

Order of a Government or a Superior as adopted by the Commission is addressed to the criminal responsibility of a subordinate who committed a crime while acting pursuant to an order of a Government or a superior. In other words, a high-ranking government official who laid down a "criminal plan" or policy and the military commander or any other officer who ordered the commission of a criminal act in the implementation of such a policy incurs or bears particular responsibility for the eventual commission of the crime. The implications flowing from this provision relate primarily to the mitigation of penalty or punishment. The commentaries to the adopted draft articles point out that "the mere existence of superior orders will not automatically result in the imposition of a lesser penalty. A subordinate is subject to a lesser punishment only when a superior order in fact lessens the degree of his culpability".

Article 6, on the other hand, deals with the "Responsibility of the Superior". It provides that the superior is responsible if he knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if he did not take all necessary measures within his power to prevent or repress the crime. Military Commanders, for example, could be held responsible for the conduct of members of the armed forces under their command and other persons under their control. It should, however, be noted that the principle of the individual criminal responsibility of a superior only applies to the conduct of his subordinate or other person under his control. Furthermore, he incurs criminal responsibility only when he fails to prevent or repress the unlawful conduct of such individuals. Referring to various authoritative sources, the commentaries to the draft article point out that the reference to "superiors" is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position to command and exercise a similar degree of control with respect to their subordinates.

Article 7 on official position and responsibility extends the principle of criminal responsibility even to the highest official position held i.e. Head of State or Government. According to the commentaries, it would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience

of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.

Article 8 addresses the issues relating to the establishment of the Jurisdiction of a court to determine the question of responsibility and, where appropriate, the punishment of an individual for a crime covered by the present code by applying the principles of individual criminal responsibility and punishment contained in Articles 2 to 7 of Part I in relation to the definitions of the crimes set out in articles 16 to 20 of Part II. In other words, it addresses procedural and jurisdictional issues relating to the implementation of the present Code. There are two regimes for its implementation. In the first regime consideration is accorded to concurrent jurisdiction of national courts and an international criminal court for the crimes set out in Articles 17 to 20, namely, genocide, crimes against humanity, crimes against UN and associated personnel and war crimes. The second regime in Article 8 provides for the exclusive jurisdiction of an international criminal court with respect to the crime of aggression set out in Article 16. Considering existing multilateral framework to deal with serious crimes, the Commission was of the view that for the effective implementation of the Code a combined approach to jurisdiction was essential i.e. based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court.

C. Extradite or Prosecute:

Article 9 incorporates the obligation to extradite or prosecute an individual alleged to have committed a crime covered by Part II other than aggression in the context of the jurisdictional regime envisaged for those crimes, as indicated by the reference to articles 1 7 to 20. The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. Article 9 also outlines a possible third alternative course of action by the custodial State other than "prosecute or extradite". This alternative is to transfer the alleged offender to an international criminal court for prosecution. The Commentaries emphasize that Article 9 does not address the cases in which a custodial State would be permitted or required to take this course of action since this would be determined by the Statute of the future court.

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The provisions of Article 10, according to the Commentaries, are intended to enable the custodial State to select and effectively implement the request received from another State for extradition of the alleged offender to its territory for trial. In other words, the purpose of this article is to ensure that the custodial State will have the necessary legal basis to grant such a extradition request and thereby fulfill its obligation under Article 9 in a variety of situations. Paragraph 1, addresses the situation in which there is an extradition treaty in effect between the States concerned which does not cover the crime for which extradition is sought. Paragraph 2, on the other hand, covers the situation in which extradition is conditional on the existence of an extradition treaty and there is no such treaty when the extradition request is made. Paragraph 3 addresses the situation where under the law of the concerned State extradition is not conditional on the existence of a treaty. Lastly, Paragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State Party to the Code with respect to the crimes covered in Part II. These provisions of Article 10 substantially reproduce the text of article 15 of the Convention on the Safety of UN and Associated Personnel. Similar provisions could be found in a number of Conventions, namely, Convention on the Suppression of Unlawful Seizure of Aircraft, the Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation on the International Convention against the Taking of Hostages.

D. Minimum Judicial Guarantees:

Article 11 and 12 provide minimum guarantees to an individual charged with a crime against the peace and security of mankind. Furthermore, these Judicial Guarantees have been specifically outlined as "rights". Briefly, these are: (a) to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law, (b) to be informed promptly of the charges in a language known to him; (c) adequate time and facilities for defence, including consultations with counsel of his own choosing; (d) to be tried without undue delay; (e) to

be provided with necessary legal assistance; (f) to examine witnesses; (g) free assistance of an interpreter, and (h) not to be compelled to testify against himself or to confess guilt. A convicted individual has the right to get his conviction and sentence reviewed according to law. Article 12 incorporates the principle Non bis in idem. It provides that "No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court. However, this principle is subjected to certain exceptions, particularly in the situations wherein the crime was tried by the national courts". Article 13 incorporates the principle of "Non-retroact i.e. no one may be convicted under the Draft Code for acts committed before its entry into force.

Article 14 relates to the "defences". Certain defences if established, may wipe out the criminal character of a specific act. Acts done in self-defence could be cited as one example. The commentaries to the draft articles point out that such extreme defences to wipe out the criminal character of a crime should not be confused with cases of exculpation. In the cases of exculpation the crime continues to exist and which the perpetrator's responsibility disappears or is mitigated. The pleas of exculpation are: duress or state of necessity, superior orders, mistake of fact or the immaturity of the perpetrator on account of his age. Article 15 deals with what is tenned as "extenuating circumstances". In other words, it is intended to ensure that the court consider any relevant extenuating circumstances or mitigating factors before taking a final decision on the question of punishment. The extenuating circumstances, it may be noted, pertain to general categories of factors which are well-established and widely recognized as lessening the degree of culpability of an individual or otherwise justifying a reduction in punishment. For example, any effort made by the convicted person to alleviate the suffering of the victim or to limit the numbers of victim may be taken into account by the Court.

E. Definition of Crimes:

13. Articles 16, 17, 18, 19 and 20 in Part 11 of the Code deal with the crimes against the peace and security of mankind and the definitions of these crimes. In Article 16, the crime of agression has however, not been defined. As pointed out by the Commission, Article 16 is designed not to define aggression but to determine the criminal responsibility of an individual

who has participated in an act of aggression. According to Article 16 aggression is "committed by a State". An individual, as leader or organizer, participates. In other words, the perpetrators of an act of aggression have the necessary authority or power to be in a position potentially to play a decisive role in committing aggression. The commentaries to the draft articles do not merely seek to consider the material fact of participating in an act of aggression to establish the guilt of a leader or organiser. Such participation, according to it, must have been intentional and should have taken place knowingly as part of a plan or policy of aggression. The Commission has taken the view that since aggression is an act committed by a State, its definition comes under State responsibility. In view of this, the determination of the "perpetrator of aggression" is a matter for the Security Council to decide under Article 39 of the UN Charter. The Commission has pointed out, however, that the decision of this jurisdiction between the Court and Security Council is "very controversial". Further, in its view, "this is a very delicate problem that only the further development of international law may be able to solve".

Article 17 defines the "crime". It has two important elements in its definition; one, the requisite intent (mens rea) and the prohibited act (actus reus). A crime of genocide, according to the definition in Article 17 refers to acts "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group". The second element relating to prohibited acts is mentioned in subparagraphs (a) to (e), such as,' killing, causing serious bodily or mental harm, deliberately inflicting destructive conditions of life, measures intended to prevent births and forcible transfer of children from one group to another. According to the Commission a general intent to commit one of the acts mentioned above, combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. On the other hand, it needs to be noted that it requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act. Referring to various authoritative sources, the ILC noted that the fact that the present article was drawn from the Genocide Convention, 1948 did not in any way affect the autonomous nature of that legal instrument.

Article 18 deals with the "Crimes against Humanity". The commentaries thereto note the scope of the definition of the article. According to it, the definition is drawn from the Nuremberg Charter, as interpreted and applied

by the Nuremberg Tribunal, taking into account subsequent developments in international law since Nuremberg. There are two basic elements in the definition of Crimes against Humanity. Firstly, the act must be "committed in a systematic manner or on a large scale". Secondly, this act should be "instigated or directed by a government or by any organization or group". In other words, the "" acts 'contemplated in the definition should be pursuant to a preconceived plan or policy and should be directed against multiplicity of victims. Considering the magnitude of the act, it would be extremely difficult for a single individual acting alone to commit these in human acts. This definition does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes. The following acts have been categorized as prohibited acts under Article 18, namely, (a) murder; (b) extermination; (c) torture; (d) enslavement; (e) persecution on political, racial, religious or ethnic grounds; (f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) arbitrary deportation or forcible transfer of population; (h) forced disappearance of persons; (i) rape, enforced prostitution and other forms of sexual abuse; 0) other inhwnane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Crimes against United Nations and associated personnel are addressed in article 19 which consists of two paragraphs. The first paragraph refers to the definition of these crimes for purposes of the present Code. The second paragraph limits the scope of application of this definition by excluding attacks committed in certain situations. These criminal attacks must be committed either in a systematic manner or on a large scale. 'Intent' also constitutes an important element in this crime. In other words, the individual must be aware of the status as a UN and associated personnel of the victim. Furthermore, the individual must commit the attack "with a view to preventing or impedin,, that operation from fulfilling its mandate". The prohibited acts mentioned in subparagraphs (a) and (b) are: (a) serious acts of violence perpetrated against a protected person, namely, "murder, kidnapping or other attack upon the person or liberty of any such personnel". The second category of acts consists of serious acts of violence upon particular places or ' modes of transportation which endanger a protected person, namely, a "violent attack upon the official premises, the private accommodation or the means of transportation of any

such personnel likely to endanger his or her person or liberty". Paragraph 2 of this article creates an exception to the above mentioned prohibited acts. This exception is directed against personnel involved in a UN operation which is mandated under Chapter VII of the Charter of the UN to take part in an enforcement action and is in fact taking part in a combat situation against organized armed forces to which the law of international armed conflict applies.

Article 20 lists acts which are termed as "war crimes". Most of the acts listed in the "war crimes" are taken from different instruments. For instance, the crimes listed in sub-paragraph (a) consists of grave breaches of the 1949 Geneva Conventions. Subparagraphs (b) and (c) cover the grave breaches listed in Additional protocol 1 to the 1949 Geneva Conventions. Subparagraph (d) refers to crimes which outrages upon personal dignity in violation of international humanitarian law, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". This type of conduct, as noted by the ILC, clearly constituted a grave breach of Geneva Conventions I to IV. Subparagraph (c) incorporates war crimes primarily of serious violations of the 1907 Hague Convention Respecting the Laws and Customs of War on Land and the regulations annexed thereto. It also covers the cultural property protected by the 1954 Hague Convention for the Protection of Cultural Property, as well as the literary and artistic works protected by the Beme Convention for the Protection of Literary and Artistic Work. Subparagraph (f) refers to serious violations of international humanitarian law applicable in non-international armed conflict. Subparagraph (g) covers violations of Additional Protocol I which are not characterized as a grave breach entailing individual criminal responsibility. This sub-paragraph contains three additional elements which are required in violations of the Protocol to constitute a war crime covered by the present code. Firstly, the use of the prohibited methods or means of warfare, was not justified by military necessity. Secondly, the conduct was committed with the specific "intent to cause widespread, long term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population". Thirdly, this subparagraph requires that such damage actually occurred as a result of the prohibited conduct.

Secretariat views

The Commission has succeeded in finally completing the work on the Draft Code of Crimes against the Peace and Security of Mankind. The work on the Draft Code, it may be recalled, had been on the agenda of the ILC in one form or the other since the 1950s. One of the major stumbling blocks in completing this work was to identify and define the core crimes. The present Draft Code, as finally adopted, has incorporated five crimes, namely, aggression, genocide, crimes against humanity, crimes against UN and associated personnel and war crimes. These five crimes have been adopted after extensive deliberations. Several other crimes, such as, international terrorism, illicit traffic in narcotic drugs and wilful and severe damage to the environment have been omitted. There was no unanimity within the Commission as to the universal acceptance of these crimes. In other words, in view of the emergence of views an effort was made to "limit the list of crimes to offences whose categorization as crimes against the peace and security of mankind was hard to challenge". The diversity of legal systems complicated the task of defining an international offence and the Commission had to abandon inclusion of some of the international crimes.

Among the five crimes incorporated in the Draft Code, "Aggression" has not been defined. As noted above, it only deals with the aspect as to who should be held responsible for the crime of aggression. The discussions within the Commission have brought into focus the nature of this crime and difficulties involved in elaborating a sufficiently precise definition of aggression for purposes of individual criminal responsibility. It may be recalled here that the definition of aggression adopted on first reading, which was drawn from General Assembly Resolution 314 (XXIX) was viewed as unsatisfactory by several members. According to them it was too political and too vague for purposes of determining individual criminal responsibility. The Commission considered, albeit briefly, the role of the Security Council in determining the definition of the crime of Aggression and the determination of individual criminal responsibility. During this discussion, it should be noted, several members emphasized the importance of clearly distinguishing between the functions of the Security Council and those of a judicial body, which may apply the Draft Code. These ideas, in the view of AALCC Secretariat,

Assembly Resolution 314 (XXIX) was viewed as unsatisfactory by several members. According to them it was too political and too vague for purposes of determining individual criminal responsibility. The Commission considered, albeit briefly, the role of the Security Council in determining the definition of the crime of Aggression and the determination of individual criminal responsibility. During this discussion, it should be noted, several members emphasized the importance of clearly distinguishing between the functions ofthe Security Council and those of a judicial body, which may apply the Draft Code. These ideas ' in the view of AALCC Secretariat, have not been adequately reflected in the Draft Code. Similar problems, it may be relevant to mention, have emerged in the context of discussion relating to the Draft Statute on the International Criminal Court.

As regards the "Punishment" (Article 3) the Commission sought to lay down its scope by mentioning that "The Punishment shall be commensurate with the character and gravity of the crime". However, there was a view to incorporate one article setting out the minimum and maximum limits for all the crimes in the Draft Code. Consideration was also sought to be given to the severity of the penalties corresponding to the seriousness of the crimes and the relevant judicial body being left to exercise its discretion within those limits. In this regard, the relevant judicial body would be the International Criminal Court (ICC). Some members of the Commission even had suggested that any provision on penalties and punishment should be made consistent with the corresponding provision in the Draft Statute for an International Criminal Court. In the draft Code, no such linkage has been established. Probably, as the AALCC Secretariat views it, such a linkage may emerge in the futi-ire course of practice. A consideratioit may have to be given to the application of Draft Code. In one sense, Draft Code has succinctly conceptualized the definitions and scope of crimes against the peace and security of mankind. Enormous authorities and sources cited by the ILC substantiate this view of the AALCC Secretariat. Therefore, the adopted articles on the Draft Code contribute immensely to the progressive development of international law and also to the development of an universally acceptable international criminal jurisdiction.

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

Introduction

At its 48th Session the Commission had before it the twelfth report of the Special Rapporteur,[4] Mr. Julio Barboza. The report furnished a review of various liability regimes proposed by the Special Rapporteur in his previous reports. At that session the ILC inter alia established a Working Group [5] under the Chairmanship of the Special Rapporteur, to consolidate work already done on the topic and to seek solutions to some unresolved questions with a view to producing a single text for transmission to the General Assembly. It would then be possible for the Commission at its 49th Session to take informed decisions as to consideration of the topic during the next quinquennium.

The Working Group in its report to the Commission has *inter alia* pointed out that in view of the priorities attached during the 48th Session of the ILC to the completion of draft articles on other topics it had neither been possible for the draft articles to be discussed by the Drafting Committee, nor were they debated in detail by the plenary during the session. The Working Group recommended that it would be appropriate for the Commission to annex to its report to the General Assembly the report of the Working Group and to transmit it to Governments for comments as a basis for future work of the Commission, on the topic. In its opinion the "Commission would not be committing itself to any specific decision on the course of the topic, nor to particular formulations, although much of the substance of Chapter I and the whole of Chapter II have been approved by the Commission in earlier sessions

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[4] See A/CN.4/475.

[5] The Working Group consisted of Mr. Julio Barboza (Special Rapporteur and Chairman); Mr. Hussain Al-Baharana; Mr. Mehmoud Bennouna; Mr. James Crawford; Mr. Gudmundur Eiriksson; Mr. Salifou Fomba; Mr. Peter Kabatsi; Mr. Igor I. Lukashuk; Mr. Patrick L. Robinson; Mr. Robert Robinson; Mr. Albert Szekl.ey and Mr. Francisco Villagran Kramer.

Report of the Working Group

The Working Group in its report has *inter alia*, observed that the draft articles formulated on the topic are limited in scope and residual in character. To the extent that existing rules of international law, whether customary or conventional, prohibit certain conduct or consequences those rules will operate within the field of State Responsibility and will fall outside the scope of the present draft articles. Attention was drawn in this regard to draft article 8. On the other hand, the field of State Responsibility for wrongful acts is separated from the scope of the present draft articles by the permission to the State of Origin to pursue the activity at "its own risk".

The Working Group expressed the view that the present topic is addressed to an issue different from that of responsibility. The key elements of the difference are (1) the prevention of transboundary harm arising from acts not prohibited by international law or, in other words prevention of certain harmful effects outside the field of State Responsibility and., (ii) the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. Thus, the first element covers prevention in a broad sense, including notification of risks of harm whether these risks are inherent in the operation of the activity or arise, or are appreciated as arising at some later stage.*

The other element, in the opinion of the Working Group, is the principle that States, on the one hand are precluded from carrying out activities not prohibited by international law, notwithstanding the fact that there may be a risk of transboundary harm arising from those activities. However on the other hand their freedom of action in that regard is not unlimited and may give rise to liability for compensation or other relief, notwithstanding the characterization of the acts in question as lawflil. For details see draft articles 3 and 5.

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* For Details see draft articles 4 and 6

The Working Group also emphasized the significance of the principle that the victim of transboundary harm should not be left to bear the entire loss.

The 22 draft articles recommended by the Working Group are arranged in three chapters. Chapter I (draft articles 1 to 8) delimits the scope of the draft articles as a whole, defines 4 terms used therein and states the applicable general principles equally in the coi'ltext of prevention of and liability for transboundary hann. Chapter II (draft articles 9 to 19) is primarily concerned with the implementation of the principle of prevention stipulated in draft article 4 including the issues of notification, consultation etc. Finally, Chapter III (draft articles 20 to 22) deals with the compensation which may be available before the national courts of the State of origin or which may flow from arrangements made between that State and one or more other affected States. In that much it is concerned with implementation of the general principle of liability stipulated in draft article 5. ome notes and comments on the draft articles are set out herein.

Draft Article 1 Activities to which the present articles apply defines the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State and which involve a risk of causing significant transboundary harm through their physical consequences. The scope of the proposed articles introduces four criteria viz. (i) that the articles apply to activities not prohibited by international law ; (ii) that the activities to which preventive measures are applicable are carried out in the territory or otherwise under the jurisdiction or control of States; (iii) that the activities proposed to be covered by these articles must involve a risk of causing significant transbouiidary harm; and (iv) that the significant transboundary harm must have been caused by the physical consequences of such activities.

The first criteria viz. "activities not prohibited by international law" has been incorporated because of its critical role in delimiting the parameters of the articles and because it is crucial in making the distinction between the scope of this topic and that of the topic of State Responsibility which deals with the wrongful acts. It may be mentioned in this regard that draft article 8 is addressed to the relationship of the present provisions to other rules of international law.

The second criterion element refers to activities carried out in the territory or otherwise under the jurisdiction or control of a State employs three concepts viz. "control" "jurisdiction" and "territory". Although the expression "jurisdiction or control of a State" is more commonly employed in many international instruments such as the United Nations Convention on the Law of the Sea, 1982; the Stockholm Declaration 1972; the Rio Declaration on Environment and Development, 1992; and the United Nations Convention on Biological Diversity 1992, the Commission deemed it useful to include the concept of territory so as to emphasize the significance of the territorial nexus between activities under these articles and a State. The commentaries clarify further that for the purpose of these articles the tenn "territory" refer to areas over which a State exercises its sovereign authority. The use of the term "territories" also stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extra- territorial jurisdiction in respect of certain activities. The Commission by its own admission, is also aware that the concept of "territory for the purposes of this articles is somewhat narrow and that there were situations where, under international law a State exercises jurisdiction and control over places over which it has no territorial rights. The definition of the term State of origin set out in draft article 2(c) seeks to cover all three concepts mentioned above.

The third criterion is that of a risk of causing significant transboundary harm. Although the term "risk of causing significant transboundary harm" is to be taken as a single phrase, its first component viz. risk is intended to limit the scope of the topic, for the present to activities with risk and their consequences to exclude activities which in fact cause transboundary harm in their normal operation. The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken or those activities which harm the global commons but without any harm to any other State. The term "risk of causing significant transboundary harm" is set out in draft article 2 paragraph (a).

The fourth element is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. The Commission had agreed in the interest of maintaining this topic within a manageable scope to exclude monetary, socioeconomic or similar fields. The most effective way of limiting the scope of the articles, it was felt was by requiring that the activities in question should have transboundary physical consequences which result in significant harm.

Draft article 2 aims to incorporate the definitions of terms for the purpose of the proposed draft articles. It will be recalled that the Commission at its forty fifth session had adopted the definitions of three terms viz. a risk of causing significant transboundary harm; (b) transboundary harm ; and (c) State of origin. It has now deemed it appropriate to adopt a fourth definition that of the "affected State".

Paragraph (a) of draft article 2 defines risk of causing significant transboundary harm as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. It alludes to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is the combined effect of risk and harm which sets the threshold. In the view of the Commission a definition based on the continued effect of risk and harm appropriate for the proposed article and that combined effect should reach a level that is deemed significant. The view prevalent in the Commission is that the obligations of prevention imposed on States should not only be reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually all activities because the activities under consideration are not prohibited by international law.

The definition allows for a spectrum of relationship between risk and harm all of which would reach the level of significant hann. It identifies two poles within which the activities proposed to be regulated, will fall. One pole is where there is a low of probability of causing disastrous harm - the characteristic of ultrahazardous activities. The other pole is a high probability of causing hann which while' not disastrous is still significant. It is to be understood that significant is sometimes more than detectable but less than serious or substantial. The harm must lead

to a real detrimental effect on such matters as human health, industry, property, environment or agriculture in other States and such detrimental effects must be susceptible of being measured by factual and objective standards.

Paragraph (b) defines transboundary harm as meaning a harm caused in the territory of or in places under the jurisdiction or control of State other than the State of origin whether or not the States share a common border. This definition includes activities conducted under the jurisdiction or control of a State for example on the high Seas or within the Exclusive Economic Zone of a coastal State with effects on the territory of another State or in places under the other State's jurisdiction or control. The intention is to be able to clearly distinguish between a State to which an activity within the ambit and scope of the proposed articles is attributable from a State which has suffered the injurious impact. The separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries and therefore the term "transboundary harm" is to be understood in the context of the expression within its territory or otherwise under its jurisdiction or control as employed in draft article 1.

Paragraph (c) of draft article 2 defines the State of origin as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out. The definition is self-explanatory and when there is more than one State of origin they shall individually and jointly as appropriate comply with the provisions of the proposed article.

Paragraph (d) of draft article 2 defines the term 1 "affected State" as one in the territory of which the significant harm has occurred or which has jurisdiction or control over any other place where such harm has commentary recognizes that there may be more than one such affected State in relation to any given activity.

Draft article 3 on freedom of action and the limits thereto incorporates the principle that the freedom of States to carry on or permit activities in their territory or otherwise within their jurisdiction or control is not unlimited. Such a freedom must be compatible with any specific