REPORT
OF THE
INTERNATIONAL LAW
COMMISSION
on the work of its thirty-seventh session

---

6 May-26 July 1985

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTIETH SESSION

SUPPLEMENT No. 10 (A/40/10)

UNITED NATIONS

REPORT
OF THE
INTERNATIONAL LAW COMMISSION
on the work of its thirty-seventh session

---

6 May-26 July 1985

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTIETH SESSION

SUPPLEMENT No. 10 (A/40/10)

UNITED NATIONS

New York, 1985

NOTE

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

The word Yearbook followed by suspension points and the year (e.g. Yearbook ... 1977) indicates a reference to the Yearbook of the International Law Commission.

A typeset version of the report of the Commission will be included in Part Two of volume II of the Yearbook of the International Law Commission 1985.

[Original: ARABIC/CHINESE/ENGLISH/
FRENCH/RUSSIAN/SPANISH]

[9 August 1985]

CONTENTS

Chapter		Paragraphs	Page
I.	ORGANIZATION OF THE SESSION	1 - 10	1
	A. Membership	3 - 4	1
	B. Officers	5 - 6	2
	C. Drafting Committee	7	3
	D. Secretariat	8	3
	E. Agenda	9 - 10	4
II.	DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND	11 - 101	5
	A. Introduction	11 - 33	5
	B. Consideration of the topic at the present session	34 - 101	16
	1. Outline of the future Code	43 - 52	18
	2. Delimitation of the scope of the topic *ratione materiae*	53 - 60	21
	3. Definition of an offence against the peace and security of mankind	61 - 74	23
	(a) Unity of the concept of offences against the peace and security of mankind	62 - 64	23
	(b) Criteria and meaning of the concept of an offence against the peace and security of mankind	65 - 74	24
	4. Acts constituting an offence against international peace and security	75 - 98	26
	(a) Aggression: article 2, paragraph (1), of the 1954 draft Code	81 - 85	27
	(b) The threat of aggression: article 2, paragraph (2), of the 1954 draft Code	86	30

		Paragraphs	Page
	(c) The preparation of aggression: article 2, paragraph (3) of the 1954 draft Code	87	31
	(d) Intervention in the internal or external affairs of another State: article 2, paragraphs (5) and (9), of the 1954 draft Code	88 - 90	31
	(e) Terrorism: article 2, paragraph (6), of the 1954 draft Code	91	32
	(f) Violation by the authorities of a State of the provisions of a treaty designed to ensure international peace and security: article 2, paragraph (7), of the 1954 draft Code	92 - 93	33
	(g) Forcible establishment or maintenance of colonial domination	94 - 96	34
	(h) Mercenarism	97	34
	(i) Economic aggression	98	35
	5. Conclusions	99 - 101	35
III.	STATE RESPONSIBILITY	102 - 163	36
	A. Introduction	102 - 163	36
	1. Historical review of the work of the Commission	102 - 107	36
	2. Consideration of the topic at the present session	108 - 163	43
	B. Draft articles on State responsibility (Part Two of the draft articles)		52
	1. Text of the draft articles provisionally adopted so far by the Commission		52
	2. Text of article 5 with commentary thereto provisionally adopted by the Commission at its thirty-seventh session		53
IV.	STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER	164 - 205	60
	A. Introduction	164 - 203	60
	1. Historical review of the work of the Commission	164 - 174	60

		Paragraphs	Page
2.	Consideration of the topic at the present session	175 - 203	65
	(a) Consideration by the Commission of the draft articles contained in the Special Rapporteur's sixth report	179 - 201	67
	(b) Discussion of the report of the Drafting Committee	202 - 203	81
B.	Draft articles on the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier	204	83
1.	Text of the draft articles provisionally adopted so far by the Commission		83
2.	Text of article 12 provisionally adopted by the Commission at its thirty-sixth and thirty-seventh sessions and text of articles 18 and 21 to 27 provisionally adopted by the Commission at its thirty-seventh session, with commentaries thereto	204	93
	Article 12. The diplomatic courier declared *persona non grata* or not acceptable		93
	Article 18. Immunity from jurisdiction		94
	Article 21. Duration of privileges and immunities		101
	Article 22. Waiver of immunities		105
	Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag		109
	Article 24. Identification of the diplomatic bag		113
	Article 25. Content of the diplomatic bag		115
	Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport		117
	Article 27. Facilities accorded to the diplomatic bag		120

		Paragraphs	Page
V.	JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY	205 - 247	123
	A. Introduction	205 - 247	123
	1. Historical review of the work of the Commission	205 - 212	123
	2. Consideration of the topic at the present session	213 - 247	127
	(a) General comments	224 - 232	133
	(b) Comments on the draft articles	233 - 247	135
	B. Draft articles on jurisdictional immunities of States and their property		142
	1. Text of the draft articles provisionally adopted so far by the Commission		142
	2. Text of articles 19 and 20, with commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session		150
	Article 19. State-owned or State-operated ships engaged in commercial service		150
	Article 20. Effect of an arbitration agreement		157
VI.	RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)	248 - 267	161
	A. Introduction	248 - 264	161
	B. Consideration of the topic at the present session	265 - 267	165
VII.	THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES	268 - 290	167
	A. Introduction	268 - 278	167
	B. Consideration of the topic at the present session	279 - 290	175
VIII.	OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION	291 - 334	177
	A. International liability for injurious consequences arising out of acts not prohibited by international law	291 - 292	177

		Paragraphs	Page
B.	Programme and methods of work of the Commission	293 - 306	177
C.	Co-operation with other bodies	307 - 320	180
	1. Arab Commission for International Law	307 - 308	180
	2. Asian-African Legal Consultative Committee	309 - 312	181
	3. European Committee on Legal Co-operation	313 - 316	182
	4. Inter-American Juridical Committee	317 - 320	183
D.	Date and place of the thirty-eighth session	321	185
E.	Representation at the fortieth session of the General Assembly	322	185
F.	Gilberto Amado Memorial Lecture	323 - 325	185
G.	International Law Seminar	326 - 334	185

CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-seventh session at its permanent seat at the United Nations Office at Geneva, from 6 May to 26 July 1985. The session was opened by the Chairman of the thirty-sixth session, Mr. Alexander Yankov.

2. The work of the Commission during this session is described in the present report. Chapter II of the report relates to the draft Code of Offences against the Peace and Security of Mankind. Chapter III relates to State responsibility, and sets out the article and commentary thereto provisionally adopted by the Commission at the present session. Chapter IV relates to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and sets out the articles and commentaries thereto provisionally adopted by the Commission at the present session. Chapter V relates to jurisdictional immunities of States and their property and sets out the articles and commentaries thereto provisionally adopted by the Commission at the present session. Chapter VI relates to relations between States and international organizations (second part of the topic) and Chapter VII relates to the law of the non-navigational uses of international watercourses. Chapter VIII of the report concerns international liability for injurious consequences arising out of acts not prohibited by international law and the programme and methods of work of the Commission and also considers certain administrative and other matters.

A. Membership

3. The Commission consists of the following members:

Chief Richard Osuolale A. AKINJIDE (Nigeria)
Mr. Riyadh AL-QAYSI (Iraq)
Mr. Gaetano ARANGIO-RUIZ (Italy)
Mr. Mikuin Leliel BALANDA (Zaire)
Mr. Julio BARBOZA (Argentina)
Mr. Boutros BOUTROS-GHALI (Egypt)
Mr. Carlos CALERO RODRIGUES (Brazil)
Mr. Jorge CASTAÑEDA (Mexico)
Mr. Leonardo DIAZ-GONZALEZ (Venezuela)
Mr. Khalafalla EL RASHEED MOHAMED-AHMED (Sudan)
Mr. Constantin FLITAN (Romania)

Mr. Laurel B. FRANCIS (Jamaica)
Mr. Jiahua HUANG (China)
Mr. Jorge E. ILLUECA (Panama)
Mr. Andreas J. JACOVIDES (Cyprus)
Mr. Satya Pal JOGOTA (India)
Mr. Abdul G. KOROMA (Sierra Leone)
Mr. José M. LACLETA MUÑOZ (Spain)
Mr. Ahmed MAHIOU (Algeria)
Mr. Chafic MALEK (Lebanon)
Mr. Stephen C. McCAFFREY (United States of America)
Mr. Frank X. NJENGA (Kenya)
Mr. Motoo OGISO (Japan)
Mr. Syed Sharifuddin PIRZADA (Pakistan)
Mr. Edilbert RAZAFINDRALAMBO (Madagascar)
Mr. Paul REUTER (France)
Mr. Willen RIPHAGEN (Netherlands)
Mr. Emmanuel J. ROUKOUNAS (Greece)
Sir Ian SINCLAIR (United Kingdom of Great Britain and Northern Ireland)
Mr. Sompong SUCHARITKUL (Thailand)
Mr. Doudou THIAM (Senegal)
Mr. Christian TOMUSCHAT (Federal Republic of Germany)
Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics)
Mr. Alexander YANKOV (Bulgaria)

4. The Commission on 8 May 1975 elected Mr. Gaetano Arangio-Ruiz (Italy), Mr. Jiahua Huang (China), Mr. Emmanuel J. Roukounas (Greece) and Mr. Christian Tomuschat (Federal Republic of Germany) to fill the four casual vacancies in the Commission caused by the elections of Mr. Jens Evensen and Mr. Zhengyu Ni to the International Court of Justice and by the deaths of Mr. Robert Quentin Quentin-Baxter and Mr. Constantin A. Stavropoulos.

B. Officers

5. At its 1875th and 1876th meetings, on 6 and 7 May 1985, the Commission elected the following officers:

Chairman: Mr. Satya Pal Jagota
First Vice-Chairman: Mr. Khalafalla El Rasheed Mohamed-Ahmed
Second Vice-Chairman: Sir Ian Sinclair
Chairman of the Drafting Committee: Mr. Carlos Calero Rodrigues
Rapporteur: Mr. Constantin Flitan.

6. The Enlarged Bureau of the Commission was composed of the officers of the present session, former chairmen of the Commission and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 1893rd meeting, on 4 June 1985, set up for the present session a Planning Group to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Khalafalla El Rasheed Mohamed-Ahmed (Chairman), Mr. Riyadh Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Leonardo Diaz-Gonzalez, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. Chafic Malek, Mr. Abdul G. Koroma, Mr. Frank X. Njenga, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Nikolai A. Ushakov. The Group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

7. At its 1880th meeting, on 13 May 1985, the Commission appointed a Drafting Committee. It was composed of the following members: Mr. Carlos Calero Rodrigues (Chairman), Chief Richard Osuolale A. Akinjide, Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Jiahua Huang, Mr. José M. Lacleta Muñoz, Mr. Ahmed Mahiou, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso, Mr. Edilbert Razafindralambo, Mr. Paul Reuter, Sir Ian Sinclair and Mr. Nikolai A. Ushakov. Mr. Constantin Flitan also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Secretariat

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

E. Agenda

9. At its 1876th meeting, on 7 May 1985, the Commission adopted an agenda for its thirty-seventh session, consisting of the following items:

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

10. The Commission considered all items on its agenda except for item 8, "International liability of injurious consequences arising out of acts not prohibited by international law," to which reference is made in section A of Chapter VIII. The Commission held 65 public meetings (1875th to 1939th) and one private meeting on 8 May 1985. In addition, the Drafting Committee of the Commission held 28 meetings, the Enlarged Bureau of the Commission held six meetings and the Planning Group of the Enlarged Bureau held three meetings.

CHAPTER II

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

11. On 21 November 1947, the General Assembly established the International Law Commission by resolution 174 (II). On the same day, the General Assembly directed the Commission by resolution 177 (II) to

> "(a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement 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 subparagraph (a) above." 1/

12. At its first session, in 1949, the Commission considered the matters referred to in resolution 177 (II) and appointed Mr. Jean Spiropoulos Special Rapporteur to continue the work on (a) the formulation of the principles of international law recognized in the Charter and Judgement of the Nürnberg Tribunal; and (b) the preparation of 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 also decided to circulate a questionnaire to Governments inquiring what offences, apart from those defined in the Charter and Judgement of the Nürnberg Tribunal, should, in their view, be comprehended in the draft code envisaged in resolution 177 (II).2/

1/ It may be of interest to note that even prior to the establishment of the Commission, the General Assembly, at its first session, in resolution 95 (I) of 11 December 1946, affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the Judgement of the Tribunal and directed the Committee on the codification of international law established by resolution 94 (I) of the same date "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized" in that Charter and Judgement. It was that Committee (sometimes referred to as the "Committee of Seventeen") which recommended to the General Assembly the establishment of an international law commission and set forth provisions designed to serve as the basis for its statute. See Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1.

2/ Yearbook of the International Law Commission, 1949, p. 283, document A/925, paras. 30-31.

13. On the basis of a report submitted by the Special Rapporteur, the Commission at its second session completed, in accordance with paragraph (a) of resolution 177 (II), a formulation of the principles of international law recognized by the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal and submitted it, with commentaries, to the General Assembly.[3/] As to the matter referred to in paragraph (b) of resolution 177 (II), the Commission discussed the topic on the basis of a report by the Special Rapporteur[4/] and of replies received from Governments to its questionnaire.[5/] In the light of the deliberations on the matter in the Commission, a Drafting Sub-Committee prepared a provisional draft code which was referred to the Special Rapporteur, who was requested to submit a further report.[6/]

14. The General Assembly at its fifth session, by resolution 488 (V) of 12 December 1950, invited Governments of Member States to furnish their observations on the formulation of the principles of international law recognized in the Charter and Judgement of the Nürnberg Tribunal and requested the Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on that formulation by delegations during the fifth session of the Assembly and of any observations which might made by Governments.

15. The Special Rapporteur submitted his second report to the Commission at its third session, in 1951. It contained a revised draft code as well as a digest of observations made on the Commission's formulation of the Nürnberg principles at the fifth session of the Assembly.[7/] The Commission also had before it observations received from Governments on that formulation,[8/] as well as a memorandum concerning the draft code prepared by Professor Vespasien V. Pella.[9/]

3/ Year book ... 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127.

4/ Ibid., p. 253, document A/CN.4/25.

5/ Ibid., p. 249, document A/CN.4/19, part II and A/CN.4/19/Add. 1-2.

6/ Ibid., p. 38, document A/1316, para. 157. The Drafting Sub-Committee was composed of the Special Rapporteur and Messrs. Ricardo Alfaro and Manley O. Hudson.

7/ Yearbook ... 1951, vol. II, p. 43, document A/CN.4/44.

8/ Ibid., p. 104, document A/CN.4/45 and Corr.1 and Add. 1-2.

9/ Yearbook ... 1950, vol. II, p. 278, document A/CN.4/39.

At the session the Commission adopted a draft Code of Offences against the Peace and Security of Mankind, consisting of five articles with commentaries, and submitted it to the General Assembly.[10/]

16. In 1951, at its sixth session, the General Assembly postponed consideration of the question of the draft Code until its seventh session. It drew the attention of Governments of Member States to the draft Code prepared in 1951 by the Commission and invited them to submit their comments and observations thereon. While the comments and observations thus received were circulated at the seventh (1952) session of the Assembly,[11/] the question of the draft Code was not placed on the agenda of that session, on the understanding that the matter would continue to be considered by the Commission. The Special Rapporteur, at the fifth session of the Commission, in 1953, was requested to undertake a further study of the question.[12/]

17. In his third report the Special Rapporteur[13/] discussed the observations received from Governments and, in the light of those observations, proposed certain changes in the draft Code adopted by the Commission in 1951. The Commission considered that report at its sixth session, in 1954, made some changes in the previously adopted text and transmitted to the General Assembly a revised version of the draft Code, consisting of four articles with commentaries.[14/]

18. The full text of the draft Code adopted by the Commission at its sixth session, in 1954, read as follows:

"Article 1

Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.

Article 2

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

10/ Yearbook ... 1951, vol. II, p. 134, document A/1858, paras. 57-58.

11/ Official Records of the General Assembly, Seventh Session, Annexes, agenda item 54, document A/2162 and Add. 1-2.

12/ Yearbook ... 1953, vol. II, p. 231, document A/2456, paras. 167-169.

13/ Yearbook ... 1954, vol. II, pp. 112-122, document A/CN.4/85.

14/ Ibid., pp. 150-151, paras. 48-53.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

(3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

(10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

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

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

(12) Acts in violation of the laws or customs of war.

(13) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or

(iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

Article 3

The fact that a person acted as Head of State or as responsible Government official does not relieve him of responsibility for committing any of the offences defined in this Code.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order."

19. By its resolution 897 (IX) of 4 December 1954, the General Assembly, considering that the draft Code as formulated by the Commission at its sixth session raised problems closely related to that of the definition of aggression and that it had entrusted to a special committee the task of preparing a report on a draft definition of aggression, decided to postpone further consideration of the draft Code until the Special Committee on the Question of Defining Aggression had submitted its report.[15/] The Assembly was of a similar

---

15/ In addition, by its resolution 898 (IX) of 14 December 1954, the General Assembly, considering, inter alia, the connection between the question of defining aggression, the draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction, decided to postpone consideration of the report of the 1953 Committee on International Criminal Jurisdiction (Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2654)) until it had taken up the report of the Special Committee on the Question of Defining Aggression and had taken up the draft Code

opinion in 1957 (resolution 1180 (XII) of 11 December 1957), although it transmitted the text of the draft Code to Member States for comment; replies were to be submitted to the Assembly at such time as the item might be placed on its provisional agenda.[16/] In 1968, the Assembly again decided not to include in its agenda the item concerning the draft Code, or the item "international criminal jurisdiction", until a later session, when further progress had been made in arriving at a generally agreed definition of aggression.

20. On 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression (resolution 3314 (XXIX), annex). In allocating the item on the question of defining aggression to the Sixth Committee, the Assembly commented that it had decided, inter alia, to consider whether it should take up the question of a draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction, as envisaged in previous Assembly resolutions and decisions.[17/]

21. The Commission, in its report on the work of its twenty-ninth session, in 1977, referred to the possibility of the General Assembly giving consideration to the draft Code, including its review by the Commission if the Assembly so wished, having regard to the fact that the Definition of Aggression had been approved by the General Assembly.[18/]

---

of Offences against the Peace and Security of Mankind. It may be noted that the 1953 Committee on International Criminal Jurisdiction was preceded by the 1951 Committee on International Criminal Jurisdiction. The 1951 Committee was established by General Assembly resolution 489 (V) of 12 December 1950 and submitted its report to the seventh (1952) session of the Assembly (Ibid., Seventh Session, Supplement No. 11 (A/2136).

16/ By resolution 1187 (XII) of 11 December 1957, the General Assembly also decided once again to defer consideration of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression and the question of the draft Code of Offences against the Peace and Security of Mankind.

17/ See Official Records of the General Assembly, Twenty-ninth Session, Annexes, agenda item 86, document A/9890, para. 2. As of July 1985, the General Assembly has not taken up the question of an international criminal jurisdiction.

18/ Yearbook ... 1977, Vol. II (Part Two), p. 130, document A/32/10, para. 111.

22. Although the item was included in the agenda for the thirty-second (1977) session of the General Assembly, its consideration was postponed until the 1978 session of the Assembly. By resolution 33/97 of 16 December 1978, the Assembly invited Member States and relevant international intergovernmental organizations to submit their comments and observations on the draft Code, including comments on the procedure to be adopted. The comments received were circulated at the next Assembly session in document A/35/210 and Add. 1-2 and Add.2/Corr.1. At its thirty-fifth session, in 1980, by resolution 35/49 of 4 December 1980, the Assembly reiterated the invitation to submit comments and observations made in resolution 33/97, adding that the replies should indicate views on the procedure to be followed in the future consideration of the item, including the suggestion that the item be referred to the International Law Commission. Those comments were subsequently circulated in document A/36/416.[19/]

23. On 10 December 1981, the General Assembly adopted resolution 36/106, entitled "Draft Code of Offences against the Peace and Security of Mankind", which read as follows:

> "The General Assembly,
>
> Mindful of Article 13, paragraph 1 a, of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,
>
> Recalling its resolution 177 (II) of 21 November 1947, by which it directed the International Law Commission to prepare a draft code of offences against the peace and security of mankind,
>
> Having considered the draft Code of Offences against the Peace and Security of Mankind prepared by the International Law Commission and submitted to the General Assembly in 1954,
>
> Recalling the belief that the elaboration of a code of offences against the peace and security of mankind could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations,
>
> Bearing in mind its resolution 33/97 of 16 December 1978, by which it decided to accord priority and the fullest consideration to the item entitled 'Draft Code of Offences against the Peace and Security of Mankind'.

19/ In addition, an analytical paper was prepared by the Secretary-General pursuant to resolution 35/49 on the basis of replies received and statements made during the debate on the item at the thirty-third and thirty-fifth sessions of the Assembly. See document A/36/535.

Having considered the report of the Secretary-General submitted pursuant to General Assembly resolution 35/49 of 4 December 1980,

Considering that the International Law Commission has just accomplished an important part of its work devoted to the succession of States in respect of State property, archives and debts and that the programme of work is thus at present lightened,

Taking into consideration that the membership of the International Law Commission was increased during the thirty-sixth session of the General Assembly and that it has at its disposal a new mandate of five years to organize its future work,

Taking into account the views expressed during the debate on this item at the current session,

Taking note of paragraph 4 of General Assembly resolution 36/114 of 10 December 1981 on the report of the International Law Commission,

1. Invites the International Law 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;

2. Requests the International Law Commission to consider at its next session the question of the draft Code of Offences against the Peace and Security of Mankind in the context of its five-year programme and to report to the General Assembly at its thirty-seventh session on the priority it deems advisable to accord to the draft Code, and the possibility of presenting a preliminary report to the Assembly at its thirty-eighth session bearing, inter alia, on the scope and the structure of the draft Code;

3. Requests the Secretary-General to reiterate his invitation to Member States and relevant international intergovernmental organizations to present or update their comments and observations on the draft Code of Offences against the Peace and Security of Mankind, and to submit a report to the General Assembly at its thirty-seventh session;

4. Requests the Secretary-General to submit to the International Law Commission all the necessary documentation, comments and observations presented by Member States and relevant international intergovernmental organizations on the item entitled 'Draft Code of Offences against the Peace and Security of Mankind';

5. Decides to include in the provisional agenda of its thirty-seventh session the item entitled 'Draft Code of Offences against the Peace and Security of Mankind' and to accord it priority and the fullest possible consideration."

24. Accordingly, at its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur on the topic "Draft Code of Offences against the Peace and Security of Mankind" and established a Working Group on the topic

chaired by the Special Rapporteur.[20] On the recommendation of the Working Group the Commission decided to accord the necessary priority to the topic within its five-year programme and indicated its intention to proceed during its thirty-fifth session to a general debate in plenary on the basis of a first report to be submitted by the Special Rapporteur. The Commission further indicated that it would submit to the General Assembly, at its thirty-eighth session, the conclusions of that debate.[21]

25. Also on the recommendation of the Working Group, the Commission requested the Secretariat to give the Special Rapporteur the assistance that might be required and to submit to the Commission all necessary source materials, including in particular a compendium of relevant international instruments and an updated version of the analytical paper prepared pursuant to resolution 35/49. The Commission had before it the comments and observations which had been received from Governments pursuant to the request contained in paragraph 4 of resolution 36/106.

26. On 16 December 1982, the General Assembly adopted resolution 37/102, by which it invited the Commission to continue its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind, in conformity with paragraph 1 of its resolution 36/106 and taking into account the decision contained in the report of the Commission on the work of its thirty-fourth session (see para. 24 above). It also requested the Commission, in conformity with resolution 36/106, to submit a preliminary report to the General Assembly at its thirty-eighth session bearing, inter alia, on the scope and the structure of the draft Code, and reiterated the invitation to Member States and relevant international intergovernmental organizations to present or update their comments and observations on the draft Code.

27. At its thirty-fifth session, the Commission had before it the first report on the topic submitted by the Special Rapporteur (A/CN.4/364), as well as a compendium of relevant international instruments (A/CN.4/368 and Add.1) and an

---

20/ The working group was composed of the following members: Mr. Doudou Thiam (Chairman), Mr. Mikuin Leliel Balanda, Mr. Boutros Boutros-Ghali, Mr. Jens Evensen, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Frank X. Njenga, Mr. Motoo Ogiso, Mr. Syed Sharifuddin Pirzada, Mr. Willem Riphagen and Mr. Alexander Yankov. Yearbook ... 1982, vol. II (Part Two), p. 121, document A/37/10, para. 252.

21/ Ibid., para. 255.

analytical paper (A/CN.4/365), both prepared by the Secretariat pursuant to the Commission's requests made at the thirty-fourth session (see para. 25 above). It also had before it replies received from Governments (A/CN.4/369 and Add. 1-2) in response to the invitation contained in resolution 37/102. The Commission proceeded to a general debate in plenary on the topic on the basis of the first report submitted by the Special Rapporteur, which related to three questions: (1) the scope of the draft; (2) the methodology of the draft; and (3) the implementation of the Code.

28. In reporting to the Assembly on the work of its thirty-fifth session, the Commission was of the opinion that the draft Code should cover only the most serious international offences. Those offences would be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject. With regard to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on this point, because of the political nature of the problem. With regard to the implementation of the Code and given the fact that some members considered that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission asked the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals. Furthermore, in view of the prevailing opinion within the Commission, which endorsed the principle of criminal responsibility in the case of States, the Commission indicated that the General Assembly should indicate whether such jurisdiction should also be competent with respect to States.[22/]

29. By resolution 38/138 of 19 December 1983, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics in its current programme. Furthermore, by its resolution 38/132 of 19 December 1983, the Assembly invited the International Law Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating, as a first step, an introduction in conformity with paragraph 67 of its report on the work of its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report. It also requested the

---

22/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), para. 69.

Secretary-General to seek the views of Member States and intergovernmental organizations regarding the questions raised in paragraph 69 of the report of the International Law Commission and to include them in a report to be submitted to the General Assembly at its thirty-ninth session with a view to adopting, at the appropriate time, the necessary decision thereon.

30. At its thirty-sixth session, the Commission had before it the second report submitted by the Special Rapporteur (A/CN.4/377 and Corr.1). The Commission proceeded to a general debate on the topic on the basis of the second report submitted by the Special Rapporteur, which dealt with two questions, namely, offences covered by the 1954 draft and offences classified since 1954.

31. In its report to the General Assembly on the work of its thirty-sixth session the Commission stated[23/] that with regard to the content ratione personae of the draft Code, the Commission intended that it should be limited at that stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. With regard to the first stage of the Commission's work on the draft Code, and in the light of General Assembly resolution 38/132, the Commission intended, for the reasons given in paragraphs 33 to 40 of its report, to begin by drawing up a provisional list of offences, while bearing in mind the drafting of an introduction summarizing the general principles of international criminal law relating to offences against the peace and security of mankind. With regard to the content ratione materiae of the draft Code, the Commission intended to include the offences covered in the 1954 Code, with appropriate modifications of form and substance to be considered by the Commission at a later stage. There was a general trend in the Commission in favour of including colonialism, apartheid, and possibly serious damage to the human environment and economic aggression in the draft Code, if appropriate legal formulations could be found. With regard to the use of atomic weapons, the Commission discussed the problem at length but, for the reasons given in paragraphs 55 to 57 of its report, intended to examine the matter in greater depth in the light of any views expressed in the General Assembly. With regard to mercenarism, the Commission considered that in so far as the practice was used to infringe State sovereignty, undermine the stability of governments or oppose national liberation movements, it constituted

---

23/ Ibid., Thirty-ninth Session, Supplement No. 10 (A/39/10), para. 65.

an offence against the peace and security of mankind. The Commission considered, however, that it would be desirable to take account of the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. With regard to the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc. and the hijacking of aircraft, the Commission considered that these practices had aspects which could be regarded as related to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission recognized that it was an international crime under customary international law. It doubted, however, whether in the present international community, the offence could be such as to constitute a threat to the peace and security of mankind.

32. By resolution 39/85 of 13 December 1984, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics on its current programme.

33. By its resolution 39/80 of 13 December 1984, the General Assembly requested the International Law Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating an introduction as well as a list of the offences, taking into account the progress made at its thirty-sixth session, as well as the views expressed during the thirty-ninth session of the General Assembly. It also requested the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the conclusions contained in paragraph 65 of the report of the International Law Commission on the work of its thirty-sixth session and to include them in a report to be submitted to the General Assembly at its fortieth session with a view to adopting, at the appropriate time, the necessary decision thereon.

B. Consideration of the topic at the present session

34. At its present session, the Commission had before it the third report on the topic submitted by the Special Rapporteur (A/CN.4/387 and Corr.1 and 2) (Spanish only) and views received from Member States and intergovernmental organizations (A/CN.4/392 and Add.1 and 2).

35. In his third report the Special Rapporteur presented to the Commission a possible outline of the future Code, and indicated his intention to follow the Commission's decision at its thirty-sixth session that the draft Code should be limited at that stage to offences committed by individuals, without prejudice to

subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments, and to include the offences covered by the 1954 Code with appropriate modifications of form and substance. The outline would consist of two parts. The first part would deal with: (a) the scope of the draft articles; (b) the definition of an offence against the peace and security of mankind; and (c) the general principles governing the subject. The second part would deal with the acts constituting an offence against the peace and security of mankind. In this context, the Special Rapporteur intended to review the traditional division of such offences into crimes against peace, war crimes and crimes against humanity.

36. The Special Rapporteur advised the Commission that the general principles would be included in the future draft and placed in the appropriate part of the aforementioned outline.

37. In his report the Special Rapporteur also specified the category of individuals that would be covered by the draft and defined an offence against the peace and security of mankind. He then examined the offences mentioned in article 2, paragraphs (1) to (9) of the 1954 draft and of the possible additions to those paragraphs.

38. Finally, the Special Rapporteur proposed a number of draft articles relating to those offences, namely: "Scope of the present articles" (article 1); "Persons covered by the present articles" (article 2); "Definition of an offence against the peace and security of mankind" (article 3); and "Acts constituting an offence against the peace and security of mankind" (article 4).[24/]

39. The Commission considered the third report submitted by the Special Rapporteur at its 1879th to 1889th meetings.

40. At its 1889th meeting, on 28 May 1985, the Commission referred to the Drafting Committee draft article 1 entitled "Scope of the present articles"; draft article 2 (first alternative) entitled "Persons covered by the present articles"; and draft article 3 (both alternatives) entitled "Definition of an offence against the peace and security of mankind". As regards draft article 4 entitled "Acts constituting an offence against the peace and security of mankind; section A thereof (both alternatives) entitled "The commission [by the authorities of a State] of an act of aggression", was also referred to the Drafting Committee, on the understanding that the Committee would consider it only if time permitted

---

24/ For the texts of those draft articles, see notes 28, 34 and 35, below.

and that if the Committee did agree upon a text for draft article 4, section A, it would be for the purpose of assisting the Special Rapporteur in the preparation of his fourth report.

41. Owing to lack of time, the Drafting Committee was not able at the present session to take up the draft articles referred to it by the Commission.

42. The following paragraphs reflect in a more detailed manner aspects of the work on the topic by the Commission at its present session.

1. Outline of the future Code

43. The third report by the Special Rapporteur dealt, on the one hand, with the delimitation of scope ratione personae and the definition of an offence against the peace and security of mankind and, on the other, with acts constituting offences against the peace and security of mankind. The Special Rapporteur had described the structure of the future Code in his first two reports. The outline would consist of the following two parts:

part I relating to:

The scope of the draft articles;

The definition of an offence against the peace and security of mankind;

The general principles governing the subject; and

part II dealing specifically with acts constituting offences against the peace and security of mankind.

44. The first two headings in part I, as well as part II, will be discussed in greater detail in the present chapter.

45. With regard to the third heading in part I, the Special Rapporteur referred to the conclusions reached by the Commission and reflected in paragraph 33 of its report on the work of its thirty-sixth session[25/] and drew attention to the general principles formulated by the Commission at its second session in 1950 in the context of its work on the Nürnberg Principles, namely:

"Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

25/ Official Records of the General Assembly, Thirty-Ninth Session, Supplement No. 10 (A/39/10).

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

.../26/

26/ Principle VI is, strictly speaking, not a principle, but a list of the acts referred to in the Charter of the Nürnberg Tribunal as offences against the peace and security of mankind. It reads:

"Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law." 27/

46. Following the Commission's further discussion of that question, in which a number of members stressed the importance of formulating general principles in parallel with the list of offences, the Special Rapporteur once again pointed out that the principles which had already been formulated by the Commission in 1950 would be supplemented, as appropriate, in the light of developments in international law.

47. The new rules that had emerged concerned, in the view of the Special Rapporteur, the non-applicability of the statutory limitations to offences against the peace and security of mankind, the scope of the principles, nullum crimen sine lege and non-retroactivity, and the applicability of jus cogens with its non-temporal element.

48. Again, once a criminal act had been defined and characterized, the responsibility of its perpetrator and the extent of that responsibility bring into play a number of moral and subjective elements, such as intention, degree of awareness and motive, which do not necessarily form part of every offence, but only of some.

49. Concepts such as complicity, the involvement of all the participants and the types of participation that might be punishable also called for serious reflection and meant that difficult choices will have to be made. Some offences, such as crimes against humanity, require a "concursus plurium ad delictum" and involved the theory of extenuating circumstances, justification, exculpation, etc.

50. The foregoing considerations showed that criminal acts should also be studied before any general principles could be formulated in order to avoid excessive abstraction and assertions not based on proven facts.

51. The views of the members of the Commission were divided on these questions. It was suggested by some members that the Special Rapporteur might deal with the question of general principles more concretely in his next report, so that members of the Commission could address themselves to them more specifically, along with the other provisions relating to the introduction and the list of offences as elements of the future Code of Offences. The Special Rapporteur said that he would consider the general principles as soon as possible.

27/ Yearbook ... 1950, vol. II, pp. 374-377, document A/1316, part III.

52. With regard to the outline or structure of the future Code, it should also be pointed out that the problem of "implementation" has also been left aside. It is not yet known what option will ultimately be chosen: the principle of universal jurisdiction, that of an international court or both.

2. Delimitation of the scope of the topic ratione materiae

53. The Commission again discussed the issue whether the draft Code should be limited to the criminal responsibility of individuals or whether it should also deal with the criminal responsibility of States.

54. In that connection, it was stated that the Commission had decided at the current stage to limit the draft to the criminal responsibility of individuals, without prejudice to the possibility of later considering the criminal responsibility of States. The latter aspect of the problem has thus been left aside, particularly since the Commission has not taken any decision on the important question whether the criminal responsibility of States will belong in the subject-matter of the draft Code or in that of the draft on the international responsibility of States.

55. Some members of the Commission stated that the purpose of the draft Code of Offences against the Peace and Security of Mankind could not be achieved if the Code was limited to the responsibility only of private individuals and that most offences against the peace and security of mankind were committed by States, not by private individuals.

56. For the time being, the question that was discussed at length is the following: even if the draft applies only to individuals, it will have to be determined exactly which individuals are to be covered. There are two categories of individuals: private individuals and the agents of a State. A private individual is a physical person who has no official authority, is acting strictly in his private capacity and therefore has none of the power or, a fortiori, the means inherent in the exercise of governmental authority. An individual may, however, also be acting as an agent of a State, exercising power in the name and on behalf of that State. Such an agent is also called an "authority" in order to make it quite clear that his functions involve a power of command.

57. This question arises because the 1954 draft drew a distinction between individuals acting as "the authorities of a State" (article 2, paragraphs (1) to (9)) and individuals acting as "private individuals" (article 2, paragraphs (10) and (11)). It is not clear whether this distinction serves any purpose. A priori, it does not really seem to be necessary, since private individuals acting as the "authorities of a State" are still individuals or, in other words,

physical persons who are, in principle, all liable to the same punishment for the commission of a particular offence. The problem which arises in this connection and on which the report could not remain silent, since the distinction was drawn in the 1954 draft, is whether private individuals can commit offences against the peace and security of mankind.

58. There are two approaches to this problem. Some members of the Commission were of the opinion that an offence against the peace and security of mankind amounted, in the final analysis, to the improper exercise or the abuse of power by private individuals at any level in a political, administrative or military hierarchy who, by the orders they give or receive, commit criminal acts which are contrary to the object and purpose of power. These members of the Commission considered that offences against the peace and security of mankind should cover only this category of individuals, since the draft Code was primarily intended to prevent the abuses to which the exercise of power may give rise. They noted, for example, that the term "offence against the peace and security of mankind" dates back to the Second World War, in consideration of the barbaric crimes committed by the Nazi régime, and that the 1954 draft Code was based on the need to prevent the odious crimes committed during that War by individuals exercising a power of command.

59. Other members of the Commission took the view that some offences against the peace and security of mankind could also be committed by private individuals without any participation, order or instigation by a State. According to those members, genocide and terrorist acts, for example, could be committed by mere private individuals. It was also stated that some private multinational corporations and criminal organizations had sufficient means to endanger the stability not only of small States, but of the great Powers as well.

60. Accordingly, the report by the Special Rapporteur proposed a draft article with two alternatives which were designed to take account of both those approaches. The first alternative, which was broader, stated that the Code applied to offences committed by individuals and made no distinction between the "authorities of a State" and "private individuals". The second alternative made the Code applicable only to acts committed by the authorities of a State, thereby linking an offence against the peace and security of mankind to the exercise of

power.[28] After a thorough discussion that reflected the two approaches described above, the Commission decided to refer the first alternative of article 2 to the Drafting Committee.

3. Definition of an offence against the peace and security of mankind

61. The definition of an offence against the peace and security of mankind involves two problems, that of the unity of the concept and that of the criteria to be used in identifying it.

(a) Unity of the concept of offences against the peace and security of mankind

62. The term "offence against the peace and security of mankind" would, at first glance, appear to cover two types of acts, namely, offences against peace and offences against the security of mankind. Upon further analysis and consideration, however, the conclusion was reached that "an offence against the peace and security of mankind" can be defined only if it is regarded as a single and unified concept.

63. The preparatory work showed that the term "offence against the peace and security of mankind" originated with Justice Francis Biddle, who was one of the Nürnberg judges and who, in attempting to characterize the crimes referred to in the Charter of the Nürnberg Tribunal, as adopted by the London Agreement of 1945,[29] referred to them, in a letter to President Truman dated 9 November 1946, as "offences against the peace and security of mankind".[30] The term is a generic one and, although it refers to two distinct types of acts, it denotes an indivisible concept because such acts are a threat or a danger to, or an attack on, the peace and security of mankind.

---

[28] The two alternatives of article 2 submitted by the Special Rapporteur read:

"Part II. Persons covered by the present articles

Article 2 - First alternative

Individuals who commit an offence against the peace and security of mankind are liable to punishment.

Article 2 - Second alternative

State authorities which commit an offence against the peace and security of mankind are liable to punishment."

[29] Agreement for the Prosecution and Punishment of the Major War Criminals of The European Axis, United Nations, Treaty Series, vol. 82, p. 284.

[30] Yearbook ... 1950, vol. II, p. 255, document A/CN.4/25 para. 9.

64. A large majority of the authors who have dealt with the matter are of the opinion that the term in question expresses one single idea.[31/] Just as the word "crime" in internal law refers to such different acts as arson, armed robbery, murder, assassination, etc., the term "offence against the peace and security of mankind" refers, despite its unity, to such different acts as aggression, terrorism, genocide, etc.

(b) Criteria and meaning of the concept of an offence against the peace and security of mankind

65. Although some members of the Commission expressed the opinion that it was necessary to define an offence against the peace and security of mankind, that opinion was not unanimously supported.

66. Some members took the view that the concept did not have to be defined. The fact was that many national codes did not define "crime", but merely provided for a range of penalties, with the harshest applying to "crimes" as opposed to lesser offences. The seriousness of a crime was thus measured only according to the harshness of the penalty. Other penal codes defined crime on the basis of a general criterion, such as the danger to society it represents, so that crime was the category of acts that represent the greatest danger to society. Another way of defining crime was not to base it on one criterion, but to proceed by enumeration. That method was used in the London Agreement of 1945 and in the 1954 draft Code.

67. In the report by the Special Rapporteur, however, an attempt was made to define an offence against the peace and security of mankind on the basis of a number of general criteria. The Commission had used the criterion of extreme seriousness as a characteristic of an offence against the peace and security of mankind. It had, however, recognized that that criterion was too vague to identify such an offence. It was therefore necessary to give the concept of extreme seriousness more specific content.

68. In that connection, article 19 of the draft on State responsibility defined an international crime as a breach of an international obligation so essential for the protection of fundamental interests of the international community that such a breach is recognized as a crime by that community as a whole.[32/] Article 19 thus introduces an objective element into the definition of an international crime, which is the obligation breached. The more important the subject-matter of the obligation, the more serious its breach.

31/ See ibid., p. 258, para. 34.

32/ Yearbook ... 1976, vol. II, pp. 95-96, document A/31/10, chap. III.B.2.

69. On the basis of that consideration, the Special Rapporteur took the view that an offence against the peace and security of mankind is constituted by the breach of obligations intended to protect the most fundamental interests of mankind, namely, those which reflect mankind's basic needs and concerns and on which the preservation of the human race depends. Such interests were the maintenance of peace, the protection of fundamental human rights, the safeguarding of the right of self-determination of peoples and the safeguarding and preservation of the human environment.

70. In the commentary to article 19, the Commission also stated that "The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community are to a large extent those which give rise to the obligations comprised within the four main categories mentioned".[33/]

71. In his third report, the Special Rapporteur submitted an article defining an offence against the peace and security of mankind, the first alternative of which was based on the four fundamental criteria just listed. The second alternative of the article was much briefer and stressed the fact that a wrongful act has to be recognized as an offence against the peace and security of mankind by the international community as a whole.[34/]

33/ Ibid., p. 121, para. (67) of the commentary to article 19.

34/ Article 1 and the two alternatives of article 3 submitted by the Special Rapporteur read:

"Part I. Scope of the present articles

Article 1

The present articles apply to offences against the peace and security of mankind.

...

Part III. Definition of an offence against the peace and security of mankind

Article 3 - First alternative

Any internationally wrongful act which results from any of the following is an offence against the peace and security of mankind:

(a) a serious breach of an international obligation of essential importance for safeguarding international peace and security;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples;

(c) a serious breach of an international obligation of essential importance for safeguarding the human being;

72. The first alternative, which was closely linked to article 19 of the draft on State responsibility, was criticized by some members of the Commission, who stated that article 19 related to the international responsibility of States and could not be used as a basis for a draft dealing with the criminal responsibility of individuals. They thus stated their preference for the second alternative of the article.

73. Other members were, however, of the opinion that, because of its seriousness, a wrongful act could also constitute an offence and that, in many legal systems, the same act could give rise both to civil and to criminal responsibility. The acts referred to in article 19 were both wrongful acts and crimes. Cumulatively, they could be the source of a right to punish and of a right to reparation.

74. As noted in paragraph 40 above, the Commission decided to refer the two alternatives of draft article 3 to the Drafting Committee.

4. Acts constituting an offence against international peace and security

75. The report of the Special Rapporteur also contained a discussion of acts constituting an offence against the sovereignty and territorial integrity of a State, called "offences against international peace and security"; to this category belong the acts contemplated in article 2, paragraphs (1) to (9), of the 1954 draft Code.

76. A distinction should be drawn between the notions of "international peace and security" and "peace and security of mankind". The two notions do not exactly coincide. Whereas every offence against international peace and security is an offence against the peace and security of mankind, the converse is not the case.

77. The notion of "international peace and security" is confined to crimes against peace and threats to peace. These are acts seriously affecting the relations between States, involving either a breach of their sovereignty or territorial integrity or an attack on their stability, which thereby constitute an offence against international peace and security.

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

Article 3 - Second alternative

Any internationally wrongful act recognized as such by the international community as a whole is an offence against the peace and security of mankind."

78. The notion of the peace and security of mankind goes beyond relations between States. It addresses relations of a broader kind involving not only States but also ethnic groups, populations, ideologies, beliefs and so on. The notion incorporates values which make international law increasingly humanistic. This second aspect of the subject will be examined in the next report, when the Commission studies crimes against humanity.

79. The view was expressed that it was necessary to introduce into the Code the express and specific condemnation as a crime against humanity, any acts aimed - with or without external support - at subjecting a people to a régime not in conformity with the principle of self-determination and depriving that people of human rights and fundamental freedoms.

80. The offences against international peace and security which the Special Rapporteur examined in his third report, and concerning which he submitted draft articles to the Commission, included the acts contemplated in article 2, paragraphs (1) to (9), of the 1954 draft Code as well as other acts which the draft Code does not mention. The following paragraphs of this chapter set forth the proposals made by the Special Rapporteur on each of these acts and dwell briefly on some aspects of the discussion to which the acts in question gave rise.

(a) Aggression: article 2, paragraph (1), of the 1954 draft Code

81. The offence contemplated in this paragraph is aggression. It will be recalled that approval of the 1954 draft was postponed pending the formulation of a definition of aggression. This definition was given in resolution 3314 (XXIX) of 14 December 1974. The problem which the Commission faced was whether to incorporate the definition in the present draft Code or simply to refer to resolution 3314 (XXIX) by means of a short provision, without reproducing the text of the resolution in full.

82. In his third report to the Commission the Special Rapporteur offered both choices, in the form of two alternatives for his draft article 4, section A.[35/]

35/ The two alternatives for section A of article 4 submitted by the Special Rapporteur read:

"Part V. Acts constituting an offence against the peace and security of mankind

Article 4

The following acts constitute offences against the peace and security of mankind:

A. The commission [by the authorities of a State] of an act of aggression

83. As regards the first alternative, some members of the Commission pointed out that resolution 3314 (XXIX) of 14 December 1974 was intended for a political organ (the Security Council) and not a judicial one. Certain provisions of the resolution were significant in that respect, particularly those giving the

---

(a) 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, as set out in this definition.

Explanatory note - In this definition, the term 'State':

(i) is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

(ii) includes the concept of 'group of States' where appropriate.

(b) Evidence of the aggression, and competence of the Security Council

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.

(c) Acts constituting aggression

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of paragraph (b), qualify as an act of aggression:

(i) 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;

(ii) 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;

(iii) the blockade of the ports or coasts of a State by the armed forces of another State;

(iv) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(v) 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 extention of their presence in such territory beyond the termination of the agreement;

Security Council power to determine that acts other than those enumerated in the resolution constituted aggression or that acts enumerated in it did not do so. Those members added that the provisions of the resolution relating to evidence of aggression would be out of place in a definition stricto sensu.

(vi) 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;

(vii) the sending by or on behalf of a State or 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;

(viii) the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

(d) Consequences of aggression

(i) No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression;

(ii) A war of aggression is a crime against international peace and security. Aggression gives rise to international responsibility;

(iii) No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

(e) Scope of this definition

(i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;

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

(f) Interpretation of the present articles

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

84. Although differences of opinion and approach emerged in the Commission as to the best way of reflecting the offence of aggression in a future Code, the fact per se of its inclusion in the proposed instrument met with general agreement. The Commission therefore decided to refer the two alternatives for article 4, section A, to the Drafting Committee.

85. In connection with the offence of aggression, it should be pointed out that the acts contemplated in article 2, paragraphs (4) and (8), of the 1954 draft Code (incursion of armed bands into the territory of a State and annexation of territory of a State) are covered by the draft article on aggression and consequently were not dealt with in a separate draft article by the Special Rapporteur. He nevertheless announced his intention of providing expressly for armed bands in a future draft article which he will prepare on the question of mercenarism.

(b) The threat of aggression: article 2, paragraph (2), of the 1954 draft Code

86. In his third report the Special Rapporteur formulated a draft article on the threat of aggression.[36/] A discussion took place in the Commission as to whether the threat of aggression was an offence which should be included in the draft Code. In 1954 the Commission took the view that the threat of aggression, like aggression itself, was an offence against the peace and security of mankind. At the present session some members considered that the threat of aggression should be excluded particularly since it was difficult to ascertain whether it existed in some cases, or how serious it was. A number of other members expressed support for including the act in question in the draft Code.

A. Second alternative

The commission [by the authorities of a State] of an act of aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974."

36/ Draft article 4. section B, submitted by the Special Rapporteur read:

"Article 4

The following acts constitute offences against the peace and security of mankind.

...

B. Recourse [by the authorities of a State] to the threat of aggression against another State."

(c) The preparation of aggression: article 2, paragraph (3), of the 1954 draft Code

87. The Commission found the notion of preparation of aggression highly controversial. Some members held it to be a vague notion which gave no idea of where preparation began or ended or what its ingredients were. Depending on the standpoint adopted, acts might seem designed either to prevent aggression or to prepare it. In any case the distinction was of little interest legally, since only one of two things could happen: either the aggression did not take place, in which case no wrong would seem to occur, or else it did, in which case the preparation merged in the aggression itself. The Special Rapporteur, having drawn attention in his third report to the problems which the notion raised, refrained from drafting an article on the preparation of aggression. The Commission will nevertheless give due heed to the discussion which takes place on this point in the Sixth Committee and the General Assembly.

(d) Intervention in the internal or external affairs of another State: article 2, paragraphs (5) and (9), of the 1954 draft Code

88. In his third report the Special Rapporteur submitted a draft article 4, section C[37] on intervention in the internal or external affairs of another State; this consolidates article 2, paragraphs (5) and (9), of the 1954 draft Code and brings together under the heading of intervention a range of offences, such as fomenting civil strife in another State and exerting pressure of various kinds on another State.

37/ Draft article 4, section C, submitted by the Special Rapporteur read:

"Article 4

The following acts constitute offences against the peace and security of mankind.

...

C. Intervention [by the authorities of a State] in the internal or external affairs of another State:

The following, inter alia, constitute interference in the internal or external affairs of a State:

(a) fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State;

(b) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind."

89. A number of members had no hesitation in supporting the inclusion of the notion of intervention among the acts contemplated in the future draft Code. They pointed out, however, that it was not always easy to distinguish internal intervention from external intervention and that nowadays the distinction was blurred in many cases and devoid of practical consequences.

90. Other members were somewhat sceptical of the notion of intervention itself as a wrongful act under international law and considered that some acts regarded by certain jurists and politicians as representing a form of intervention were no more than legitimate means of negotiation between States. It was also said that intervention in the affairs of another State was necessarily translated objectively into certain specific actions, such as fomenting internal troubles or exerting political or economic pressure. It would be wise for the Commission not to inscribe "intervention", as such, as an offence in the Code, but to break down the concept and list instead, as offences, the specific acts which constituted intervention. In addition, it was pointed out that acts of intervention did not have the character of seriousness which was the distinctive feature of offences against the peace and security of mankind.

(e) Terrorism: article 2, paragraph (6), of the 1954 draft Code

91. The phenomenon of terrorism is a particularly pressing one today. Having examined its various forms (internal, international), its motives (ideological, political, vicious, etc.) and the methods it employs (violence, intimidation, fear, etc.), the Commission, for the purposes of the draft Code, settled on its international content, i.e. terrorism which affects the security and stability of another State, as well as the security of its inhabitants and their property. The draft article submitted by the Special Rapporteur is based to a considerable extent on the 1937 Convention for the Prevention and Punishment of Terrorism.[38/] This convention has been updated to take account of new forms of modern terrorism, including seizure of aircraft and violence directed against persons enjoying special protection, especially diplomatic or consular protection.[39/]

38/ League of Nations document C.547(1).M.384(1).1937.V.

39/ Draft article 4, section D, submitted by the Special Rapporteur read:

"Article 4

The following acts constitute offences against the peace and security of mankind.

...

(f) Violation by the authorities of a State of the provisions of a treaty designed to ensure international peace and security: article 2, paragraph (7), of the 1954 draft Code

92. The draft article submitted by the Special Rapporteur on this subject[40/] reproduces almost word for word the provision on the matter appearing in the 1954 draft Code. It should be noted, however, that the term "fortifications" appearing in that text was considered obsolete and has been replaced by the term "strategic structures".

D. The undertaking or encouragement [by the authorities of a State] of terrorist acts in another State, or the toleration by these authorities of activities organized for the purpose of carrying out terrorist acts in another State.

(a) The term 'terrorist acts' means criminal acts directed against another State and calculated to create a state of terror in the minds of public figures, or a group of persons or the general public.

(b) The following constitute terrorist acts:

(i) any wilful act causing death or grievous bodily harm to a head of State, persons exercising the prerogatives of the head of State, the successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

(ii) acts calculated to destroy or damage public property or property devoted to a public purpose;

(iii) any wilful act calculated to endanger the lives of members of the public, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;

(iv) the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act."

40/ Draft article 4, section E, submitted by the Special Rapporteur read:

"Article 4

The following acts constitute offences against the peace and security of mankind.

...

E. A breach [by the authorities of a State] of obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on strategic structures, or of other restrictions of the same character."

93. Some members of the Commission considered that any draft article approved on this question should refer by way of illustration, in the text of the provision itself, to the different categories of treaty the violation of which might constitute the international offence in question. Other members expressed the view that the draft article should relate rather to the violation of disarmament treaties. Other members again expressed doubts about the relevance in present-day circumstances of this provision in the 1954 draft Code.

(g) Forcible establishment or maintenance of colonial domination

94. This subject, which was not provided for in the 1954 draft Code, was dealt with in a draft article in the Special Rapporteur's third report.41/

95. Some members of the Commission criticized the inclusion of such a provision in the draft Code. In their opinion, the notion of colonial domination belonged to the past and the future instrument should not be burdened with something which was only of historical interest.

96. Other members, however, expressed the view that the case of Namibia and various cases of colonialism persisting in all continents were sufficient proof that the question was a topical one. Moreover, the notion of colonial domination should be interpreted broadly. The view was also expressed that it was appropriate that the future Code should incorporate a number of very topical and modern manifestations of the violation of the right of peoples to self-determination.

(h) Mercenarism

97. The question of mercenarism was not dealt with in the 1954 draft Code. Although this offence is already mentioned in the resolution on the definition of aggression, several members considered that it should be the subject of a separate provision in the future draft Code because of its special character.

41/ Draft article 4, section F, submitted by the Special Rapporteur read:

"Article 4

The following acts constitute offences against the peace and security of mankind.

...

F. The forcible establishment or maintenance of colonial domination by the authorities of a State."

(i) Economic aggression

98. In addition, the notion of economic aggression was the subject of further extensive discussion in the Commission, but one which did not produce any definite conclusions. It was observed that either the measures taken by a State, albeit for economic reasons, were forcible ones, in which case they became part of the aggression defined in resolution 3314 (XXIX) of 14 December 1974, or else they consisted of acts of a different kind such as pressure, threats, etc., in which case they were identifiable with the corresponding offences in the Code. It was also said that measures of an economic nature, in addition to their psychological impact, might constitute a form of aggression, which could threaten the stability of a Government or the very life of the people of a country.

5. Conclusions

99. Following its discussion of the topic, the Commission decided to refer to the Drafting Committee the following articles submitted by the Special Rapporteur: article 1 on scope; the first alternative for article 2, on persons covered by the draft Code; both alternatives for article 3, on the definition of an offence against the peace and security of mankind; and article 4, section A, on aggression.

100. The Commission also decided to resume consideration of the remaining sections of article 4 at its next session.

101. The Commission took note of the Special Rapporteur's intention to devote his next report to war crimes and crimes against humanity and to consider the question of general principles as soon as possible.

CHAPTER III

STATE RESPONSIBILITY

A. Introduction

1. Historical review of the work of the Commission

102. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles on the topic "State responsibility".[42/] Part One was composed of 35 draft articles in five chapters and, under the general plan adopted by the Commission[43/] for the structure of the draft articles on the topic, concerned "the origin of international responsibility". The comments of Member States on the provisions of Part One were requested. The comments received are to be found in documents A/CN.4/328 and Add.1-4,[44/] A/CN.4/342 and Add.1-4,[45/] A/CN.4/351 and Add.1-3[46/] and A/CN.4/362. It is hoped that more comments will be received before the Commission begins its second reading of Part One.

103. The Commission at its thirty-second session, in 1980, commenced the consideration of Part Two of the draft articles on the topic. Part Two, under the general plan adopted by the Commission for the structure of the draft articles on the topic, concerns "the content, forms and degrees of international responsibility", namely, the consequences which an internationally wrongful act of a State may have under international law in different cases, e.g. reparative and punitive consequences, the relationship between these two types of consequences, material forms which reparation and sanction may take, etc. The Commission had before it at its thirty-second session the first and preliminary report[47/] submitted by the Special Rapporteur, Mr. Willem Riphagen. The

---

42/ Yearbook ... 1980, Vol. II (Part Two), pp. 26-63, document A/35/10, chap. III.

43/ The general plan for the draft articles on the topic adopted by the Commission at its twenty-seventh session, in 1975, envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the "implementation" ("mise en oeuvre") of international responsibility. Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

44/ Yearbook ... 1980, vol. II (Part One), p. 87.

45/ Yearbook ... 1981, vol. II (Part One), p. 71.

46/ Yearbook ... 1982, vol. II (Part One), p. 15.

47/ Yearbook ... 1980, vol. II (Part One), pp. 107-129, document A/CN.4/330.

preliminary report analysed in a general manner the various possible new legal relationships (i.e. new rights and corresponding obligations) which would arise from an internationally wrongful act of a State as determined by Part One of the draft articles. The Special Rapporteur proposed three parameters for the consideration of such relationships: the new obligations of the State whose act is internationally wrongful; the new rights of the "injured" State; and the position of "third" States with respect to the situation created by the internationally wrongful act.[48/]

104. The Commission at its thirty-third session, in 1981,[49/] had before it the second report[50/] submitted by the Special Rapporteur. The report proposed five draft articles for inclusion in Part Two of the draft articles on the topic, as follows: chapter I "General principles" (articles 1 to 3) and chapter II "Obligations of the State which has committed an internationally wrongful act" (articles 4 and 5). The Commission decided to refer the draft articles to its Drafting Committee.[51/] The Drafting Committee was unable, however, to consider the draft articles at the thirty-third session.

105. The Commission at its thirty-fourth session, in 1982, had before it the third report[52/] submitted by the Special Rapporteur. The report proposed six draft articles (articles 1 to 6) for inclusion in Part Two of the draft articles on the topic. The Commission decided to refer the draft articles to the

---

48/ For the views expressed in the Commission, see Yearbook ... 1980, vol. I, pp. 73-98, 1597th to 1601st meetings.

49/ The General Assembly in its resolution 35/163 of 15 December 1980 had recommended, inter alia, that, taking into account the written comments of Governments and views expressed in debates in the General Assembly, the Commission should continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning Part Two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles constituting Part One of the draft. A similar recommendation was made by the Assembly in its resolution 36/114 of 10 December 1981. By its resolutions 37/111 of 16 December 1982, 38/138 of 19 December 1983 and 39/85 of 13 December 1984, the General Assembly recommended inter alia, that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the Commission should continue its work on all topics in its current programme.

50/ Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/344.

51/ For the views expressed in the Commission, see Yearbook ... 1981, vol. I, pp. 126-144 and 206-217, 1666th to 1670th and 1682nd to 1684th meetings.

52/ Yearbook ... 1982, p. 22, document A/CN.4/354 and Add.1-2.

Drafting Committee. The Commission also confirmed[53/] the referral to the Drafting Committee of articles 1 to 3 as proposed in the second report of the Special Rapporteur in 1981. This was done on the understanding that the Drafting Committee would prepare framework provisions and consider whether an article along the lines of the new article 6 should have a place in those provisions. The Drafting Committee was unable, however, to consider the draft articles at its thirty-fourth session.

106. The Commission at its thirty-fifth session, in 1983, had before it and considered the fourth report (A/CN.4/366 and Add.1 and Add.1/Corr.1) of the Special Rapporteur. The Commission, on the recommendation of its Drafting Committee, provisionally adopted for inclusion in Part Two of the draft articles on the topic, draft articles 1, 2, 3 and 5 as follows:

Article 1

The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

Article 2

Without prejudice to the provisions of articles [4] and 5, the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

Without prejudice to the provisions of articles [4] and 5, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

Article 5

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.

53/ For the views expressed in the Commission, see Yearbook ... 1982, vol. I, pp. 199-224 and 230-242, 1731st to 1734th and 1736th to 1738th meetings.

107. The Commission at its thirty-sixth session, in 1984, had before it the fifth report (A/CN.4/380 and Corr.1) of the Special Rapporteur. The report proposed 12 draft articles,[54/] for inclusion in Part Two of the draft articles

---

54/ Those draft articles read as follows:

"Article 5

For the purposes of the present articles 'injured State' means:

(a) if the internationally wrongful act constitutes an infringement of a right appertaining to a State by virtue of a customary rule of international law or of a right arising from a treaty provision for a third State, the State whose right has been infringed;

(b) if the internationally wrongful act constitutes the breach of an obligation imposed by a judgement or other binding dispute settlement decision of an international court or tribunal, the other State party or States parties to the dispute;

(c) if the internationally wrongful act constitutes a breach of an obligation imposed by a bilateral treaty, the other State party to the treaty;

(d) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

(i) the obligation was stipulated in its favour, or

(ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties, or

(iii) the obligation was stipulated for the protection of collective interests of the States parties, or

(iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

(e) if the internationally wrongful act constitutes an international crime, all other States.

Article 6

1. The injured State may require the State which has committed an internationally wrongful act to:

(a) discontinue the act, to release and return the persons and objects held through such act, and to prevent continuing effects of such acts; and

on the topic, to follow (as articles 5 to 16) the four draft articles already provisionally adopted by the Commission at its thirty-fifth session in 1983

(b) apply such remedies as are provided for in its internal law; and

(c) subject to article 7, re-establish the situation as it existed before the act; and

(d) provide appropriate guarantees against repetition of the act.

2. To the extent that it is materially impossible to act in conformity with paragraph 1 (c), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Article 7

If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State, within its jurisdiction, to aliens, whether natural or juridical persons, and the State which has committed the internationally wrongful act does not re-establish the situation as it existed before the breach, the injured State may require that State to pay to it a sum of money corresponding to the value which a re-establishment of the situation, as it existed before the breach, would bear.

Article 8

Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.

Article 9

1. Subject to articles 10 to 13, the injured State is entitled, by way of reprisal, to suspend the performance of its other obligations towards the State which has committed the internationally wrongful act.

2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed.

Article 10

1. No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful

(provisionally adopted article 5 being renumbered article 4). The Commission decided to refer articles 5 and 6 to the Drafting Committee on the understanding that members who had not been able to comment on these two articles at the

---

settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.

2. Paragraph 1 does not apply to:

(a) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measure of protection;

(b) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.

Article 11

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or

(b) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or

(c) such obligations are stipulated for the protection of individual persons irrespective of their nationality.

2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, subparagraphs 1 (a) and 1 (b) do not apply to the extent that such decision so determines.

Article 12

Articles 8 and 9 do not apply to the suspension of the performance of the obligations:

(a) of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff;

(b) of any State by virtue of a peremptory norm of general international law.

thirty-sixth session, could do so at an early stage of the thirty-seventh session of the Commission, in order that the Drafting Committee might also take such comments into account.

Article 13

If the internationally wrongful act committed constitues a manifest violation of obligations arising from a multilateral treaty, which destroys the object and purpose of that treaty as a whole, article 10 and article 11, subparagraphs 1 (a) and 1 (b) and paragraph 2, do not apply.

Article 14

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

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

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

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

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

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, mutatis mutandis, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

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

Article 15

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

Article 16

The provisions of the present articles shall not prejudge any question that may arise in regard to:

(a) the invalidity, termination and suspension of the operation of treaties;

(b) the rights of membership of an international organization;

(c) belligerent reprisals".

2. Consideration of the topic at the present session

108. At the present session, the Commission had before it the sixth report (A/CN.4/389 and Corr.1 and Corr.2 (French only)) submitted by the Special Rapporteur.

109. The report set out the four draft articles with commentaries, already provisionally adopted by the Commission at its thirty-fifth session, and the remaining 12 draft articles proposed by the Special Rapporteur at the thirty-sixth session, intended together to constitute Part Two of the draft articles on State responsibility.

110. The report also contained commentaries on the 12 remaining draft articles.

111. The report furthermore set out the proposals of the Special Rapporteur on the possible contents of a Part Three to the draft articles on State responsibility, which the Commission might decide to include, to deal with the "implementation (mise en oeuvre)" of international responsibility and the settlement of disputes.

112. The proposed outlined of Part Three was based on the thesis, that there exists a close analogy between the situation envisaged in the Vienna Convention on the Law of Treaties (in particular articles 42, 65, 66 and 67 thereof and the annex)[55/] dealing with the question of the invalidity, termination and suspension of the operation of treaties, on the one hand, and the situation, in which new legal relationships between States, resulting from an internationally wrongful act having been committed, are alleged to have arisen, on the other hand.

113. In particular, it was stated that, if an alleged injured State exercises its new rights, under the provisions of Part Two, to suspend the performance of its obligations towards the alleged author State, and the latter State, denying having committed an internationally wrongful act, in its turn, as an alleged injured State, suspended the performance of its obligations towards the former State, an escalation would have been set in motion, which would threaten to, in fact, completely nullify the existing "primary" legal relationships between the States involved in the situation.

55/ Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), p. 287, document A/CONF.39/27.

114. In order to stop such escalation it was proposed to introduce a compulsory conciliation procedure along the lines of the Vienna Convention on the Law of Treaties and of the United Nations Convention on the Law of the Sea.[56/]

115. It was noted, furthermore, that the draft provisions of Part Two (a) contained a reference to rules of jus cogens, and (b) attached special legal consequences to international crimes. In view of the connection between these two concepts, it was proposed that a procedure analogous to the one provided for in article 66, under (a), of the Vienna Convention on the Law of Treaties, be included in Part Three of the draft articles on State responsibility, to the effect that any dispute concerning the interpretation or the application of article 19 of Part One[57/] and article 14 of Part Two[58/] might, by a written application of any one of the parties to the dispute, be submitted to the International Court of Justice for a decision.

116. The Commission considered the sixth report at its 1890th to 1902nd meetings, taking into account that, in accordance with its decision taken at its previous session (see paragraph 107, above) draft articles 5 and 6, though already referred to the Drafting Committee, could still be commented upon.

117. In the discussions in the Commission, the overall structure of the set of draft articles for Part Two was generally considered acceptable, though several members expressed the opinion that the special legal consequences of international crimes should be further elaborated in the draft articles. In this connection, reference was made to the relationship between the present topic and the topic of the draft Code of Offences against the Peace and Security of Mankind, and the observation was made that the criminal responsibility of States as such should be considered by the Commission under either the one or the other topic. It was recognized by several members, however, that, at the present stage, it was difficult to determine the specific additional legal consequences of international crimes in the legal relationships between States, since, on the one hand, article 19 of Part One, as at present drafted, left open several questions as to the determination of the facts and the qualification of an internationally wrongful act as a crime, and, on the other hand, a "punishment" to be meted out

---

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

57/ See note 42, above.

58/ See note 54, above.

to a State as such (beyond the normal legal consequences of an internationally wrongful act) raised questions as to its compatibility with rules otherwise considered as peremptory norms protecting the existence of States, the right of self-determination of peoples and individual human rights.

118. As regards article 5, it had, as noted above, been referred to the Drafting Committee by the Commission at its thirty-sixth session on the understanding that members who had not been able to comment on the article at the thirty-sixth session could do so at the present thirty-seventh session of the Commission in order that the Drafting Committee might also take such comments into account. The provisions of article 5 were, accordingly, also commented on at the present session of the Commission. The Commission considered the report of the Drafting Committee on article 5 at its 1929th and 1930th meetings on 18 July 1985 (see paragraph 163, below).

119. As to article 6[59/] the point was made that the words "may require" in the first part of paragraph 1 and in paragraph 2 would seem too weak and that it should be stated that the author State is under an obligation to take the measures required of it under this article.

120. The question of injury (moral or material damage) was invoked in connection with reparation.

121. The question was also raised as to whether distinctions should not be made as between injured States, both from the point of view of injury suffered and from the point of view of countermeasures which such States would be entitled to take.

122. It was also suggested that the article was not exhaustive; in this connection mention was made of apologies (as referred to in paragraph (11) of the Special Rapporteur's commentary to his proposed draft article 6), the bringing to justice of individuals responsible for the act, compensation in kind (as mentioned in paragraph (8) of that commentary) and alternative performance of the primary obligation. It was pointed out that an ex gratia payment of compensation could also be an acceptable way of satisfying a claim of an alleged injured State. Some members suggested to insert the words "inter alia" in the "chapeau" of paragraph 1.

59/ For the text of the draft article proposed by the Special Rapporteur, see note 54, above.

123. As to subparagraph (a) of paragraph 1 the suggestion was made to delete the words "to release and return the persons and objects held through such act", since that was already implied by the other words of this subparagraph.

124. Some members suggested the deletion of subparagraph (b) since it dealt with the application of internal rather than international law.

125. As to subparagraph (d) some members considered it unrealistic to expect States to give "guarantees" against repetition of the wrongful act though some measures aiming at a prevention of repetition could be explored.

126. It was pointed out that paragraph 2 raised the question of the quantum of damages and should be looked at carefully. A degree of flexibility, allowing for lesser or greater compensation might seem useful.

127. As to article 7[60/] some members were opposed to include a special rule relating to the position of aliens, while other members considered article 7 to be useful not only in the context of North-South co-operation but also in the context of South-South co-operation.

128. In respect of articles 8[61/] and 9[62/] several members considered the distinction between "reciprocity" and "reprisal" not entirely clear; some of those members would prefer to deal with both types of measures in the same way under the heading of "countermeasures" (as in article 30 of Part One); other members would at any rate prefer to leave out the words "by way of reciprocity" in article 8 and the words "by way of reprisal" in article 9. It was also pointed out that the suspension of the performance of obligations "directly connected with the obligation breached" (article 8) might under particular circumstances amount to a form of pressure coming in effect close to a "reprisal" (article 9).

129. The view was expressed that perhaps provisions should be included allowing for an "intermediate" phase of amicable notification and discussions before any recourse to countermeasures against the author State.

130. In particular some members felt that the idea underlying article 10[63/] - prior exhaustion of third party dispute settlement procedures - should apply also to measures by way of "reciprocity".

60/ Ibid.

61/ Ibid.

62/ Ibid.

63/ Ibid.

131. One member suggested an alternative text for articles 8 and 9 reading as follows:

"Article 8

1. The injured State shall be entitled to take measures legitimate under international law against a State which has committed an international delict; such measures shall include (but not be limited to):

(a) the restriction or temporary suspension of the rights and interests of the State which has committed a delict within the sphere of jurisdiction of the injured State;

(b) the temporary suspension of the injured State's economic obligations towards the State which has committed a delict;

(c) the temporary suspension of technological, scientific and cultural relations between the injured State and the State which has committed a delict;

(d) the suspension or severance of diplomatic relations between the injured State and the State which has committed a delict.

2. The measures referred to in paragraph 1 shall be taken by the injured State in the light of the circumstances of the delict in question and of its seriousness and they shall be lifted as soon as the State which committed the delict has fulfilled its obligations under article 6".

132. As to article 8, the opinion was expressed that a restrictive interpretation of a treaty in response to such interpretation being applied by another State party to the treaty did not constitute a countermeasure.

133. As to article 9, some members considered the term "manifestly disproportional" too vague.

134. Some members advocated an express prohibition of armed reprisals to be included in the article.

135. There was general agreement with the idea underlying article 10, though several remarks were made as regards its elaboration.

136. The point was made that Article 33 of the United Nations Charter listed "negotiation" among the procedures for peaceful settlement of disputes, but that that procedure was generally time-consuming and often not effective. More in general, the limitation contained in paragraph 1 should apply only if the dispute settlement procedure was not only "available" but also effective.

137. The view was expressed that the "exceptions" to paragraph 1 set out in paragraph 2, should rather be integrated in the rule itself so as not to over-weaken the entitlement of an injured State to take "reprisals".

138. Doubts were expressed at the appropriateness of the term "interim measures of protection" in paragraph 2(a).

139. The basic purpose of article 11[64/] was generally accepted, though some doubts were expressed as to the wording of subparagraphs (b) and (c) of paragraph 1.

140. With reference to paragraph 2, the point was made that a "collective decision" may not be a simple matter, particularly if unanimity was required, and would involve delays; thus this paragraph would place too severe a limitation.

141. Article 12[65/] was considered, in substance, acceptable by most members though various observations were made as to its drafting and its place within the set of articles of Part Two.

142. As to paragraph (a) the point was made that its scope should be limited to such immunities as were essential for the continuance of smooth international relations. It was also remarked that its scope should be expanded to cover also the immunities provided for in the 1969 Convention on Special Missions[66/] and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[67/]

143. As to paragraph (b) some members were reluctant to apply the concept of jus cogens outside the framework of the Vienna Convention on the Law of Treaties. Other members, however, favoured the retention of this paragraph.

144. The view was expressed that a provision relating to jus cogens required - perhaps in Part Three of the draft articles - a procedural provision along the lines of that provided for in the Vienna Convention on the Law of Treaties.

145. Article 13[68/] was generally considered acceptable. The suggestion was made that its language could be adapted to that of article 60 of the Vienna Convention on the Law of Treaties.

64/ Ibid.

65/ Ibid.

66/ General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

67/ Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, vol. II, Documents of the Conference (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16.

68/ For the text of the draft article proposed by the Special Rapporteur, see note 54, above.

146. Apart from the general observations on article 14[69/] as a whole already referred to above (paragraph 117), the point was made in relation to paragraph 1 of the article, that the expression "the applicable rules accepted by the international community as a whole" was too vague and should perhaps be replaced by the terms "the applicable rules of international law". However, such modification was objected to by other members.

147. In respect to paragraph 2 the point was made that, even as the expression of a minimum obligation of solidarity, the paragraph should refer to more active duties of every State other than the author State. Mention was made, in this connection, to the duty of co-operation of those States in respect of the trial and punishment of the perpetrator of an international crime.

148. It was suggested that in subparagraph (a) the word "legal" was unnecessary. It was pointed out, however, that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[70/] which inspired this subparagraph, contains this word.

149. The view was expressed, in relation to subparagraph (c), that its application would be difficult and required a "consolidation" of the response of the international community in the case of an international crime.

150. It was also suggested that subparagraph (c) be expanded so as to cover assistance to the injured State in exercising its rights.

151. As to paragraph 3 the question was raised whether the present articles could expand the competence of United Nations organs. The point was also made that, to the extent that the Security Council was involved, the exercise of the right of veto could in practice, be incompatible with the requirement of solidarity.

152. The point was made that the reference in paragraph 3 to the procedures of the United Nations Charter only, raised the question whether the inherent right of self-defence would apply in the case of an international crime having been committed.

153. As to paragraph 4, it was observed that its relationship to article 2 and to jus cogens should be clarified.

69/ Ibid.

70/ General Assembly resolution 2625 (XXV) of 24 October 1970.

154. Conflicting views were expressed as regards the inclusion of a separate article 15.[71/] While some members were in favour of deleting the article or combining it with article 14 on the ground that aggression constituted an international crime and a separate article would tend to diminish the significance of other international crimes, other members felt that a separate article 15 was necessary in view of the fact that the legal consequences of aggression were specifically dealt with in the United Nations Charter, and included the right of self-defence as recognized in Article 51 of the Charter.

155. In this connection, the view was also expressed by some members that article 15 itself should mention the right of self-defence and possibly specify its limitations.

156. While several members considered article 16[72/] an acceptable "saving clause", the point was made by some members that the enumeration of not covered fields might not be exhaustive. On the other hand, some members doubted the necessity of article 16 in view of article 3.

157. As regards paragraph (a), it was remarked that the prime relationship between the draft articles on State responsibility and the Vienna Convention on the Law of Treaties should be further clarified, particularly in view of the subtle distinction between "performance of treaty obligations" and the "operation" of treaties.

158. Doubts were expressed on the advisability of including paragraph (b), in particular in connection with the legal consequences of international crimes.

159. As to the outline of Part III, it was generally considered that provisions on the settlement of disputes were necessary for the implementation of Parts One and Two, many of the provisions of which would, in the absence of agreement between the alleged author State and the alleged injured State lead to dispute and escalation thereof. The proposals made were also generally considered acceptable.

160. One member, however, considered a Part Three unnecessary for the implementation of the other Parts of the draft articles. Some other members expressed the need for caution in the elaboration of proposals in this field, referring to the reluctance of States to accept third-party dispute settlement procedures. In this connection, the question was also raised whether the

---

71/ For the text of the draft article proposed by the Special Rapporteur, see note 54, above.

72/ Ibid.

International Court of Justice could be considered to be in a position to take a decision on behalf of "the international community as a whole". In view of these hesitations, some members preferred to express their definite opinion only after the presentation by the Special Rapporteur of draft articles for Part Three.

161. The point was made that a number of specific questions would arise for consideration when dealing with the articles of Part Three. Thus, for example, account would have to be taken of the consequences of an eventual establishment of an international criminal court in connection with the draft Code on Offences against the Peace and Security of Mankind.

162. The Commission, at the conclusion of its discussions, decided to refer articles 7 to 13 to the Drafting Committee. The Commission also decided to refer articles 14 to 16 to the Drafting Committee, on the understanding that any comments the Drafting Committee wished to make on articles 14 to 16 might be taken into consideration by the Special Rapporteur in preparing his report to the next session of the Commission.

163. The Commission at its 1930th meeting on 18 July 1985, having considered the report of the Drafting Committee, provisionally adopted draft article 5 (see section B of this Chapter, below). The Drafting Committee in view of the shortage of time was unable to give consideration to articles 6 to 16.

B. Draft articles on State responsibility (Part Two of the draft articles)

1. Text of the draft articles provisionally adopted so far by the Commission 73/

Article 1

The international responsibility of a State which, pursuant to the provisions of Part One, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present Part.

Article 2

Without prejudice to the provisions of articles 4 and [12], the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present Part.

Article 4

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present Part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

73/ As a result of the provisional adoption of draft article 5 at the present session, the Commission adopted consequential modifications to certain draft articles provisionally adopted at its thirty-fifth session (see para. 106, above). Those modifications were as follows: in draft articles 2 and 3, the references to "articles [4] and 5" were changed to "articles 4 and [12]"; and draft article "5" was re-numbered draft article "4".

2. In particular, "injured State" means

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

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

2. Text of article 5 with commentary thereto provisionally adopted by the Commission at its thirty-seventh session

Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

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

Commentary

(1) An internationally wrongful act entails new legal relationships between States independent from their consent thereto. These new legal relationships are those between the "author" State or States and the "injured" State or States. In order to describe such legal consequences it is necessary, at the outset, to define the "author" State and the "injured" State or States. Part One of the draft articles, in particular chapters II and IV thereof, define the "author" State. The present article is addressed to the determination of the "injured State or States.

(2) Part One defines an internationally wrongful act solely in terms of obligations, not of rights. This was done on the assumption that to each and every obligation corresponds per definitionem a right of at least one other State.

(3) For the purposes of the articles of Part Two, it is necessary to determine which State or States are legally considered "injured" State or States, because only that State is, or those States are, entitled to invoke the new legal relationship, as described in Part Two, entailed by the internationally wrongful act.

(4) This determination is obviously connected with the origin and content of the obligation breached by the internationally wrongful act in question, in the sense that the nature of the "primary" rules of international law and the circle of States participating in their formation, are relevant to the indication of the State or States "injured" by the breach of an obligation under such "primary" rules.

(5) In this connection, reference must be made to article 2, stipulating the residual character of the provisions of Part Two. Indeed, States when creating "primary" rights and obligations between them may well, at the same time, determine which State or States are to be considered "injured" State or States in case of a breach of an obligation imposed by that "primary" rule, and thereby determine which State or States are entitled to invoke new legal relationships and even which new legal relationships are entailed by such a breach.

(6) Accordingly, article 5 can only make presumptions as to what legal consequences are intended by the scope and content of the "primary" rule involved.

(7) Paragraph 1 of the article states the general proposition which underlies Part One of the draft articles (see paragraph (2) above). The "right" to which reference is made in the first part of the paragraph is, of course, a right under international law; in fact this is implied by the second part of the paragraph in conjunction with the first sentence of article 4 of Part One.

(8) Paragraph 2 of the article sets out a number of situations in which the origin and content of the primary rule may determine - subject to what is stated in paragraph (5) above - the State or States legally to be considered "injured" State or States.

(9) Subparagraph (a) deals with the situation in which the obligation breached is one imposed on a State in a bilateral treaty; the right infringed in such a case is then the right of the other State party to that bilateral treaty and, consequently, it must be presumed that the other State is an "injured State".

(10) According to article 36 of the Vienna Convention on the Law of Treaties, a right may arise from a provision of a treaty for a third State; this situation is dealt with in subparagraph (d), applicable to both bilateral and multilateral treaties.

(11) The operative part of a judgement or other binding dispute settlement decision of an international court or tribunal may impose an obligation on a State. Such obligation is an independent one inasmuch as the judgement puts an end to a dispute, precisely relating to the question whether or not the facts of the case and the rules, as considered applicable, result in an obligation having been breached and a right having been infringed.

(12) Normally, it will be clear from such operative part both which State according to the judgement is the author State and which State is the injured State. However, as stated in Article 59 of the Statute of the International Court of Justice and in many other international instruments governing other international courts and tribunals, "the decision of the court has no binding force except between the parties and in respect of that particular case". It follows that the judgement can determine rights and obligations only as between the parties to the dispute. Presumably then, if any party to the dispute fails to perform the obligations incumbent upon it under the judgement, the other party to the dispute is the "injured State".

(13) In most cases there are only two States parties to a dispute brought before an international court or tribunal. There may, however, arise situations in which by virtue of a common application or by virtue of an intervention permitted by the court or by its statute (compare e.g. Articles 62 and 63 of the Statute of the International Court of Justice), there are more than two States parties to the dispute. In such cases the question arises if all those parties are to be considered injured States in case of non-performance of obligations imposed by the judgement. Normally, the operative part of the judgement will in so many words answer this question. If not, it will result from the other parts of the judgement, which State or States parties to the dispute are entitled to the benefit of the right infringed by non-performance of the obligation imposed by the operative part.

(14) International courts and tribunals are often empowered by their statutes to "indicate" interim measures of protection as a part of their task of settling disputes. Whether or not an "order" of the court or tribunal indicating such measures is a binding dispute settlement decision depends on the interpretation of its statute or other rule of international law binding on the parties to the dispute.

(15) Again, reference must be made to article 2 of Part Two. It is not excluded that the statute of a court or tribunal or other relevant rule of international law, binding on States, provides specifically for decisions of the court or tribunal binding on, and stipulating the "status" of "injured State", also for a State or States which are not, strictly speaking, party to the dispute. In fact, Article 94, paragraph 2, of the United Nations Charter empowers the Security Council to widen the circle of States "injured" by non-performance of an obligation under a judgement of the International Court of Justice (compare subparagraph (c)); similar powers may be given to the international court or tribunal itself.

(16) Where as regards international courts and tribunals there clearly is a residual rule as stated in subparagraph (b), the situation is somewhat different in respect of binding decisions of an international organ other than an international court or tribunal. Here, a reference to the constituent instrument of the international organization concerned is necessary to determine the injured State or States. Actually such constitutent instrument is either a bilateral treaty, in which case subparagraph (a) applies, or a multilateral treaty, in which case subparagraph (e) applies.

(17) Particular questions arise in "multilateral" situations, where more than two States are bound by a rule of international law, conventional or customary, imposing obligations the breach of which constitutes the internationally wrongful act. In such situations it cannot always be presumed that all those States (other than the author State) are "injured" by the particular act. In fact, universal international customary law recognizes that the sovereign equality of States entails certain obligations, the breach of which in a particular case in the first instance "injures" only the State whose rights are thereby infringed. The same goes for certain multilateral treaties. Subparagraph (i) of subparagraph (e) deals with this type of situation.

(18) But the situation may be different, either by virtue of the facts, or by virtue of the content and nature of the rule of international law involved.

(19) Thus, subparagraph (ii) of subparagraph (e) deals with a situation of fact, recognized as a special one also in the Vienna Convention of the Law of Treaties insofar as multilateral treaties are concerned (see e.g. article 41, subparagraph 1 (b) (i), article 58, subparagraph 1 (b) (i) and, in a somewhat different context and wording, article 60, subparagraph 2 (c)). As appears from the use of the word "other" in the chapeau of subparagraph (e) and in its

subparagraph (ii) the expression "act of a State" in that chapeau and subparagraph (ii) must be understood as meaning the act of a State party to the multilateral treaty or bound by the relevant rule of customary international law.

(20) Subparagraph (iii) of subparagraph (e) relates to the growing number of rules of international law concerning obligations of States to respect human rights and fundamental freedoms. The interests protected by such provisions are not allocatable to a particular State. Hence the necessity to consider in the first instance every other State party to the multilateral convention, or bound by the relevant rule of customary law, as an injured State.

(21) The term "human rights and fundamental freedoms" is here used in the sense which is current in present-day international relations. It is meant to cover also the rights of peoples to self-determination, which indeed are referred to in the two United Nations covenants on human rights.[74/]

(22) Obviously subparagraph (iii) cannot and does not prejudge the question to what extent "primary" rules of international law, either customary or conventional, impose obligations on States and create or establish rights of States for the protection of human rights and fundamental freedoms. While the Universal Declaration on Human Rights[75/] and other relevant instruments are certainly pertinent for the determination of the possible scope of this subparagraph, it is clear that not every one of the rights enumerated in these instruments, nor every single act or omission attributable to a State which could be considered as incompatible with the respect of such rights even if an isolated act or omission (which might not even be intentional), must necessarily be qualified as giving rise to the application of the present subparagraph.

(23) Paragraph 2 (f) deals with still another situation. Even if, as a matter of fact, subparagraph 2 (e) (ii) may not apply, the States parties to a multilateral treaty may agree to consider a breach of an obligation, imposed by such treaty, as infringing a collective interest of all the States parties to that multilateral treaty. Actually, and by way of example, the concept of a "common heritage of mankind", as recently accepted in respect of the mineral resources of the seabed and subsoil beyond national jurisdiction, expresses such a collective interest.

74/ International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, General Assembly resolution 2200 A (XXI) of 16 December 1966, annex.

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

(24) Obviously, in the present stage of development of the international community of States as a whole, the recognition or establishment of a collective interest of States is still limited in application. Accordingly, subparagraph 2 (f) is limited to multilateral treaties, and to express stipulations in those treaties.

(25) However, subparagraph 2 (f) does not and cannot exclude the development of customary rules of international law to the same effect.

(26) Paragraph 3 deals with international crimes. While it is clear from the very wording of draft article 19 of Part One of the draft articles that, in the first instance, all States other than the author State are to be considered "injured States", the Commission at the outset, in provisionally adopting article 19, recognized that the "legal consequences" of an international crime may require further elaboration and distinctions.

(27) In particular, the question arises whether all other States, individually, are entitled to respond to an international crime in the same manner as if their individual rights were infringed by the commission of the international crime.

(28) Obviously, article 5, paragraph 3, while implying that all other States, individually, are entitled to invoke some legal consequences as an "injured" State (including in any case the entitlement to require the author State to stop the breach) does not and cannot prejudice the extent of the legal consequences otherwise to be attached to the commission of an international crime. This is a matter to be dealt with within the framework of the particular articles of Part Two relating to international crimes. For this reason, the words "and in the context of the rights and obligations of States under articles 14 and 15" are provisionally put within square brackets.

CHAPTER IV

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

A. Introduction

1. Historical review of the work of the Commission

164. The International Law Commission began its consideration of the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at its twenty-ninth session, pursuant to General Assembly resolution 31/76 of 13 December 1976. At its thirtieth session, the Commission considered the report of the Working Group on the topic introduced by its Chairman, Mr. Abdullah El-Erian. The result of the study undertaken by the Working Group was submitted to the General Assembly at its thirty-third session, in 1978.[76/] The Assembly, at that session, after having discussed the results of the Commission's work, recommended in resolution 33/139 of 19 December 1978 that the:

> "Commission should continue the study, including those issues it has already identified, concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in the light of comments made during the debate on this item in the Sixth Committee at the thirty-third session of the General Assembly and comments to be submitted by Member States, with a view to the possible elaboration of an appropriate legal instrument."

165. In its resolution 33/140 of 19 December 1978, the General Assembly decided that it:

> "will give further consideration to this question and expresses the view that, unless Member States indicate the desirability of an earlier consideration, it would be appropriate to do so when the International Law Commission submits to the Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

166. At the thirty-first session, in 1979, the Commission again established a Working Group under the chairmanship of Mr. Alexander Yankov which studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. As recommended by the Working Group, the Commission, at that session, appointed Mr. Alexander Yankov Special Rapporteur

---

76/ Yearbook ... 1978, vol. II (Part Two), pp. 138-147, document A/33/10, paras. 137-144.

for the topic and took the decision to entrust him with the preparation of a set of draft articles for an appropriate legal instrument.[77]

167. At its thirty-second session, in 1980, the Commission had before it a preliminary report[78] submitted by the Special Rapporteur, and also a working paper[79] prepared by the Secretariat. A summary of the Commission's debate on the preliminary report was set out in the relevant chapter of the report of the Commission on the work of its thirty-second session.[80] The General Assembly, by resolution 35/163 of 15 December 1980, recommended that the Commission, taking into account the written comments of Governments and views expressed in debates in the General Assembly, should continue its work on the topic with a view to the possible elaboration of an appropriate legal instrument.

168. At its thirty-third session, in 1981, the Commission had before it the second report submitted by the Special Rapporteur,[81] containing the text of six draft articles which constituted Part I, entitled "General provisions".[82] The six draft articles comprised three main issues, namely, the scope of the draft articles on the topic, the use of terms and the general principles of international law relevant to the status of the diplomatic courier and the diplomatic bag.

77/ For a review of the work of the Commission on the topic see Yearbook ... 1979, vol. II (Part Two), p. 170, document A/34/10, paras. 149-155; Yearbook ... 1980, vol. II (Part Two), pp. 162-165, document A/35/10, paras. 145-176; Yearbook ... 1981, vol. II (Part Two), pp. 159-162, document A/36/10, paras. 228-249; Yearbook ... 1982, vol. II (Part Two), pp. 112-120, document A/37/10, paras. 199-249; Preliminary report by the Special Rapporteur, Yearbook ... 1980, vol. II (Part One), p. 231, document A/CN.4/335; Second report by the Special Rapporteur, Yearbook ... 1981, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2; Third report by the Special Rapporteur, Yearbook ... 1982, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1.

78/ See note 77, above.

79/ A/CN.4/WP.5.

80/ Yearbook ... 1980, vol. II (Part Two), pp. 164-165, document A/35/10, paras. 162-176. See also ibid., vol. I, pp. 260-264, 274-276 and 281-287, 1634th, 1636th and 1637th meetings.

81/ See note 77, above.

82/ For the text of the six draft articles, see the report of the International Law Commission on the work of its thirty-third session, Yearbook ... 1981, vol. II (Part Two), pp. 159-162, document A/36/10, notes 679 to 683.

169. The second report was considered by the Commission at its 1691st, 1693rd and 1694th meetings.[83] The Commission referred the six draft articles to the Drafting Committee, but the Drafting Committee did not consider them owing to lack of time.[84]

170. At its thirty-fourth session, in 1982, the Commission had before it the third report submitted by the Special Rapporteur.[85] Since the six draft articles contained in the second report were not considered by the Drafting Committee, the Special Rapporteur re-examined them in the light of discussions in the Commission as well as in the Sixth Committee of the General Assembly at its thirty-sixth session[86] and reintroduced them, as amended, in the third report. The third report consisted of two parts and contained 14 draft articles. Part I, entitled "General provisions", contained the following six draft articles: "Scope of the present articles" (article 1); "Couriers and bags not within the scope of the present articles" (article 2); "Use of terms" (article 3); "Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" (article 4); "Duty to respect international law and the laws and regulations of the receiving and the transit State" (article 5); and "Non-discrimination and reciprocity" (article 6). Part II, entitled "Status of the diplomatic courier, the diplomatic courier ad hoc and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag", contained eight draft articles: "Proof of status" (article 7); "Appointment of a diplomatic courier" (article 8); "Appointment of the same person by two or more States as a diplomatic courier" (article 9); "Nationality of the diplomatic courier" (article 10); "Functions of the diplomatic courier"(article 11); "Commencement of the functions of the diplomatic courier" (article 12); "End of the function of the diplomatic courier" (article 13); and "Persons declared non grata or not acceptable" (article 14).[87]

83/ For a summary of the Commission's debate on the second report, see ibid., pp. 159-162, paras. 235-249.

84/ Ibid., p. 162, para. 249.

85/ See note 77, above.

86/ See the topical summary of the discussion held in the Sixth Committee on the report of the Commission on the work of its thirty-third session, prepared by the Secretariat, document A/CN.4/L.339, paras. 180-200.

87/ For the text of the 14 draft articles, see the report of the International Law Commission on the work of its thirty-fifth session, Yearbook ... 1982, vol. II (Part Two), pp. 115-119, document A/37/10, notes 314, 315, 318 and 320-330.

171. The third report was considered by the Commission at its 1745th to 1747th meetings. A summary of the Commission's debate on the third report was set out in the relevant chapter of the report of the Commission on the work of its thirty-fourth session.[88] The Commission referred the 14 draft articles to the Drafting Committee.[89] By its resolution 37/111 of 16 December 1982, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work aimed at the preparation of drafts in all topics in its current programme.

172. At its thirty-fifth session, in 1983, the Commission had before it the fourth report submitted by the Special Rapporteur (A/CN.4/374 and Corr.1 (English only), Add.1 and Corr.1 (English only), Add.2 and Corr.1 (English only), Add.3 and Corr.1 (English only) and Add.4 and Corr.1 (English only) and 2).[90] The Commission, however, due to the lack of time considered only the first and second instalments of the fourth report, namely documents A/CN.4/374 and Corr.1 (English only) and Add.1 and Add.1/Corr.1 (English only). The first two instalments contained draft articles 15 to 23 of Part II of the draft articles, entitled "Status of the diplomatic courier, the diplomatic courier ad hoc and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag", "General facilities" (article 15); "Entry into the territory of the receiving State and the transit State" (article 16); "Freedom of movement" (article 17); "Freedom of communication" (article 18); "Temporary accommodation" (article 19); "Personal inviolability" (article 20); "Inviolability of temporary accommodation" (article 21); "Inviolability of the means of transport" (article 22); and "Immunity from jurisdiction" (article 23).[91] At the same session the Commission decided to refer draft articles 15 to 19 to the Drafting Committee and to resume its debate on draft articles 20 to 23 at its thirty-sixth session, in 1984, before referring them to the Drafting Committee.[92]

88/ Ibid., pp. 114-120, paras. 206-249.

89/ Ibid., p. 120, para. 249.

90/ The Commission also had before it information on the topic received from Governments, document A/CN.4/372 and Add.1-2.

91/ For the text of draft articles 15 to 23, see the report of the International Law Commission on the work of its thirty-fifth session, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), notes 190-194 and 197-200.

92/ Ibid., paras. 171 and 189.

It also decided to adopt provisionally on first reading articles 1 to 8 of the set of draft articles on the topic.[93] By its resolution 38/138 of 19 December 1983, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics in its current programme.

173. At its thirty-sixth session, in 1984, the Commission had before it Addenda 1, 2, 3 and 4 to the fourth report submitted by the Special Rapporteur (see paragraph 172, above). Addendum 1 contained the text of and explanations to draft articles 20 to 23, entitled "Personal inviolability" (article 20); "Inviolability of temporary accommodation" (article 21); "Inviolability of the means of transport" (article 22); and "Immunity from jurisdiction" (article 23), the discussion of which was resumed by the Commission at that session. Addenda 2 to 4 contained the text of and explanations to draft articles 24 to 42, entitled "Exemption from personal examination, customs duties and inspection" (article 24); "Exemption from dues and taxes" (article 25); "Exemption from personal and public services" (article 26); "Exemption from social security" (article 27); "Duration of privileges and immunities" (article 28); "Waiver of immunity" (article 29); "Status of the captain of a commercial aircraft, the master of a merchant ship or the authorized member of the crew" (article 30); Part III, "Status of the diplomatic bag": "Indication of status" (article 31); "Content of the diplomatic bag" (article 32); "Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or the authorized member of the crew" (article 33); "Status of the diplomatic bag dispatched by postal service or other means" (article 34); "General facilities accorded to the diplomatic bag" (article 35); "Inviolability of the diplomatic bag" (article 36); "Exemption from customs and other inspection" (article 37); "Exemption from customs duties and all dues and texes" (article 38); "Protective measures in circumstances preventing the delivery of the diplomatic bag" (article 39); Part IV, "Miscellaneous provisions": "Obligations of the transit State in case of force majeure or fortuitous event" (article 40); "Non-recognition of States or governments or absence of diplomatic or consular relations" (article 41);

93/ Ibid., para. 190.

and "Relation to other conventions and international agreements" (article 42).[94] The Commission also had before it the fifth report submitted by the Special Rapporteur (A/CN.4/382) and information received from Governments (A/CN.4/379 and Add.1).

174. The Commission considered the topic at its 1824th to 1830th, 1832nd, 1842nd to 1947th and 1862nd to 1864th meetings and proceeded as follows: (a) the Special Rapporteur introduced his fifth report and draft articles 24 to 42; (b) the Commission resumed from its thirty-fifth session its discussion of draft articles 20 to 23 and decided to refer them to the Drafting Committee; (c) it also considered draft articles 24 to 35 and decided to refer them to the Drafting Committee; (d) the Commission commenced its discussion of draft articles 36 to 42 and decided to resume its consideration of these articles at its thirty-seventh session, in 1985; (e) at its 1862nd to 1864th meetings the Commission considered the report of the Drafting Committee. After discussing the report, the Commission decided to adopt provisionally draft articles 9, 10, 11, 12,[95] 13, 14, 15, 16, 17, 19 and 20, as well as a consequential amendment to the text of draft article 8 and a consequentially modified version of the commentary thereto. By its resolution 39/85 of 13 December 1984, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics in its current programme.

2. Consideration of the topic at the present session

175. At its thirty-seventh session the Commission had before it the sixth report submitted by the Special Rapporteur (A/CN.4/390 and Corr.1). The sixth report contained proposed revised texts of and explanations to draft articles 23, 36, 39 and 42, entitled "Immunity from jurisdiction" (article 23); "Inviolability of the diplomatic bag" (article 36); "Protective measures in circumstances preventing the delivery of the diplomatic bag" (article 39) and "Relation to

---

94/ For the text of draft articles 24 to 42, see the report of the International Law Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), notes 72 to 90.

95/ It was agreed to return to paragraph 2 of article 12 after the examination of draft article 28.

other conventions and international agreements" (article 42).[96] The sixth report also contained the proposed text of and explanations to a new draft article 37 entitled "Exemptions from customs inspection, customs duties and all dues and taxes"[97] to replace former draft articles 37 ("Exemption from customs and other inspection") and 38 ("Exemptions from customs duties and all dues and taxes").[98] Furthermore, the sixth report included the text of and explanations to a newly proposed draft article 43 entitled "Declaration of optional exceptions to applicability in regard to designated types of couriers and bags".[99] Draft articles 40 and 41 were re-submitted by the Special Rapporteur in his sixth report in their original form.[100]

176. The Commission considered the sixth report at its 1903rd to 1911th, 1913th and 1914th meetings and proceeded as follows:

(a) The Special Rapporteur introduced his sixth report containing the draft articles listed in paragraph 12 above.

(b) The Commission resumed from its thirty-sixth session its discussion of draft articles 36 to 42 on the basis of the text contained in the Special Rapporteur's sixth report. It also discussed draft article 43 newly proposed by the Special Rapporteur in his sixth report and draft article 23, taking into account the text reported by the Drafting Committee at the previous session[101] and the revised text proposed by the Special Rapporteur in his sixth report.

(c) The Commission decided to refer draft articles 23 and 36 to 43 to the Drafting Committee.

177. At its 1911th to 1913th and 1930th meetings, the Commission considered the report of the Drafting Committee.[102] After discussing the report, the Commission provisionally adopted draft articles 18, 21, 22, 23, 24, 25, 26 and 27

96/ For the text of revised draft articles 36, 39 and 42, see notes 103, 111 and 114 below.

97/ For the text of the new draft article 37, see note 108, below.

98/ For the text of former draft articles 37 and 38 as originally submitted by the Special Rapporteur, see Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), notes 85 and 86.

99/ For the text of newly proposed draft article 43, see note 117, below.

100/ For the text of draft articles 40 and 41, see notes 112 and 113 below. Draft article 40 was the subject of an oral amendment by the Special Rapporteur at the time of introducing it to the Commission. See para. 190 below.

101/ See the report of the International Law Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), paras. 188 to 193.

102/ See para. 202, below.

and commentary thereto, as well as decided on the deletion of the brackets from paragraph 2 of article 12 and the adoption of a new commentary to that paragraph.

178. The following paragraphs reflect in a more detailed manner aspects of the work on the topic by the Commission at its present session.

(a) Consideration by the Commission of the draft articles contained in the Special Rapporteur's sixth report

179. Introducing the revised text of draft article 36,[103] the Special Rapporteur stated that the question of the inviolability of the diplomatic bag, including its possible scanning through electronic means, had given rise to much discussion and opposing views both in the Commission and in the Sixth Committee. He had come to the conclusion that, on balance, it would be wisest to abide by the well established rule of absolute inviolability, while possibly providing for some flexibility in its application. Accordingly, he had proposed a revised version of draft article 36. In paragraph 1 he proposed the deletion from the original version of the draft article,[104] of the words "in the territory of the receiving or the transit State" after the words "wherever it may be" in order to avoid the impression that the same degree of inviolability should not be accorded the diplomatic bag on the high seas or in airspace above the high seas. Paragraph 2 of the revised text of the draft article had been formulated on the basis of a significant body of practice which suggested that the return of the bag to its place of origin in the event of serious suspicion as to its contents, was preferable to a provision requiring the bag to be opened.

103/ The revised text of draft article 36 as proposed by the Special Rapporteur read:

"Article 36

Inviolability of the diplomatic bag

1. The diplomatic bag shall be inviolable at all times and wherever it may be; unless otherwise agreed by the States concerned, it shall not be opened or detained and shall be exempt from any kind of examination directly or through electronic or other mechanical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use, referred to in article 32, they may request that the bag be returned to its place of origin."

104/ See note 94, above.

180. Several observations were made by members of the Commission with regard to different parts of the draft article. With specific reference to paragraph 1, the words "at all times", as applied to the inviolability of the bag, were criticized on the ground that there were occasions on which the bag was empty or contained only other bags that were empty. Furthermore, some members felt that the concept of inviolability should not apply to the bag but to its contents, since the only purpose of the bag's protection was to ensure the confidentiality of its contents. Other members could not perceive how the bag could be dissociated from its contents. The phrase "unless otherwise agreed by the States concerned" also gave rise to various observations. It was asked whether the said "agreement" would be an agreement ex ante, a general agreement or a special agreement establishing a régime that would apply to all diplomatic bags and be applicable in case of difficulties. It was also suggested that the above-mentioned phrase could be deleted, as under article 6, paragraph 2 (b), the sending State and transit State could modify among themselves "by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags". The words "from any kind of examination" were criticized for being too broad, for if they were to be interpreted literally, even olfactory examination by means of sniffing dogs for the detection of drugs as well as the external examination of the bag would be prohibited. As to the prohibition of electronic scanning contained in the paragraph, some members felt that although electronic scanning should not be practised as a matter of routine, it should be allowed under specific circumstances when the grounds for suspicion were sufficiently strong to justify scanning. They were therefore against the inclusion of such a prohibition in the paragraph although they could agree to the inclusion of some reference to scanning in the commentary together with an indication that it should be carried out under strictly controlled conditions. One member, in particular, pointed out that the prohibition of electronic scanning, as stated in paragraph 1, could be held to extend to airlines as a result of which they might refuse to take on board any pouch not accompanied by courier. He suggested that the paragraph should end after the word "detained". Most members, however, were in favour of prohibiting the electronic scanning of the bag on the ground that it might easily break into the confidential character of the bag's contents, particularly if account was taken of the quick pace at which technical progress was being made in this area. Furthermore, to allow electronic scanning would place at a disadvantage developing countries,

which did not possess the sophisticated means developed countries had for that purpose. The problem of possible compensation for electronic scanning which proved to be unjustified was also raised as an additional problem that its use might create.

181. Observations were also made in connection with paragraph 2 of the draft article. It was observed that in cases of suspicion as to the contents of the bag, the paragraph appeared to leave the receiving or the transit State as arbiters of whether a bag should be sent back to the sending State. This solution was excessive, and a preference was expressed by several members for a solution along the lines of that contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations,[105/] according to which it was up to the sending State either to allow the suspected bag to be opened in the presence of its representatives, or send it back home unopened. It was also wondered what would happen, under the terms of the proposed draft paragraph, if the bag was not returned to its place of origin as the competent authorities of the receiving or the transit State had requested, or if the sending State offered to allow the bag to be opened.

182. It was also observed that given the plurality of régimes concerning the bag established by the 1961 and 1963 Vienna Conventions on diplomatic[106/] and consular relations respectively, it was not possible just simply to extend the régime of consular bags to all bags, as had been suggested. The solution could lie in differentiating in the draft article itself between the consular bag and other types of bag and then to provide States with an option to apply to all bags the more qualified régime applicable to the consular bag. Unlike draft article 43 which would only allow a State to apply the whole set of draft articles exclusively to certain types of courier and bags, the proposed solution offered an option which was confined to draft article 36 alone and which was required in order to provide the flexibility that would be acceptable to all members of the Commission. Taking this into account as well as some of the observations made with regard to paragraph 1, one member, later supported by some other members, suggested that the draft article should be reformulated as follows:

"1. The diplomatic bag shall not be opened or detained.

2. However, in the case of a consular bag within the meaning of article 35 of the Vienna Convention on Consular Relations, the competent authorities of the receiving State may, if they have serious reason to believe that the bag

---

105/ United Nations, Treaty Series, vol. 596, p. 261.

106/ Ibid., vol. 500, p. 95.

contains something other than the official correspondence, documents or articles referred to in article 25 of these draft articles, request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

3. Notwithstanding paragraph 1 of this article, a State may, when signing, ratifying or acceding to these draft articles or at any time thereafter, make a written declaration that it will apply to the diplomatic bag the rule applicable to the consular bag by virtue of paragraph 2 of this article.

4. In relation to other States parties to these draft articles, a State which has made a written declaration under paragraph 3 of this article shall not be entitled to raise objection to the application to its diplomatic bags of the rule stipulated in paragraph 2 of this article."

183. One member suggested that the following words should be added to paragraph 1 of the above proposal: "by the authorities of the receiving or transit State". It was also observed in connection with the above proposal that, if adopted, it might create some problems with existing conventions. Under the terms of article 47, paragraph 2 (b), of the 1961 Vienna Convention on Diplomatic Relations, discrimination was not regarded as taking place where, by custom or agreement, States extended to each other more favourable treatment than was required by the provisions of that Convention. Yet, the proposal appeared to confer a more severe rather than a more favourable treatment to the diplomatic bag. Some other members found that the proposal dispensed with the concept of inviolability of the diplomatic bag, which was an essential one to ensure the confidentiality of the communications of the sending State with its missions, consular posts and delegations, and was to be found in specific provisions of existing multilateral conventions, such as article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. One member raised the question of possible objections to the declaration under paragraph 3 of that proposal. He explained that such an optional declaration related to articles which themselves would be accepted in advance by the negotiating States concerned; there could be no question of any objection to it since under general international law, objections were possible to a unilateral reservation but not to a declaration of the type contemplated here.

184. The Special Rapporteur addressed some of the observations made with regard to the revised text of draft article 36. With reference to the use of the words "at all times", he pointed out that they were based on article 24 of the 1961 Vienna Convention on Diplomatic Relations and corresponding provisions of other codification conventions, which used the words "at any time". He had no strong feelings about one expression or the other. He shared the view of those who thought that the contents of the bag were indivisible from the bag

itself and that the concept of inviolability should apply to the latter. In this connection, articles 24, 27 (paragraphs 2 and 4) and 40 (paragraph 3) of the 1961 Vienna Convention on Diplomatic Relations formed a coherent whole and could not be disregarded. Recent State practice showed that States had formally opposed attempts to interpret the 1961 Vienna Convention as permitting the opening of the bag under certain circumstances. Inviolability should apply to the bag itself and its entire contents, whether correspondence or other articles. As to the means of examining the bag, it was clear that a routine identification check of the visible marks, seals and other external features would not affect the bag's inviolability, but a close examination of the packages constituting the bag in a manner which might reveal their contents was an entirely different matter. In this connection, electronic scanning of the bag, even under controlled conditions, might not only affect the confidentiality of its contents, at the discretion of the receiving or transit States, but would also discriminate against less developed countries. With regard to some proposals made in the Commission to amend or replace the draft article, he thought that the application of the régime established in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations to the diplomatic bag without any previously agreed procedure would clearly derogate from the régime established in the 1961 Vienna Convention on Diplomatic Relations and the other two codification conventions.[107] Furthermore, if a special régime were established by way of reciprocity through unilateral declarations of optional exceptions, as envisaged in paragraphs 3 and 4 of the proposal reproduced in paragraph 182 above, then such declarations could, in his view, also provide for the application of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations to the consular bag, as was in fact the case with a number of bilateral consular agreements; the option, he added, should be a two-way one. Concluding his remarks on draft article 36, he said that the Commission and, possibly, the Drafting Committee might consider the suggestion that article 36 should state as a general rule that the diplomatic bag should be inviolable at all times, or at any time, and wherever situated; that it should not be opened or detained; and that it should be exempt from customs and other similar inspection or examination through electronic or other mechanical devices which might be prejudicial to its

---

[107] The 1969 Convention on Special Missions (see note 66, above) and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (see note 67, above) hereafter referred to as "the 1975 Vienna Convention on the Representation of States".

inviolability and confidential character. The article might also contain a provision concerning the consular bag and the application of the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention, as well as a reference to the declaration of optional exceptions provided for in article 43.

185. Introducing new draft article 37,[108] the Special Rapporteur pointed out that it was an amalgamation of former draft articles 37[109] ("Exemption from customs and other inspection") and 38[110] ("Exemptions from customs duties and all dues and taxes"). The first part of the new draft article dealing with the exemption of the diplomatic bag from customs and other inspection had long been recognized as a rule of customary international law, the Special Rapporteur said. As to the second part of the draft article, the exemption of the diplomatic bag from payment of customs duties and/or other dues and taxes, was based on the sovereign equality of States and the immunities accorded to official State agents.

186. The new draft article was generally regarded as an improvement over the previous two draft articles it intended to replace. Several drafting suggestions were made in its regard, such as the insertion of the words "as appropriate" between the words "the receiving State or" and "the transit State", as well as the insertion of the word "similar" between the words "other" and "inspections" in the third line and of the word "free" between the words "the" and "entry" in the second line. It was doubted whether the phrase "in accordance with such laws and regulations as they may adopt" was acceptable in the case of the diplomatic bag since it appeared obvious that the receiving State would adopt provisions to regulate the quantity and frequency of duty-free imports. Several speakers

---

108/ The text of new draft article 37 as proposed by the Special Rapporteur read:

"Article 37

Exemptions from customs inspection, custom duties and all dues and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as they may adopt, permit the entry, transit or exit of the diplomatic bag and shall exempt it from customs and other inspections, customs duties and all national, regional or municipal dues and taxes and related charges, other than charges for storage, cartage and other specific services rendered."

109/ See note 94, above.

110/ Ibid.

wondered about the relationship between draft article 36, particularly its paragraph 2, and draft article 37. They pointed out that it might perhaps be advisable to have article 37 deal exclusively with matters relating to exemption from taxation, leaving all matters relating to exemption from customs and other inspections to be dealt with in article 36. Regarding the latter suggestion the Special Rapporteur stated that he had no objection to it provided that the wording of article 36 was amended accordingly.

187. Introducing the revised text of draft article 39,[111] the Special Rapporteur stressed that its main object was to protect the diplomatic bag when, in exceptional circumstances, it was no longer in the custody or control of a person authorized by the sending State. It was designed to cover the possibility of the functions of the diplomatic courier being terminated before the diplomatic bag had been delivered to its destination rather than cases of force majeure or fortuitous event. The new proposed version of the draft article, he added, did not introduce changes of substance but it took into account comments made in the Commission and in the Sixth Committee.

188. Most speakers were generally in agreement with the substance of the draft article, although some reservations were expressed about its wording which, it was said, might give rise to misinterpretation. In particular, the words "in the event of termination of the functions of the diplomatic courier" were criticized as not covering all possible situations which could prevent a diplomatic bag from being delivered. The view was also expressed that the notification of the sending State provided for in the draft article should be specifically

---

[111] The revised text of draft article 39 as proposed by the Special Rapporteur read:

"Article 39

Protective measures in circumstances preventing the delivery of the diplomatic bag

The receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State in the event of termination of the functions of the diplomatic courier, which prevents him from delivering the diplomatic bag to its destination or in circumstances preventing the captain of commercial aircraft or the master of a merchant ship from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State."

required only in rare cases of illness or accident, where the circumstances were known to the receiving State, but not to the sending State, or where some special purpose would be served by the notification. The suggestion was also made that draft articles 39 and 40 could be merged since the situation as described in draft article 39 could be considered as constituting a case of force majeure. Some speakers thought that the Commission should exercise restraint in imposing additional obligations on the receiving State and the transit State, which could not be expected to know exactly where the diplomatic bag was at all times.

189. In connection with the latter observation the Special Rapporteur stated that the operation of the draft article would depend on the circumstances of each particular case and no general prescription could be provided; he therefore thought that the provision could be drafted in a more flexible manner. Appropriate wording could also be found, he added, to make the draft article cover circumstances other than the termination of the functions of the diplomatic courier. The suggestion to combine draft articles 39 and 40 into a single article could be accommodated, by making one paragraph deal with the situations covered by present draft article 39, duly broadened, and another paragraph with the obligations of an "unforeseen" transit State in case of force majeure or fortuitous event.

190. Referring to draft article 40 the Special Rapporteur stated that although the text contained in this sixth report was identical with that he had originally submitted, he wished at this stage to submit a slight drafting amendment to it consisting of the addition of the words "to the diplomatic courier or the diplomatic bag" after the words "shall accord" and before the words "the inviolability".112/

112/ The text of draft article 40 as proposed by the Special Rapporteur read:

"Article 40

Obligations of the transit State in case of force majeure or fortuitous event

If, as consequence of force majeure or fortuitous event, the diplomatic courier or the diplomatic bag, is compelled to deviate from its normal itinerary and remain for some time in the territory of a State which was not initially foreseen as a transit State, that State shall accord to the diplomatic courier or the diplomatic bag the inviolability and protection as the receiving State is bound to accord and shall extend to the diplomatic courier or the diplomatic bag the necessary facilities to continue their journey to their destination or to return to the sending State."

The main obligations under the draft article were based on the rule "jus transiti innoxii" and were addressed to an unforeseen transit State referred to as a "third State" in corresponding provisions of multilateral conventions of diplomatic and consular law. The latter expression, however, did not accord with the meaning of "third State" under the 1969 Vienna Convention on the Law of Treaties. The obligation of the unforeseen transit State was to assure the protection and inviolability of the courier and bag and to make available the necessary facilities for the continuation of the journey. The proposed draft article had found general support in the Sixth Committee, he added.

191. Most speakers spoke in favour of the draft article although some proposals for its improvement were advanced. It was suggested to replace the words "remain for some time in the territory of a State" by the words "pass through the territory of a State" as well as to replace the words "the receiving State is bound to accord" by the words "any transit State is bound to accord". It was also pointed out that the words "or to return to the sending State" could be deleted. The draft article, it was further proposed, could be redrafted to cover the case, referred to in draft article 39, of the diplomatic bag being entrusted to the captain of a commercial aircraft, or the master of a merchant ship. While one member thought that the article or commentary thereto should provide for an obligation to notify the State concerned of the presence in its territory of a courier or bag in the special circumstances described in the draft article, another member thought that this would not be practical since a situation of force majeure necessarily implied unforeseen circumstances. Although some members felt that the obligations of a State not initially foreseen as a transit State, should be equal to those of a transit State rather than to those of a receiving State, the view was also expressed that in practice there was little difference between both kinds of obligations. The word "inviolability" in reference to the bag was questioned. One member felt that the draft article would be relevant only in cases where a visa was necessary, since no requirement existed to inform beforehand any transit State, whether unforeseen or not. Another member felt that the draft article should refer only to force majeure; the notion of fortuitous event might give rise to interpretation difficulties.

192. Referring to draft article 41,[113/] the Special Rapporteur pointed out that its purpose was to contemplate the situation of non-recognition or absence of diplomatic or consular relations between a sending State and the State host to an international conference or an international organization. The Commission, he said, in its work on special missions had already affirmed that the rights and obligations of the host and sending States were not dependent on recognition or existence of diplomatic or consular relations at the bilateral level. A provision along those lines could be found in the 1975 Vienna Convention on the Representation of States.

193. Although several members supported in principle the rule embodied in the draft article, they also expressed some reservations regarding what appeared to be its all-encompassing nature. Objections were advanced, in particular, to the possibility that the draft article might be interpreted as imposing obligations on a receiving State, on a bilateral plane, with regard to couriers and bags from a sending State with which the former did not maintain diplomatic or consular relations or in a situation of non-recognition of the State itself or of its government. In the first case, it was said, the international practice would be for the sending State to entrust the protection of its interests to a third State acceptable to the receiving State. Some members felt that the

---

113/ The text of draft article 41 as proposed by the Special Rapporteur read as follows:

"Article 41

Non-recognition of States or Governments or absence of diplomatic or consular relations

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the receiving State, the host State or the transit State or by the non-existence or the severance of diplomatic or consular relations between them.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the receiving State, the host State or the transit State, shall not by itself imply recognition by the sending State of the receiving State, the host State or the transit State, or of their Governments, nor shall it imply the recognition by the receiving State, the host State or the transit State of the sending State or of its Government."

provision might not even be necessary in cases of couriers or bags dispatched to missions to international organizations or conferences, since the headquarters agreements would normally take care of that situation. According to another view, the substance of draft article 41 might be included in draft article 40 since a provision concerning the non-recognition of States or Governments or the absence of diplomatic or consular relations could be useful in dealing with the problems arising with regard to the obligations of an unforeseen transit State in case of force majeure or fortuitous event.

194. Commenting on the observations made to the draft article the Special Rapporteur stressed that he had made a point of explaining that the draft article was specifically intended to ensure the protection of couriers and bags being dispatched to or by a special mission, a delegation to an international conference or a permanent mission to an international organization. The use of the term "receiving State" might have given the impression that the provision referred to bilateral relations. The draft article was necessary, he added, to guarantee a State freedom of communication with its missions abroad. In his view it was the wording of the draft article, not its substance, that had given rise to some problems and efforts should therefore be concentrated on improving its drafting.

195. Introducing the revised text of draft article 42,[114] the Special Rapporteur explained that in the light of certain suggestions made at the Commission's previous session, he had shortened the draft article by deleting paragraph 1 of its original version[115] which stated the complementary nature of the draft articles with regard to the provisions on the courier and the bag of existing multilateral conventions on diplomatic and consular law adopted under the aegis of the United Nations. He recognized, however, that in its present form,

---

114/ The revised text of draft article 42 as proposed by the Special Rapporteur read:

"Article 42

Relations to other conventions and international agreements

1. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or those in international agreements in force as between States parties thereto.

2. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag, confirming or supplementing or extending or amplifying the provisions thereof."

115/ See note 94, above.

the draft article had a very modest function and the Commission might therefore wish to consider whether a new paragraph should be added to define in more explicit terms the position of the draft vis-à-vis other conventions so far as the status of the courier and bag was concerned.

196. Referring to the draft article as a whole most members appeared to express a preference for the original version of the draft article. It appeared desirable to them to stress that the draft articles were intended to complement the existing codification conventions. It was pointed out in this connection that the word "complement" contained in the original wording of paragraph 1 presumably meant that the draft articles did not derogate from the relevant provisions of the four codification conventions although one could wonder whether they also meant that if the draft articles provided for additional protection, the latter would stand, even though they were not provided for in the existing codification conventions. With specific reference to paragraph 1 of the draft article as presently introduced, the view was expressed that the words "without prejudice to" were not clear enough. One member also suggested that the paragraph could be deleted. As to paragraph 2, the words "confirming or supplementing or extending or amplifying" were the subject of criticism by several members. It was pointed out that a drafting change might be required in order to bring paragraph 1 into line with article 6, paragraph 2 (b), provisionally adopted. Those words, it was added, were presumably not designed to prohibit inter se modifications of the draft articles by two or more States within the limit set by article 41 of the Vienna Convention on the Law of Treaties, but they could bear that meaning, since the paragraph made no mention of "modification". It was suggested that the words could be deleted. Other suggestions were that the word "modifying" could either replace those words or be added to them.

197. Commenting on the observations made to the revised text of the draft article, the Special Rapporteur stressed that he had revised the draft article in the light of the suggestion contained in the report of the Commission's preceding session.[116/] He would have no objection if the words "without prejudice to" were to be clarified in order to bring out their meaning to the effect that there should be compatibility in object and purpose between the present draft articles and the four codification conventions and other international agreements with a bearing on the status and, especially, the legal protection of the courier and

---

116/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), para. 150.

the bag. He would also go along with the proposal to revert to the provision contained in paragraph 1 of the original version of the draft article. With regard to paragraph 2, although the words "confirming or supplementing or extending or amplifying" had been taken from article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations, he agreed that to replace them by the word "modifying" would constitute an improvement.

198. Presenting the text of newly proposed draft article 43[117] the Special Rapporteur stressed that its inclusion responded to earlier suggestions. The four codification conventions contemplated different régimes so far as the inviolability of the diplomatic courier and diplomatic bag were concerned and only two of those conventions were in force. The other two might eventually enter into force, but that would simply add to the plurality of régimes. He had therefore sought to draft a provision intended to achieve a measure of flexibility. In so doing, he had drawn on articles 19, 22 and 23 of the Vienna Convention on the Law of Treaties and had also found some support in article 298 of the United Nations Convention on the Law of the Sea, concerning optional exceptions to the applicability of compulsory proceedings entailing binding decisions. That article was in turn perhaps influenced to some extent by article 22 of the Vienna Convention on the Law of Treaties. Against that background, he had sought to reflect three main ideas: first, the right to make a declaration of optional exceptions to applicability in regard to designated

---

117/ The text of new draft article 43 as proposed by the Special Rapporteur read:

"Article 43

Declaration of optional exceptions to applicability in regard to designated types of couriers and bags

1. A State may, without prejudice to the obligations arising under the provision of the present articles when signing, ratifying or acceding to those articles, designate by written declaration those types of couriers and bags to which it wishes the provisions to apply.

2. A State which has made a declaration under paragraph 1 of this article, may at any time withdraw it.

3. A State which has made a declaration under paragraph 1 of this article, shall not be entitled to invoke the provisions relating to any of the excepted types of couriers and bags as against another State party, which has accepted the applicability of those provisions."

types of couriers and bags, together with the legal consequences of such a declaration; second, the right to formulate the declaration and the right to withdraw it; and third, the procedural matter of making such a declaration in writing. The "types of couriers and bags" to which the draft article alluded referred to the definitions provided in article 3, provisionally adopted, corresponding to the four codification conventions on diplomatic and consular law already in existence.

199. Most members welcomed the element of flexibility that the provision of draft article 43 incorporated into the draft articles. If the uniform approach was retained, it was said, some provision along the lines of draft article 43 was essential to allow States to distinguish between the four codification conventions as to the manner in which the draft articles would ultimately apply. States should be free not to apply the draft articles to all or some of the types of couriers and bags referred to in provisionally adopted article 3. In the view of some members, however, such flexibility would be inconsistent with the underlying objective of the draft articles and would result in uncertainty as to their interpretation and application. It was stated in this connection that the Commission could not, in drafting the present instrument, either weaken the régime of the Diplomatic Relations Convention or strengthen the régime of the Consular Relations Convention. It was suggested in this connection that the draft article should be reformulated so as to make clear that the option of making the declaration was available only to States acceding to the new convention, which had not yet ratified one of the four existing diplomatic conventions mentioned in provisionally adopted article 3. With specific reference to the title of the draft article, the suggestion was made that the adjective "optional" should apply to the word "declaration" rather than to the word "exceptions". As to paragraph 1 of the draft article, several members felt that the words "without prejudice to" were inappropriate since some prejudice to the obligations arising under the provisions of the draft articles was bound to occur. Also in connection with this paragraph it was noted that while the paragraph referred to the possibility of making a declaration only when signing, ratifying or acceding to the draft article, some States, especially those acting as host States to international organizations, might prefer to be allowed to make a declaration at any time after signature, ratification or accession. That would bring the wording into line with article 298 of the Law of the Sea Convention on which the

draft article was modelled. With reference to paragraph 2 of the draft article, the observation was made by one member that its contents already seemed to be covered by provisionally adopted article 6, paragraph 2 (b). Furthermore, the possibility that the declaration allowed by paragraph 1 could be withdrawn at any time, might become a source of instability in international relations. This member suggested to delete paragraph 2.

200. Referring to the observations made on the draft article the Special Rapporteur said that the existence of a plurality of régimes was a result of the régimes established in the four codification conventions and, more specifically, of the difference between the status of the consular bag and that of bags referred to in the three other conventions. Although a plurality of régimes might obviously create highly complex situations, flexibility was undoubtedly needed. Most of the comments made on the draft article had related to its wording. He therefore suggested that paragraph 1 should state that a declaration of optional exceptions could be made without prejudice "to the object and purpose of the present articles". The words "or at any time thereafter" should be added at the end of the second line of paragraph 1. A new sentence should be added at the end of paragraph 2 to show that the declaration of withdrawal had to be made in writing. Special provisions should also be introduced on the application of the régime of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations to all kinds of bags, or of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations to the consular bag, through a declaration of optional exceptions and by way of reciprocity.

201. The Special Rapporteur expressed appreciation to the Codification Division of the Office of Legal Affairs for its valuable assistance to him. Upon the suggestion of the Special Rapporteur, the Commission requested the Secretariat to up-date the statement on the status of the four multilateral conventions in the field of diplomatic and consular law elaborated under the auspices of the United Nations.

(b) Discussion of the report of the Drafting Committee

202. As reflected above in paragraph 177, the Commission devoted its 1911th to 1913th and 1930th meetings to the discussion of the report of the Drafting Committee, which was introduced by its Chairman. The Drafting Committee reported on the text of eight draft articles, based on its consideration of nine draft articles proposed by the Special Rapporteur and referred to it,

having deleted one draft article (see paragraph 203, below). The draft articles on which texts were recommended were the following: articles 23, 28, 29, 30, 31, 32, 34 and 35. It also recommended the deletion of the brackets from paragraph 2 of article 12, provisionally adopted at the thirty-sixth session. The comments, observations and reservations made by members of the Commission while discussing those draft articles have been reflected in the commentaries accompanying the text of the corresponding articles provisionally adopted by the Commission at the present session, which are reproduced below in section B of this Chapter.

203. On the recommendation of the Drafting Committee, the Commission decided not to adopt a provision along the lines of draft article 33 proposed by the Special Rapporteur, which dealt with the status of the diplomatic bag entrusted to the captain of a ship or aircraft (see note 94, above). It was of the view that the language of articles 24 and 25 as provisionally adopted, and of draft articles 36 and 39, as originally submitted by the Special Rapporteur or as revised by him in his sixth report, was clear to the effect that the provisions concerned applied also to the bags referred to in the omitted draft article.

B. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

1. Text of the draft articles provisionally adopted so far by the Commission 118/

Article 1

Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

Article 2

Couriers and bags not within the scope of the present articles

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations, shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

Article 3

Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier ad hoc, as:

(a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

118/ For the commentaries to articles 1 to 7, provisionally adopted by the Commission at its thirty-fifth session, see the report of the International Law Commission on the work of its thirty-fifth session, Official Records of the General Assembly, Thirty-eighth Session, Supplement No.10 (A/38/10), chap.V.C. For the commentary to article 8, provisionally adopted at the thirty-fifth and thirty-sixth sessions, as well as the commentaries to articles 9 to 17, 19 and 20, provisionally adopted at the thirty-sixth session, see the report of the International Law Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No.10 (A/39/10), chap.III.C.2. For the commentary to paragraph 2 of article 12, from which paragraph the Commission at its thirty-seventh session decided to remove the brackets which had appeared in the text as provisionally adopted it at its thirty-sixth session, as well as the commentary to articles 18 and 21 to 27, see section C.2 of this Chapter, below.

(b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a courier of a permanent mission, of a permanent observer mission, of a delegation, or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal character of 14 March 1975.

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts, or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a special mission within the meaning of the Convention on special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 4

Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

Article 5

Duty to respect the laws and regulations of the receiving State and the transit State

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

Article 6

Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

Article 7 119/

Documentation of the diplomatic courier

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

Article 8 120/

Appointment of the diplomatic courier

Subject to the provisions of articles 9 and 12, the diplomatic courier is freely appointed by the sending States or by its missions, consular posts or delegations.

Article 9

Nationality of the diplomatic courier

1. The diplomatic courier should in principle be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of the State which may be withdrawn at any time.

119/ Provisional numbering.

120/ Provisional numbering.

3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

Article 10

Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

Article 11

End of the functions of the diplomatic courier

The functions of the diplomatic courier come to an end, inter alia, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 12, it refuses to recognize the person concerned as a diplomatic courier.

Article 12

The diplomatic courier declared persona non grata or not acceptable

1. The receiving State may at any time and without having to explain its decision notify the sending State that the diplomatic courier is persona non grata or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.

Article 13

Facilities

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

Article 14

Entry into the territory of the receiving State or the transit State

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

Article 15

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

Article 16

Personal protection and inviolability

The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

Article 17

Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State, may not enter the temporary accommocation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

3. The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

Article 18

Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

Article 19

Exemption from personal examination, customs duties and inspection

1. The diplomatic courier shall be exempt from personal examination.

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

Article 20

Exemption from dues and taxes

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

Article 21

Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier ad hoc shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

Article 22

Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

Article 23

Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The capitain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

Article 24

Identification of the diplomatic bag

1. The packages consistituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

Article 25

Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

Article 26

Transmission of the diplomatic bag by postal service or by any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

Article 27

Facilities accorded to the diplomatic bag

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

2. Text of article 12 provisionally adopted by the Commission at its thirty-sixth and thirty-seventh sessions and text of articles 18 and 21 to 27 provisionally adopted by the Commission at its thirty-seventh session, with commentaries thereto

204. At its present, thirty-seventh session (1911th to 1913th and 1930th meetings) the Commission adopted, on first reading, the draft articles and commentaries thereto which follow. It should be noted, however, that the text of article 12 and the commentary thereto had been provisionally adopted by the Commission at its thirty-sixth session. Paragraph 2 of article 12 had been placed between brackets with the proviso that the Commission would revert to its consideration at the time of considering draft article 28.[121/] Within the context of the provisional adoption of draft article 21 (corresponding to article 28 originally proposed by the Special Rapporteur), the Commission decided to delete the brackets from paragraph 2 of article 12. It did, however, provisionally adopt a new commentary to the paragraph, reproduced below, in the light of its interrelationship to articles 21, paragraph 2, and 11 (b). In order to facilitate the comprehension of the above-mentioned interrelationship the text of article 12 is reproduced again below in its entirety.

Article 12

The diplomatic courier declared persona non grata or not acceptable

1. The receiving State may at any time and without having to explain its decision notify the sending State that the diplomatic courier is persona non grata or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.

121/ See the report of the International Law Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), chap. III.C.2, para. (6) of the commentary to article 12.

Commentary

Paragraph 1[122/]

Paragraph 2

(6) Paragraph 2 is based on comparable provisions contained in the corresponding articles of the codification conventions cited in paragraph (1) of the present commentary. This paragraph should be read in conjunction with article 11 (b) and article 21, paragraph 2, and the commentaries thereto. The commentary to paragraph 2 of article 21 explains in greater detail the interrelationship between the present paragraph and the above-mentioned provisions. It should, however, be noted here that in the Commission's conception the present paragraph refers to the refusal or failure of the sending State to carry out its obligations under paragraph 1 of the present article. It is therefore concerned with the termination of the functions of the courier and the consequences of such termination. By way of contrast, the second part of paragraph 2 of article 21 refers to the requirement that the courier himself should leave the territory of the receiving State within a reasonable period, and is particularly concerned with the cessation of his privileges and immunities. Both provisions therefore are complementary.

Article 18

Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State, or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

122/ For the commentary to paragraph 1 of article 12, provisionally adopted by the Commission at its thirty-sixth session, see ibid., paras. (1)-(5) of the commentary to article 12.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

Commentary

(1) The sources for the present article are the following provisions from existing multilateral conventions on diplomatic law: articles 31 and 37, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations; articles 31 and 36 of the 1969 Convention on Special Missions and articles 30, 60 and 36, paragraph 2, of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) Paragraph 1, which refers to the immunity from criminal jurisdiction of the diplomatic courier, represents a compromise solution between two clearly cut bodies of opinion in the Commission: those who believed that the granting of absolute immunity from criminal jurisdiction to the courier was essential and entirely justified because of his position and his functions and those who felt that such a granting was superfluous and functionally unnecessary. The article, therefore, differs from the original version of the Special Rapporteur,[123/] in that the granting of the immunity from criminal jurisdiction is qualified by the phrase: "in respect of all acts performed in the exercise of his functions", thus following an approach similar to that adopted in paragraph 2 for the immunity from the civil and administrative jurisdiction.

(3) The adding of the phrase "in respect of all acts performed in the exercise of his functions" is intended to make clear that the immunity from criminal jurisdiction would not apply to any act performed by the courier not directly related to the performance of his functions. Those acts not covered by the immunity from criminal jurisdiction would range from the most obvious offences such as theft or murder to cases of serious abuses of the diplomatic bag, for example, the act of carrying intentionally articles prohibited under article 25, such as weapons for terrorists or narcotic drugs. It was pointed out in this connection, that the provision of paragraph 1 should be interpreted in the light of and in conjunction with: article 5 on the duties to respect the

---

123/ For the original text of the draft article submitted by the Special Rapporteur as article 23, see ibid., note 70.

laws and regulations of the receiving State and the transit State; article 10 on the functions of the diplomatic courier, which consist in taking custody of, transporting and delivering the bag; article 12 on the diplomatic courier declared persona non grata or not acceptable; and article 25 on the content of the diplomatic bag. Further observations on the interpretation and practical application of the phrase: "in respect of all acts performed in the exercise of his functions" are contained in paragraphs (6) to (10) of the present commentary.

(4) Some members expressed reservations to paragraph 1 on the ground that article 16 on the inviolability of the diplomatic courier already provided the latter with all the protection he needed to perform his functions. Furthermore, they felt that it was not desirable in a functional approach, and taking into account the peripatetic nature of the courier's functions, to create a new category of persons enjoying immunity from criminal jurisdiction. They extended those reservations to the article as a whole.

(5) Other members expressed reservations as to the addition of the words "in respect of all acts performed in the exercise of his functions", maintaining that the granting of immunity from criminal jurisdiction to the diplomatic courier should be unqualified. The addition of the above-mentioned phrase, it was added, might create difficulties of interpretation.

Paragraph 2

(6) The direct and immediate source of the first sentence of this paragraph is the second sentence of paragraph 1 of article 60 of the 1975 Vienna Convention on the Representation of States. Although the four codification conventions in the field of diplomatic and consular law concluded under the auspices of the United Nations adopt a functional approach in respect of the immunity from the civil and administrative jurisdiction of the receiving or transit State, most of them do so by enumerating exceptions to the principle of immunity, the underlying rationale being that those exceptions constitute clear cases of acts performed outside the functions of the person enjoying the immunity concerned, such as, for instance, an action relating to any professional or commercial activity exercised by the person in question in his personal capacity. The present paragraph, like article 60, paragraph 1, of the 1975 Convention mentioned above, reflects the functional approach to the immunity from civil and administrative jurisdiction in a non-specific manner by means of a general formula, namely, "in respect of all acts performed in the exercise of his functions". This is also the approach followed by the codification conventions mentioned in paragraph (1) of the

present commentary with regard to the members of the administrative and technical staff of the mission concerned, which stipulate that the immunity "shall not extend to acts performed outside the course of their duties".

(7) The next question, as in the case of paragraph 1, is the determination of the legal nature and scope of an act "performed in the exercise of his functions" as distinct from the private activity of the person concerned. The functional approach in this case presupposes that the immunity is recognized in fact by the sending State and therefore is limited to the acts performed by the courier as an authorized official fulfilling a mission for the sending State. The character of such acts could be determined by multilateral or bilateral treaties or conventions, by customary international law or by the internal laws and regulations of States. Clear examples of acts outside the performance of his functions are those enumerated in the provisions of codification conventions mentioned above, such as article 31 of the 1961 Vienna Convention on Diplomatic Relations. However, there could be contemplated other acts performed by the person enjoying immunity from local civil jurisdiction such as contracts concluded by him which were not done expressly or implicitly as an authorized official performing a mission for the sending State. This may be the case in respect of renting a hotel room, renting a car, making use of services for cartage and storage or concluding a lease or purchase contract during the journey of a diplomatic courier. The obligations for payment of a hotel bill or other purchases made and services rendered to the diplomatic courier, though arising during and even in connection with the exercise of his official functions, are not exempt from local laws and regulations. The main reason for such a conclusion is that in all of these instances there are purchases and services of a general commercial nature rendered to the person concerned which have to be paid by anyone who is their beneficiary. The same rule also applies to charges levied for specific services rendered, as provided for in article 34 (e) of the Vienna Convention on Diplomatic Relations and the corresponding articles in the other multilateral conventions in the field of diplomatic and consular law. Consequently, acts relating to such purchases or services cannot be considered per se to be acts performed in the exercise of the official functions of the courier, covered by the immunity from local civil and administrative jurisdiction.

(8) As to who is entitled to determine whether an act of a diplomatic courier is or is not "an act performed in the exercise of his functions", the question, as in the case of consuls and members of delegations to international organizations, may receive different answers in doctrine and State practice. One position favours

the receiving State whereas another considers that the determination may be jointly made by the receiving or transit State and the sending State. In the practice of States on this matter, both doctrines are followed, i.e that the decision on the distinction should be made by both the sending and the receiving State, or by the receiving State alone. In case of dispute between the sending and the receiving State, the most appropriate practical manner to solve a problem of this kind would be an amicable solution through diplomatic channels.

(9) Accidents caused by a vehicle the use of which may have involved the courier's liability where the damages are not recoverable from insurance may give rise to two kinds of situations. An accident may happen outside the performance of the courier's functions, in which case, by application of the general rule of the first sentence of paragraph 2, the courier shall not enjoy immunity. But an accident may also happen during the performance of the courier's functions. In this situation, in which by an application of the rule contained in the first sentence of paragraph 2 the courier would in principle enjoy immunity from the civil and administrative jurisdiction of the receiving or transit State, an exception is made and the paragraph specifically provides that this immunity shall not extend to an action for damages arising from such an accident. There are weighty reasons for this exception. The use of motor vehicles for personal or professional purposes has become part of daily life. Traffic accidents and offences have inevitably increased, giving rise to a growing number of claims. The need to regulate questions of liability for personal injuries and damage to property arising from traffic accidents in which diplomatic agents and other persons enjoying diplomatic immunities were involved, has become obvious. Nevertheless, it took some time until the proper codification of international law took place in this field. While the 1961 Vienna Convention on Diplomatic Relations contains no provision to that effect, later conventions included specific norms regulating the matter, namely, article 43, paragraph 2 (b), of the 1963 Vienna Convention on Consular Relations; article 31, paragraph 2 (d), of the 1969 Convention on Special Missions and article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

(10) This second sentence of paragraph 2 replaces paragraph 5 of draft article 23 as originally proposed by the Special Rapporteur, which read:

> "Nothing in this article shall exempt the diplomatic courier from the civil and administrative jurisdiction of the receiving State or the transit State in respect of an action for damages arising from an accident caused by a vehicle used or owned by the courier in question if such damages cannot be covered by the insurer."

Apart from the displacement of the provision into paragraph 2, which was considered as a more appropriate place given its subject matter, the Commission felt that the former drafting might convey the impression that a courier in the hypothesis described in former paragraph 5 was in the exercise of his official functions and, exceptionally, immunity was not extended to such an official act. Furthermore, it was felt that the expression "vehicle used or owned by the courier" could be of questionable interpretation under certain legal systems and might intrude into the assignment of civil and administrative responsibility under the internal law of certain countries. The expression "vehicle the use of which may have involved the liability of the courier", although less concrete was considered to be generically more accurate and more acceptable since it referred ("renvoyait") to the internal law of the receiving or transit State the determination of the conditions under which a person is liable in a given accident.

Paragraph 3

(11) Paragraph 3 refers to immunity from measures of execution. As a consequence of the functional immunity of the courier, measures of execution can only be taken against him with respect to cases which are not related to acts performed in the exercise of his functions. It is appropriate that the courier should enjoy immunity from execution. Firstly, on the basis of his official functions he is entitled to enjoy immunity from local civil and administrative jurisdiction, at least on the same level as members of the administrative and technical staff. Secondly, all the codification conventions explicitly provide for the personal inviolability of the courier, which means that he is not liable to any form of arrest and detention. Thirdly, it is obvious that measures of execution would lead inevitably to impediments to the normal performance of the official functions of the courier. It is precisely because of these reasons that even in cases in which in principle measures of execution might be taken against the courier (in acts outside the performance of his functions) such measures are not permissible if they infringe the inviolability of the courier's person, his temporary accommodation or the diplomatic bag entrusted to him.

Paragraph 4

(12) Paragraph 4 is inspired by article 31, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations and corresponding provisions of the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States as to the basic principle it lays down, namely, that

the diplomatic courier is not obliged to give evidence as a witness. It is, however, in substance, although with important differences in drafting, closer to article 44 of the 1963 Vienna Convention on Consular Relations, as to the qualifications or modalities to which the above-mentioned principle is subjected.

(13) The paragraph states that the diplomatic courier is not obliged to give evidence as a witness "in cases involving the exercise of his functions". In this connection two points were particularly stressed in the Commission. In the first place, the expression "in cases involving the exercise of his functions" should be interpreted with the same reservations and qualifications expressed in the case of paragraphs 1 and 2 and reflected in the relevant paragraphs above of the present commentary. Secondly, the paragraph refers to cases in which the courier is called upon to give evidence on his having witnessed someone else's acts or behaviour. It does not refer to cases concerning his own acts as an accused or indicted person, as in the second sentence of paragraph 2 in which instance he may be called upon to give evidence in a case arising from an accident caused by a vehicle the use of which may have involved the courier's liability.

(14) The paragraph further provides that the courier "may be required to give evidence in other cases". Two points are also in order in this connection. In the first place, it was the clear understanding in the Commission that a receiving or transit State could request testimony in writing from the courier in accordance with its internal rules of civil procedure or applicable agreements contemplating such a possibility. Secondly, it should be noted that an essential goal of the functions and status of the diplomatic courier is to ensure the safe and speedy delivery of the diplomatic bag and this goal cannot be compromised by possible undue delays caused by a requirement to give evidence. Therefore, the paragraph qualifies the possibility that the courier may be required to give evidence in certain cases to the condition that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

Paragraph 5

(15) This paragraph, which is common to all provisions on immunity from jurisdiction noted in paragraph (1) of the present commentary, recognizes the fact that the effective jurisdiction of the sending State over its officials abroad serves to enhance justice and legal order. It suggests a legal remedy in the sending State in favour of a claimant of the receiving State whose rights could not be otherwise protected, due to the immunity of the diplomatic agent. The provision also rests on the permanent legal relationship between a person and the State of his nationality, even when the person is abroad.

(16) But to state, as the paragraph does, that the courier's immunity in the receiving or transit State does not exempt him from the jurisdiction of his own country is not the same thing as affirming the existence of such jurisdiction. As pointed out in the commentary to the parallel provision of the 1961 Vienna Convention on Diplomatic Relations (article 31 of the Convention and 29 of the Commission's draft) "it may happen that this jurisdiction does not apply, either because the case does not come within the general competence of the country's courts, or because its laws do not designate a local forum in which the action can be brought. In the provisional draft the Commission had meant to fill this gap by stipulating that in such a case the competent court would be that of the seat of the Government of the sending State. This proposal was, however, opposed on the ground that the locus of the jurisdiction is governed by municipal law".[124/]

(17) Notwithstanding the foregoing the Commission felt that the paragraph, although not as effective as would be desirable, had a certain value and was useful, even from a psychological point of view. It constituted a subtle suggestion to the sending State that it should exercise its jurisdiction in cases which, otherwise, might constitute a denial of justice because of the invocation of the immunity prerogatives, with respect to the jurisdiction of the receiving or transit State.

...

Article 21

Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier ad hoc shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

124/ Yearbook ... 1958, vol.II, p.99, document A/3859, Chap.III, sect.II, paragraph (12) of the commentary to article 29.

Commentary

(1) Although none of the existing multilateral conventions on diplomatic and consular law contain any specific provision on the duration of the privileges and immunities of the diplomatic courier, the wording of the present article has been inspired by several provisions contained in those conventions regarding the duration of privileges and immunities of the diplomatic agent or consular officer, namely, article 39 of the 1961 Vienna Convention on Diplomatic Relations, article 53 of the 1963 Vienna Convention on Consular Relations, article 43 of the 1969 Convention on Special Missions and articles 38 and 68 of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(1) The first sentence of paragraph 1 acknowledges the close link between the beginning of the privileges and immunities of the diplomatic courier and the performance or exercise of his functions. As stated in paragraph (6) of the commentary to article 10 provisionally adopted at the thirty-sixth session,[125/] the Commission had decided to delete draft article 12 submitted by the Special Rapporteur, which dealt with the commencement of the functions of the diplomatic courier, on the ground that the matter would be better dealt with in the context of draft article on the duration of privileges and immunities. As a general rule the diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions. In this case the moment of commencement of the privileges and immunities is the crossing by the diplomatic courier of the frontier of the territory, the objective of the crossing being the performance of the courier's functions. In this case the functions of the courier might well of course have commenced before the crossing, i.e. if the courier had previously received the bag to be transported, but the reason or need for the privileges and immunities arises only when, having left the territory of the sending State, he enters the territory of the transit or receiving State. This would normally be the case of a permanent courier appointed by the Ministry for Foreign Affairs who finds himself at the time of the appointment in the territory of the sending State. But the situation may arise in which the person who will be appointed a courier already finds himself in the territory of the receiving State at the time of his appointment. This would usually happen in the case of an ad hoc courier appointed by the mission, consular post or

---

125/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), chap.III.C.2.

delegation of the sending State in the receiving State. In this case the article provides that the courier's privileges and immunities shall commence from the moment he actually begins to exercise his functions. Certain members expressed the view in the Commission that the expression "from the moment he begins to exercise his functions" should be interpreted as referring to the moment of his appointment and receipt of the documentation referred to in article 7. It was also made clear that although for drafting reasons the article reads "if he is already in the territory of the receiving State" that phrase should be understood as meaning that the person concerned, when appointed a courier, should already be in the territory of the receiving State.

(2) The second sentence of paragraph 1 adopts, with respect to the moment at which the privileges and immunities of the diplomatic courier shall cease, a criterion or rationale symmetric to that adopted in the first sentence for their commencement. It lays down that such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving or the transit State. This would be the case of a permanent courier. The courier no longer being in the receiving State or the transit State, the foundation for his privileges and immunities disappears. The word "normally" has been used not only because it is contained in the relevant provisions on diplomatic and consular law listed in paragraph (1) of the present commentary but also because the article itself provides for two exceptions to the general principle laid down in this second sentence. Those exceptions are contained in the third sentence of paragraph 1 and in the last phrase of paragraph 2. One member of the Commission still pointed out that he found the words of the second sentence of paragraph 1 not clear.

(3) The third sentence of paragraph 1 contemplates an exception to the general rule laid down in the second sentence. While some members of the Commission felt that the granting of a different treatment to the permanent and the ad hoc courier with respect to the moment at which their privileges and immunities shall cease was not justified, the Commission felt that on this matter it was bound to follow the solution adopted by the specific provisions on this issue contained in all four existing multilateral conventions on diplomatic and consular law, namely, article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 6, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 7, of the 1969 Convention on Special Missions and articles 27, paragraph 6, and 57, paragraph 7, of the 1975 Vienna Convention on the Representation of States. It is uniformly provided for in those Conventions

that the privileges and immunities of the diplomatic courier ad hoc shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge. This is also the solution adopted by the Commission in the present article.

Paragraph 2

(4) Paragraph 2 should be read in conjunction with article 11 (b) and article 12 and the commentaries thereto. Those provisions establish that a diplomatic courier may be declared persona non grata by the receiving State. His functions do not end ipso facto but, as a consequence of that declaration, there arises for the sending State the obligation either to recall its courier or, if it is a multiple mission courier, to terminate his functions in the receiving State which has declared the courier persona non grata. If the sending State refuses or fails within a reasonable period to carry out the above-mentioned obligations, the receiving State may notify to the sending State that in accordance with article 12, paragraph 2, it refuses to recognize the person concerned as a diplomatic courier. This notification by the receiving State ends the courier's functions in accordance with article 11 (b). Although his functions have ceased, his privileges and immunities continue to subsist, in principle, until the courier leaves the territory of the receiving State by application of the general rule laid down in the second sentence of paragraph 1 of the present article. But given the very specific factual situation of a persona non grata declaration, the receiving State is likely to have an interest in ensuring that the person concerned leave its territory as rapidly as possible, that is to say, on the expiry of a reasonable time-limit. It is in the very specific hypothesis of the courier failing to leave the territory of the receiving State within the given time-limit that the present paragraph creates an exception to the general rule laid down by the second sentence of paragraph 1. In such a case his privileges and immunities shall cease at the moment of expiration of the time-limit.

(5) It should be noted that the expression "privileges and immunities" used in paragraphs 1 and 2 of the present article, unlike the word "immunity" used in paragraph 3 refers to all the privileges and immunities granted to the diplomatic courier and dealt with in the present draft articles.

Paragraph 3

(6) Paragraph 3 is modelled on the corresponding provisions of the existing multilateral conventions on diplomatic and consular law listed in paragraph (1) of the present commentary. This provision, which prolongs the immunity of the courier for acts performed in the exercise of his functions after the latter have

ended and subsequent to the departure from the receiving State, refers only to the immunity from jurisdiction as provided for in article 18. Its raison d'être is to be found in the official nature of the mission performed by the courier, which corresponds to a sovereign decision of the sending State.

Article 22

Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

Commentary

(1) The sources of the present article are the corresponding provisions of the existing multilateral conventions in the field of diplomatic and consular law, namely, article 32 of the 1961 Vienna Convention on Diplomatic Relations, article 45 of the 1963 Vienna Convention on Consular Relations, article 41 of the 1969 Convention on Special Missions and, particularly for paragraph 5, articles 31 and 61 of the 1975 Vienna Convention on the Representation of States.

(2) The present article extends to the immunities of the diplomatic courier, the institution of waiver to be found in all above-mentioned diplomatic and consular conventions. Waiver may thus be considered as one of the forms of suspension of the immunities of the diplomatic courier. This institution is based on the fundamental concept that such immunities are an expression of the principle of sovereign equality of States and they are granted not to benefit individuals but to ensure the efficient performance of the courier's functions.

Paragraph 1

(3) Paragraph 1 states the general principle that the immunities of the diplomatic courier may be waived only by the sending State. The waiver of immunities must be on the part of the sending State because the object of the

immunities is that the diplomatic courier should be able to discharge his duties in full freedom and with the dignity befitting such duties.[126/]

(4) The plural adopted by the Commission for the word "immunities" contained in paragraph 1 indicates that the possible scope of application of the sending State's decision to proceed to a waiver may be very broad. The most common cases envisaged cover immunity from jurisdiction, either criminal, civil or administrative, each or all of them, according to the sovereign decision of the sending State. But the decision to proceed to a waiver on the part of the sending State could also extend to immunities and privileges other than those relating to jurisdiction, including immunity from arrest, since the foundation of all of them is to facilitate the better performance of the courier's functions as explained in paragraph (3), above.

(5) While the paragraph states the principle that the immunities of the diplomatic courier may be waived by the sending State, it does not say anything about which is the competent authority within the sending State to give such a waiver. There has been a great deal of diversity in State practice and in doctrinal views regarding the authority entitled to exercise the right of waiver. The question has been raised whether it should in all cases be the central authority, for example the Ministry for Foreign Affairs, or whether the head of the mission, another diplomatic agent, or the member of the mission involved in a particular case, should also have the right to waive jurisdictional immunity. The Commission was of the view that the possible solutions to this problem depended essentially upon the domestic laws and regulations of the sending State where such laws and regulations had been enacted, or upon the established practice and procedures where no special legislation existed. Some States confer the power to waive jurisdictional immunity to heads of missions or their members but only on instructions from the Ministry given prior to or on the occasion of a specific case. In such instances heads of diplomatic and other missions or members of such missions may be required to seek instructions before making a statement of waiver.

(6) Extensive State practice and the relevant commentaries to draft articles which formed the basis of similar provisions in multilateral conventions on diplomatic law[127/] agree that proceedings, in whatever court or courts, are

---

126/ See paragraph (1) of the commentary to article 30 of the Commission's 1958 draft on diplomatic intercourse and immunities, which served as the basis for article 32 of the 1961 Vienna Convention on Diplomatic Relations. Yearbook ... 1958, vol.II, p.99, document A/3859, chap.III, sect.II.

127/ See in particular, paragraph (5) of the commentary cited in the preceding note.

regarded as an indivisible whole and consequently that a waiver given in accordance with the relevant requirements and recognized or accepted by the court concerned precludes the right to plead immunity either before the judgement is pronounced by that court or on appeal.

(7) It was pointed out in the Commission that the principle stated in paragraph 1 that the waiver is effected by the sending State should not be interpreted as detracting from the very specific situation contemplated in paragraph 3 of the article in which the acts of the courier himself are taken as an implied waiver. It was pointed out in the Commission that the apparently diverse solutions adopted in paragraphs 1 and 3 of the article were in practice made more uniform by the usual requirement of sending States that prior authorization is required for their diplomatic personnel to initiate proceedings in the receiving State, as further explained in paragraph (9) below of the present commentary.

Paragraphs 2 and 3

(8) Paragraph 2, which follows closely paragraph 2 of article 45 of the 1963 Vienna Convention on Consular Relations, lays down the principle that the waiver must be express and requires the written communication of the waiver as the most appropriate and unequivocal manifestation of its express character. The same paragraph refers to the exception contemplated in paragraph 3 whereby the initiation of proceedings by the diplomatic courier shall be construed as an implied waiver in respect of any counter-claim directly connected with the principal claim. The rationale behind the provision of paragraph 3 is that under such circumstances the courier is deemed to have accepted the jurisdiction of the receiving State as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.[128/] It is the understanding of the Commission that the implied waiver in paragraph 3 refers to civil and administrative proceedings and that any waiver of immunity from jurisdiction in respect of criminal proceedings should always be express and communicated in writing.

(9) As already mentioned in paragraph (7) above, the regulations of the sending State usually require that its diplomatic agents as well as couriers obtain prior authorization from the central authorities before instituting legal proceedings in the receiving State. It should however be noted that the implied waiver arises from the behaviour of the courier himself and if he institutes proceedings, then he is presumed to have the necessary authorization. A fortiori, if in such

---

128/ See paragraph (6) of commentary cited in note 126, above.

proceedings a valid waiver may be inferred from the diplomatic courier's behaviour, then his expressly declared waiver must naturally also be regarded as valid.[129]

Paragraph 4

(10) Paragraph 4 draws a distinction between waiver of immunity from jurisdiction and waiver of immunity in respect of execution of the judgement. It stipulates that waiver of immunity from jurisdiction in respect of civil and administrative proceedings shall not be held to imply waiver of immunity in respect of execution of the judgement, for which a separate waiver is required. This rule had been established in customary international law prior to the 1961 Vienna Convention on Diplomatic Relations and has been confirmed by State practice. Although some voices in the Commission questioned the advisability of this rule establishing the need for a double waiver, the Commission was of the view that its inclusion in all provisions relating to waiver of immunities contained in all four multilateral conventions on diplomatic and consular law listed above in paragraph (1) of this commentary, was sufficient demonstration of its existence as an accepted norm of international law.

Paragraph 5

(11) Paragraph 5 reproduces a provision first introduced by articles 31 and 61 of the 1975 Vienna Convention on the Representation of States. As expressed by the Commission in its commentary to paragraph 5 of draft article 62 on waiver of immunity concerning the draft articles on the representation of states in their relations with international organizations, "... the provision set forth in paragraph 5 places the sending State, in respect of civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation which may give to the host State grounds for complaint if the sending State fails to comply with it."[130]

(12) The provision of paragraph 5 should be considered as a practical method for the settlement of disputes in civil matters. It may offer in some instances efficient remedies to solve problems. Taking into account the specific features

---

129/ See paragraph (3) of commentary cited in note 126, above.

130/ Yearbook ... 1971, vol.II (Part One), p.321, document A/8410/Rev.1, chap.II.D., paragraph (2) of the commentary to article 62.

of the legal status and the official functions of the diplomatic courier, the extrajudicial method of amicable settlement of a dispute may be appropriate. It compensates for the eventuality that a sending State may refuse to waive the courier's immunity, offering the possibility of arriving at a just settlement through negotiation and equity.

(13) It was made clear in the Commission that the paragraph should be interpreted as referring to any stage of a civil action and it therefore applied equally to cases in which a sending State did not waive the courier's immunity in respect of execution of a judgement.

Article 23

Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

Commentary

(1) With the exception of a few complementary elements and drafting adjustments, the basic components of the present article are contained in the corresponding provisions of the four multilateral conventions on diplomatic and consular law, namely article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 7, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 8, of the 1969 Convention on Special Missions and articles 27, paragraph 7, and 57, paragraph 8, of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) The relevant provisions of the above-mentioned multilateral conventions, as well as of numerous bilateral agreements which are confirmed by an examination of the behaviour of States, demonstrate that the practice dealt with in the present article of employing the captain of a ship or aircraft in commercial service for the custody, transportation and delivery of diplomatic bags forms part of modern international law. The diplomatic bag entrusted to the captain of a commercial aircraft, in particular, has been widely used in modern times.

This practice has proven its advantages, which can be summarized as economy, speed and reasonable safety since the bag, though not accompanied by a courier, is still under the custody or the care of a responsible person. The employment of the captain of a passenger or other merchant ship, although not so frequent, has been used where seaborne transport is the most convenient means of communication or where the shipment of some sizable consignments is more economical by sea.

(3) An earlier version of the draft article, proposed by the Special Rapporteur, spoke of "captain of a commercial aircraft or master of a merchant ship", whereas the article as presently drafted refers to "captain of a ship or aircraft in commercial service". The word "captain" has been retained to apply to both a ship and an aircraft, for the sake of uniformity with language used in the provisions contained in three of the conventions referred to in paragraph (1) of the present commentary, namely, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The word is intended to describe the functions of the person at the top of command and in charge of a ship or aircraft, irrespective of the particular meaning that it may have under the domestic law of any country. By conveying the actual meaning in which the word is used, the Commission also intends to relieve the eventual semantic tension that the use of the same word "captain" for both a ship and an aircraft may create in some of the language versions. As to the expression "in commercial service" it has been used to categorize both a ship and an aircraft in order to eliminate any possible restrictive connotation that the phrase "merchant ship" may have had as compared to the phrase "commercial aircraft", as used in the original formulation proposed for the draft article.

(4) The phrase "which is scheduled to arrive at an authorized port of entry" has been included in the paragraph to denote ships or aircraft in regular service or belonging to a regular line between the States and the port of entry concerned rather than voyages or flights undertaken by any boat or aeroplane on an ad hoc basis. It was accepted in the Commission that under the regulations of certain airlines and arrangements made with certain countries "chartered flights" could offer all the characteristics of a regular flight, except for the booking system and could be considered as covered by the expression "scheduled to arrive". It was however also pointed out that the phrase was designed to take into account the fact that the article established certain obligations on the part of the receiving State under paragraph 3 and the receiving State might have difficulties in fulfilling those obligations in cases of non-scheduled flights or voyages. Yet nothing in paragraph 1 should be interpreted as

precluding the possibility that States, by mutual agreement, could decide to entrust their bags to the captain of a ship or aircraft on a non-scheduled flight or voyage or of a nature other than "in commercial service".

(5) Although not expressly mentioned in the text of the paragraph itself, the Commission was of the view that the wording of the paragraph did not preclude the existing practice of several States to entrust the unaccompanied bag to a member of the crew of the ship or aircraft, either by decision of the central authorities of the State or by delegation from the captain of the ship or aircraft to the crew member.

Paragraph 2

(6) The captain of a ship or aircraft to whom a bag is entrusted is provided with an official document indicating the number of packages constituting the diplomatic bag entrusted to him. This document may be considered as having the same character as the official document issued to a diplomatic courier as elaborated upon in the commentary to article 7.[131/] It should, however, be noted (and all the above-mentioned multilateral conventions are clear on this point) that he is not to be considered as a diplomatic courier, whether permanent or ad hoc. Therefore, those provisions of the present articles which concern the personal status of the diplomatic courier do not apply to the captain of a ship or aircraft.

Paragraph 3

(7) Whenever a bag is sent by the sending State by means of the captain of a ship or aircraft in commercial service, the overriding obligation for the receiving State is to facilitate the free and direct delivery of the diplomatic bag to the authorized members of the diplomatic mission or other authorized officials of the sending State, who are allowed to have access to the aircraft or ship in order to take possession of the diplomatic bag. The receiving State should enact relevant rules and regulations and establish appropriate procedures in order to ensure the prompt and free delivery of the diplomatic bag at its port of entry. The unimpeded access to the plane or ship should be provided for receiving the incoming diplomatic bag at the authorized port of entry or for handing over to the captain of the aircraft or ship, the outgoing diplomatic bag. In both instances the persons entitled to receive or hand over the diplomatic bag should be authorized members of the diplomatic mission, consular post or

---

131/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No.10 (A/38/10), chap.V.C.

delegation of the sending State. This two-way facility for receiving from or handing over the diplomatic bag to the captain should be reflected in the relevant provisions of the rules governing the dispatch of a diplomatic bag entrusted to the captain of an aircraft or ship in commercial service. The drafting changes undergone by the present paragraph from its original submission by the Special Rapporteur are intended to stress the above-mentioned obligation of the receiving State, shifting the emphasis from the facilities accorded to the captain to the obligation of the receiving State to permit unimpeded access to the ship or aircraft. It was pointed out in the Commission that in order to carry out its obligations under the paragraph, the receiving State must know of the arrival of the bag, either because of the scheduled and regular nature of the flight or voyage involved or because of the mutual agreements concluded with specific States, as explained above in paragraph (4) of the present commentary.

(8) As stated in paragraph 3, the purpose of the unimpeded access to the ship or aircraft to be granted by the receiving State to the member of a mission, consular post or delegation of the sending State is to enable the latter "to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him". It was stressed in the Commission that the words "directly and freely" should be interpreted as meaning literally "from the hands of the captain to those of the designated official" and vice versa, without interference from any intermediary individual. In this connection, it was observed that the expressions used in the Spanish and French versions of the article, namely "de manos del" and "des mains du", respectively, reflected faithfully the idea that the English version intended to convey by the words "directly and freely".

(9) It was discussed in the Commission whether the obligation for the receiving State laid down in the present paragraph should be qualified by the words "by arrangement with the appropriate authorities of the sending State", mention of which is to be found in the corresponding provisions of the multilateral conventions listed in paragraph (1) to the present commentary. The Commission decided against incorporating those words into the paragraph so as not to create the impression that such an arrangement would constitute a precondition for the existence of the said obligation for the receiving State. Those arrangements could, instead, regulate the modalities or aspects of practical implementation of that obligation.

(10) Although not expressly stated, it should be understood that the member of the mission, consular post or delegation who is to take possession of the bag from the captain or to deliver it to him, must be duly authorized by the appropriate authorities of the sending State. The usual identity card would not suffice and a special permit or authorization may be required. The determination of the material aspects of such an authorization could constitute a matter for special arrangements between the receiving and the sending State.

Article 24

Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

Commentary

Paragraph 1

(1) Paragraph 1 of the present article is modelled on the initial part of the following provisions of the four existing multilateral conventions on diplomatic and consular law: article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 5, of the 1969 Convention on Special Missions and article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(2) In conformity with long-standing State practice the diplomatic bag has always been identified through certain visible external marks. The most common visible external feature of a diplomatic bag is a tag or a stick-on label with an inscription such as "diplomatic correspondence", "official correspondence", "expédition officielle". In particular, the diplomatic bag must be sealed by the competent authority of the sending State by means of the official stamp imprinted with wax or lead seals, padlocks or in other ways which may be agreed upon between the sending and the receiving States. It was stressed in the Commission that the existence of such seals operated not only in the interest of the sending State, to ensure the confidentiality of the bag's contents, but also in the interest of the receiving State. Those seals, on the one hand, helped the receiving State to ascertain the bona fide character and authenticity of the diplomatic bag and, on the other hand, could provide the receiving State with evidence against eventual accusations of having tampered with the bag.

(3) The provisions of the present paragraph apply to all kinds of bags, whether accompanied or not.

Paragraph 2

(4) The diplomatic bag not accompanied by diplomatic courier, with which paragraph 2 is specially concerned, has acquired a prominent place in modern diplomatic communications. The frequency of the use of this kind of diplomatic bag reflects widespread State practice with increasing dimensions and significance. As arises from article 23 and commentary thereto, one form of unaccompanied bag is that which has been entrusted to the captain of a ship or aircraft in commercial service. But the transmission of the diplomatic bag by postal service or by any mode of transport is also frequently used, as explained below in article 26 and commentary thereto. Although the use of unaccompanied bags for the diplomatic mail has become almost a regular practice of developing countries for economic considerations, this type of bag has at present acquired widespread utilization also by many other States.

(5) The unaccompanied bag must meet the same requirements in respect of its external features as that accompanied by a courier; it should be sealed by the official stamp with wax or lead seals by the competent authority of the sending State. The fact that the bag is not carried by a professional or ad hoc courier may require even greater care for proper fastening, or the use of special padlocks, since it is forwarded as a consignment entrusted to the captain of a ship or aircraft. Also in connection with the visible external marks, it is necessary to provide the diplomatic bag with a tag, or stick-on label with an indication of its character as such. But given the greater likelihood that an unaccompanied bag may get lost, a clear indication of the destination and consignee of the unaccompanied diplomatic bag is necessary. In this connection, it was felt in the Commission that although this latter requirement could only be considered as necessary in the case of the unaccompanied diplomatic bag, it could also be helpful in the case of bags accompanied by courier, since the possibility always existed, as some cases of international practice have shown, that a bag may be separated from the courier and get stranded. In those cases a clear indication of destination and consignee could greatly facilitate a speedy and safe delivery. It was also made clear in the Commission that although the provision of paragraph 2 constituted an additional requirement for the practical purpose of ensuring the delivery of the unaccompanied bag, the lack of any such additional indication should not detract from the status of the bag as a diplomatic bag.

(6) It was explained in the Commission that the terminology "the packages constituting the diplomatic bag" had been adopted for the sake of uniformity with

the language of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations. It was meant to cover the various physical components constituting the diplomatic bag, as a unified legal notion, but it did not refer to the individual pieces constituting the contents of the bag.

(7) The original drafting of the paragraph as submitted by the Special Rapporteur contained an additional clause to the effect that the unaccompanied bag shall also bear a visible indication of "any intermediary points on the route or transfer points". While some members of the Commission felt that the indication of transfer points was very useful, particularly in cases of loss of the bag, and therefore the said clause should be maintained in the text of the paragraph, other members felt that the question of transfer points fell more within the realm of airline itineraries which could be changed by airlines without prior notice. The Commission, as a whole, although recognizing that the practice of some States was to indicate the transfer points and that this practice could be useful on some occasions, did not deem it advisable to lay it down in mandatory language in the text of the paragraph.

(8) The draft article, as originally submitted by the Special Rapporteur, contained a third paragraph to the effect that "the maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State". After carefully considering the paragraph, as well as proposals for its amendment, the Commission decided not to incorporate it. It felt that if drafted in optional terms, as suggested in one proposed amendment, the paragraph would be superfluous, while if adopted in mandatory terms, as originally proposed, it might convey the mistaken impression that such an agreement was a precondition for the granting of facilities to a diplomatic bag by the receiving State. The Commission did agree, however, that it was advisable to determine by agreement between the sending State and the receiving State the maximum size or weight of the diplomatic bag and that this procedure was backed by widespread State practice.

Article 25

Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

Commentary

Paragraph 1

(1) Paragraph 1 of the present article is modelled on the second part of paragraph 4 of article 35 of the 1963 Vienna Convention on Consular Relations. Its wording is also closely related to article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, article 28, paragraph 5, of the 1969 Convention on Special Missions, and articles 27, paragraph 4, and 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

(2) The paragraph defines the permissible content of the diplomatic bag by the criterion of the official character of the correspondence or documents included therein or the official use for which the articles contained in the bag are intended. Under this rule, which is based on extensive State practice as well as on the above-mentioned conventions, the bag may contain official letters, reports, instructions, information and other official documents as well as cypher or other coding or decoding equipment and manuals, office materials such as rubber-stamps or other articles used for office purposes, wireless equipment, medals, books, pictures, cassettes, films and "objets d'art", which could be used for the promotion of cultural relations.

(3) The adverbs "only" and "exclusively" emphasize the official character of the permissible items in question in view of recent abuses committed with regard to the content of the diplomatic bag. Some members felt that the adverb "exclusively" added nothing to the substance of the provision and was out of place, particularly if account was taken of the fact that the word was contained only in the corresponding provision of the 1963 Consular Relations Convention but not in the other Conventions. Other members felt that the adverb was appropriate, all the more so considering that it was already included in the definition of the diplomatic bag contained in article 3, paragraph 1, subparagraph (2), provisionally adopted by the Commission. The Commission decided to include provisionally the word "exclusively" without prejudice to re-examining the question in the second reading of the draft articles, bearing in mind that the word should either be kept in or removed from both article 3, paragraph 1, subparagraph (2) and draft article 25.

(4) It was also observed in the Commission that while article 25 referred to "official correspondence, and documents or articles intended exclusively for official use", article 3, paragraph 1, subparagraph (2), spoke of "official correspondence, documents or articles intended exclusively for official use". It was stressed that at a later stage the provision in article 3 should be aligned

with the terminology used in article 25 so as to make clear that the phrase "intended exclusively for official use" applies both to "documents" and "articles".

(5) One member of the Commission had reservations about the paragraph. He felt that more emphasis should have been placed on the confidential nature of the items included in the bag so as to ensure that it should be used as a true means of communication rather than a means of transport.

Paragraph 2

(6) The rules governing the content of the diplomatic bag should comprise not only provisions dealing with the permissible content of the bag such as in paragraph 1 of the present article but also provisions for the appropriate preventive measures to be taken in order to ensure compliance with the rules on the content of the diplomatic bag and to avoid any abuses of the facilities, privileges and immunities accorded by international and domestic law to the diplomatic bag. These two elements, namely, the rule for the legally admissible content of the bag and its efficient implementation, have practical significance for the proper functioning of official communications in the interest of international co-operation and understanding. Their strict observance would avoid mutual suspicions on the part of the receiving State when the diplomatic bag is admitted into its territory, as well as on the part of the sending State when procedures for inspection, including the use of sophisticated devices for examination are required by the receiving State. At present none of the multilateral conventions in the field of diplomatic law have offered a viable solution to the problem of verifiability in respect of the legally admissible content of the diplomatic bag. The increasing number of abuses has given particular importance to this problem, with certain political, economic and other implications. In view of the above the Commission has deemed it advisable to state expressly in a separate paragraph the duty of the sending State to take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1. The paragraph should be read in conjunction with the provisions of proposed draft article 36.

Article 26

Transmission of the diplomatic bag by postal service or by any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

Commentary

(1) The present article which refers to the transmission of the diplomatic bag by postal service or by any mode of transport, deals with types of unaccompanied bag other than the unaccompanied bag entrusted to the captain of a ship or aircraft. While this latter type is expressly provided for in specific provisions of the multilateral conventions on diplomatic and consular law referred to above in paragraph (1) of the commentary to article 23, the types of unaccompanied bag referred to in the present article must be considered as embodied in the mention of "all appropriate means" to be used by missions, consular posts and delegations in communications with the sending State, mention of which is made by all relevant provisions of multilateral conventions on diplomatic and consular law, namely article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 28, paragraph 1, of the 1969 Convention on Special Missions and articles 27, paragraph 1, and 57, paragraph 1, of the 1975 Vienna Convention on the Representation of States.

(2) The rules establishing the conditions governing the use of the postal service for the transmission of a diplomatic bag may be of more than one kind: there are multilateral agreements such as the international postal regulations established by the Universal Postal Union; there also exist consular or other bilateral agreements which may mention the postal service among the means of communication between the sending State and its missions or consular posts; and there are special agreements for the transmission by post of diplomatic correspondence or the exchange of diplomatic correspondence through postal channels by air mail. Besides these international regulations there are also national administrative and postal regulations adopted by some States. In accordance with the terms of the article, the international postal regulations of the Universal Postal Union would apply whenever such rules may be of application between the States concerned. If not ruled out by such regulations, other international regulations would also apply, such as bilateral agreements. Finally, national rules would apply if they are not in contradiction with the international rules in force between the States concerned or in the absence of such international rules. Among national rules, there may be provision for the transmission of bags by commercial means of transportation, according to the internal legislation and administrative rules of each State.

(3) With regard to the modes of transport to which the article refers, this expression replaces the clause "whether by land, air or sea" used by the Special Rapporteur in an earlier version of the draft article. The dispatch of diplomatic bags as cargo consignments through commercial means of transportation, whether by land, air or sea, has been a common practice of States a long time before the 1961 Vienna Convention on Diplomatic Relations. This kind of official communication has been particularly used for heavy and sizable consignments or for non-confidential correspondence, documents and other articles, such as books, exhibits, films and other items for the official use of the diplomatic missions, consular posts and other missions. Again in this case, the article refers to international or national rules governing the conditions of transmission of the bag by such modes. In this connection, the 1980 United Nations Convention on International Multimodal Transport of Goods[132/] which is concerned with the multilateral regulation of various modes of transport, should be noted. There also exist other international conventions, including regional ones, regulating the carriage of goods by land, air or sea. If any of those conventions is applicable between the States concerned, then such international regulations would apply. National rules would apply in the absence of applicable international regulations.

(4) The original version of the draft article as submitted by the Special Rapporteur treated separately in paragraphs 2 and 3 the "dispatch of the diplomatic bag by postal service" and "the dispatch of diplomatic bags by ordinary means of transportation, whether by land, air or sea". Apart from combining both paragraphs and reflecting the changes in terminology in the text as noted above in paragraphs (2) and (3) of the present commentary, the Commission also deleted a second sentence contained in both earlier paragraphs which referred, mutatis mutandis, to the obligation of the competent authorities of the receiving or the transit State to facilitate the safe and expeditious transmission of the bag dispatched by the postal service or through the ports of those States. The Commission was of the view that those sentences were unnecessary since their contents were covered by article 27 dealing with the facilities to be accorded to the diplomatic bag by the receiving or the transit State.

(5) An earlier version of the draft article included a paragraph 1 containing a provision on the applicability to the unaccompanied bag dispatched by postal service or by any ordinary means of transport of draft articles 31 (now 24) and 35 (now 27) to 39. The provision was deleted for the same reasons explained in paragraph 203

132/ Document TD/MT/CONF/16.

above regarding the omission of draft article 33. It was felt that the language of those draft articles was clear to the effect that they also applied to all unaccompanied bags, including those regulated by the present article.

(6) In that connection, it was also considered unnecessary to refer in the article to the bill of lading (as did the originally proposed draft article) or to the postal receipt "as a document indicating the official status of the bag". It was felt that article 24 and its commentary, which also applied to the bags referred to in the present article, provided sufficient regulation on the identification of these diplomatic bags. Although the Commission was of the view that the inclusion of such reference was not necessary in the text of the article itself, it also felt that frequently in practice the bill of lading or the postal receipt was used as evidence of the nature of the consignment as a diplomatic bag. Although those documents were not strictly necessary for identifying the diplomatic bag as such they could serve to facilitate the evidence or proof of such an identification.

Article 27

Facilities accorded to the diplomatic bag

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

Commentary

(1) The present article, which refers to the facilities to be accorded to the diplomatic bag by the receiving or the transit State, is inspired by considerations similar to those which led to the inclusion of article 13 in the set of draft articles provisionally adopted by the Commission. It may therefore be said that the sources for this article are mutatis mutandis those indicated in paragraph (2) of the commentary to paragraph 1 of article 13.[133/]

(2) Although the article applies to all kinds of diplomatic bags, whether accompanied by diplomatic courier, entrusted to the captain of a ship or aircraft or transmitted by postal service or by any mode of transport, the existence of a specific provision on facilities to the diplomatic courier which is in practice intended to make easier the safe and speedy transportation and delivery of the accompanied bag, makes the present article even more important for unaccompanied

---

133/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No.10 (A/39/10), chap.III.C.2.

bags, particularly those that are dispatched by postal service or any mode of transport which in practice require greater care for their safe and expeditious transmission and delivery.

(3) The facilities accorded to the bag should be conceived also in close relationship with all other provisions that contain explicit or implicit reference to the need to grant certain assistance or extend co-operation on the part of the receiving or the transit State and their authorities for the proper functioning of the official communications through the use of the diplomatic bag. As in the case of the facilities accorded to the diplomatic courier, those accorded to the diplomatic bag should always be considered on the basis of functional necessity and the actual need for assistance, depending on the various modes of transport and the concrete circumstances.

(4) It would seem neither advisable nor possible to provide a complete listing of the facilities to be accorded to the diplomatic bag. It would rather seem preferable to define the circumstances in which the need for according such facilities would arise. In general terms it may be affirmed that the scope of the facilities should be determined by the official function of the diplomatic bag and the conditions which are necessary for the safe and speedy transmission or delivery of the bag to its final destination. Therefore the general criterion would be that the need for facilities could or would arise whenever the safe or speedy transmission or of the delivery of the bag, or of both, is endangered. In this connection, it was noted in the Commission that the terms "transmission or delivery" should be read as "transmission and/or delivery" meaning that the need for facilities could apply to each of those operations either separately or taken together. The word "transmission" was preferred to the word "transportation" contained in the original version of the draft article as submitted by the Special Rapporteur for the sake of uniformity with the language adopted in draft article 26 and because of its broader character, which clearly covered not only bags transmitted by any mode of transport but also those transmitted by postal service. The use of the word "transmission" also purports to cover the ground of the second sentence of paragraphs 2 and 3 of draft article 34 as originally submitted by the Special Rapporteur, which were later deleted in the final version of article 26 as provisionally adopted.

(5) Although in many cases the facilities to be accorded the diplomatic bag would entail duties of abstention on the part of the receiving or transit State, in other instances more positive obligations might be involved such as favourable treatment in case of transportation problems or, also, the speeding up of the clearance procedures and formalities applied to incoming and outgoing consignments. The present article and the commentary thereto should also be read in conjunction with paragraph 3 of article 23 and the commentary thereto.

(6) The Commission expressed the desirability that at a later stage the title of article 13 provisionally adopted by the Commission ("Facilities") be aligned with that of the present article, so as to read "Facilities accorded to the diplomatic courier".

CHAPTER V

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

1. Historical review of the work of the Commission

205. The topic entitled "Jurisdictional immunites of States and their property" was included in the current programme of work of the International Law Commission by the decision of the Commission at its thirtieth session, in 1978,[134/] on the recommendation of the Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

206. At its thirty-first session, in 1979, the Commission had before it a preliminary report[135/] on the topic submitted by the Special Rapporteur, Mr. Sompong Sucharitkul. The preliminary report gave a historical sketch of international efforts towards codification and examined sources of international law and possible contents of the law of State immunities, including the practice of States, international conventions, international adjudications, and opinions of writers as source materials. The report also made an inquiry into initial questions, definitions, the use of the inductive approach to the study of the topic, the general rule of State immunity and possible exceptions to the rule itself.

207. During the discussion of the preliminary report, it was pointed out that relevant materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible. It was also emphasized that another potential source of materials would be found in the treaty practice of States, which indicates consent to some limitations on jurisdictional immunity in specific circumstances. In that connection, the Commission, at its thirty-first session, decided to seek further information from Governments of Member States of the United Nations in the form of replies to a questionnaire. It was noted that States know best their own practice, wants and needs as to immunities in respect of their activities and that the views and

---

134/ Yearbook ... 1978, vol. II (Part Two), pp. 152-155, document A/33/10, paras. 179-190.

135/ Yearbook ... 1979, vol. II (Part One), p. 227, document A/CN.4/323. The Commission discussed the preliminary report at its 1574th and 1575th meetings. See ibid., vol. I, pp. 208-218.

comments could provide an appropriate indication of the direction in which the codification and progressive development of the international law of State immunity should proceed.[136/]

208. Following the preliminary report, the Special Rapporteur submitted the second report[137/] for the consideration of the Commission at its thirty-second session, in 1980, in which he introduced six draft articles: "Scope of the present articles" (article 1); "Use of terms" (article 2); "Interpretative provisions" (article 3); "Jurisdictional immunities not within the scope of the present articles" (article 4); "Non-retroactivity of the present articles" (article 5); "The principle of State immunity" (article 6). The first five constituted Part I, entitled "Introduction", while the sixth was placed in Part II, entitled "General principles". The Commission referred draft articles 1 and 6 to the Drafting Committee. At the same session, the Commission provisionally adopted, on the recommendation of the Drafting Committee, draft article 1, entitled "Scope of the present articles", and article 6, entitled "State immunity".

209. In his third report,[138/] submitted at the thirty-third session of the Commission, in 1981, the Special Rapporteur proposed the text of the following five draft articles: "Rules of competence and jurisdictional immunity" (article 7); "Consent of State" (article 8); "Voluntary submission" (article 9); "Counter-claims" (article 10); and "Waiver" (article 11). The five draft articles contained in the third report were placed in Part II, entitled "General principles", following draft article 6 already provisionally adopted. The

---

136/ The materials received were originally organized by the secretariat in a systematic order (and published in English, French, Russian and Spanish) as follows: Part I consisted of Government replies to the questionnaire (A/CN.4/343 and Add.3-4); Part II contained materials that Governments had submitted together with their replies to the questionnaire (A/CN.4/343/Add.1); Part III contained materials submitted by the Governments which had not replied to the questionnaire (A/CN.4/343/Add.2). The materials now appear in a volume of the United Nations Legislative Series (hence in either English or French), Materials on jurisdictional immunities of States and their property (United Nations publication, Sales No. E/F.81.V.10), hereafter referred to as "Materials on jurisdictional immunities ...".

137/ Yearbook ... 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1. The Commission discussed the second report at its 1622nd to 1626th meetings. See ibid., vol. I, pp. 195-204 and pp. 214-220.

138/ Yearbook ... 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1. The Commission discussed the third report at its 1653rd to 1657th and 1663rd to 1665th meetings. See ibid., vol. I, pp. 55-80 and 110-124.

Commission referred draft articles 7 to 11 to the Drafting Committee. At the same session, in the light of the discussion in the Commission, the Special Rapporteur prepared and submitted for the consideration of the Drafting Committee a revised version of his original five draft articles (draft articles 7 to 11), which he reduced to four articles as follows: "Obligation to give effect to State immunity" (article 7); "Consent of State" (article 8); "Expression of consent" (article 9); and "Counter-claims" (article 10).[139/] Owing to lack of time, the Drafting Committee was unable to consider these articles at the thirty-third session.

210. In his fourth report,[140/] submitted at the thirty-fourth session of the Commission, in 1982, the Special Rapporteur dealt with Part III of the draft articles entitled "Exceptions to State immunities", and proposed two draft articles: "Scope of the present Part" (article 11); and "Trading or commercial activity" (article 12). The Commission decided to refer to the Drafting Committee articles 11 and 12. It further decided that article 6, already provisionally adopted, should be re-examined by the Drafting Committee in the light of the discussions of the rest of the draft articles constituting Part II of the draft articles, and further decided that the Drafting Committee should also examine the provisions of articles 2 and 3 relevant to the problems of definition of "jurisdiction" and "trading or commercial activities".[141/] At the same session, the Commission, on the recommendation of the Drafting Committee, provisionally adopted the text of draft articles 2 (subparagraph 1 (a)), 7, 8 and 9, as well as the text of a revised version of draft article 1.[142/] The Drafting Committee re-examined the text of article 6 as provisionally adopted and, while not proposing a new formulation thereof, agreed to re-examine the article at its subsequent session.

211. In his fifth report (A/CN.4/363 and Corr.1 and Add.1 and Add.1/Corr.1), submitted at the thirty-fifth session of the Commission, in 1983, the Special Rapporteur proposed three additional draft articles for inclusion in Part III of

---

139/ Ibid., vol. II (Part Two), pp. 157-158, document A/36/10, para. 226.

140/ Yearbook ... 1982, vol. II (Part One), pp. 199-229, document A/CN.4/357. The Commission discussed the fourth report at its 1708th to 1718th and 1728th to 1730th meetings. See ibid., vol. I, pp. 59-119 and 182-199.

141/ Ibid., vol. II (Part Two), p. 99, document A/37/10, para. 198.

142/ Ibid.

the draft.[143] They were "Contracts of employment" (article 13); "Personal injuries and damage to property" (article 14); and "Ownership, possession and use of property" (article 15). The Commission also had before it a memorandum on the topic submitted by one of the members (A/CN.4/371). After the conclusion of its debate on the topic, the Commission decided to refer draft articles 13, 14 and 15 to the Drafting Committee.[144] The Commission, on the recommendation of the Drafting Committee, provisionally adopted draft articles 2 (subparagraph 1 (g)), 3 (paragraph 2), 10, 12 and 15.[145] At the same session, on the basis of the discussions in the Commission, the Special Rapporteur prepared and submitted to the Drafting Committee revised versions of draft article 13 ("Contracts of employment")[146] and draft article 14 ("Personal injuries and damage to property").[147] Owing to lack of time, the Drafting Committee was not in a position to consider these articles or the question of the re-examination of draft article 6.

212. In his sixth report (A/CN.4/376 and Add.1-2), submitted at the thirty-sixth session of the Commission, in 1984, the Special Rapporteur proposed five draft articles, thereby completing Part III of the draft.[148] They were "Patents, trademarks and intellectual properties" (article 16); "Fiscal liabilities and customs duties" (article 17); "Share-holdings and membership of bodies corporate" (article 18); "Ships employed in commercial service" (article 19, alternative A and alternative B); and "Arbitration" (article 20). The Commission decided to refer to the Drafting Committee articles 16, 17 and 18 for consideration.[149] Owing to lack of time, the Commission was not in a position

---

143/ The Commission discussed the fifth report at its 1762nd to 1770th meetings.

144/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), para. 94.

145/ Ibid., para. 95.

146/ Ibid., note 52.

147/ Ibid., note 53.

148/ The Commission discussed the sixth report at its 1833rd to 1841st and 1869th meetings.

149/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), para. 205.

to conclude its deliberations on article 19 or to take up article 20. It decided to consider those articles the following year at its thirty-seventh session.[150] However, in the light of the preliminary discussions held in the Commission on article 19, the Special Rapporteur prepared and submitted a revised version of draft article 19 ("Ships employed in commercial service").[151] At the same session, on the recommendation of the Drafting Committee, the Commission provisionally adopted draft articles 13, 14, 16, 17 and 18.[152] With regard to the provisional adoption of draft article 16 by the Commission, the Special Rapporteur submitted the text of paragraph 2 of draft article 11 to the Commission.[153] The Commission decided to refer paragraph 2 of article 11 to the Drafting Committee.[154]

2. Consideration of the topic at the present session

213. At the present session, the Commission had before it article 19 ("Ships in commercial service") and article 20 ("Arbitration") which remained from the sixth report submitted by the Special Rapporteur at the thirty-sixth session of the Commission. These two draft articles completed Part III of the draft. In addition the Commission had before it the seventh report submitted by the Special Rapporteur (A/CN.4/388 and Corr.1 (English only) and Corr.2 (French only)) introducing the last two remaining Parts, namely Part IV entitled "State immunity in respect of property from attachment and execution" and Part V entitled "Miscellaneous provisions", of the outline of his topic. Part IV is comprised of: "Scope of the present Part" (article 21); "State immunity from attachment and execution" (article 22); "Modalities and effect of consent to attachment and execution" (article 23); and "Types of State property permanently immune from attachment and execution" (article 24). Part V is comprised of: "Immunities of personal sovereigns and other heads of State" (article 25); "Service of process and judgement in default of appearance" (article 26); "Procedural privileges" (article 27); and "Restriction and extension of immunities and privileges" (article 28). Owing to lack of time the Commission was not in a position to take up Part V and limited its discussion to draft articles 19 and 20

150/ Ibid.

151/ Ibid., para. 214, note 185.

152/ Ibid., para. 206.

153/ Ibid., para. 207, note 182.

154/ Ibid., para. 207

from Part III and draft articles 21 to 24 from Part IV. It was decided to consider Part V at the next, thirty-eighth session of the Commission.

214. The Commission, after having considered the sixth and seventh reports at its 1915th to 1924th meetings, referred draft articles 19 to 24 to the Drafting Committee.

215. As recommended by the Drafting Committee, the Commission at its 1932nd meeting provisionally adopted draft articles 19 and 20.[155/]

216. For the benefit of the General Assembly, a summary of the debate on the articles constituting Part IV of the draft is presented below.

217. In introducing Part IV, the Special Rapportuer recalled that many members of the Commission thought, at an earlier stage of the consideration of this topic, that it would be better to concentrate on immunities of States from jurisdiction and leave aside the question of immunity from attachment and execution. He believed, however, that during the course of studying this topic, the Commission would necessarily have to deal with property aspects of immunity in a number of instances. His concerns proved true. The question of property bore some important relationship to article 7, paragraph 2, and article 15 of the draft articles. In yet another separate connection, property came into direct contact with the jurisdictional immunities of States inasmuch as States were also immune under Part IV, not only in respect of property belonging to States but also, invariably, in respect of property in their possession or control or in which they had interests, from attachment, arrest and execution by order or pursuant to an order of a court of another State. In defining State property, the Special Rapporteur stated that he had followed the suggestion that such a definition should be borrowed from the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[156/] That definition appeared in article 2, subparagraph 1 (f) which had not yet been referred to the Drafting Committee. However, during his work on this topic, he came to believe that that definition of State property was incomplete and inappropriate as far as jurisdictional immunities of States and their property were concerned. Such a definition of property for example, did not take into account property taken in violation of the generally accepted principles of international law. There were a number of

---

155/ See section B.2 below, for the text of draft articles 19 and 20, and commentaries thereto.

156/ Document A/CONF.117/14.

other difficulties in that definition if one tried to apply it to this topic. That explained his new efforts in determining State property for the purposes of these draft articles.

218. The Special Rapporteur further drew attention to the general and well-known difficulties associated with enforcement measures in international law.[157] This edge of international law quickly encounters fundamental policy and diplomatic issues of sovereignty of States. Moreover the technical problems in enforcement were formidable. But it was equally apparent that the effectuation of rights, once lawfully established was a central and indispensable part of a meaningful legal system.

219. The Special Rapporteur had arranged the structure of Part IV in such a way as to present a clear and easily perceptible picture of the whole treatment of State immunities.

220. Introducing article 21 entitled "Scope of the present part",[158] the Special Rapporteur spelled out his intention to draw distinctions and at the same time to underline the close connection between State immunities from the jurisdiction of the courts of another State, in Parts II and III, and State immunities from attachment and execution in respect of property by order of the courts of another State in Part IV. Jurisdiction was normally understood to refer to the power to adjudicate or settle disputes by adjudication, but immunity from attachment and execution related more specifically to immunities of States in

---

157/ See e.g. The "Societé commerciale de Belgique" [Socobelge], P.C.I.J., Series A/B, No. 78, Judgement of 15 June 1939 relating to arbitral awards of 3 January and 25 July 1936; and Socobelge et Etat belge v. Etat hellénique, Banque de Grèce et Banque de Bruxelles (judgement of 30 April 1951), Journal du droit international (Clunet), (Paris), 79th year, No. 1 (January-March 1952), pp. 244-266.

158/ The text of article 21 proposed by the Special Rapporteur read as follows:

"Article 21

Scope of the present Part

The present Part applies to the immunity of one State in respect of State property or property in its possession or control, or in which it has an interest, from attachment, arrest and execution by order of a court of another State."

respect of their property from prejudgement attachment and arrest as well as from execution of judgement rendered. That distinction, namely that waiver of immunity from jurisdiction did not automatically entail waiver of immunity from execution emerged clearly from State practice. Some linkage between the two types of immunity had, however, been seen in a number of instances. A further question might be raised as to whether there should be immunity from execution, attachment or seizure arising under an executive order or legislative decree. He thought, however, that these types of cases were beyond the scope of current enquiry. He had limited the possibility of attachments, arrest and execution to only when ordered by a court of law or tribunal of another State, or emanating from judicial proceedings.

221. In introducing article 22 entitled "State immunity from attachment and execution"[159/] the Special Rapporteur stated that the principles of immunity from attachment, arrest and execution flowed from the same principle as did

---

159/ The text of article 22 proposed by the Special Rapporteur read as follows:

"Article 22

State immunity from attachment and execution

1. In accordance with the provisions of the present articles, State property or property in the possession or control of a State or property in which a State has an interest is protected by the rule of State immunity from attachment, arrest and execution by order of a court of another State, as an interim or precautionary prejudgement measure, or as a process to secure satisfaction of a final judgement of such a court, unless

(a) the State concerned has consented to such attachment, arrest or execution against the property in question; or

(b) the property is in use or intended for use by the State in commercial and non-governmental service; or

(c) the property, being movable or immovable, intellectual or industrial, is one in respect of which it is the object of the proceedings to determine the question of ownership by the State, its possession or use, or any right or interest arising for the State by way of succession, gift or bona vacantia; or

(d) the property is identified as specifically allocated for satisfaction of a final judgement or payment of debts incurred by the State.

2. A State is also immune in respect of its property, or property in its possession or control or in which it has an interest, from an interim or final injunction or specific performance order by a court of another State, which is designed to deprive the State of its enjoyment, possession or use of the property or other interest or otherwise to compel the State against its will to vacate the property or to surrender it to another person."

jurisdictional immunity, par in parem imperium non habet, and were thus founded on the principles of the independence and sovereign equality of States. Like jurisdictional immunity, immunity from attachment and execution was linked to the question of consent. He mentioned that in drafting this article he had relied on national legislation, international and regional conventions, bilateral treaties and the decisions of domestic courts. He also thought that this was an area in which international opinion seemed to favour more absolute and less qualified immunity.

222. Explaining article 23 entitled "Modalities and effect of consent to attachment and execution",160/ the Special Rapporteur stated that consent to attachment was normally expressed in writing, either in multilateral or in bilateral treaties. Consent might also be made in general terms, which could be interpreted as allowing attachment and execution against assets connected with the commercial transactions in question. Consent may be limited to specific assets or property allocated for the purpose of satisfying judgement debts. In any event, attachment and execution would not be exercised against assets forming part of the public property of a State devoted to public services or used for public purposes.

160/ The text of draft article 23 proposed by the Special Rapporteur read as follows:

"Article 23

Modalities and effect of consent to attachment and execution

1. A State may give its consent in writing, in a multilateral or bilateral treaty or in an agreement or contract concluded by it or by one of its agencies with a foreign person, natural or juridical, not to invoke State immunity in respect of State property or property in its possession or control or in which it has an interest, from attachment, arrest and execution, provided that the property in question, movable or immovable, intellectual or industrial:

(a) forms part of a commercial transaction or is used in connection with commercial activities, or is otherwise in use for non-public purposes unconnected with the exercise of governmental authority of the State, and

(b) is identified as being situated in the territory of the State of the forum.

2. The effect of paragraph 1 is further limited by the provisions of article 24."

223. Article 24 entitled "Types of State property permanently immune from attachment and execution",[161/] the Special Rapporteur stated, imposed certain limitations on the effectiveness of consent and was designed to protect States that might unknowingly have been led to agree in advance to allow available assets including bank accounts of their embassies or diplomatic premises to be seized without being fully aware of the extent of the resulting disruption of diplomatic relations. There were certain types of property of which the seizure might conceivably cause an outbreak of hostilities. Article 24 was, therefore, designed primarily to protect public order of inter-State relationships. He had identified five categories of property that were clearly immune from attachment and execution.

161/ The text of draft article 24 proposed by the Special Rapporteur read as follows:

"Article 24

Types of State property permanently immune from attachment and execution

1. Notwithstanding article 23 and regardless of consent or waiver of immunity the following property may not be attached, arrested or otherwise taken in forced execution of the final judgement by a court of another State:

(a) property used or intended for use for diplomatic or consular purposes or for purposes of special missions or representation of States in their relations with international organizations of universal character internationally protected by inviolability; or

(b) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of the State; or

(c) property of a central bank held by it for central banking purposes, and not allocated for any specified payments; or

(d) property of a State monetary authority held by it for monetary and non-commercial purposes, and not specifically earmarked for payments of judgement or any other debts; or

(e) property forming part of national archives of a State or of its distinct national cultural heritage.

2. Nothing in paragraph 1 shall prevent a State from undertaking to give effect to the judgement of a court of another State, or to consent to the attachment, arrest or execution of property other than the types listed in paragraph 1."

(a) General comments

224. It was generally recognized that in the present stage of international trade, both governments and private entities were operating in the production, transfer and sale of goods. There were also States that supported the conduct of foreign trade by government-owned companies and others that supported and encouraged the private sector in this area. It was further understood that such an interaction between government and private entities, which have competing interests, must result in conflicts, and that there should be a system of conflict resolution which took into account the essential interests of both sides. It was generally understood that the substance of Part IV was related to, although analytically distinct from, the conceptual approach, nature, extent and scope of jurisdictional immunity itself. In this connection, the emphasis placed in the Special Rapporteur's seventh report on the significance of consent, whether in the form of prior consent or waiver, or in the form of express or implied consent was considered significant and essential to this Part.

225. Different views were expressed as to the overall approach taken by the Special Rapporteur in Part IV and as to how successfully he had been able to balance the competing interests in Part IV of his report. In the view of some, the approach did not sufficiently take into account the principle of the sovereign equality of States and the principle that State property could not be attached without the State's consent. This view suggested that Part IV had overlooked the interest of the developing countries, where governments were obliged under their legal system to conduct trade with foreign entities. The purpose of this type of foreign trade or "commercial activity" was not, however, "profit-making" but internal development, satisfying the basic needs of their population. The commercial activities of governments in such circumstances should therefore not be treated at the same level as the commercial activities of private entities. The purpose of the activity should therefore be given a more prominent role in setting up Part IV.

226. It was also stated that as States were sovereign on their territory and outside it, and on an equal footing with other States, a State could not be made subject to another State's public authority unless it consented thereto. This view further held that since attachment or execution measures involved the use of force by the public authority of the forum State, the express consent of the defendant State was essential. Part IV, according to this view, overlooked this important principle.

227. On the other hand it was felt that Part IV, by expanding immunity to State property in respect of attachment and execution, brought a balance to the whole structure of the draft articles and the interests of developing countries and States with a different socio-economic structure were harmonized with those promoting private trade.

228. In addition, views were expressed that Part IV in general represented current State practice and the policies behind it were fair to all sides. It had clearly recognized the reality that, in all matters pertaining to a claim to State immunity, in addition to the forum State and the State that conducted commercial activity, there was a third party which could not be ignored, namely the private party wishing to pursue a claim against the foreign State and which was, or might be, frustrated by a plea of State immunity. This triangular relationship which involved the interests of the acting State, the territorial State and the private claimant should be acknowledged. It was further suggested that there was ample authority for the proposition that immunity of State property from attachment, arrest and execution was not absolute but dependent upon the uses to which the property was being or had been put.

229. It was finally stated that the realities of the present international trade had to be recognized, namely that in the present world, with States following by choice or necessity different economic and foreign trade policies in which both State and private agencies were involved, draft articles of this nature ought to take into account the interests of all the parties involved, Part IV therefore had to be pragmatic and set forth provisions that would be acceptable to most States.

230. Several concepts used in the articles of Part IV raised some concern as to their appropriateness for general application. For example, the concepts "attachment", "arrest" and "execution" might have different meanings under the domestic laws of States and could therefore be replaced by a general term, such as "judicial measures of constraint upon the use of such property, including attachment, arrest or execution". This general reference, it was felt, would also include all other measures of judicial constraint under domestic law, including certain types of interlocutory injunctions which might not be strictly considered "attachment", "arrest" or "execution".

231. The concept of "State property" also raised questions as to its exact meaning within the formula "properties in which a State has an interest". There were uncertainties as to what "interest" referred to in this context. It was explained that the concept "interest", which was equivalent to "intérêt" in French, had nothing to do with the concept of "controlling interest" in a company. The

question of the participation of a State in a company as a shareholder was a matter governed by article 18. It was felt that an example in which a State, without having ownership over it, might have an interest in a property was illustrated by the Dollfus Mieg case,[162/] which had taken place immediately after the Second World War. Another illustration was provided by the Vavasseur v. Krupp case.[163/]

232. The term "control", it was thought, could also be helpful as a criterion for determining the party that enjoys immunity, in situations where the ownership of a particular property is claimed by a de facto or a de jure government. In State practice physical control in such situations appeared to be an important if not always determinative factor.

(b) Comments on the draft articles

233. It was stated, by some, that article 21[164/] as drafted did not contribute to the overall understanding of Part IV nor did it give a comprehensive account. Furthermore, it was thought that property within the meaning of article 21 differed from State property as tentatively defined in proposed draft article 2, subparagraph 1 (f), now withdrawn by the Special Rapporteur. Article 21, it was suggested, did not provide for a variety of available modalities of execution and enforcement, for it was seemingly limited to attachment, arrest and execution by order of a "court".

234. Another view favoured having a scope article in Part IV which brought symmetry and restored equilibrium between this Part and earlier Parts. Furthermore, it was considered essential that an article such as article 21 should indicate the relationship between immunity from jurisdiction and immunity from execution.

235. The broad framework of article 22[165/] appeared acceptable. The general rule of this article, it was suggested, could be founded on the equality and sovereignty of States. In the view of some, in the absence of either a prior explicit agreement or an express waiver, the State of the forum should not dispose

---

162/ Dollfus Mieg et Cie. v. Bank of England (1950), United Kingdom, The Law Reports, Chancery Division, 1950, p. 333; also reported in Annual Digest and Reports of Public International Law Cases, 1949 (London), vol. 16 (1955), case No. 36, p. 103.

163/ United Kingdom, The Law Reports, Chancery Division, vol. IX (1878), p. 351.

164/ See note 158, above.

165/ See note 159, above.

of any means to enforce the award or judgement against the other State. Accordingly, execution was subsequent to and dependent on either the judgement requiring satisfaction or upon failure on the part of the debtor State to comply with the award. Similarly, it was thought that the principle of reciprocity was an important component of the principle of the equality of States and should be given a place in the text. Some believed that diplomatic negotiations might be regarded as one possible way of arriving at a solution before resorting to measures of execution and even before judgement had been made final.

236. As to the exceptions to immunity listed in subparagraphs (a) to (d), several suggestions were made. One found it useful to combine subparagraphs (a) and (b) to extend the requirement of consent even to attachment of property in commercial non-governmental service. It was believed this merger would give greater protection to the interest of the developing countries which have to be involved in external commercial activities. For others such a merger and the extension of consent to State property for commercial use was unacceptable, since it would provide undue protection for States even when they were engaged solely in commercial activity. Subparagraph (b) raised a number of questions. It was mentioned that this subparagraph withholds immunity in respect of property used in commercial non-governmental service, while seizure or execution in respect of the same property, under article 23, paragraph 1 (a), required the consent of the State. There was, therefore, an apparent inconsistency between the two provisions.

237. While some supported the requirement of State property in "commercial and non-governmental service" in subparagraph (b) and considered it as a positive step in protecting the interest of developing countries, others found the conjunction "and" used to link the concepts of commercial and non-governmental service unacceptable, since it would seem to allow for the possibility of extending immunity to an activity characterized as "governmental service" even though it was solely "commercial" in nature. A suggestion was made that this term be replaced by "commercial use" or "use for commercial purposes". The Special Rapporteur pointed out that the term "government and non-commercial" was used in article 3 of the Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels of 1926,[166/] while article 9 of the 1958 Geneva Convention on the High Seas[167/] referred to "government non-commercial". The 1982 United Nations Convention on the Law of the Sea[168/] used

---

166/ League of Nations, Treaty Series, vol. CLXXVI, p. 199.

167/ United Nations, Treaty Series, vol. 450, p. 11.

168/ See note 50 above.

the term "non-commercial purposes" in articles 31 and 32 and "government non-commercial" in article 236. Therefore, there was no uniformity in references to this term.

238. As to subparagraph (c), concern was expressed as to its possible relationship with nationalized property. It frequently happened that, subsequent to nationalization, former owners of such properties tried to attach them in the importing States. Such a proceeding, it was believed, could embarrass or even paralyse the economy of the State that had carried out the nationalization. The Special Rapporteur did not believe that this subparagraph could be used as a means to resolve the many delicate questions connected with nationalization. As he stated earlier in his report, this topic dealt directly with jurisdictional immunities of States and their property and did not deal with the acquisition of legal titles or the legality or illegality of State acts in the seizure of property under international law.

239. Finally it was suggested that if the terms "attachment", "arrest" and "execution" were replaced by a broader term as mentioned in paragraph 230 above, namely "judicial measures of constraint upon the use of such property, including attachment, arrest or execution", paragraph 2 of article 22 could be deleted. It was generally agreed that the article needed redrafting and could be simplified even further.

240. As to draft article 23,[169/] it was felt that the article should be limited to modalities and the effect of consent to attachment and execution, as the title suggested, and therefore the proviso at the end of paragraph 1 should be deleted. It was also suggested that the final drafting of article 23 should give due regard to the wording of article 8 dealing with express consent to the exercise of jurisdiction. In addition, in article 23, paragraph 1, it should be made clear that consent could also be given before the court.

241. Article 24[170/] generated considerable discussion as to the implied principle which it seemed to suggest. The opening clause of paragraph 1, stating "Notwithstanding article 23 and regardless of consent or waiver of immunity ..." appeared to place a limitation upon the consent which a State might give. No such limitations, it was felt, could be imposed on State sovereignty with regard to the circumstances in which a State could give its consent. Otherwise, it

---

169/ See note 160, above.

170/ See note 161, above.

seemed that the article was creating a rule bordering on jus cogens. Besides, the opening clause might also be incompatible with existing codification conventions which provided that, once a separate waiver of immunity from execution had been given, there was no restriction on the types of property that could be affected in relation to the execution. Since article 24 listed the various types of State property that could not in any circumstances be regarded as being used for commercial purposes, it might be drafted in such a way as to present its provisions as an interpretation of what constituted property used for commercial activities. It was, of course, understood that the intention of the Special Rapporteur was to avoid pressure being placed on a developing country to make it give its consent or waiver in a contract. But the opening clause, as it was drafted, posed other difficulties, namely the imposition of limitations on the sovereign power of States. Questions were raised as to whether or not certain types of property which, by their nature or because of the use to which they were put, could be regarded as unattachable; for example whether the article could include property which is deemed to be indispensable for the livelihood of a State. It was understood that this analogy was borrowed from domestic law and there might be certain difficulties in adapting it to international law.

242. The Special Rapporteur agreed that the language of the opening clause should be changed to remove any suggestion of a rule of jus cogens.

243. As for the list of types of State property that were immune from attachment and execution, there was a suggestion that the property of regional organizations should be included, in addition to that of international organizations of a universal character. The Special Rapporteur, however, pointed out that he was prepared to do so but there were some problems arising from that addition. Firstly, regional organizations were no covered by the 1975 Vienna Convention on the Representation of States.[171/] Secondly, some regional organizations had disappeared after a short existence. Thirdly, the legal personality and capacity of regional organizations were not, in every State, recognized under municipal law. For example, in Japan and Thailand, the law recognized the European Economic Community as a legal person but the legal personality of the Community was not

---

171/ See note 67, above.

fully recognized in various States. There was a general agreement that property constituting instrumentum legati or consular premises, archives, etc., should not be attached.172/

244. As for subparagraph (b), questions were raised as to the scope of "property of a military character". It seemed, it was suggested, to have a broad meaning which could cause certain difficulties. For example, it was mentioned that transactions relating to supply of cigarettes to the army of a State should not constitute, under this provision, the act of State jure imperii. The Special Rapporteur stated that he did not intend to give extensive interpretation to the concept of "property of a military character". By reference to "military authority or defence agency" he also had in mind covering, for example, the defence agency in Japan, since under its constitution that country did not have military authority.

245. It was stated that subparagraph (c) was particularly important to the developing countries that, for necessity, have to maintain a certain amount of their foreign currency reserves abroad. Points were raised as to the necessity for the qualifications set forth in paragraphs (c) and (d). Some, however, found the qualifications too narrow. It was also proposed that "property of a central bank" be replaced by "funds of a central bank" which conveyed a narrower meaning. In the view of some the property of central banks should be immune from attachment unless it was specifically placed in the bank as a security or guarantee which might then be subject to attachment or execution. Certain clarification was also requested in relation to the meaning and the scope of the property of a "State monetary authority" provided for in subparagraph (d). Suggestions were also made that subparagraphs (c) and (d) might be merged for the purposes of economy in drafting.

246. Subparagraph (e) was considered by some as essential and particularly important to the developing countries and to their efforts in protecting their national heritage. There was a proposal that "religious heritage" should be added to cultural heritage. Some reservations were also expressed regarding the scope

---

172/ For the case-law regarding attachment of embassy bank accounts, see e.g. Birch Shipping Corp. v. Embassy of the United Republic of Tanzania (1980) United States, Federal Supplement, vol. 507, pp. 311-313; Alcom Ltd. v. Republic of Colombia, judgement of 12 April 1984 of the United Kingdom House of Lords reproduced in International Legal Materials, vol. 23, p. 719, and X v. Republic of Philippines, decision 46/342 of 13 December 1977 of the Federal Constitutional Court of the Federal Republic of Germany, Materials on Jurisdictional Immunities, ... , p. 297.

of the paragraph since it seemed to cover works of artistic or historic value that were in private hands. In many countries, the State imposed restrictions upon the export of such items but without affecting their character as purely private property. Property of that kind, it was believed, should not be covered by State immunity and the article should not even imply it.

247. In the light of the discussions held in the Commission, the Special Rapporteur prepared and submitted a new title for Part IV as well as revised texts of draft articles 21 to 24 for the consideration of the Drafting Committee, which will take up these articles at the next session of the Commission in 1986.[173/]

173/ The new title of Part IV and the revised texts of draft articles 21 to 24 submitted by the Special Rapporteur for the consideration of the Drafting Committee read as follows:

"PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM ENFORCEMENT MEASURES

Article 21

Scope of the present Part

The present Part applies to the immunity of one State in respect of its property or property in its possession or control, or in which it has an interest, from judicial measures of constraint upon the use of property, including attachment, arrest and execution in connection with a proceeding before a court of another State.

Article 22

State immunity from enforcement measures

A State is immune without its consent in respect of its property or property in its possession or control, or in which it has an interest, from judicial measures of constraint upon the use of property, including attachment, arrest and execution, in connection with a proceeding before a court of another State, unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgement or any other debts.

Article 23

Effect of express consent to enforcement measures

1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint on the use of its property or property in its possession or control, or in which it has an interest, in a proceeding before

173/ (continued)

a court of another State if the property in question is located in the State of the forum and it has expressly consented to the exercise of judicial measures of constraint on the property which it has specifically identified for this purpose,

(a) by international agreement, or

(b) in a written contract, or

(c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under Part IV of the present draft articles, for which a separate waiver is required.

Article 24

Types of property generally immune from enforcement measures

1. Unless otherwise expressly and specifically agreed by the State concerned, no judicial measure of constraint by a court of another State shall be permitted on the use of the following property:

(a) property used or intended for use for diplomatic or consular purposes or for purposes of special missions or representation of States in their relations with international and regional organizations protected by inviolability;

(b) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of a State; or

(c) property of a central bank held by it for central banking purposes, and not allocated to any specific payments; or

(d) property of a State monetary authority held by it for monetary and non-commercial purposes, and not specifically earmarked for payments of judgement or any other debts; or

(e) public property forming part of national archives of a State or of its distinct national cultural heritage.

2. In no circumstances shall any property listed in paragraph 1 be regarded as property used or intended for use for commercial and non-governmental purposes."

B. Draft articles on jurisdictional immunities of States and their property

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

PART I

INTRODUCTION

Article 1

Scope of the present articles 174/

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2

Use of terms 175/

1. For the purposes of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions

...

(g) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

174/ As provisionally adopted by the Commission at its thirty-fourth session, during which the article was re-examined. For the commentary thereto, see Yearbook ... 1982, vol. II (Part Two), pp. 99-100, document A/37/10, chap. V.B. An earlier version of the article was provisionally adopted by the Commission at its thirty-second session. See ibid., note 209.

175/ The Commission adopted the text of subparagraph 1 (a) during its thirty-fourth session in the course of its discussion of article 7, dealing with the modalities for giving effect to State immunity. For the commentary to that text, see ibid, p.100. The Commission adopted the text of subparagraph (g) during its thirty-fifth session in the course of its discussion of article 12, dealing with commercial contracts. For the commentary to that text, see Official Records of the General Assembly, Thirty-eighth Session, Supplement No.10 (A/38/10), chap. III.B.2.

Article 3

Interpretative provisions 176/

...

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract.

PART II

GENERAL PRINCIPLES

Article 6

State immunity 177/

Article 7

Modalities for giving effect to State immunity 178/

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

176/ The Commission adopted the text of paragraph 2 of article 3 during its thirty-fifth session in the course of its discussion of article 12, dealing with commercial contracts. For the commentary to that text, see ibid.

177/ Article 6 as adopted provisionally at the thirty-second session read as follows:

"Article 6

State immunity

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

2. Effect shall be given to State immunity in accordance with the provisions of the present articles."

For the commentary to the article, see Yearbook ... 1980, vol. II (Part Two), pp. 141-142, document A/35/10, chap. VI.B.

Article 6 was further discussed by the Commission at the thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the thirty-fourth session, the Commission agreed to re-examine draft article 6 at its future sessions. The Drafting Committee considered article 6 briefly during the present session but, for lack of time, was unable to conclude its consideration of this article.

178/ The Commission provisionally adopted the text of this article at its thirty-fourth session. For the commentary thereto, see Yearbook ... 1982, vol. II (Part Two), pp.100-107, document A/37/10, chap. V.B.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8

Express consent to exercise of jurisdiction 179/

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court in a specific case.

Article 9

Effect of participation in a proceeding before a court 180/

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or

(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

179/ Ibid, pp. 107-109.

180/ Ibid, pp. 109-111.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10

Counter-claims 181/

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III

EXCEPTIONS TO STATE IMMUNITY 182/

Article 12

Commercial contracts 183/

1. If a State enters into a commercial contract with a foreign natural or juridical person and by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a government-to-government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

181/ The Commission provisionally adopted the text of this article at its thirty-fifth session. For the commentary thereto, see Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), chap. III.B.2.

182/ The title of this Part will be re-examined after the Commission has considered all possible exceptions.

183/ The Commission provisionally adopted the text of this article at its thirty-fifth session. For the commentary thereto, see Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), chap. III.B.2.

Article 13

Contracts of employment 184/

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority;

(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time the proceeding is instituted;

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 14

Personal injuries and damage to property 185/

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

184/ The Commission provisionally adopted the text of this article at its thirty-sixth session. For the commentary thereto, see Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), chap.IV.B.2.

185/ Ibid.

Article 15

Ownership, possession and use of property 186/

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding-up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by prima facie evidence.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

186/ The Commission provisionally adopted the text of this article at its thirty-fifth session. For the commentary thereto, see Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), chap. III.B.2.

Article 16

Patents, trade marks and intellectual or industrial property 187/

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Article 17

Fiscal matters 188/

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 18

Participation in companies or other collective bodies 189/

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum

or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

187/ The Commission provisionally adopted the text of this article at its thirty-sixth session. For the commentary thereto, see Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), chap. IV.B.2.

188/ Ibid.

189/ Ibid.

Article 19

State-owned or State-operated ships engaged in commercial service 190/

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, inter alia, any proceeding involving the determination of:

(a) a claim in respect of collision or other accidents of navigation;

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability, which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

190/ The Commission provisionally adopted the text of this article at its thirty-seventh session. For the commentary thereto, see section B.2 of this Chapter, below.

Article 20

Effect of an arbitration agreement 191/

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement,

(b) the arbitration procedure,

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

2. Text of articles 19 and 20, with commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session

PART III

EXCEPTIONS TO STATE IMMUNITY 192/

...

Article 19

State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, inter alia, any proceeding involving the determination of:

(a) a claim in respect of collision or other accidents of navigation;

191/ Ibid.

192/ The title of this Part will be re-examined after the Commission has considered all possible exceptions.

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability, which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the Government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Commentary

(1) Draft article 19 is concerned with a very important area of maritime law as it relates to the conduct of external trade. It is entitled "State-owned or State-operated ships engaged in commercial service". The expression "ship" in this context should be interpreted as covering all types of sea-going vessels, whatever their nomenclature and even if they are engaged only partially in sea-going traffic. It is formulated as a residual rule, since States can always conclude agreements or arrangements 193/ allowing, on a reciprocal basis or otherwise, for the application of jurisdictional immunities in respect of ships in commercial service owned or operated by States or their agencies.

193/ See e.g., the Protocol of 1 March 1974 to the Treaty on Merchant Navigation between the United Kingdom and the Union of Soviet Socialist Republics signed at London on 3 April 1968, United Kingdom Treaty Series No. 104 (1977); see also the treaties regarding shipping concluded between the Soviet Union and the following States: the Netherlands (17 May 1969, article 16), United Nations Treaty Series, vol. 815, p. 176; Bulgaria (3 December 1971, article 16), Netherlands Yearbook of International Law, vol. 10, pp. 173-174; Algeria (18 April 1973, article 16), ibid.; Iraq (25 April 1974, article 15), ibid.; and Portugal (20 December 1974), ibid.

(2) Paragraphs 1 to 3 are exclusively concerned with ships engaged in commercial service, paragraphs 4 and 5 are concerned with the status of cargo. Paragraph 4 enunciates the rule of non-immunity in proceedings relating to the carriage of cargo on board a ship owned or operated by a State and engaged in commercial non-governmental service. Paragraph 5 maintains State immunity in respect of any cargo carried on board the ships referred to in paragraph 2 as well as any cargo belonging to a State and used or intended for use in government non-commercial service.

(3) The difficulties inherent in the formulation of rules for the exception under article 19 are manifold. They are more than linguistic. The use of the English language presupposes the employment of terms that may be common in current usage of the common law but unknown to and have no equivalance in other legal systems. Thus, the expression "suits in admiralty", "libel in rem", "maritime lien" and "proceedings in rem against the ship," may have little or no meaning in the context of civil law or other non-common law systems. That is why the terms originally used in the earlier draft proposed by the Special Rapporteur have been replaced by those which could have a more general application.

(4) There are also conceptual difficulties surrounding the possibilities of proceedings in rem against ships, such as, by service of writs on the main mast of the ship, or by arresting the ship in port, or attaching it, and releasing it on bond. In addition, there is a special process of arrest ad fundandam jurisdictionem. In some countries it is possible to proceed against another merchant ship in the same ownership as the ship in respect of which the claim arises, on the basis of what is known as sister-ship jurisdiction for which provision is made in the Brussels International Convention relating to the Arrest of Sea-going Ships of 1952. 194/

(5) The problem of government-owned or State-operated vessels employed in ordinary commercial activities is not new. This is apparent from the vivid account given by one author 195/ and confirmed by the fact that some maritime powers felt it necessary to convene a conference to adopt the Brussels Convention for Unification of Certain Rules Relating to the Immunity of State-owned Vessels of 1926 196/ and its Protocol of 1934 197/ on the subject. The main purpose of

---

194/ United Nations, Treaty Series, vol. 439, p. 193.

195/ See e.g. G. van Slooten, "La Convention de Bruxelles sur le statut juridique des navires d'Etat", Revue de droit international et de législation compareé, 3rd series, vol. VII (1926), p. 457.

196/ League of Nations, Treaty Series, vol. CLXXVI, p. 199.

197/ Ibid., p. 214.

the 1926 Brussels Convention was to reclassify sea-going vessels not according to ownership but according to the nature of their operation (exploitation) or their use, whether in "governmental and non-commercial" or in "commercial" service.

(6) The dichotomy of service of vessels classified according to a double criterion of "commercial and non-governmental" or "governmental and non-commercial" use used by Professor Gilbert Gidel. 198/ The term "governmental and non-commercial" is used in the 1926 Brussels Convention, and the term "government non-commercial" in conventions of a universal character such as the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea in which ships are classified according to their use, i.e., governmental and non-commercial service as opposed to commercial service.

(7) Some members of the Commission expressed misgivings concerning this double criterion as it might suggest the possibility of a very different combination of the double criterion, such as "governmental commercial" service or "commercial and governmental" service. Other members, on the other hand, denied the likelihood of this interpretation, and considered that "commercial" and "non-governmental" could be taken cumulatively. Others again added that States, particularly developing countries, and other public entities could engage in activities of a commercial and governmental nature without submitting to the jurisdiction of national courts. Furthermore, the purchase of armaments was often concluded on a government-to-government (G to G) basis, including the transport of such armaments by any type of carrier, which would not normally be subject to the exercise of jurisdiction by any national court. The diversity of views led the Commission to maintain square brackets around the phrase "non-governmental" in paragraphs 1 and 4 of the draft article.

(8) Some members opposed the retention of the words "non-governmental" which appear in square brackets in paragraphs 1 and 4.

(9) While some members did not insist on retention of the words "non-governmental" which appear in square brackets in paragraphs 1 and 4, holding that the wording in paragraph 2 if adopted could also be so interpreted as to cover the situation envisaged with the addition of the adjective "non-governmental" in the square brackets, a few other members still found it useful to maintain those words.

198/ See Le droit international public de la mer (Paris, Sirey, 1932) vol. I, pp. 98-99.

(10) The words "operate" (exploiter) and "operation" (exploitation) in paragraph 1 must be understood against the background of the Brussels Convention of 1926 and of existing State practice. Both terms refer to the exploitation or operation of ships in the transport of goods and passengers by sea. The carriage of goods by sea constitutes an important subject in international trade law. Its study has been undertaken by the United Nations Commission on International Trade Law (UNCITRAL) and a model convention or legislation on maritime law or the law of carriage of goods by sea has been proposed, 199/ to serve as a model for developing countries which are contemplating national legislation on the subject. It covers a wide field of maritime activities, from organization of the merchant marine, the construction and building of a merchant fleet, the training of master and crew, the establishment of forwarding and handling agents, and the taking of marine insurance. More generally known are questions relating to the liabilities of carriers for the carriage of dangerous goods or animals, the discharge of oil off-shore away from port, collision at sea, salvage and repair, general average, seamen's wages, maritime liens and mortgages. The concept operation of merchant ships or ships engaged in commerce is given some clarification by way of illustration in paragraph 3. The expression "State-owned ships" covers also the "possession", "control", "management" and "charter" of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise.

(11) Some members expressed a reservation regarding a point in paragraph 1. The question was raised as to why a State, owning a ship but allowing a separate entity to operate it, could still be proceeded against. The answer lay in the special nature of proceedings in rem or in admiralty or maritime lien which might be provided for in some common law countries, and which were directed to all persons having an interest in the ship or cargo. In practice, a State owning a ship but not operating it should not otherwise be held liable for its operation at all, as the corporation or operating entity existed to answer for all liabilities arising out of the operation of that ship. It turned out to be the question of the choice of parties against which to bring an action. According to this view, it should be possible to allow actions to proceed relating to the operation of the ship without involving the State or its claim for jurisdictional

---

199/ See the 1978 United Nations Convention on the Carriage of Goods by Sea, Official Records of The United Nations Conference on the Carriage of Goods by Sea (United Nations publication, Sales No.E.80.VIII.1), p.148, document A/CONF.89/13, annex I.

immunity. There seemed to be no need in such a case to institute a proceeding in personam against the State owning the ship as such, particularly if the cause of action related to its operation, such as collision at sea, general average, and carriage of goods by sea. But if the proceeding related to the repairs or salvage services rendered to the ship, it might be difficult in some legal systems to imagine that the owner was not enriched by the repairs or services rendered and that the operator alone was liable. Further mutual understanding may be needed in this connection to avoid unnecessary embarrassment, such as proceeding against the State for which a more convenient defendant could be substituted, namely the entity or corporation set up for the operation of the merchant marine and purposely made answerable for whatever causes of action that could have arisen in connection with the operation or exploitation of the ship. If such an eventuality occurred, a State owning but not operating the vessel, could allow the operator to appear in its place to answer the complaint or claim made. The practice is slowly evolving in this direction through bilateral arrangements.

(12) Paragraph 2 enunciates the rule of State immunity in favour of warships and naval auxiliaries, even though such vessels may be employed occasionally for the carriage of cargoes for such purposes as to cope with an emergency or other natural calamities. Immunity is also maintained for other government ships such as police patrol boats, customs inspection boats, oceanographic survey ships, training vessels and dredgers, owned or operated by a State and used or intended for use in government non-commercial service.

(13) It is important to note that both paragraphs 1 and 2 apply to both "use" and "intention to use". This is to clarify thg application of the criterion of usage of the ship which may be either actual and current, or also eventual or intended. A ship under construction may not be in actual use but the intention of the user may be well-known or apparent, either from the fitting of the ship with loading and unloading gears or from the State agencies that order the construction, if the character of the ship, such as a transport, does not per se determine its destined use. A ship may also be put to a different use, so different as to alter its character. Thus an ordinary merchant ship may be requisitioned by a government and converted into a warship, but, before its actual commission or use as a man-of-war, attempts may be made to arrest or attach the ship intended for use as a ship of war. Such arrest or attachment would not be permitted under the test of "intended for use". Thus, the

schooner "Exchange" was not at the material time intended for use as a trading vessel but as a frigate, and therefore had to be released. 200/

(14) The adverb "exclusively" inserted between "intended" and "for use for commercial [non-governmental] purposes" raised some difficulties and doubts were expressed regarding its usefulness in this context.

(15) The expression "before a court of another State which is otherwise competent in any proceeding" is designed to refer back (renvoi) to the existing jurisdiction of the courts competent under the internal law, including maritime law, of the forum State, which may recognize a wide variety of causes of action and may allow a possible choice of proceedings such as in personam against the owner and operator or in rem against the ship itself, or suits in admiralty or actions to enforce a maritime lien or to foreclose a mortgage. A court may be competent on a variety of grounds, including the presence of the ship at a port of the forum State, and it need not be the same ship that caused damage at sea or other liabilities but a similar merchant ship belonging to the same owner. Courts in common law systems generally recognize the possibility of arrest or seizure of a sister ship also ad fundandam jurisdictionem, but once bond is posted the ship would be released and the proceedings allowed to continue. Thus, the expression "any proceeding" refers to "any type of proceeding" regardless of its nature, whether in rem, in personam, in admiralty or otherwise. The rules enunciated in paragraphs 1 and 2 are supported by State practice, both judicial and governmental, as well as by multilateral and bilateral treaties. 201/

(16) Another question was raised regarding the non-immunity rule contained in paragraph 4 as well as, to some extent, in paragraph 1 applicable to a cargo belonging to a State and used or intended for use for commercial non-governmental purposes. According to one view, it is difficult to see how property such as a ship or cargo could be State-owned and used by it for non-governmental purposes. According to this view, therefore, every use made by a State of its property must be essentially governmental and therefore not commercial.

(17) Paragraph 5 is designed to maintain immunity for any cargo, commercial or non-commercial carried on board the ships referred to in paragraph 2, as well as

---

200/ The Schooner "Exchange" v. M. Faddon and others (1812), W. Cranch, Reports of Cases argued and adjudged in the Supreme Court of the United States (New York, 1911), vol. VII, 3rd ed., pp. 135-137.

201/ See the sixth report by the Special Rapporteur, document A/CN.4/376/Add.1, paragraphs 136-230.

for any cargo belonging to a State and used, or intended for use, in government non-commercial service. This provision maintains immunity for, inter alia, cargo involved in emergency operations such as food relief or medical supplies.

(18) Paragraphs 6 and 7 apply to both ships and cargoes and are designed to strike an appropriate balance between the State's non-immunity under paragraphs 1 and 4 and certain protection to be afforded the State. Paragraph 6 reiterates the availability of measures of defence, prescription and limitation of liability for States owning and operating ships engaged in commercial service, which are open to private ships and cargoes and their owners. Paragraph 7 indicates a practical method for proving the government and non-commercial character of the ship or cargo, as the case may be, by a certificate signed in normal circumstances by the accredited diplomatic representative of the State to which the ship or cargo belongs. In the absence of an accredited diplomatic representative, a certificate signed by another competent authority such as the Minister of Transport or the consular officer concerned shall serve as evidence before the court. The communication of the certificate to the court will, of course, be governed by the applicalbe rules of procedure of the forum State.

Article 20

Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement,

(b) the arbitration procedure,

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Commentary

(1) This draft article is now entitled "Effect of an arbitration agreement" and not simply "arbitration" as previously suggested by the Special Rapporteur. The longer title is preferred to ensure greater precision. The article is based upon the concept of implied consent to the supervisory jurisdiction of a court of another State which is otherwise competent to determine questions connected with the arbitration agreement, such as the validity of the obligation to arbitrate or to go to arbitration or to compel the settlement of a difference by

arbitration, the interpretation and validity of the arbitration clause or agreement, the arbitration procedure and the setting aside of arbitral awards.

(2) The draft article was originally designed to cover arbitration of differences relating to a "civil or commercial matter". While some members of the Commission suggested the possibility of widening the scope of this exception to cover arbitration of differences other than those relating to a "civil and commercial matter", other members were more predisposed to accept this exception only if limited to differences relating to a "contract" or a "commercial contract", as defined in article 2, subparagraph 1 (g). The expressions "commercial contract" and "civil or commercial matter" have been placed in square brackets as alternative confines of the exception relating to an arbitration agreement.

(3) The expression "the court which is otherwise competent" in this context refers to the competence of a court, if any, to exercise supervisory jurisdiction under the internal law of the State of the forum, including in particular its rules of private international law, in a proceeding relating to the arbitration agreement. A court may be competent to exercise such supervisory jurisdiction in regard to a commercial arbitration for one or more reasons. It may be competent in normal circumstances because the seat of the arbitration is located in the territory of the State of the forum, or because the parties to the arbitration agreement have chosen the internal law of the forum as the applicable law of the arbitration. It may also be competent because the property being seized or attached is situated in the territory of the forum.

(4) It should be pointed out in this connection that it is the growing practice of States to create conditions more atttractive and favourable for parties to choose to have their differences arbitrated in their territory. One of the attractions is an endeavour to simplify the procedures of judicial control. Thus, the United Kingdom and Malaysia have amended their legislation regarding supervisory jurisdiction applicable to arbitration generally. The fact remains that in spite of this trend, many countries, such as Thailand and Australia, continue to maintain more or less strict judicial control or supervision of arbitration in civil, commercial and other matters, taking place within the territory of the forum State. Thus, it is possible that in a given instance the court which is otherwise competent may either decline to exercise supervisory jurisdiction or may have its jurisdiction restricted as a result of new legislation. Furthermore, the exercise of supervisory jurisdiction may have been excluded, at least in some jurisdictions, by the option of the parties to

adopt an autonomous type of arbitration, such as International Centre for Settlement of Investment Disputes (ICSID) arbitration or to regard arbitral awards as final, thereby precluding judicial intervention at any stage. The proviso "unless the arbitration agreement otherwise provides" is designed to cover the option freely expressed by the parties concerned which may serve to take the arbitration procedure out of domestic judicial control. Some courts may still insist on the possibility of supervision or control over arbitration despite the expression of unwillingness on the part of the parties. In any event, agreements to arbitrate are binding on the parties thereto although their enforcement may have to depend, at some point, on judicial participation.

(5) For reasons indicated, submission to commercial arbitration under this article constitutes an expression of consent to all the consequences of acceptance of the obligation to settle differences by the type of arbitration clearly specified in the arbitration agreement. It is merely incidental to the obligation to arbitrate undertaken by a State that a court of another State which is otherwise competent may be prepared to exercise its existing supervisory jurisdiction in connection with the arbitration agreement, including the arbitration procedure and other matters arising out of the arbitration agreement or compromissory clause.

(6) Consent to arbitration is as such no waiver of immunity from the jurisdiction of a court which would otherwise be competent to decide the dispute or difference on the merits. However, consenting to a commercial arbitration necessarily implies consent to all the natural and logical consequences of the commercial arbitration contemplated. In this limited area only, it could therefore be said that consent to arbitration by a State entails consent to the exercise of supervisory jurisdiction by a court of another State, competent to supervise the implementation of the arbitration agreement.

(7) It is important to note by way of commentary that the draft article refers to "arbitration agreement" between a State and a foreign natural or juridical person and not between States themselves or between States and international organizations. Also excluded from this article are the types of arbitration provided by treaties between States or binding upon States to settle differences between themselves and nationals of other States such as the 1965 ICSID Convention 202/ which is self contained and autonomous, with provisions for

---

202/ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, Treaty Series, vol. 575, p.159.

execution of the awards. This does not prevent States and international organizations from concluding arbitration agreements which may entail consequences of submission to the supervisory jurisdiction of the forum State.

(8) It should also be added that of the several types of arbitration available to States as pacific means of settling various categories of disputes, only the type between States and foreign natural and juridical persons is contemplated in this article. They may take any form, such as arbitration under international Chamber of Commerce or UNCITRAL rules or other institutionalized or ad hoc commercial arbitration. Submission of an investment dispute to an ICSID arbitration, for instance, is not submission to the kind of comercial arbitration envisaged in this draft article and can in no circumstances be interpreted as waiver of immunity from the jurisdiction of a court which is otherwise competent to exercise supervisory jurisdiction in connection with a commercial arbitration, such as an International Chamber of Commerce (ICC) arbitration or an arbitration under the aegis of the American Arbitration Association (AAA). 203/

(9) The article in no way seeks to add to or detract from the existing jurisdiction of the courts of any State nor to interfere with the role of the judiciary in any given legal system in the judicial control and supervision which it may be expected or disposed to exercise, to ensure the good morals and public order in the administration of justice necessary to implement arbitral settlement of differences. It is only correct in this narrow sense to state that submission to commercial arbitration by a State entails an implied acceptance of the supervisory jurisdiction of a court of another State otherwise competent in matters relating to the arbitration agreement.

203/ See, e.g., The Matter of Arbitration Between Maritime Nominees Establishment (MINE) v. the Republic of Guinea, (United States of America, intervenor) (1981), Federal Reporter, 2nd Series, vol. 693, p. 1094; also reproduced in Materials on jurisdictional immunities ... p. 524.

CHAPTER VI

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

A. Introduction

248. The topic entitled "Relations between States and international organizations" has been studied by the International Law Commission in two parts. The first part, relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session, in 1971, when it adopted a set of draft articles and submitted them to the General Assembly.[204]

249. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference which was convened in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[205]

250. At its twenty-eighth session, in 1976, the Commission then commenced its consideration of the second part of the topic, namely "Relations between States and international organizations", which deals with the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States.[206]

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

252. The first (preliminary) report was submitted by the Special Rapporteur to the International Law Commission at its twenty-ninth session, in 1977.[207] At the conclusion of its debate, the Commission authorized the Special Rapporteur to continue his study of the second part of the topic along the lines indicated in the preliminary report. The Commission also agreed that the Special Rapporteur should seek additional information and expressed the hope that he would carry out research in the normal way, including investigations into the agreements and practices of international organizations, whether within or outside the United Nations family, and also the legislation and practice of States. These

---

204/ Yearbook ... 1971, vol. II (Part One), pp. 284-338, document A/8410/Rev.1, chap. II.C.

205/ See note 67, above.

206/ Yearbook ... 1976, vol. II (Part Two), p. 164, document A/31/10, para. 173.

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

conclusions of the Commission regarding its work on the second part of the topic were subsequently endorsed by the General Assembly in paragraph 6 of its resolution 32/151 of 19 December 1977.

253. Pursuant to the authority to seek additional information to assist the Special Rapporteur and the Commission, the Legal Counsel of the United Nations, by a letter of 13 March 1978, addressed to the heads of the specialized agencies and IAEA, circulated a questionnaire aimed at eliciting information concerning the practice of the specialized agencies and IAEA relating to the status, privileges and immunities of such organizations, their officers, experts and other persons engaged in their activities, not being representatives of States. The replies to the questionnaire were intended to supplement the information gathered from a similar questionnaire circulated to the same organizations on 5 January 1965, which formed the basis of a study prepared by the Secretariat in 1967 entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".[208/]

254. The former Special Rapporteur on the topc submitted his second report to the Commission at its thirtieth session, in 1978.[209/]

255. The Commission discussed the second report of the Special Rapporteur at its 1522nd, 1523rd and 1524th meetings. Among the questions raised in the course of the discussion were: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by Governments for the express purpose of engaging in operational - and sometimes even commercial - activities, and difficulty of applying to them the general rules of international immunities; relationship between the privileges and immunities of international organizations and their responsibilities; responsibility of States to ensure respect by their nationals of their obligations as international officials; need to study the case law of national courts in the sphere of international immunities; need to define the legal capacity of international organizations at the level of both internal and international law; need to study the proceedings of committees on host country relations, such as that functioning

---

208/ Yearbook ... 1967, vol. II, document A/CN.4/L.118 and Add.1 and 2.

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

at the Headquarters of the United Nations in New York; need to analyse the relationship between the scope of the privileges and immunities of the organizations and their particular functions and objectives.

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

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

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

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

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

257. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz-González, Special Rapporteur for the present topic to succeed Mr. Abdullah El-Erian, who had resigned on his election to the International Court of Justice.[210/]

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

259. The Commission resumed its consideration of the topic at its thirty-fifth session on the basis of a preliminary report (A/CN.4/370 and Corr.1) submitted by the new Special Rapporteur.

210/ Yearbook ... 1979, vol. II (Part Two), p. 189, document A/34/10, para. 196.

260. In the preliminary report, the Special Rapporteur gave a concise history of the work so far done by the Commission on the topic, indicating the major questions which had been raised during the discussions on the previous reports;[211] and outlining the major decisions taken by the Commission concerning its approach to the study of the topic.[212]

261. The report was designed to offer an opportunity to the Commission in its present enlarged membership and especially its new members, to express views, opinions and suggestions on the lines the Special Rapporteur should follow in his study of the topic, having regard to the issues raised and the conclusions reached by the Commission during the discussion of the two previous reports mentioned above.

262. The Commission considered the Special Rapporteur's preliminary report at its 1796th to 1799th meetings. It emerged from the discussion that nearly all the members of the Commission were in agreement with the conclusions endorsed by the Commission at its thirtieth session, in 1978 (see para. 255 above), and referred to by the new Special Rapporteur in his report.

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

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

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

(b) this work should proceed with great prudence;

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

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

---

[211] As summarized in para. 255, above. See also A/CN.4/370 and Corr.1, para. 9.

[212] As outlined in para. 256, above. See also A/CN.4/370 and Corr.1, para. 11.

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

(f) The Legal Counsel of the United Nations should be requested to send the legal counsels of regional organizations a questionnaire similar to that circulated to the legal counsels of the specialized agencies and IAEA, with a view to gathering information of the same kind as that acquired through the two questionnaires sent to the United Nations specialized agencies and IAEA in 1965 and 1978.

B. Consideration of the topic at the present session

265. At its thirty-seventh session the Commission had before it the second report submitted by the Special Rapporteur (A/CN.4/391 and Add.1 and Add.1/Corr.1 (Spanish only) and Add.1/Corr.2 (English only)). In his second report, the Special Rapporteur examined the question of the notion of an international organization and possible approaches to the scope of the future draft articles on the topic, as well as the question of the legal personality of international organizations and the legal powers deriving from it. Regarding the latter question, the Special Rapporteur proposed to the Commission a draft article with two alternatives in its presentation.213/ The Commission also had before it a

213/ The draft article as presented by the Special Rapporteur read as follows:

"Title I

Legal personality

1. International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

(a) contract;

(b) acquire and dispose of movable and immovable property; and

(c) institute legal proceedings.

2. The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization."

[The Special Rapporteur presented two alternatives with regard to the two paragraphs reproduced above: to consider both paragraphs as part of draft article 1 or to consider them as two separate draft articles, namely, draft articles 1 and 2.]

supplementary study prepared at the Commission's request[214] by the Secretariat, on the basis of replies received to the questionnaire sent by the United Nations Legal Counsel to the legal counsels of the specialized agencies and IAEA, on the practice of such organizations concerning their status, privileges and immunities (A/CN.4/L.383 and Add.1-3).

266. The Commission considered the topic at its 1925th to 1929th meeting centring its discussion around the matters dealt with by the Special Rapporteur in his second report.

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

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

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

(c) the Commission looks forward to the report which the Special Rapporteur has expressed an intention to present at the Commission's next session;

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

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

(f) it would be useful if the Secretariat could submit to the members of the Commission at its next session copies of the replies to the questionnaire referred to in paragraph 264 (f), above.

214/ See para. 264 (e), above.

CHAPTER VII

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction

268. The Commission included the topic of "The law of the non-navigational uses of international watercourses" in its general programme of work at its twenty-third session, in 1971,[215] in response to the recommendation at the General Assembly in resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report on legal problems relating to the non-navigational uses of international watercourses prepared by the Secretariat.[216] At that session, the Commission set up a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, chaired by Mr. Richard D. Kearney. The Sub-Committee submitted a report[217] which proposed the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee during the same session and also appointed Mr. Kearney as Special Rapporteur for the topic.[218]

269. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States[219] to the questionnaire[220] which had been circulated to Member States by the Secretary-General, as well as a report submitted by Mr. Kearney.[221] At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from

---

215/ See Yearbook ... 1971, vol. II, (Part One), p. 350, document A/8410/Rev.1, para. 120.

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

217/ Ibid., vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex.

218/ Ibid., p. 301, para. 159.

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

220/ The final text of the questionnaire, as communicated to Member States, is set forth in the report of the International Law Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), para. 262, as well as in Yearbook ... 1976, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

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

Governments dealt with in the report submitted by the Special Rapporteur, concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The Commission's consideration of the topic at that session "led to general agreement ... that the question of determining the scope of the term 'international watercourses' need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses."[222/]

270. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel as Special Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission. [223/] Mr. Schwebel made a statement to the Commission in 1978 and, at the thirty-first session of the Commission in 1979, presented his first report,[224/] which contained 10 draft articles. At that session the Commission held a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole.

271. Mr. Schwebel submitted a second report containing six draft articles at the Commission's thirty-second session in 1980.[225/] At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted draft articles 1 to 5 and article X, which read as follows:

Article 1

Scope of the present articles

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

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

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

223/ Yearbook ... 1977, vol. II (Part Two), p. 124, document A/32/10, para. 79.

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

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

Article 2

System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

Article 3

System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Article 4

Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Article 5

Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory or one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

...

Article X

Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present article do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

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

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

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

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

273. In its report to the General Assembly on the work of its thirty-second session, the Commission drew attention to the fact that, from the outset of its work on the topic it has recognized the diversity of international watercourses, in terms of both their physical characteristics and the human needs they serve. It also noted, however, that the existence of certain common watercourse characteristics had been recognized, and that it is possible to identify certain principles of international law already existing and applicable to international watercourses in general. Mention was made in this regard of such concepts as the principle of good neighbourliness and sic utere tuo ut alienum no laedas, as well as the sovereign rights of riparian States.

274. By resolution 35/163 of 15 December 1980, the General Assembly, noting with appreciation the progress made by the Commission in the preparation of draft articles on international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

275. The Commission did not consider the topic at its thirty-third session in 1981 due to the resignation from the Commission of the Special Rapporteur upon his election to the International Court of Justice. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.[226/] Also at that session the third report[227/] of the former Special Rapporteur was circulated, Mr. Schwebel having begun its preparation prior to his resignation from the Commission.

276. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen (A/CN.4/367 and Corr.1). It contained a tentative draft convention, the purpose of which was to serve as a basis of discussion, consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the term "international watercourse system" and that of an international watercourse system as a shared natural resource.

226/ Yearbook ... 1982, vol. II (Part Two), p. 121, document A/37/10, para. 250.

227/ Ibid., vol. II (Part One), p. 65, document A/CN.4/348.

That report contained inter alia, the following proposed draft articles: "Equitable participation" (article 6); "Equitable use determination" (article 7); "Responsibility for appreciable harm" (article 7); "Information and data collection, processing and dissemination" (article 9); "Environmental protection and pollution" (article 10); "Prevention and mitigation of hazards" (article 11); "Regulation of international watercourses" (article 12); "Water resources and installation safety" (article 13); "Denial of inherent use preference" (article 14); "Administrative management" (article 15); and "Principles and procedures for the avoidance and settlement of disputes" (article 16).

277. At the thirty-sixth session the Commission had before it the second report submitted by the then Special Rapporteur (A/CN.4/381 and Corr.1 and Corr.2 (French only)). It contained a revised draft of a convention on the law of the non-navigational uses of international watercourses. The draft consisted of 41 draft articles arranged in six chapters as follows:

"Chapter I.	Introductory articles
Article 1.	Explanation (definition) of the term 'international watercourse' as applied by the present (draft) convention
Article 2.	Scope of the present articles
Article 3.	Watercourse States
Article 4.	Watercourse agreements
Article 5.	Parties to the negotiation and conclusion of watercourse agreements
Chapter II.	General principles, rights and duties of watercourse States
Article 6.	General principles concerning the sharing of the waters of an international watercourse
Article 7.	Equitable sharing in the uses of the waters of an international watercourse
Article 8.	Determination of reasonable and equitable use
Article 9.	Prohibition against activities with regard to an international watercourse causing appreciable harm to other watercourse States
Chapter III.	Co-operation and management in regard to international watercourses
Article 10.	General principles of co-operation and management
Article 11.	Notification to other watercourse States. Contents of notification.
Article 12.	Time-limits for reply to notifications
Article 13.	Procedures in case of protest
Article 14.	Failure of watercourse States to comply with the provisions of articles 11 to 13
Article 15.	Management of international watercourses. Establishment of commissions

Article 15 bis.	Regulation of international watercourses
Article 15 ter.	Use preferences
Article 16.	Collection, processing and dissemination of information and data
Article 17.	Special requests for information and data
Article 18.	Special obligations in regard to information about emergencies
Article 19.	Restricted information
Chapter IV.	Environmental protection, pollution, health hazards, natural hazards, safety and national and regional sites
Article 20.	General provisions on the protection of the environment
Article 21.	Purposes of environmental protection
Article 22.	Definition of pollution
Article 23.	Obligation to prevent pollution
Article 24.	Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution
Article 25.	Emergency situations regarding pollution
Article 26.	Control and prevention of water-related hazards
Article 28.	Safety of international watercourses, installations and constructions, etc.
Article 28 bis.	Status of international watercourses, their waters, constructions, etc. in armed conflicts
Article 30.	Establishment of international watercourses or parts thereof as protected national or regional sites
Chapter V.	Peaceful settlement of disputes
Article 31.	Obligation to settle disputes by peaceful means
Article 31 bis.	Obligations under general, regional or bilateral agreements or arrangements
Article 32.	Settlement of disputes by consultations and negotiations
Article 33.	Enquiry and mediation
Article 34.	Conciliation

Article 35.	Functions and tasks of the Conciliation Commission
Article 36.	Effects of the report of the Conciliation Commission. Sharing of costs
Article 37.	Adjudication by the International Court of Justice, another international court or a permanent or *ad hoc* arbitral tribunal
Article 38.	Binding effect of adjudication
Chapter VI.	Final provisions
Article 39.	Relationship to other conventions and international agreements"

278. The Commission considered the second report at its 1831st, 1832nd, 1853rd to 1857th, 1859th and 1860th meetings. On the suggestion of the Special Rapporteur, the Commission focused its discussion on draft articles 1 to 9 and questions related thereto. Particular attention was given to the issues of the general approach suggested by the Special Rapporteur. The elimination from the draft articles of the "system" concept, and the replacement in the Special Rapporteur's proposed text of draft article 6 of the words "the watercourse system and its waters are ... a shared natural resource" with the words "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". A summary of the main trends of the debate on these issues, as well as other aspects of the second report, was included in the report of the Commission on the work of its thirty-sixth session for the information of the General Assembly.[228/] At the conclusion of its consideration of the topic the Commission decided to refer to the Drafting Committee draft articles 1 to 9 contained in the second report, for consideration in the light of the debate.[229/] Owing to a lack of time, the Drafting Committee was unable to consider those articles at the 1984 session.

228/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), Chap. VI.

229/ It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its 1980 session (see para. 272, above), the text of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see para. 271, above) as well as the text of articles 1 to 9 proposed by the Special Rapporteur in his first report (see Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10), notes 227-232).

B. Consideration of the topic at the present session

279. At the present session the Commission, at its 1910th meeting on 25 June 1985, appointed Mr. Stephen C. McCaffrey as Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, due to the resignation from the Commission of Mr. Jens Evensen upon his election to the International Court of Justice. The Commission also requested the new Special Rapporteur to prepare a preliminary report indicating the status of the topic to date and lines of further action.

280. The new Special Rapporteur accordingly submitted a preliminary report (A/CN.4/393) which reviewed the Commission's work on the topic to date, emphasizing the discussion thereof in the Commission and the Sixth Committee in 1984, and indicated his preliminary views as to the general lines along which the Commission's work on the topic could proceed.

281. The Special Rapporteur's recommendations in relation to further work on the topic were: first, that draft articles 1 to 9 which had been referred to the Drafting Committee in 1984 be taken up by that Committee at the 1986 session and not be subjected to another general debate in plenary session; and second, that the Special Rapporteur follow the general organizational structure provided by the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic (see para. 277, above).

282. With regard to his first recommendation, the Special Rapporteur noted that it would seem appropriate that he provide in his next report a concise statement of his views concerning the articles referred to the Drafting Committee in 1984. He suggested that the Commission's work might be most effectively expedited if in 1986, any discussion in plenary of the issue covered by these articles were directed, in principle, to any responses there may be to the views expressed on them in the Special Rapporteur's next report.

283. In relation to this second recommendation, the Special Rapporteur noted that the outline, if not all of the draft articles, proposed by the previous Special Rapporteur seemed broadly acceptable as a general framework and basis for future work. He therefore proposed to follow, for the time being at least, the general organizational structure provided by the outline in elaborating further draft articles. Since all of the articles contained in chapters I and II of the outline had been referred to the Drafting Committee in 1984, the next issues to be addressed would be those covered by chapter III. Accordingly, the Special Rapporteur indicated his intention to take up at least some of those issues and to

seek to present in his next report a set of draft articles on them which would be of manageable size and scope. However, he also indicated his readiness to include in his next report any observations or proposals in relation to other specific issues which the Commission, as a result of its discussion of the topic at its 1985 session, might request him to offer.

284. The Commission at its present session considered the preliminary report of the new Special Rapporteur at its 1928th meeting.

285. There was general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed with the work on the topic.

286. Members of the Commission generally expressed support for and confidence in the Special Rapporteur's intention, indicated in his preliminary report, to build as much as possible on the progress already achieved, aiming at further concrete progress in the form of the provisional adoption of draft articles.

287. Emphasis was placed on the importance of continuing with the work on the topic with minimum loss of momentum, in light of the need to complete the work on the topic in the shortest time possible. It was recognized that the Commission must make every effort to reach acceptable solutions, especially in view of the urgency of the problems of fresh water, which were among the most serious confronting mankind.

288. At the same time, it was recognized that the subject was a difficult and sensitive one and that the Commission's task was to find solutions that were fair to all interests and thus generally acceptable. Confidence was, however, expressed that the Commission, with the assistance of the new Special Rapporteur, would be able to bring its work on the topic to an early, speedy and successful conclusion without a break in continuity.

289. Attention was drawn to the fact that no consensus had been reached in 1984 on some of the major issues raised by articles 1 to 9 which had been referred to the Drafting Committee in that year and that further discussion on them was needed. In that connection it was noted that the Special Rapporteur had indicated his intention to provide in his next report, a concise statement of his views on the major issues raised by articles 1 to 9.

290. In his summing up, the Special Rapporteur expressed his appreciation to members of the Commission for their support and approval of his proposals concerning the future course of the Commission's work on the law of the non-navigational uses of international watercourses. He confirmed his intention to proceed along the lines indicated in his preliminary report and endorsed by the Commission, with a view to expediting progress on the topic in a practical and efficient manner.

CHAPTER VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

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

291. The Commission reviewed the situation arising from the untimely death of the Special Rapporteur on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", Mr. Robert Quentin Quentin-Baxter. The Commission appointed Mr. Julio Barboza as Special Rapporteur on that topic at its 1910th meeting on 25 June 1985 and requested him to prepare a preliminary report indicating the status of the work done so far on the topic and the lines on which he intended to proceed with the topic.

292. The new Special Rapporteur submitted his preliminary report (A/CN.4/394) to the Commission. The Commission noted the report with appreciation, but could not discuss it at the present thirty-seventh session. The Commission expressed the hope that the Special Rapporteur may wish to present a new report, which along with his preliminary report, will be discussed by the Commission at its thirty-eighth session in 1986.

B. Programme and methods of work of the Commission

293. The Planning Group of the Enlarged Bureau of the Commission was established by the Commission at its 1893rd meeting on 4 June 1985, to review the programme and methods of work of the Commission.

294. The Planning Group was composed of Mr. Khalafalla El Rasheed Mohamed-Ahmed (Chairman), Mr. Riyadh Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Leonard Diaz-Gonzalez, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. Chafic Malek, Mr. Abdul G. Koroma, Mr. Frank X. Njenga, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Nikolai A. Ushakov.

295. The Planning Group held three meetings on 6 and 27 June and 12 July 1985, and considered questions relating to the organization of the work of sessions of the Commission, the Drafting Committee, documentation and other matters.

296. The Enlarged Bureau considered the report of the Planning Group on 19 July 1985. On the basis of proposals made by the Planning Group, the Enlarged Bureau recommended to the Commission that paragraphs 297 to 306 below be included in the report of the Commission to the General Assembly. This recommendation was adopted by the Commission at its 1933rd meeting on 23 July 1985.

297. Organization of work of sessions of the Commission. The Commission confirmed the view it had expressed in its report on the work of its thirty-sixth session[230/] that it should, in so far as possible and in the light of all relevant factors and allowing also for the necessary flexibility, consider at each session how available time could best be allocated between the topics on its current programme, having regard in particular to the topics on which most progress could be achieved before conclusion of its present term of membership in 1986. The Commission recognized, nevertheless, as it had also done last year, that all topics on the present programme of the Commission may need to be considered, however briefly, at an annual session of the Commission.

298. The Commission decided that, at its thirty-eighth session, it should continue its work on all the topics on its current programme, but in doing so bear in mind the clear desirability of its achieving as much progress as possible in the preparation of draft articles on specific topics, before the conclusion of the present five-year term of membership in the Commission in 1986.

299. In this connection, the Commission hopes to complete, before conclusion of the present term of membership, the first reading of draft articles on two topics, namely "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and "Jurisdictional immunities of States and their property". The Commission also acknowledges that it would be highly desirable to complete a first reading of Part Two and Part Three of the draft articles on "State responsibility". The Commission will make every effort to achieve these goals.

300. Drafting Committee. The Commission, having in view the number of draft articles already referred and likely to be referred to the Drafting Committee, emphasized the importance of the Drafting Committee being convened as early as possible in the course of a session of the Commission. The Commission noted with appreciation that, at its present session, the Drafting Committee was established and convened its first meeting early in the session and had reduced its backlog from previous sessions of the Commission. The Commission is of the view that the practice of the earliest possible establishment and convening of the Drafting Committee should be followed at future sessions of the Commission, in order to enable the Drafting Committee to deal with draft articles referred to it at that

---

230/ Official Records of the General Assembly, Thirty-ninth session, Supplement No. 10 (A/39/10), para. 386.

particular session as well as any other draft articles left pending. The Commission also wished to note, as it had done at its thirty-sixth session, that it is open to the Commission as well as the Drafting Committee, if they deem it appropriate, to establish a working group for consideration of a particular matter, as had actually on occasion been done in the past on an ad hoc basis.

301. Documentation. The Commission expressed appreciation for the efforts made by the Special Rapporteurs to complete their reports for the Commission as early as possible, and for the efforts made by the Secretariat to have all pre-session documentation distributed to the members of the Commission in due time. The Commission wished, however, to reiterate the great importance of early submission of the reports of the Special Rapporteurs and the early distribution of all pre-session documentation, as far in advance of the commencement of a session of the Commission as possible. The Commission welcomed the readiness of the Secretariat to continue to examine ways in which the distribution of pre-session documents to members of the Commission might be expedited further.

302. The Commission noted with appreciation that, following special efforts by the Secretariat, including in particular the United Nations Department of Conference Services, the summary records of discussions in the Sixth Committee of the General Assembly in 1984 relating to the report of the Commission had been issued early. This had enabled the Codification Division of the Office of Legal Affairs to prepare and make available to members of the Commission a most helpful topical summary[231/] of the discussions at an early date. The Commission wishes to emphasize the importance of such a practice being maintained in the future, both with a view to facilitating the work of the Special Rapporteurs as well as from the point of view of enabling all members of the Commission to undertake necessary studies prior to the convening of a session of the Commission.

303. The Commission noted that there were delays in the publication of the Yearbook of the International Law Commission owing to causes of a technical nature. The Commission wishes to draw attention to the fact that the summary records of the annual sessions of the Commission, the reports of the Special Rapporteurs and studies prepared for the Commission by the Secretariat appear in final form only in the Yearbook. Thus, delays in the publication of the Yearbook entail delays in the availability of such materials to the Commission, the Sixth Committee of the General Assembly, States Members of the United Nations and others

---

231/ A/CN.4/L.382.

following the work of the Commission. The Commission was particularly concerned at the delay of almost two years in publication of volume II (Part One) of the Yearbook, which seemed to the Commission rather excessive, and wished the Secretariat to consider how such delay could as far as possible be reduced.

304. The desirability of an updating and re-issuance of the United Nations publication "The Work of the International Law Commission"[232/] was considered by the Commission. The publication contained brief histories of the topics considered by the Commission, as well as the texts of drafts prepared by the Commission and of conventions adopted on the basis of drafts prepared by the Commission. The publication had proved, in the Commission's opinion, an extremely useful work of reference. The Commission requested the Secretariat to examine the possibility of having the publication, which was presently in its third (1980) edition, updated and re-issued as soon as possible.

305. Other matters. The Commission expressed appreciation to the Codification Division of the United Nations Office of Legal Affairs for the valuable assistance provided by the Division in the preparation of background studies and pre-session documentation, the servicing of sessions of the Commission and the compilation of post-session documentation. The Commission also expressed its appreciation to the other Offices of the Secretariat, in particular the Department of Conference Services, for all the unfailing assistance provided to the Commission at the present session.

306. The Commission agreed that it should continue at future sessions to keep on its agenda the review of the status of its programme and methods of work.

B. Co-operation with other bodies

1. Arab Commission for International Law

307. The Arab Commission for International Law was represented at the thirty-seventh session of the Commission by Mr. Iyadh Ennaifer of the Legal Department of the League of Arab States. Mr. Ennaifer addressed the Commission at its 1931st meeting on 19 July 1985.

308. Mr. Ennaifer in his statement referred to the work of the Arab Commission for International Law and noted that it was also concerned with certain subjects that were being considered by the International Law Commission such as: jurisdictional immunities of States and their property, the draft Code of Offences against the Peace and Security of Mankind, the law of non-navigational uses of

---

232/ United Nations publication, Sales No. E.80.V.11.

international watercourses, and relations between States and international organizations. The procedure followed by the Arab Commission for International Law included the appointment of a Special Rapporteur for each subject under consideration and it was on the basis of the reports of the Special Rapporteurs that substantive discussions took place. The recommendations of the Arab Commission for International Law were submitted to the Council of the League of Arab States. The work of the Arab Commission for International Law was of assistance to Governments members of the League of Arab States in preparations for discussions at the General Assembly of the United Nations and at international legal conferences. The harmonization of national legislation of countries members of the League of Arab States was one of the objectives of the work of the Arab Commission for International Law. Such work included, for example, the necessary harmonization of national laws in the light of the provisions of the United Nations Convention on the Law of the Sea. Co-operation with the International Law Commission was a matter to which, Mr. Ennaifer stated, the Arab Commission for International Law attached great importance.

2. Asian-African Legal Consultative Committee

309. The Commission was represented at the February 1985 session of the Asian-African Legal Consultative Committee in Kathmandu by Mr. Sompong Sucharitkul who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission.

310. The Asian-African Legal Consultative Committee was represented at the thirty-seventh session of the Commission by the Secretary-General of the Committee, Mr. B. Sen. Mr. Sen addressed the Commission at its 1903rd meeting on 14 June 1985.

311. Mr. Sen in his statement to the Commission recalled developments in the membership and activities of the Committee since the Committee's establishment in 1956 following the Asian-African conference in Bandung. The membership of the Committee, composed initially of seven countries, had he noted grown over the years to the present membership of 40 countries with two permanent observers. The work of the Committee had, until 1967, been confined to matters of a strictly legal consultative nature. The newly independent countries members of the Committee had needed advice on the formulation of policies on a variety of legal subjects, including: diplomatic relations; sovereign immunities; extradition; status of aliens; dual nationality; enforcement of foreign judgements; refugees; international rivers; and State responsibility. The Committee was also required to consider subjects that were before the International Law Commission

and thus a co-operative relationship between the Commission and the Committee had been established. Over the period 1968 to 1979 the emphasis of the Committee's activities moved to assisting its member countries in preparations for international conferences including the Third United Nations Conference on the Law of the Sea and the United Nations Conference on the Environment. The Committee, in the years following 1980 when it was accorded observer status at the General Assembly, began to assist its member countries in the field of economic co-operation and in matters of co-operation with the United Nations and its organs such as UNCTAD, UNIDO and UNCITRAL, as well as the World Bank. The Committee had prepared standard commodity contracts, made contributions to UNCTAD meetings on shippings, and had worked with UNCITRAL. The Committee had assisted in meetings of a promotional nature between investors and prospective countries for investment. The Committee valued its co-operative relationship with the Commission, Mr. Sen stated, and each year prepared for its member countries notes and comments on questions before the Sixth Committee of the General Assembly, including the report of the Commission. While all topics under consideration by the Commission were clearly of importance and of great interest to the Committee, the Committee was particularly interested in the law of the non-navigational uses of international watercourses and the jurisdictional immunities of States and their property. The Committee looked forward to the Commission's adoption of draft articles on these two topics.

312. The Commission, having a standing invitation to send an observer to sessions of the Asian-African Legal Consultative Committee, requested its Chairman, Mr. Satya Pal Jagota, to attend the next session of the Committee or, if he is unable to do so, to designate another member of the Commission for the purpose.

3. European Committee on Legal Co-operation

313. The Commission was represented at the November 1984 meeting of the European Committee on Legal Co-operation in Strasbourg by Sir Ian Sinclair who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission.

314. The European Committee on Legal Co-operation was represented at the thirty-seventh session of the Commission by the Deputy Director of the Legal Division of the Council of Europe, Mr. Ferdinando Albanese. Mr. Albanese addressed the Commission at its 1915th meeting on 1 July 1985.

315. Mr. Albanese in his statement to the Commission noted that the European Committee on Legal Co-operation, which had prepared the European Convention on State Immunity, was interested in the work of the Commission on the topic of

jurisdictional immunities of States and their property. The European Convention on State Immunity had entered into force on 11 June 1976 and there were six States parties to the Convention. An additional Protocol to the Convention, providing procedures for settlement of disputes concerning enforcement of a judgement against a State party to the Protocol and the interpretation and application of the Protocol, had entered into force on 22 May 1985 and had been ratified by five States. The Committee had also completed preparation of a draft of a European Convention on Recognition of the Legal Personality of International Non-Governmental Organizations. The purpose of the Convention was to facilitate the work of non-governmental organizations at the international level. A number of questions of public international law were also under consideration in the Committee's Group of Experts on Public International Law. These questions included the study of: reciprocity in application of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations; the multilateral treaty making process; the question of succession of States in respect of State property, archives and debts which had been the subject of a conference of plenipotentiaries in 1983; and the draft international convention against the recruitment, use, financing and training of mercenaries, which was under study by an ad hoc committee of the United Nations. The Group of Experts will also be examining matters that are likely to arise at the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations. The Committee wished to co-operate as much as possible with the International Law Commission and the United Nations. The Committee's work in the legal field was undertaken not only in the interests of States mambers of the Council of Europe, but also for the international community as a whole because regional activities in the legal field eventually facilitated the work of the United Nations in the progressive development of international law and its codification.

316. The Commission, having a standing invitation to send an observer to sessions of the European Committee on Legal Co-operation, requested its Chairman, Mr. Satya Pal Jagota, to attend the next session of the Committee, or, if he is unable to do so, to designate another member of the Commission for the purpose.

4. Inter-American Juridical Committee

317. The Commission was represented at the January 1985 session of the Inter-American Juridical Committee in Rio de Janeiro by Mr. Alexander Yankov who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission.

318. The Inter-American Juridical Committee was represented at the thirty-seventh session of the Commission by Mr. Manuel A. Vieira, member of the Inter-American Juridical Committee. Mr. Vieira addressed the Commission at its 1908th meeting on 22 June 1985.

319. Mr. Vieira in his statement to the Commission noted that the work of the Inter-American Juridical Committee included matters of private international law as well as matters of public international law. The Committee's work in the codification of private international law had been substantial and had led to the adoption, within the last 10 years, of 18 treaties. The Committee had in the field of public international law recently completed its preparation of drafts of two international conventions: a draft Inter-American Convention Prohibiting the Use of Certain Weapons and Methods of Combat and a draft Convention on Disaster Relief. The Committee had, further, at the request of the General Assembly or other organs of the Organization of American States (OAS) undertaken studies or given opinions on a number of questions of public international law and other legal matters. These included: a study of possible amendment of the OAS Charter, the Pact of Bogota and the Inter-American Treaty of Reciprocal Assistance; a study of the question of coercive measures of an economic and political character under article 19 of the OAS Charter; a study of procedures for peaceful settlement of disputes under the OAS Charter as well as possible steps for their promotion, updating and extension; a review of principles, other than those included in the OAS Charter, that should govern relations between States; preparation of a catalogue on the interpretation and application of the provisions of the OAS Charter by the organs of OAS; encouragement of OAS member States to participate in measures against drug abuse; and collection of information on progress made by OAS member States in the development of their judicial systems. The Committee had conducted an annual course in international law which had, this year, included a special tribute to the United Nations in honour of the fortieth anniversary of the signature of the United Nations Charter. Mr. Vieira emphasized the importance the Inter-American Juridical Committee placed on its co-operative relationship with the International Law Commission and the care with which the work of the Commission was followed by the Committee.

320. The Commission, having a standing invitation to send an observer to sessions of the Inter-American Juridical Committee, requested its Chairman, Mr. Satya Pal Jagota, to attend the next session of the Committee or, if he is unable to do so, to designate another member of the Commission for the purpose.

D. Date and place of the thirty-eighth session

321. The Commission decided to hold its next session at the United Nations Office at Geneva from 5 May to 25 July 1986.

E. Representation at the fortieth session of the General Assembly

322. The Commission decided that it should be represented at the fortieth session of the General Assembly by its Chairman, Mr. Satya Pal Jagota.

F. Gilberto Amado Memorial Lecture

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

324. The Gilberto Amado Memorial Lecture was made possible this year in view of a generous contribution from the Government of Brazil. The Commission established an informal consultative committee, early in its present session, composed of Mr. Carlos Calero Rodrigues, Mr. Ahmed Mahiou, Mr. Edilbert Razafindralambo, Mr. Paul Reuter and Mr. Nikolai A. Ushakov, to advise on necessary arrangements. A seventh Gilberto Amado Memorial Lecture, followed by a Gilberto Amado Memorial dinner, took place on 20 June 1985. The lecture, which was delivered by Professor Georges Abi-Saab of the Graduate Institute of International Studies, Geneva, was on "Reflections on the contemporary processes of developing international law". The Commission hopes that, as on the six previous occasions, the text of the lecture will be printed in English and French and so made available to the largest possible number of specialists in the field of international law.

325. The Commission expressed its gratitude to the Government of Brazil for its generous contribution which enabled the Gilberto Amado Memorial Lecture to be held in 1985. The Commission requested its Chairman to convey its gratitude to the Government of Brazil.

G. International Law Seminar

326. Pursuant to General Assembly resolution 39/85, the United Nations Office at Geneva organized the twenty-first session of the International Law Seminar during the thirty-seventh session of the Commission. The Seminar is intended for advanced students of international law and junior professors or government officials who normally deal with questions of international law in the course of their work.

327. A selection committee met on 28 March 1985 to select the participants in this session of the Seminar from among over 60 candidates. The committee consisted of Mr. Giblain, Director of the Seminar; Mr. L. Ferrari Bravo, former Chairman of the Sixth Committee of the General Assembly of the United Nations; Mr. A. Boisard (UNITAR) and Mr. G. Ramcharan (Centre for Human Rights). Twenty-four candidates, all of different nationalities and mostly from developing countries, were selected. In addition, a UNITAR fellowship holder and two observers were admitted to this session of the Seminar.

328. During the session of the Seminar, which was held at the Palais des Nations from 3 to 21 June 1985, the participants had access to facilities of the United Nations library. They were given copies of basic documents necessary for following the discussions of the Commission and lectures of the Seminar, and were also able to obtain or purchase at reduced cost United Nations printed documents which were unavailable or difficult to find in their countries of origin.

329. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission. In addition, the following eight members of the Commission gave lectures which were followed by discussions: Mr. A. Yankov, "The work of the International Law Commission - introduction to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier"; Mr. W. Riphagen, "Introduction to the question of State responsibility"; Mr. M. Ogiso, "Some aspects of the codification of international law"; Mr. J. Barboza, "International liability for injurious consequences arising out of acts not prohibited by international law"; Mr. D. Thiam, "Some considerations on offences against the peace and security of mankind"; Mr. M.L. Balanda, "The field of application rationae personae of the draft code of offences and the international criminal liability of States and other legal entities"; Mr. S. Sucharitkul, "Jurisdictional immunities of States and their property"; and Mr. L. Diaz-Gonzalez, "Relations between States and international organizations".

330. In addition, talks were given by Mr. F. Verhagen on the activities of the Office of the United Nations Disaster Relief Co-ordinator, Mr. C. Lopez-Polo on the activities of the Economic Commission for Europe in the environmental field, and by Mr. Kurt Herndl and Mr. G. Ramcharan on trends and developments in the international protection of human rights. Mr. C. Swinarski spoke to the Seminar on the question of international humanitarian law as a branch of public international law. After the last-mentioned talk, the participants in the Seminar went to the headquarters of the International Committee of the Red Cross

where they were received by Mr. J. Moreillon, Director for General Affairs of the International Committee of the Red Cross. As at the last three sessions of the Seminar, participants were also officially received by the City of Geneva, in the Alabama Room at the Hôtel de Ville. During the reception Mr. R. Vieux, Chief of Protocol of the City of Geneva, gave a talk on the international aspects of Geneva.

331. Mr. C.-A. Fleischhauer, Under-Secretary-General, the Legal Counsel of the United Nations, delivered a personal address to the participants in the Seminar during the session. At the end of the session, Mr. Satya Pal Jagota, Chairman of the International Law Commission, and Mr. E. Suy, Director-General of the United Nations Office at Geneva, gave participants a certificate testifying to their diligent work at the twenty-first session of the Seminar.

332. None of the costs of the Seminar fell on the United Nations, which is not asked to contribute to the travel or living expenses of the participants. The Governments of Austria, Denmark, Finland and the Federal Republic of Germany made fellowships available to participants from developing countries. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would have otherwise been prevented from participating in the session. This year, fellowships were awarded to 17 participants. Of the 475 participants, representing 113 nationalities, who have been accepted since the beginning of the Seminar, fellowships have been awarded to 230.

333. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable young lawyers and especially those from developing countries to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters at Geneva. It should be noted that owing to the small number of applications received from Asia, that region could not be equitably represented at this session of the Seminar.

334. The Commission wishes to invite attention to the fact that, due to a shortage of funds, if adequate contributions are not forthcoming, the holding of the twenty-second session of the International Law Seminar in 1986 may become difficult. The Commission, therefore, appeals to all States to contribute, in order that the holding of the twenty-second session of the Seminar in 1986 might prove feasible.

كيفية الحصول على منشورات الامم المتحدة

يمكن الحصول على منشورات الامم المتحدة من المكتبات ودور التوزيع في جميع انحاء العالم . استعلم عنها من المكتبة التي تتعامل معها أو اكتب الى : الامم المتحدة ،قسم البيع في نيويورك او في جنيف .

如何购取联合国出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

Litho in United Nations, New York 01750 25489—September 1985—3,850