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YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1984

Volume II
Part Two

Report of the Commission to the General Assembly on the work of its thirty-sixth session

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UNITED NATIONS

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Report of the Commission
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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.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook* ..., followed by the year (for example, *Yearbook ... 1980*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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Report of the International Law Commission on the work of its thirty-sixth session (7 May-27 July 1984)

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ABBREVIATIONS

ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
IMO	International Maritime Organization
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WIPO	World Intellectual Property Organization

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I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1-24: up to and including 1930)

NOTE CONCERNING QUOTATIONS

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

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-sixth session at its permanent seat at the United Nations Office at Geneva, from 7 May to 27 July 1984. The session was opened by the Chairman of the thirty-fifth session, Mr. Laurel B. Francis.

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 the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and sets out the articles and commentaries provisionally adopted by the Commission at the present session. Chapter IV relates to jurisdictional immunities of States and their property and also sets out the articles and commentaries provisionally adopted by the Commission at the present session. Chapter V relates to international liability for injurious consequences arising out of acts not prohibited by international law. Chapter VI relates to the law of the non-navigational uses of international watercourses. Chapter VII relates to State responsibility, and chapter VIII of the report concerns 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 Mahmoud Sami AL-QAYSI (Iraq);
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 DÍAZ GONZÁLEZ (Venezuela);
Mr. Khalafalla EL RASHEED MOHAMED AHMED (Sudan);
Mr. Jens EVENSEN (Norway);
Mr. Constantin FLITAN (Romania);
Mr. Laurel B. FRANCIS (Jamaica);
Mr. Jorge E. ILLUECA (Panama);
Mr. Andreas J. JACOVIDES (Cyprus);
Mr. S.P. JAGOTA (India);
Mr. Abdul G. KOROMA (Sierra Leone);
Mr. José Manuel LACLETA MUÑOZ (Spain);
Mr. Ahmed MAHIOU (Algeria);
Mr. Chafic MALEK (Lebanon);
Mr. Stephen C. MCCAFFREY (United States of America);
Mr. Zhengyu NI (China);
Mr. Frank X. NJENGA (Kenya);
Mr. Motoo OGISO (Japan);
Mr. Syed Sharifuddin PIRZADA (Pakistan);
Mr. Robert Q. QUENTIN-BAXTER (New Zealand);
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);
Mr. Paul REUTER (France);
Mr. Willem RIPHAGEN (Netherlands);
Sir Ian SINCLAIR (United Kingdom of Great Britain and Northern Ireland);
Mr. Constantin A. STAVROPOULOS (Greece);
Mr. Sompong SUCHARITKUL (Thailand);
Mr. Doudou THIAM (Senegal);
Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics);
Mr. Alexander YANKOV (Bulgaria).

B. Officers

4. At its 1814th meeting, on 7 May 1984, the Commission elected the following officers:

Chairman: Mr. Alexander Yankov;
First Vice-Chairman: Mr. Sompong Sucharitkul;
Second Vice-Chairman: Mr. Julio Barboza;
Chairman of the Drafting Committee: Mr. Ahmed Mahiou;
Rapporteur: Mr. Jens Evensen.

5. At the present session of the Commission, its Enlarged Bureau was composed of the officers of the session, former chairmen of the Commission and the special rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission at the present session. On the recommendation of the Enlarged Bureau, the Commission, at its 1817th meeting, on 10 May 1984, 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. Sompong Sucharitkul (Chairman), Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. S.P. Jagota, Mr. Abdul G. Koroma, Mr. Zhengyu Ni, Mr. Frank X. Njenga, Mr. Robert Q. Quentin-Baxter, Mr. Paul Reuter, Mr. Constantin A. Stavropoulos, Mr. Doudou Thiam 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

6. At its 1817th meeting, on 10 May 1984, the Commission appointed a Drafting Committee. It was composed of the following members: Mr. Ahmed Mahiou (Chairman), Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Carlos Calero Rodrigues, Mr. Khalafalla El Rasheed Mohamed Ahmed, Mr. Constantin Flitan, Mr. José Manuel Lacleta Muñoz, Mr. Stephen C. McCaffrey, Mr. Zhengyu Ni, Mr. Motoo Ogiso, Mr. Syed Sharifuddin Pirzada, Mr. Edilbert Razafindralambo, Mr. Paul Reuter, Sir Ian Sinclair and Mr. Nikolai A. Ushakov. Mr. Jens Evensen also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Secretariat

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

E. Agenda

8. At its 1814th meeting, on 7 May 1984, the Commission adopted an agenda for its thirty-sixth session, consisting of the following items:

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

9. The Commission considered all the items on its agenda, with the exception of item 8, "Relations between States and international organizations (second part of the topic)". The Commission held 61 public meetings (1814th to 1874th) and, in addition, the Drafting Committee of the Commission held 28 meetings, the Enlarged Bureau of the Commission held four meetings and the Planning Group of the Enlarged Bureau held five meetings.

Chapter II

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

10. 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 Judgment of the Tribunal, and

(*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in subparagraph (*a*) above.[1]

11. 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 Judgment of the Nürnberg Tribunal; (*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 Judgment of the Nürnberg Tribunal, should in their view be comprehended in the draft code envisaged in resolution 177 (II).[2]

12. On the basis of a report submitted by the Special Rapporteur on the formulation of the Nürnberg Principles,[3] the Commission adopted at its second session, in accordance with paragraph (*a*) of resolution 177 (II), a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted them, with commentaries, to the General Assembly.[4] As to the matter referred to in paragraph (*b*) of resolution 177 (II), the Commission discussed the topic on the basis of the report of the Special Rapporteur on the draft code of offences against the peace and security of mankind[5] and of replies received from Governments to the questionnaire which it had sent to them.[6] 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.[7]

13. 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 Judgment 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 be made by Governments.

14. The Special Rapporteur submitted his second report[8] 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 General Assembly. The Commission also had before it observations received from Governments on that formulation,[9] as well as a memorandum concerning the draft code prepared by Professor Vespasien V. Pella.[10] At that 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.[11]

15. In 1951, at its sixth session, the General Assembly postponed consideration of the question of the draft code until its seventh session. As a result thereof, the attention of Governments of Member States was drawn to the draft code prepared in 1951 by the Commission and they were invited to submit their comments and observations thereon. While the comments and obser-

[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 Judgment 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 Judgment. 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 No. 1*, document A/331.

[2] *Yearbook ... 1949*, p. 283, document A/925, paras. 30-31.

[3] *Yearbook ... 1950*, vol. II, p. 181, document A/CN.4/22.

[4] *Ibid.*, pp. 374-378, document A/1316, paras. 95-127.

[5] *Ibid.*, p. 253, document A/CN.4/25.

[6] *Ibid.*, p. 249, document A/CN.4/19, part II, and A/CN.4/19/Add.1 and 2.

[7] *Ibid.*, p. 380, document A/1316, para. 157. The Drafting Sub-Committee was composed of the Special Rapporteur and Mr. Ricardo J. Alfaro and Mr. Manley O. Hudson.

[8] *Yearbook ... 1951*, vol. II, p. 43, document A/CN.4/44.

[9] *Ibid.*, p. 104, document A/CN.4/45 and Add.1 and 2.

[10] *Yearbook ... 1950*, vol. II, p. 278, document A/CN.4/39.

[11] *Yearbook ... 1951*, vol. II. pp. 134 *et seq.*, document A/1858, paras. 57-59.

vations thus received were circulated at the seventh session of the General Assembly in 1952,[12] 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. At the Commission's fifth session, in 1953, the Special Rapporteur was requested to undertake a further study of the question.[13]

16. In his third report,[14] the Special Rapporteur 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 certain revisions in the text previously adopted, and transmitted to the General Assembly a revised version of the draft code, consisting of four articles with commentaries thereto.[15]

17. 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.

(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.

18. By its resolution 897 (IX) of 4 December 1954, the General Assembly, considering that the draft code 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 com-

[12] *Official Records of the General Assembly, Seventh Session, Annexes*, vol. II, agenda item 54, document A/2162 and Add.1.

[13] *Yearbook ... 1953*, vol. II, p. 231, document A/2456, paras. 167-169.

[14] *Yearbook ... 1954*, vol. II, p. 112, document A/CN.4/85.

[15] *Ibid.*, pp. 150-152, document A/2693, paras. 49-54.

mittee 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.[16] The Assembly was of a similar opinion in 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.[17] In 1968, the Assembly again decided not to include in its agenda the item concerning the draft code and the item "international criminal jurisdiction", until a later session when further progress had been made in arriving at a generally agreed definition of aggression.

19. On 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression.[18] In allocating the item on the question of defining aggression to the Sixth Committee, the General Assembly commented that it had decided, *inter alia,* to consider whether it should take up the question of the 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.[19]

20. In its report on the work of its twenty-ninth session, in 1977, the Commission 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.[20]

21. Although the item was included in the agenda of the thirty-second session of the General Assembly, in 1977, its consideration was postponed until the thirty-third session in 1978. By resolution 33/97 of 16 December 1978, the General 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 Assembly's next session.[21] At its thirty-fifth session, in 1980, by its resolution 35/49 of 4 December 1980, the General Assembly reiterated the invitation for the submission of comments and observations made in resolution 33/97, adding that such 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 Commission.[22]

22. 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 its 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",

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

[16] 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/2645)) until it had taken up the report of the Special Committee on the Question of Defining Aggression and had taken up the draft Code 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 Committee on International Criminal Jurisdiction (hereinafter called 1951 Committee) established by General Assembly resolution 489 (V) of 12 December 1950. The 1951 Committee submitted its report to the seventh session of the General Assembly in 1952 (*ibid., Seventh Session, Supplement No. 11* (A/2136)).

[17] General Assembly resolution 1186 (XII) of 11 December 1957; however, by its resolution 1187 (XII) of the same day, 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.

[18] General Assembly resolution 3314 (XXIX), annex.

[19] See *Official Records of the General Assembly, Twenty-ninth Session, Annexes,* agenda item 86, document A/9890, para. 2. As of July 1984, the General Assembly has not taken up the question of an international criminal jurisdiction.

[20] *Yearbook ... 1977,* vol. II (Part Two), p. 130, para. 111.

[21] A/35/210 and Add.1 and 2 and Add.2/Corr. 1.

[22] The replies were subsequently circulated in document A/36/416. In addition, the Secretary-General, pursuant to General Assembly resolution 35/49, prepared an analytical paper (A/36/535) 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.

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 thirty-fourth 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.

23. Accordingly, at its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for 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.[23] 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 present to the General Assembly at its thirty-eighth session the conclusions of that debate.[24]

24. 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 General Assembly resolution 35/49.[25] The Commission had before it the comments and observations received from Governments pursuant to the request contained in paragraph 4 of General Assembly resolution 36/106.[26]

25. 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 Assembly 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 paragraph 23 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 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.

26. At its thirty-fifth session, the Commission had before it the first report on the topic submitted by the Special Rapporteur,[27] as well as a compendium of relevant international instruments[28] and an analytical paper,[29] both prepared by the Secretariat pursuant to the Commission's requests made at the thirty-fourth session (see paragraph 24 above). It also had before it replies received from Governments[30] in response to the invitation contained in General Assembly 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: (*a*) the scope of the draft codification; (*b*) the methodology of codification; (*c*) implementation of the code.

27. In its report to the General Assembly on the work of its thirty-fifth session,[31] the Commission expressed 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 stated that the General Assembly should indicate whether such jurisdiction should also be competent with respect to States.

28. By resolution 38/138 of 19 December 1983, the General Assembly recommended that, taking into ac-

[23] *Yearbook ... 1982*, vol. II (Part Two), p. 121, para. 252. 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 (*ibid.*, p. 8, para. 8).

[24] Ibid., p. 121, para. 255.

[25] A/36/535 (see footnote 22 above).

[26] A/CN.4/358 and Add.1-4, reproduced in *Yearbook ... 1982*, vol. II (Part One), p. 273.

[27] A/CN.4/364, reproduced in *Yearbook ... 1983*, vol. II (Part One), p. 137.

[28] A/CN.4/368 and Add.1.

[29] A/CN.4/365.

[30] A/CN.4/369 and Add.1 and 2, reproduced in *Yearbook ... 1983*, vol. II (Part One), p. 153.

[31] *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69.

count the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the 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 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 Secretary-General to seek the views of Member States and intergovernmental organizations regarding the questions raised in paragraph 69 of the Commission's report 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.

B. Consideration of the topic at the present session

29. At its present session, the Commission had before it the second report on the topic submitted by the Special Rapporteur (A/CN.4/377).[32]

30. The Commission considered the topic at its 1816th to 1824th meetings, from 9 to 21 May 1984, on the basis of the second report of the Special Rapporteur. In that report, the Special Rapporteur advised the Commission that at the present stage the topic should be limited to the less controversial questions until more precise replies were received from the General Assembly and from Governments. His report dealt with the list of acts to be classified as offences against the peace and security of mankind. He recommended that the draft Code of Offences against the Peace and Security of Mankind should include those offences covered by the draft prepared by the Commission in 1954, as well as certain violations of international law recognized by the international community since 1954, namely colonialism, *apartheid*, the taking of hostages, mercenarism, the threat or use of violence against internationally protected persons, serious disturbance of the public order of the receiving country by a diplomat or an internationally protected person, the taking of hostages organized or encouraged by a State and acts causing serious damage to the environment. The general principles and the rules applicable to international penal law as a whole would be examined at a later stage.

31. The following paragraphs reflect views expressed in the Commission and conclusions reached by it in the light of the discussion held at the present session.

1. The content *ratione personae* of the draft code

32. With regard to the content *ratione personae*, the Commission took the view that its efforts at this stage should be devoted exclusively to the criminal responsibility of *individuals*. This approach was dictated by the uncertainty still attaching to the problem of the criminal responsibility of States. That uncertainty, however, did not prevent the problem of the criminal responsibility of individuals from being tackled separately. True, the criminal responsibility of individuals does not eliminate the international responsibility of States for the consequences of acts committed by persons acting as organs or agents of the State. But such responsibility is of a different nature and falls within the traditional concept of State responsibility. The criminal responsibility of the State cannot be governed by the same régime as the criminal responsibility of individuals, if only from the point of view of penalties and *procedural rules*. Certain concepts, such as extradition, would be inconceivable, and others, such as the non-applicability of prescription, seem doubtful. For all these reasons, the question of international criminal responsibility should be limited, at least at the present stage, to that of individuals.

2. The content *ratione materiae* of the draft code and the first stage of the Commission's work on the draft

33. With regard to the content *ratione materiae* of the draft code, the Commission had well in mind General Assembly resolution 38/132, which invited it to elaborate, as a first step, an introduction in conformity with paragraph 67 of its report on its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report. It considered, however, that this mandate, which lists in their logical order the elements of the final result which the Commission's work is expected to yield, does not necessarily establish an order of priority for their elaboration, and that a question of method obliges it, at the present stage, to begin by preparing a list of international crimes and to take up the drafting of the introduction as a second step. Although the final draft will necessarily have to include such an introduction, it would be premature at the present stage to prepare a general part containing a definition of an offence against the peace and security of mankind and deducing the general principles and rules applicable.

34. Some members were, however, of the view that preparation of an introduction should proceed in parallel with the establishment of the list of offences, which in any case was desirable in response to General Assembly resolution 38/132. The view was expressed that more precise criteria for identifying offences against the peace and security of mankind should be established. Among the several possible criteria suggested were the following: the inspiration of the criminal act (for example an act based on racial, religious or political conviction); the status of the victim of the criminal act (for example, a State or a private individual); the nature of the law or interest infringed (the interest of security appearing more important than a purely material interest); or lastly, the motive, etc. Interesting as those suggestions were, none of the criteria proposed sufficed by itself to identify an offence against the peace and security of mankind. The seriousness of an act was judged sometimes according to the motive, sometimes according

[32] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

to the end pursued, sometimes according to the particular nature of the offence (the horror and reprobation it arouses), sometimes according to the physical extent of the disaster caused. Furthermore, these elements seemed difficult to separate and were often combined in the same act.

35. It was also thought that the introduction should contain a statement of principles in regard to the content of which the following were among observations made by one member: the notion of individual criminal responsibility should be one of the basic principles of the code; offences against the peace and security of mankind constituted international crimes whose prosecution was a universal duty; the non-applicability of statutory limitation in respect of crimes committed by individuals; criminal responsibility may be attributed to States, although they cannot as such be subject to any international criminal jurisdiction; the need to draw further upon the Nürnberg Principles in the preparation of the introduction. The above-mentioned approach would, in the view of that member, be consistent with the Commission's decision "that the deductive method should be closely combined with the inductive method ..."[33]—a decision which was overwhelmingly endorsed by representatives in the Sixth Committee during the thirty-eighth session of the General Assembly.

36. Other members of the Commission wondered to what extent the concept of an offence against the peace and security of mankind was a homogeneous one. The question was raised whether a distinction should not be made between offences against peace and offences against the security of mankind. The Commission considered that it was difficult to answer that question at present, just as it was difficult to determine forthwith the content of the term "mankind". Some members thought that term should be understood to mean the whole of the human community. Others thought that it should be understood in the sense of humanism, that is to say, as representing a set of moral and spiritual values generally accepted by the human community.

37. The question was raised, in that connection, whether crimes against humanity came under a special régime distinct from the general régime of protection of human rights. It was generally considered that, whereas not every violation of a human right is an offence against the peace and security of mankind, serious systematic or repeated violations of human rights can be assimilated to offences against the peace and security of mankind.

38. Most members of the Commission took the view that not all general rules common to the different offences could, at the present stage, be deduced from the general debate outlined above. It was necessary first, to determine *what those offences were.* It is difficult, for example, to say whether the theory of justifying facts or that of attenuating circumstances is applicable—and to what extent—to offences against the peace and security of mankind, unless it is first known precisely what offences are involved. The application of these theories to *colonialism, apartheid,* wrongful *annexation* of a territory, or *aggression* is extremely problematical, if not unthinkable. Conversely, it may well be imagined that such theories could apply in the case of *crimes against humanity.* In that connection, Principle IV of the Judgment of the Nürnberg International Military Tribunal, as formulated by the Commission,[34] according to which a person who had committed a crime recognized by the Tribunal's Charter was not relieved from responsibility "provided a moral choice was in fact possible to him", is rather significant, since it implies that the perpetrator of such a crime could invoke a justifying act. And as we know, it was also possible to apply the theory of attenuating circumstances to some of those crimes.

39. The considerations set out in the foregoing paragraphs explain why the Commission, because of the diversity of the situations in question, considered that it could not enunciate general rules at the present stage. To deduce the applicable rules *a priori* might lead to begging the question. It was thought preferable first to study the "living tissue", to collect, analyse and classify the material, before seeking to identify the rules common to the different situations. Analysis may show that certain rules apply only to some offences and not to others, and that it is necessary to divide the different offences into categories. But all that cannot be prejudged. A meticulous prior analysis seems necessary. The study should proceed from the particular to the general.

40. The first step, then, would be to sift the acts constituting serious breaches of international law, making an inventory of the international instruments (conventions, declarations, resolutions, etc.) which regard these acts as international crimes, and selecting the most serious of them, since not every international crime is necessarily an offence against the peace and security of mankind. Moreover, the acts selected would, at this stage, be in the raw state, independent of any rigorous terminology or classification. A precise terminology and typology would be worked on later, when all the material had been selected and determined. It is not, indeed, impossible that on re-reading the relevant instruments certain expressions, such as the "laws or customs of war", may appear outdated, since war is now outlawed. Other practices, which correspond to real phenomena, such as "colonialism", might be given a more appropriate legal designation. But this typological and terminological study would be undertaken later.

41. After these preliminary remarks, the paragraphs which follow will be divided into two parts: (*a*) a part devoted to the 1954 draft code; (*b*) a part devoted to offences not covered by the 1954 draft code.

3. Preparation of the list of offences against the peace and security of mankind

(a) *Part One. Offences covered by the 1954 draft code*

42. These offences can be divided into three categories, it being understood that each category is not necessarily a watertight compartment.

[33] *Yearbook ... 1983,* vol. II (Part Two), p. 16, para. 66.

[34] *Yearbook ... 1950,* vol. II, p. 375, document A/1316, paras. 105-106.

The first category is that of offences against the *sovereignty* and *territorial integrity* of a State.

The second category is that of *crimes against humanity.*

The third category is that defined by the general expression *offences violating the laws or customs of war.*

43. The first category is covered by paragraphs (1) to (9) of article 2 of the 1954 draft code, as follows:

(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.

(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.

44. Several comments were made on these offences. It was observed that paragraph (1), on aggression, should be reworded to take due account of the new Definition of Aggression[35]. It was also observed that paragraph (8), on annexation of foreign territory, should be reworded along the lines of paragraph (*a*) of article 3 of the same Definition. Furthermore, some members wondered whether the phrases "threat ... to resort to an act of aggression" and "preparation ... of the employment of armed force" were not linked with too subjective a criterion. Doubts were expressed about the moment from which such a threat or preparation of the employment of armed force could be considered to exist, and it was also asked at what point armed preparations ceased to be mere preparations and became a "preparation ... of the employment of armed force". It was thought that such offences could be designated differently or even combined in a single offence, which would be only one of the modalities of aggression. Similar questions were raised in regard to the offences covered by paragraphs (4) and (5), which comprise the organization or toleration, by the authorities of a State, of armed bands within its territory, as well as direct participation in their activities, and the undertaking or encouragement of activities calculated to foment civil strife in another State. It was asked whether permitting the organization of an armed band already constituted an offence, at what point a State was to be held responsible for having tolerated the organization of an armed band, and when a group of individuals became an armed band. The same questions could be asked about the undertaking or encouragement of civil strife, since in both cases the offence can hardly be established before it has been committed. In relation to paragraph (7), it was pointed out that, since disarmament agreements were often concluded by a limited number of participants, the question might arise whether acts contrary to such agreements committed by non-participants would also be regarded as offences. In a rather different context, it was observed that the phrase used in paragraph (9), namely "intervention ... in the internal or external affairs of another State, by means of coercive measures of an economic or political character", left much to be desired, because, *inter alia,* it could not be clearly determined at what moment the economic measures became coercive.

45. The second category of offences is covered by paragraphs (10) and (11), as follows:

(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.

46. It was observed that the classification of these offences is somewhat arbitrary. There is no difference in nature between the inhuman acts listed in paragraph (11) and those in paragraph (10), which constitute genocide. It was also regretted that the term "genocide" had not been expressly used in the body of paragraph (10). As to paragraph (11), although the list it contains is not exhaustive, it was considered that it should not be excessively extended. While it is true that crimes against humanity include serious and unmistakable human rights violations, this category should not be broadened

[35] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

to include all violations of human rights within a frontier, for that would deprive the concept of crimes against humanity of all specificity.

47. The third category of offences, which is covered by paragraph (12), is that of "acts in violation of the laws or customs of war". Regarding such acts, the question was raised whether every breach of the 1949 Geneva Conventions[36] or of their 1977 Additional Protocols[37] should be regarded as an offence against the peace and security of mankind. Some breaches might constitute only a minor infringement, reprehensible no doubt, but not falling within that category of offences. It was also pointed out that the expression "laws or customs of war" no longer met the needs of our time.

48. Lastly, paragraph (13) of article 2 covers *conspiracy, direct incitement to commit any of the offences defined in the code, complicity* and *attempts*. These offences will be examined by the Commission in due course. For the reasons given earlier, it is difficult to discuss offences which are often related to main offences without having previously studied the offences to which they are related. The same applies to the circumstances contemplated in articles 3 and 4 of the 1954 draft, which refer to offences committed by a person acting as head of State or as a responsible government official, or pursuant to an order of his Government or of a superior.

49. Subject to these reservations as to form and substance, the Commission as a whole considered that the 1954 draft provided a good working basis, and that the offences it proposed should be retained. It will therefore be necessary to study how they should be formulated and reclassified if necessary.

(b) *Part Two. Offences covered since the 1954 draft code and the relevant instruments*

50. As to the offences recognized since 1954, as stated in paragraph 40, in order to apply the inductive method here the Commission needs to make an inventory of the international instruments (conventions, declarations, resolutions, etc.) which regard certain acts as international crimes. The most important instruments listed by the Special Rapporteur are the following:

(1) The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956;[38]

(2) The Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960);

(3) The Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons (General Assembly resolution 1653 (XVI) of 24 November 1961); General Assembly resolution 33/71 B of 14 December 1978 on the non-use of nuclear weapons and prevention of nuclear war; resolution 34/83 G of 11 December 1979 requesting the Committee on Disarmament to take into appropriate consideration the views expressed by States concerning resolution 33/71 B; resolution 35/152 D of 12 December 1980 on the non-use of nuclear weapons and prevention of nuclear war; resolution 36/92 I of 9 December 1981 on the non-use of nuclear weapons and prevention of nuclear war; resolution 37/100 C of 13 December 1982 on the convention on the prohibition of the use of nuclear weapons; resolution 38/75 of 15 December 1983 on the condemnation of nuclear war;

(4) The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, of 5 August 1963;[39]

(5) The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (General Assembly resolution 2131 (XX) of 21 December 1965);

(6) The International Covenant on Civil and Political Rights, of 16 December 1966;[40]

(7) The International Covenant on Economic, Social and Cultural Rights, of 16 December 1966;[41]

(8) The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, of 27 January 1967;[42]

(9) The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, of 26 November 1968;[43]

(10) The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex);

(11) The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, of 11 February 1971;[44]

(12) The Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970,[45] and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 23 September 1971;[46]

(13) The principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (General Assembly resolution 3020 (XXVII) of 18 December 1972);

[36] United Nations, *Treaty Series*, vol. 75.

[37] United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*

[38] United Nations, *Treaty Series*, vol. 266, p. 3.

[39] *Ibid.*, vol. 480, p. 43.

[40] *Ibid.*, vol. 999, p. 171.

[41] *Ibid.*, vol. 993, p. 3.

[42] *Ibid.*, vol. 610, p. 205.

[43] *Ibid.*, vol. 754, p. 73.

[44] *Ibid.*, vol. 955, p. 115.

[45] *Ibid.*, vol. 860, p. 105.

[46] *Ibid.*, vol. 974, p. 177.

(14) The various instruments on *apartheid,* in particular the International Convention on the Suppression and Punishment of the Crime of *Apartheid,* of 30 November 1973,[47] as well as the numerous General Assembly resolutions indicating that *apartheid* has been a matter of great concern;[48]

(15) The basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes (General Assembly resolution 3103 (XXVIII) of 12 December 1973);

(16) The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973;[49]

(17) The Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex);

(18) The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX) of 9 December 1975, annex);

(19) The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, of 10 December 1976;[50]

(20) The Additional Protocols to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977;[51]

(21) The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, of 5 December 1979;[52]

(22) The International Convention against the Taking of Hostages, of 17 December 1979;[53]

(23) The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, of 10 October 1980;[54]

(24) The Declaration on the Prevention of Nuclear Catastrophe (General Assembly resolution 36/100 of 9 December 1981).

51. The above list, although not exhaustive, contains the most important instruments. In the light of these instruments, it would seem possible to draw up a list of offences not covered by the 1954 draft code. It will, however, be necessary to make a choice between a *minimum content* and a *maximum content* of the code to be drafted.

(i) *Minimum content*

52. *Colonialism.* General Assembly resolution 1514 (XV) of 14 December 1960 condemned colonialism in all its forms and manifestations. The comments made on the subject in the Commission were basically concerned with a question of terminology. It was considered that the word "colonialism" denoted a political and historical phenomenon rather than a legal concept and that it would be better to use wording modelled on article 19 of part 1 of the draft articles on State responsibility, which spoke of "the establishment or maintenance by force of colonial domination",[55] or the expression "denial of the right of self-determination".

53. There was no problem, either, about the principle of condemning the crime of *apartheid.* Some members of the Commission considered, however, that "*apartheid*" should not appear as such in the draft, being covered by the general expression "racial discrimination". Other members pointed out that, whereas there were no reservations on the question of condemning racial discrimination, the 1973 Convention on *Apartheid* had not been adopted by some States. Furthermore, these members said, *apartheid* was too particular a term, which had the serious drawback of applying only to the shameful practices of a single country. None of these arguments is without interest. Nevertheless, most members believed that *apartheid* ought to be included, precisely because of its specific aspects, which make it a crime apart, consisting in the erection of racialism into a political and constitutional *system* and *method* of government. These aspects peculiar to *apartheid* are not necessarily covered in the general resolutions on racial discrimination. From their point of view, the fact that some States had not acceded to the Convention on *Apartheid* did not deprive it of its force as *jus cogens.* In short, *apartheid* is a prime candidate for the list of offences against the peace and security of mankind.

54. Another problem is raised by the use of *nuclear weapons.* It should be noted first of all that article 2, paragraphs (7) and (12), of the 1954 draft code far from cover the problems raised here. Paragraph (7) defines as crimes *"acts ... in violation of**... obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments ... or of other restrictions of the same character". So far, however, there is no treaty forbidding the use of nuclear weapons. Furthermore, it is not possible to invoke the reference to "violation of the laws or customs of war", inasmuch as the provisions in question relate to the methods employed in armed conflicts, not to the weapons used, the prohibition of which has always

[47] *Ibid.,* vol. 1015, p. 243.

[48] General Assembly resolutions 2775 E (XXVI) of 29 November 1971, on the establishment of Bantustans; 3151 G (XXVIII) of 14 December 1973; 3324 E (XXIX) of 16 December 1974; 3411 G (XXX) of 10 December 1975; 31/6 I and 31/6 J of 9 November 1976; 32/105 M of 14 December 1977; 33/183 B and 33/183 L of 24 January 1979; 34/93 A and 34/93 O of 12 December 1979; 35/206 A of 16 December 1980; 36/172 A of 17 December 1981; and 37/69 A of 9 December 1982.

[49] United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 74.

[50] *Ibid., 1976* (Sales No. E. 78.V.5), p. 125.

[51] See footnote 37 above.

[52] United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 109.

[53] *Ibid.,* p. 124.

[54] *Ibid., 1980* (Sales No. E.83.V.1), p. 113.

[55] *Yearbook ... 1976,* vol. II (Part Two), p. 95.

been determined by treaties. Certain weapons of mass destruction are forbidden by specific conventions.

55. The Commission was thus faced with the question whether specific provisions on nuclear weapons should be included in the draft code. There are many resolutions on the use of nuclear weapons. Opinion in the Commission, however, was divided on this point. Some members advanced considerations of realism and expediency, maintaining that such a prohibition would be purely theoretical and would not be accepted by States possessing such weapons. They invoked the deterrence argument, namely that a formal prohibition of the use of nuclear weapons would deprive them of the desired deterrent effect. Some members were of the view that, unless international agreements for prohibition of nuclear weapons were reached within the framework of general disarmament, it was premature to conclude that the use of nuclear weapons was an offence.

56. One member of the Commission even considered that the problem of the use of nuclear weapons went beyond the field of law, being a *metajuridical* question, and that, with certain qualifications, it was even beyond the scope of *jus cogens*.

57. Other members, however, took a different view. They considered that it was inconceivable for a code of offences against the peace and security of mankind to remain silent on the problem of the use of nuclear weapons, that political difficulties should not stand in the way of stating a rule *de lege ferenda* and that, although the question was being considered in disarmament bodies, lawyers could not remain indifferent to the legality or illegality of the use—at least in the case of a State that made the first use—of such weapons of mass destruction. The Commission could not omit to mention the problem, pending more specific guidance from the appropriate political bodies.

58. The problem of the *environment* was also considered. Article 19 of part 1 of the draft articles on State responsibility recognizes that, under certain conditions, causing serious damage to the environment may be considered as an international crime. The question arises whether it should not in some cases be made a crime against humanity. Some members thought not. However, the Commission considered that, although just any damage to the environment could not constitute a crime against humanity, the development of technology and the considerable harm it sometimes did—for example, to the atmosphere and to water—might lead to certain kinds of damage to the human environment being regarded as crimes against humanity. It was pointed out that there were conventions prohibiting certain tests which could harm the environment. Although those conventions were primarily concerned with military tests, the essential reason for the prohibition seemed to have been the damage done to the environment. This applied in particular to the treaties prohibiting nuclear weapons in the atmosphere, in outer space, on the seabed and the ocean floor and in the subsoil thereof.

59. *Mercenarism.* There was also a discussion on mercenarism and whether it should or should not be regarded as an offence against the peace and security of mankind. It was argued that mercenarism was not in itself to be condemned and that everything depended on the aim of the mercenaries or of those who engaged them. The hiring of non-nationals to form or reinforce a national army was a long-standing practice which was in no way immoral in itself. Mercenarism was only to be condemned, it was said, by reason of the aim pursued. The recruitment of mercenaries to oppose a national liberation movement or destabilize a State or a political régime was contrary to international law and should be punished accordingly. However, some members of the Commission considered that, seen in that light, mercenarism merged with aggression or the formation of armed bands. The question thus arose whether mercenarism could be considered a separate offence to be included in a code of offences against the peace and security of mankind. Furthermore, the question of mercenarism is at present being studied by an *ad hoc* committee of the General Assembly and it is not yet known what conclusions it may reach.

60. *Taking of hostages, violence against persons enjoying diplomatic privileges and immunities.* The Commission considered certain acts which are attracting more and more attention from the international community, namely the taking of hostages and violence against internationally protected persons, including diplomatic agents, and also acts committed by diplomats which constitute a serious violation of law and order in the State to which they are accredited. On the taking of hostages, some members of the Commission expressed the opinion that, while that act was an international crime under the International Convention against the Taking of Hostages, it was doubtful whether it fell into the category of offences against the peace and security of mankind. One member expressed the opinion that to include the taking of hostages in the draft at the present stage would be to prejudge the question whether States were to be held responsible for crimes in international law. It was also argued that the taking of hostages, whether diplomats or not, was a particular aspect of terrorism; the reference should therefore be to the offence of terrorism, in order to cover all the cases mentioned in article 2, paragraph (6), of the 1954 draft code. However, it is at a later stage that the problem of classifying certain offences will arise. For the time being it is the criminal acts which have to be defined.

61. *Economic aggression.* It was generally held that the phenomenon existed, but that the expression "economic aggression" was not legally appropriate. There are, of course, certain *coercive* procedures of an economic nature to compel a State to act or not to act, to sway its policy in one direction or another. But some members considered that those procedures were already covered by the 1954 draft code under article 2, paragraph (9), which prohibits "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". But if economic aggression means taking possession of a country's natural resources and wealth by force or preventing it by force from exploiting them or freely disposing of them, the

case would rather come under the definition of aggression. All in all, there was a body of opinion in the Commission that was not opposed to condemning economic aggression, provided that a suitable definition and terminology could be found. However, some members expressed reservations about the advisability of including the concept of economic aggression in the draft.

62. Finally, some members of the Commission mentioned *piracy* and the *hijacking of aircraft*. Piracy is undeniably an international crime and has been recognized as such from time immemorial. It is noteworthy, however, that the Commission did not include it as an offence against the peace and security of mankind in 1954. It would seem that, however serious the phenomenon may be, it is not at present a scourge of mankind. As far as the hijacking of aircraft is concerned, it is enough to treat it as an international crime. The problem that arises is how to deal with it. The existing conventions do not yet seem to have found an effective solution.

(ii) *Maximum content*

63. There is also a movement in favour of extending the idea of an offence against the peace and security of mankind to include, for example, forgery of passports, dissemination of false or distorted news, insulting behaviour towards a foreign State, etc. After carefully considering the advantages and disadvantages, the Commission tended to take the view that the effect of the draft would be weakened if it were extended so far that the essential considerations were lost sight of. To go beyond the minimum content and aim at a broader instrument would be risky. It would blur the distinction between an international crime and an offence against the peace and security of mankind; not every international crime is necessarily an offence against the peace and security of mankind. The code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature. These are essentially offences which threaten the very foundations of modern civilization and the values it embodies. It is these particular characteristics which set apart offences against the peace and security of mankind and justify their separate codification.

64. As already noted, paragraphs 42 to 63 are largely confined, at this first stage of the method, to collecting raw material. This material will then be processed and classified, and the Commission will try to find the appropriate legal concepts, descriptions and categories by which it can be organized. Only later will it be possible to deduce the general principles and rules applicable.

4. Conclusions

65. To sum up:

(*a*) With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments;

(*b*) 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 intends, for the reasons given in paragraphs 33 to 40 of the present 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;

(*c*) With regard to the content *ratione materiae* of the draft code:

(i) The Commission intends to include the offences covered by the 1954 draft code, with appropriate modifications of form and substance to be considered by the Commission at a later stage;

(ii) 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;

(iii) 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, intends to examine the matter in greater depth in the light of any views expressed in the General Assembly;

(iv) With regard to mercenarism, the Commission considers that, in so far as the practice is used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constitutes an offence against the peace and security of mankind. The Commission considers, 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;

(v) With regard to the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc. and the hijacking of aircraft, the Commission considers that these practices have aspects which can be regarded as related to the phenomenon of international terrorism and should be approached from that angle;

(vi) With regard to piracy, the Commission recognizes that it is an international crime under customary international law. It doubts, however, whether in the present international community the offence can be such as to constitute a threat to the peace and security of mankind.

Chapter III

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

A. Introduction

66. The 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, in 1977, pursuant to General Assembly resolution 31/76 of 13 December 1976. At its thirtieth session, in 1978, 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.[56] At that session, after having discussed the results of the Commission's work, the Assembly 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 ... .

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

> 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.

68. At its thirty-first session, in 1979, the Commission again established a Working Group, 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 for the topic and decided to entrust him with the preparation of a set of draft articles for an appropriate legal instrument.[57]

69. At its thirty-second session, in 1980, the Commission had before it a preliminary report[58] submitted by the Special Rapporteur, and also a working paper[59] prepared by the Secretariat. At that session, the Commission considered the preliminary report in a general discussion.[60] 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.

70. At its thirty-third session, in 1981, the Commission had before it the second report of the Special Rapporteur,[61] containing the texts of six draft aticles constituting part I of the draft entitled "General provisions".[62] 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.

71. After discussion of the second report of the Special Rapporteur at that session,[63] the Commission referred the six articles to the Drafting Committee, but the Committee did not consider them owing to lack of time.

72. At its thirty-fourth session, in 1982, the Commission had before it the third report of the Special Rapporteur.[64] 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 the discussion in the Commission and in the Sixth Committee of the General Assembly at its thirty-sixth session,[65] and reintroduced them, as amended, in the third report. The third report consisted of two parts and contained 14 draft articles. Part I, dealing with

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[56] See *Yearbook ... 1978*, vol. II (Part Two), pp. 138 *et seq.*, paras. 137-144.

[57] For a historical review of the work of the Commission on the topic, see (*a*) the reports of the Commission: *Yearbook ... 1979*, vol. II (Part Two), p. 170, paras. 149-155; *Yearbook ... 1980*, vol. II (Part Two), pp. 162 *et seq.*, paras. 145-176; *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 228-249; *Yearbook ... 1982*, vol. II (Part Two), pp. 112 *et seq.*, paras. 199-249; (*b*) the reports of the Special Rapporteur: preliminary report, *Yearbook ... 1980*, vol. II (Part One), p. 231. document A/CN.4/335; second report, *Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/437 and Add.1 and 2; third report, *Yearbook ... 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1.

[58] See footnote 57 (*b*) above.

[59] A/CN.4/WP.5.

[60] See *Yearbook ... 1980*, vol. I, pp. 260-264, 1634th meeting, and pp. 274-276 and 281-287, 1636th and 1637th meetings; and *Yearbook ... 1980*, vol. II (Part Two), pp. 164-165, paras. 162-176.

[61] See footnote 57 (*b*) above.

[62] For the texts of the six draft articles, see *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, footnotes 679 to 683.

[63] See *Yearbook ... 1981*, vol. I, pp. 255-260, 1691st meeting, and pp. 273-281, 1693rd and 1694th meetings; and *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 230-249.

[64] See footnote 57 (*b*) above.

[65] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), sect. F.

"General provisions", contained the following six draft articles: "Scope of the present articles" (art. 1); "Couriers and bags not within the scope of the present articles" (art. 2); "Use of terms" (art. 3); "Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" (art. 4); "Duty to respect international law and the laws and regulations of the receiving and the transit State" (art. 5); and "Non-discrimination and reciprocity" (art. 6). Part II, dealing with the "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" (art. 7); "Appointment of a diplomatic courier" (art. 8); "Appointment of the same person by two or more States as a diplomatic courier" (art. 9); "Nationality of the diplomatic courier" (art. 10); "Functions of the diplomatic courier" (art. 11); "Commencement of the functions of the diplomatic courier" (art. 12); "End of the function of the diplomatic courier" (art. 13); and "Persons declared *non grata* or not acceptable" (art. 14).[66]

73. The Commission considered the third report of the Special Rapporteur at its thirty-fourth session and referred the 14 draft articles to the Drafting Committee.[67] 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 on all the topics in its current programme.

74. At its thirty-fifth session, in 1983, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/374 and Add.1-4),[68] as well as information on the topic received from Governments.[69] Due to lack of time, however, the Commission considered only the first and second instalments of the report (A/CN.4/374 and A/CN.4/374/Add.1). 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",[70] namely: "General facilities" (art. 15); "Entry into the territory of the receiving State and the transit State" (art. 16); "Freedom of movement" (art. 17); "Freedom of communication" (art. 18); "Temporary accommodation" (art. 19); "Personal inviolability" (art. 20); "Inviolability of temporary accommodation" (art. 21); "Inviolability of the means of transport" (art. 22); and "Immunity from jurisdiction" (art. 23). 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.[71] It also decided to adopt provisionally on first reading articles 1 to 8 of the set of draft articles.[72] 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 Commission should continue its work on all the topics in its current programme.

B. Consideration of the topic at the present session

75. At its present session, the Commission had before it the four remaining instalments of the fourth report of the Special Rapporteur (A/CN.4/374/Add.1, Add.2, Add.3 and Add.4). Document A/CN.4/374/Add.1 contained the texts of and explanations concerning draft articles 20 to 23,[73] entitled "Personal inviolability" (art. 20), "Inviolability of temporary accommodation" (art. 21), "Inviolability of the means of transport" (art. 22), and "Immunity from jurisdiction" (art. 23), the discussion of which was resumed by the Commission at the present session. Documents A/CN.4/374/Add. 2-4 contained the texts of and explanations concerning draft articles 24 to 42,[74] entitled "Exemption from personal examination, customs duties and inspection" (art. 24); "Exemption from dues and taxes" (art. 25); "Exemption from personal and public services" (art. 26); "Exemption from social security provisions" (art. 27); "Duration of privileges and immunities" (art. 28); "Waiver of immunity" (art. 29); "Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew" (art. 30); *Part III*, "Status of the diplomatic bag": "Indication of status of the diplomatic bag (art. 31); "Content of the diplomatic bag" (art. 32); "Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew" (art. 33); "Status of the diplomatic bag dispatched by postal services or other means" (art. 34); "General facilities accorded to the diplomatic bag" (art. 35); "Inviolability of the diplomatic bag" (art. 36); "Exemption from customs and other inspections" (art. 37); "Exemption from customs duties and all dues and taxes" (art. 38); "Protective measures in circumstances preventing the delivery of the diplomatic bag" (art. 39); *Part IV*, "Miscellaneous provisions": "Obligations of the transit State in case of *force majeure* or fortuitous event" (art. 40); "Non-recognition of States or Governments or absence of diplomatic or consular relations" (art. 41); and "Relation of the present articles to other conventions and international agreements" (art. 42). The Commission also had before it the fifth report of the

[66] For the texts of these 14 draft articles, see *Yearbook ... 1983*, vol. II (Part Two), pp. 45-46, footnotes 181 to 194.

[67] See *Yearbook ... 1982*, vol. I, pp. 293 *et seq.*, 1745th meeting, paras. 7 *et seq.*, and 1746th and 1747th meetings; and *Yearbook ... 1982*, vol. II (Part Two), pp. 114 *et seq.*, paras. 206-249.

[68] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[69] *Ibid.*, p. 57, document A/CN.4/372 and Add.1 and 2.

[70] For the texts of draft articles 15 to 19, see *Yearbook ... 1983*, vol. II (Part Two), pp. 48-49, footnotes 202 to 206; for the texts of draft articles 20 to 23, see footnotes 79 to 82 below.

[71] *Yearbook ... 1983*, vol. II (Part Two), p. 50, para. 171, and p. 53, para. 189.

[72] *Ibid.*, pp. 53 *et seq.*, para. 190.

[73] For the texts of draft articles 20 to 23, see footnotes 79 to 82 below.

[74] For the texts of draft articles 24 to 42, see footnotes 84 to 90 and 93 to 104 below.

Special Rapporteur (A/CN.4/382)[75] and information received from Governments (A/CN.4/379 and Add.1).[76]

76. The Commission considered the topic at its 1824th to 1830th, 1832nd, 1842nd to 1847th and 1862nd to 1864th meetings, from 21 to 29 May, on 1 June, from 18 to 25 June and from 16 to 18 July 1984, 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 began its discussion of draft articles 36 to 42 and decided to resume 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 that report, the Commission decided to adopt provisionally draft articles 9, 10, 11, 12,[77] 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.

77. The following subsections reflect in a more detailed manner the work on the topic by the Commission at its present session.

1. Presentation by the Special Rapporteur of his fifth report and of draft articles 24 to 42

78. Introducing his fifth report (A/CN.4/382), the Special Rapporteur said it was essentially a progress report, mainly intended to establish a linkage between what had been done so far and the work that lay ahead. Its purpose was to set out the present status of the draft articles and the stage that had been reached in considering each one and to indicate the main points which had arisen with regard to the draft articles during the discussion in the Sixth Committee of the General Assembly.[78]

79. No new substantive elements had emerged from that discussion. Most of the views expressed had related to the Commission's methods of work and to the Special Rapporteur's approach to the topic, with regard to which certain comments had been made and reservations expressed. The overall view regarding the Commission's progress at its thirty-fifth session had been favourable and some representatives had even suggested that the Commission might be able to complete consideration of the topic during the present term of office of its members. Most of the criticisms on a number of issues had related to points of drafting and arrangement.

80. With regard to the provisionally adopted articles 1 to 8 (dealing with the scope of the draft, the use of terms and certain general provisions), the main problem discussed had been the question of whether provision should be made for international organizations and for national liberation movements. As to the status of the courier, the suggestion had been made that draft article 9 should become part of article 8.

81. On draft article 20 (Personal inviolability),[79] a suggestion had been made to delete the last part of paragraph 2: "and shall prosecute and punish persons responsible for such infringements", on the ground that it would be going too far to require the receiving State or the transit State to prosecute and punish the persons in question. As the Special Rapporteur saw it, however, there was evidence in State practice that such abuses were in fact prosecuted and punished. Nevertheless, he would not insist on retaining the passage in question.

82. In draft article 21 (Inviolability of temporary accommodation),[80] paragraph 3 had attracted the most criticism, with suggestions to delete it, despite the many qualifications and restrictions it placed on the immunity of temporary accommodation from inspection or search.

83. Some speakers in the Sixth Committee had found that the provisions of draft article 22 (Inviolability of the means of transport)[81] were adequate, whereas others had

[75] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[76] *Ibid.*

[77] It was agreed to return to paragraph 2 of article 12 after the examination of draft article 28.

[78] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-eighth session of the General Assembly" (A/CN.4/L.369), sect. E.

[79] Draft article 20 as presented by the Special Rapporteur read:

"Article 20. Personal inviolability

"1. The diplomatic courier shall enjoy personal inviolability when performing his official functions and shall not be liable to any form of arrest or detention.

"2. The receiving State or, as applicable, the transit State shall treat the diplomatic courier with due respect and shall take all appropriate measures to prevent any infringement of his person, freedom or dignity and shall prosecute and punish persons responsible for such infringements."

[80] Draft article 21 as presented by the Special Rapporteur read:

"Article 21. Inviolability of temporary accommodation

"1. The temporary accommodation used by the diplomatic courier shall be inviolable. Officials of the receiving State or the transit State shall not enter the accommodation except with the consent of the diplomatic courier.

"2. The receiving State or the transit State has the duty to take appropriate measures to protect from intrusion the temporary accommodation used by the diplomatic courier.

"3. The temporary accommodation of the diplomatic courier shall be immune from inspection or search, unless there are serious grounds for believing that there are in it articles the 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, provided that the inspection or search be taken 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 and impediments to the delivery of the diplomatic bag."

[81] Draft article 22 as presented by the Special Rapporteur read:

"Article 22. Inviolability of the means of transport

"1. The individual means of transport used by the diplomatic courier in the performance of his official functions shall be immune from inspection, search, requisition, seizure and measures of execution.

"2. When there are serious grounds for believing that the individual means of transport referred to in paragraph 1 carries articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State, the competent authorities of those States may undertake inspection or search of that individual means of transport, provided that such inspection or search shall be conducted in the presence of the diplomatic courier and without infringing the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag."

suggested eliminating paragraph 2 for reasons similar to those advanced in connection with paragraph 3 of article 21.

84. Draft article 23 (Immunity from jurisdiction)[82] was a complex article and had also been the subject of considerable comment. The main criticism had centred on the terms of paragraph 4, namely that the diplomatic courier was not obliged to give evidence as a witness. Some representatives in the Sixth Committee had felt that such an exemption was not consistent with the diplomatic courier's duty, under paragraph 5 of the same article, to assist the competent jurisdiction in a lawsuit arising from an accident caused by a vehicle used or owned by him. Some suggestions had also been made to simplify draft article 23, more particularly in view of the temporary character of the presence of the courier.

85. Section III of the fifth report (A/CN.4/382, paras. 40-81) contained a brief analytical survey of State practice, compiled in the interval between the previous session and the present one. The Special Rapporteur wished to express his gratitude to the Secretariat for its valuable assistance in that regard and to point out that the survey should be read in conjunction with the material on State practice contained in the fourth report (A/CN.4/374 and Add.1-4). The main purpose of the survey was to explain which of his proposals were supported by recent State practice. The position was, quite objectively, that some of his proposals were backed by recent State practice, whereas others were not.

86. Section IV of the fifth report (A/CN.4/382, paras. 82-84) offered brief suggestions on the way in which the Commission might deal with the draft articles at the present session.

87. Introducing draft articles 24 to 29, the Special Rapporteur said that draft articles 24 to 27 dealt with the various exemptions accorded to the diplomatic courier, while articles 28 and 29 related to the duration of facilities, privileges and immunities and to waiver of immunity. Although not expressly defined in the codification conventions,[83] the term "exemption" appeared to have the legal meaning of a right which was granted to a person and which relieved that person from certain legally binding duties otherwise incumbent upon everyone under the legal system in question. As far as the diplomatic courier was concerned, the exemptions were determined by functional necessity, an aspect that was much more apparent in the case of the courier than in that of diplomatic agents or of members of missions, consular posts or delegations. Accordingly, because of the very nature of the functions of the diplomatic courier, the model employed was the status of the technical and administrative staff of a mission. Among the various exemptions recognized by the four codification conventions, he had identified four which were relevant to the status of the diplomatic courier (A/CN.4/374 and Add.1-4, para. 148) and which, in varying degrees, were of practical significance with regard to the courier's functions.

88. Regarding draft article 24 (Exemption from personal examination, customs duties and inspection),[84] the Special Rapporteur stated that, since the rules governing the admission of persons and goods into a country pertained to State sovereignty and fell under national jurisdiction, and since protective measures in the matter related to the security and other legitimate interests of the State, exemptions from such rules and measures had to be precise and specific. As to the applicability of those exemptions to the diplomatic courier, the question arose of how far functional necessity justified the various exemptions set forth in the codification conventions. The underlying legal justification for granting the courier such exemptions was the principle of freedom of communication and the need to safeguard the confidential nature of his task. Accordingly, the prevailing practice favoured the granting of exemptions on

[82] Draft article 23 as presented by the Special Rapporteur read:

"Article 23. Immunity from jurisdiction

"1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.

"2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of all acts performed in the exercise of his official functions.

"3. No measures of execution may be taken against the diplomatic courier, except in cases not covered by 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 witness.

"5. 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.

"6. Immunity from the jurisdiction of the receiving State or the transit State shall not exempt the diplomatic courier from the jurisdiction of the sending State."

[83] The four conventions codifying diplomatic and consular law (hereinafter referred to as "codification conventions") are the following: 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95); 1963 Vienna Convention on Consular Relations (*ibid.*, vol. 596, p. 261); 1969 Convention on Special Missions (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125); 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87), hereinafter referred to as "1975 Vienna Convention on the Representation of States".

[84] Draft article 24 as presented by the Special Rapporteur read:

"Article 24. Exemption from personal examination, customs duties and inspection

"1. The diplomatic courier shall be exempt from personal examination, including examination carried out at a distance by means of electronic or other mechanical devices.

"2. The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry of articles for the personal use of the diplomatic courier and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services.

"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 covered by the exemptions referred to in paragraph 2 of this article, or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. In such cases inspection shall be carried out only in the presence of the diplomatic courier."

a basis of reciprocity. Of course, the receiving or transit State could also extend further facilities as a matter of courtesy. Some Governments in their written replies had suggested that an examination carried out at a distance by means of electronic or other mechanical devices did not infringe inviolability or immunity. With technical progress, however, it was now possible to have a more detailed picture than that provided by a mere X-ray examination and he was not at all convinced that the devices in question could be used without disregard for the inviolability of the diplomatic bag and the confidentiality of the communications carried by the diplomatic courier. Furthermore, not all States had the capability for producing or obtaining those sophisticated devices and the technologically advanced States enjoyed an obvious advantage in that regard.

89. Draft article 25 (Exemption from dues and taxes)[85] was based on a rule contained in article 34 of the 1961 Vienna Convention on Diplomatic Relations, but which had already been applied prior to 1961, albeit on the basis of reciprocity. The terms of article 34 had been copied in subsequent codification conventions and also embodied in many bilateral treaties. Draft article 25 was patterned on the privileges and immunities applicable to administrative and technical staff and incorporated only the two exceptions laid down in article 34, subparagraphs (*a*) and (*e*), of the 1961 Vienna Convention.

90. Draft article 26 (Exemption from personal and public services)[86] provided for an exemption which applied to the administrative and technical staff of a diplomatic mission under article 37, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. As far as the courier was concerned, any imposition of such services would run directly counter to the proper discharge of this mission of delivering the diplomatic bag safely and speedily. Draft article 26 thus embodied a rule which was supported by long-standing practice, customary diplomatic law and treaty law.

91. The exemption from social security provisions under draft article 27[87] was to be found, with respect to diplomatic agents or consular officers, in all codification conventions since the 1961 Vienna Convention on Diplomatic Relations. There was good reason to apply the same rule to diplomatic couriers and to afford to them treatment similar to that extended by a receiving State or a transit State to any official of the sending State temporarily in its territory.

92. Draft articles 28[88] and 29[89] were both concerned with the time factor and with the duration of facilities, privileges and immunities. Draft article 28 dealt with duration in its strict sense, in other words with the problem of ordinary termination, while draft article 29 covered a special form of termination, namely that of waiver. Both types of termination had important legal implications that deserved careful examination.

93. Draft article 28 raised the question of the duration of the functions and the duration of the privileges and immunities of the diplomatic courier, and the problem of the relationship beween those two closely connected though legally distinct issues was not an easy one. In the matter of prescribing the duration of immunities, there were a number of different doctrines. Taking into account article 39 of the 1961 Vienna Convention on Diplomatic Relations and article 53 of the 1963 Vienna Convention on Consular Relations, draft article 28 proposed that the diplomatic courier would enjoy privileges and immunities from the moment of entry into the territory of the receiving State or the transit State in order to perform his official functions, and they would normally cease when he left the territory of that State, or on the expiry of a reasonable period in which to do so. It also proposed that, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity should continue to subsist. Since the codification conventions did not contain any special provisions regarding the duration of the facilities, privileges and immunities accorded to the diplomatic courier, it seemed appropriate to include a rule on the subject in the draft articles.

[85] Draft article 25 as presented by the Special Rapporteur read:

"Article 25. Exemption from dues and taxes

"The diplomatic courier shall be exempt from taxes, dues and charges, personal or real, national, regional and municipal, 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."

[86] Draft article 26 as presented by the Special Rapporteur read:

"Article 26. Exemption from personal and public services

"The receiving State or the transit State shall exempt the diplomatic courier from all personal and public services of any kind."

[87] Draft article 27 as presented by the Special Rapporteur read:

"Article 27. Exemption from social security provisions

"The diplomatic courier shall be exempt from the social security provisions which may be in force in the receiving State or the transit State with respect to services rendered for the sending State."

[88] Draft article 28 as presented by the Special Rapporteur read:

"Article 28. 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 the transit State in order to perform his official functions.

"2. If the official functions of a diplomatic courier come to an end, his privileges and immunities shall normally cease when he leaves the territory of the receiving State or, as applicable, the transit State, or on the expiry of a reasonable period in which to do so. However, with respect to acts performed by the courier in the exercise of his official functions, immunity shall continue to subsist."

[89] Draft article 29 as presented by the Special Rapporteur read:

"Article 29. Waiver of immunity

"1. The sending State may waive the immunity of the diplomatic courier from jurisdiction. The waiver of immunity may be authorized by the head or a competent member of the diplomatic mission, consular post, special mission, permanent mission or delegation of that State in the territory of the receiving State or transit State.

"2. The waiver must always be express.

"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. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed 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 suit, it shall make every effort to settle the matter justly."

94. Draft article 29 dealt with waiver of immunity, which constituted voluntary submission to the jurisdiction of the receiving State and therefore directly affected the duration of the immunity. It could thus be considered as a form of suspension or termination of immunity from the jurisdiction of the receiving State. The Special Rapporteur said that he had based draft article 29 on provisions contained in existing codification conventions. As to who was entitled to waive the immunity, article 32, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations stipulated that the immunity from jurisdiction of the members of the mission "may be waived by the sending State". That rule, as applied to the diplomatic courier, was restated in paragraph 1 of draft article 29, which, to avoid confusion, also went on to specify that waiver could be authorized by the head or a competent member of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State. As to the method of waiving immunity, paragraph 2 of draft article 29 stated that the waiver "must always be express", a provision that was in keeping with the rule embodied in all the existing codification conventions. Another important point was that the requirements for the validity of the waiver and the other procedural rules must conform to the rules and regulations of the State of the forum. As to the scope and implications of waiver, article 32 of the 1961 Vienna Convention included immunity from criminal, administrative and civil jurisdiction. In that regard, draft article 29 contained rules for the diplomatic courier that were similar to those applicable to the administrative and technical staff of missions. In respect of civil and administrative proceedings, article 32, paragraph 4, of the 1961 Vienna Convention drew a distinction between waiver of immunity from jurisdiction and waiver of immunity in respect of execution of the judgment. A separate waiver was required for the purposes of execution. He had incorporated that rule in paragraph 4 of draft article 29. Lastly, paragraph 5 embodied a rule taken from article 31 of the 1975 Vienna Convention on the Representation of States, which required the sending State either to waive the immunity of the diplomatic courier in respect of a civil suit or, as an alternative, to make every effort to settle the matter justly.

95. With reference to draft article 30,[90] the Special Rapporteur stated that, since the conclusion of the 1961 Vienna Convention on Diplomatic Relations, the diplomatic bag had increasingly been transported and delivered by captains of commercial aircraft, masters of merchant ships and authorized members of the crew. In his work on the draft article he had drawn upon existing State practice, the preparatory work of the 1961 United Nations Conference at Vienna, as well as on article 27, paragraph 7, of the 1961 Vienna Convention. The captain of an aircraft or master of a ship, as the commanding officer, had powers to deal with any situation arising on board. Once the aircraft had landed or the ship had arrived in port, all that was required was facilities for delivery of the diplomatic bag. Furthermore, under the rules of ICAO[91] and the provisions of the Convention on the High Seas (Geneva, 1958),[92] the captain or master incurred liability for any damage caused by his negligence or incompetence. The introduction of any element of immunity would run counter to that liability. It was therefore not appropriate to assimilate the captain or master to a member of the administrative or technical staff of a diplomatic mission, and still less to a diplomatic agent. All that was required was that he should have the necessary facilities for safe delivery of the bag. In practice, the document indicating the number of packages constituting the diplomatic bag and and required of a captain or master carrying the bag was the same as that given to a regular courier, but it simply meant that its holder was entitled to be treated with due respect and to have the necessary facilities for delivery of the bag. It was the duty of the receiving State to permit free access to the ship or aircraft by the representative of the diplomatic mission of the sending State who came to take delivery of the bag. With regard to aircraft, there had been significant changes in the past 25 years. It was no longer appropriate to place the additional responsibility of the diplomatic bag on the captain of a large aircraft who was responsible for the safety of several hundred passengers and a large crew. The best solution was to entrust the bag to a member of the crew authorized for that purpose.

96. Draft article 31 (Indication of status of the diplomatic bag[93] was the first of the nine articles in part III,

[90] Draft article 30 as presented by the Special Rapporteur read:

"Article 30. Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew

"1. The captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command may be employed for the custody, transportation and delivery of the diplomatic bag of the sending State to an authorized port of entry on his scheduled itinerary in the territory of the receiving State, or for the custody, transportation and delivery of the bag of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State in the territory of the receiving State addressed to the sending State.

"2. The captain, the master or the authorized member of the crew entrusted with the diplomatic bag shall be provided with an official document indicating the number of packages constituting the bag entrusted to him.

"3. The captain, the master or the authorized member of the crew shall not be considered to be a diplomatic courier.

"4. The receiving State shall accord to the captain, the master or the authorized member of the crew carrying the diplomatic bag the facilities for free and direct delivery of the diplomatic bag to members of the diplomatic mission of the sending State who are allowed by the receiving State to have access to the aircraft or ship in order to take possession of the diplomatic bag."

[91] *Rules of the Air. Annex 2 to the Convention on International Civil Aviation*, chap. 2, para. 2.3.

[92] Article 11 of the Convention (United Nations, *Treaty Series*, vol. 450, p. 88).

[93] Draft article 31 as presented by the Special Rapporteur read:

"PART III

"STATUS OF THE DIPLOMATIC BAG

"Article 31. Indication of status of the diplomatic bag

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

(*Continued on next page.*)

dealing with the status of the diplomatic bag. The bag could consist of any form of envelope or container and the markings used to identify it could vary, but it always had to be sealed with wax or lead seals bearing the official stamp of the competent authority of the sending State, usually the Ministry of Foreign Affairs. Sometimes, the diplomatic bag was also locked and fastened with padlocks. An official covering document was an absolute requirement in all cases. When a diplomatic bag was sent by sea, the bill of lading had to specify its particulars. With regard to the maximum size or weight of a diplomatic bag to be allowed, there had been some suggestions in the Sixth Committee of the General Assembly to the effect that such a limitation could act as an indirect safeguard against abuses. When the diplomatic bag was sent by mail, the rules of UPU regarding maximum size and weight would apply. Otherwise, in draft article 31 the question of the maximum size or weight allowed had been left to be determined by agreement between the sending State and the receiving State.

97. Draft article 32[94] laid down the basic rule that the diplomatic bag must contain only official correspondence and documents or articles intended exclusively for official use, which had been adopted in article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations. The problem which arose—in its most acute form—was that of verification and the prevention of abuse. In spite of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, in many bilateral consular conventions there was no provision for opening the consular bag, but the receiving State could cause it to be returned unopened if it had suspicions about the contents. An analysis of State practice, including bilateral consular conventions, showed consistent adherence to the principle of absolute inviolability of the diplomatic bag, by reason of the confidentiality of its contents. There had, however, been some difficulties regarding the interpretation of the expression "articles intended for official use". The Special Rapporteur's fifth report elaborated further on that point, referring to State practice concerning the appropriateness of including in a diplomatic bag articles such as those which could be obtained commercially, notarial certificates, medicines, drugs, valuables and private or personal correspondence (A/CN.4/382, paras. 65-69).

98. Introducing draft article 33,[95] the Special Rapporteur stated that the procedure of entrusting diplomatic mail to the captain of a commercial aircraft or an authorized member of his crew had proved in practice to have the advantage of economy combined with reasonable safety, since the bag was in the custody of a responsible person. Masters of merchant ships were still being employed for the same purpose in some cases. The requirements relating to documentation, to visible external marks and to the legally permissible contents of the bag were fully applicable in that situation as well. Furthermore, when carried in that way, the diplomatic bag had to be given at least the same measure of protection and be accorded the same facilities, privileges and immunities as were granted by the receiving State or the transit State to a bag accompanied by a professional courier or an *ad hoc* courier. In his view, a diplomatic bag which was not in the direct and permanent custody of a diplomatic courier needed an even greater measure of protection and preferential treatment, in order to ensure its safe and unimpeded transport.

99. Draft article 34[96] dealt with a bag not entrusted to any particular person. In that connection, article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations provided that missions could "employ all appropriate means" of communication, which, in

(*Footnote 93. continued.*)

"2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee, as well as of any intermediary points on the route or transfer points.

"3. The maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State."

[94] Draft article 32 as presented by the Special Rapporteur read:

"*Article 32. 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, and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag."

[95] Draft article 33 as presented by the Special Rapporteur read:

"*Article 33. Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew*

"The diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew shall comply with all the requirements set out in articles 31 and 32, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory."

[96] Draft article 34 as presented by the Special Rapporteur read:

"*Article 34. Status of the diplomatic bag dispatched by postal services or other means*

"1. The diplomatic bag dispatched by postal services or other means, whether by land, air or sea, shall comply with all the requirements set out in article 31, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory.

"2. The conditions and requirements for the international conveyance of the diplomatic bag by postal services, including its visible external marks, maximum size and weight, shall conform to the international regulations established by the Universal Postal Union or be determined in accordance with bilateral or multilateral agreements between the States or their postal administrations. The postal authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag conveyed through their postal services.

"3. The conditions and requirements for the dispatch of diplomatic bags by ordinary means of transportation, whether by land, air or sea, shall conform to the rules and regulations applicable to the respective means of transportation, and the bill of lading shall serve as a document indicating the official status of the diplomatic bag. The competent authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag dispatched through the ports of those States."

State practice, was taken to mean postal services and other means of transport. There were two basic requirements, namely that the rules regarding proof of the status and content of the diplomatic bag should apply, and that the same protection should be given as for the accompanied bag, particularly in regard to inviolability and expeditious forwarding. Whatever the means of transport used, the bag was entitled to special treatment because of its official character. Commercial means of transport were also commonly used for the dispatch of heavy consignments and articles such as films, books and exhibits intended exclusively for the official use of diplomatic missions. The four codification conventions did not contain any specific provisions on that type of unaccompanied diplomatic bag, but all the rules regarding official seals and other visible external marks and safety devices applied, and the bill of lading for the consignment could serve as a document indicating the status of the bag. The requirement of inviolability provided an added guarantee of protection and hence of safe delivery of the bag. It was on that basis that draft article 34 was proposed for the Commission's consideration.

100. With reference to draft article 35 (General facilities accorded to the diplomatic bag),[97] the Special Rapporteur stated that three different sets of circumstances could be envisaged regarding the safe and speedy delivery of the diplomatic bag. First, normal circumstances in which the usual facilities determined by functional necessity would be accorded, for instance in regard to transport, customs clearance and other formalities to expedite delivery of the bag. Secondly, special circumstances of some difficulty, when facilities would be provided upon a reasonable request being made by the courier or the sending State. Such special circumstances would not fall within the scope of *force majeure* and could be regarded as surmountable with the assistance of the sending or receiving State. Thirdly, circumstances that were covered not by draft article 35, but by draft articles 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag) and 40 (Obligations of the transit State in case of *force majeure* or fortuitous event). On that basis, draft article 35 was proposed for the Commission's consideration. The second set of circumstances to which he had referred could perhaps be dealt with in some detail in the commentary.

101. Draft article 36 (Inviolability of the diplomatic bag),[98] the Special Rapporteur went on to say, dealt with one aspect of the inviolability of the official correspondence and documents of diplomatic missions provided for in article 24 and in article 27, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. The provision in paragraph 1 of draft article 36 reflected the rule in article 27, paragraph 3, of the 1961 Vienna Convention: "The diplomatic bag shall not be opened or detained." That rule stated a basic principle of customary international law recognized long before 1961. Although on occasion the rule of inviolability had been abused and it was therefore necessary to protect the legitimate interests of the receiving State, the diplomatic bag was so important for communication that a proper balance with the interests of the sending State had to be maintained. At the 1961 United Nations Conference at Vienna, a number of proposals designed to restrict the inviolability of the diplomatic bag had been rejected. Although article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations contemplated under very special circumstances and guarantees the possibility of the bag being opened, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States had reverted to the régime of absolute inviolability adopted in the 1961 Vienna Convention. Therefore the first clause of paragraph 1 of draft article 36 stated the basic principle of the inviolability of the bag, but a second clause had been added to meet the concern of some States by giving them the option to agree otherwise. As he understood the principle of inviolability, the protection to be afforded the bag should be such as to prevent any abuse whatsoever, including abuses through electronic means which could not only ascertain the contents of the bag without opening it, but also create inequality between the countries which possessed the necessary technical equipment and those which did not.

102. There were, of course, other possibilities in drawing up draft article 36. For instance, a paragraph could be added on the lines of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, to cover the bag used by consular posts. He had also considered the possibility of providing in the draft for States to make a choice between the provisions of the different conventions to which they had acceded. Another possibility would be to apply the consular bag procedure to all kinds of diplomatic bags. Yet another possibility would be to work out a formula distinguishing between the treatment of a diplomatic bag containing only confidential material, which would enjoy unconditional inviolability, and that of a bag containing non-confidential documents and articles for official use, which would not enjoy unconditional inviolability. The most appropriate approach, in his view, would be to follow article 27 of the 1961 Vienna Convention on Diplomatic Relations,

[97] Draft article 35 as presented by the Special Rapporteur read:

"Article 35. General facilities accorded to the diplomatic bag

"The receiving State and the transit State shall accord all necessary facilities for the safe and speedy transportation and delivery of the diplomatic bag."

[98] Draft article 36 as presented 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 in the territory of the receiving State or the transit State; 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. The receiving State or the transit State shall take all appropriate measures to prevent any infringement of the inviolability of the diplomatic bag, and shall also prosecute and punish persons under its jurisdiction responsible for such infringement."

perhaps adding a reservation to take account of the régime under article 35 of the 1963 Vienna Convention on Consular Relations.

103. Turning to draft article 37 (Exemption from customs and other inspections),[99] the Special Rapporteur pointed out that the rule stated in the article was of long-standing application and practical significance. Its basis was the principle of inviolability and the functional necessity of providing for safe and quick delivery of the diplomatic bag. Although the 1961 Vienna Convention on Diplomatic Relations and the other relevant conventions contained no specific provision on the subject, the rule could be derived from the general principle of inviolability. Draft article 37 did not specify the scope of the exemption in detail; that might perhaps be done in the commentary. Broadly speaking it covered customs inspection, all clearance procedures and any inspection carried out at points of entry and exit or in transit. His understanding of the practical significance and scope of the exemption from inspection was supported by an impressive body of State practice.

104. Regarding draft article 38,[100] the Special Rapporteur pointed out that the exemption from customs duties and all dues and taxes contained therein had first been based on *comitas gentium* and reciprocity and had evolved through customary law to become a conventional rule of modern international law, though the principle of reciprocity was still an inherent part of the operation of the rule. The object of the exemptions was, again, safe and quick delivery of the bag, and their legal foundation was in conformity with article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. Charges for services such as storage and cartage would, of course, be levied: that too was in accordance with the codification conventions. The scope of draft article 38 extended to exemption from fiscal dues and taxes levied on the export and import of goods, and related charges for customs clearance.

105. Draft article 39[101] provided for protection of the bag when the functions of the diplomatic courier terminated before he had delivered it; for instance, if he was incapacitated from natural causes. In those circumstances, it was incumbent on States to assist each other as an expression of solidarity. Even greater care was needed in the case of the unaccompanied bag, which was provided for in paragraph 2 of the article, since it would not have the protection of the dedicated services of the courier.

106. Speaking generally on part IV of the draft articles, dealing with "Miscellaneous provisions", the Special Rapporteur pointed out that it was of a tentative character and limited in scope. In addition to the matters covered in draft articles 40, 41 and 42, there were a number of other matters that could be dealt with therein: for instance, reservations, especially in regard to participation in conventions and obligations assumed by transit States; settlement of disputes arising out of the interpretation or application of the draft articles; special rules relating to a state of war or armed conflict; and final clauses. If he had not seen fit to cover them, it was because he believed that a selective approach would assist the Commission.

107. The first article in part IV was draft article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event).[102] For the purposes of that article, a distinction had been drawn between a "transit State", as defined in article 3, paragraph 1 (5), as provisionally adopted, and a "third State". He considered it preferable to avoid the term "third State" in that context. The term "transit State" would cover a State in whose territory the diplomatic courier or unaccompanied diplomatic bag was compelled to stay as a result of *force majeure* or some fortuitous event. The problem that then arose was whether the State in question should accord the facilities that would have been accorded by the receiving State or transit State initially envisaged. Draft article 40 was proposed for the Commission's consideration on that basis.

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[99] Draft article 37 as presented by the Special Rapporteur read:

"Article 37. Exemption from customs and other inspections

"The diplomatic bag, whether accompanied or not by diplomatic courier, shall be exempt from customs and other inspections."

[100] Draft article 38 as presented by the Special Rapporteur read:

"Article 38. Exemption from customs duties and all dues and taxes

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

[101] Draft article 39 as presented by the Special Rapporteur read:

"Article 39. Protective measures in circumstances preventing the delivery of the diplomatic bag

"1. In the event of termination of the functions of the diplomatic courier before the delivery of the diplomatic bag to its final destination, as referred to in articles 13 and 14, or of other circumstances preventing him from performing his functions, 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 of that event.

"2. The measures provided for in paragraph 1 shall be taken by the receiving State or the transit State with regard to the diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship in circumstances preventing the delivery of the diplomatic bag to its final destination."

[102] Draft article 40 as presented by the Special Rapporteur read:

"PART IV

"MISCELLANEOUS PROVISIONS

"Article 40. Obligations of the transit State in case of force majeure *or fortuitous event*

"If, as a consequence of *force majeure* or fortuitous event, the diplomatic courier or the diplomatic bag is compelled to deviate from his or 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 the inviolability and protection that the receiving State is bound to accord and shall extend to the diplomatic courier or the diplomatic bag the necessary facilities to continue his or its journey to his or its destination or to return to the sending State."

108. The provision contained in draft article 41[103] had appeared for the first time in the 1969 Convention on Special Missions. Its purpose was to ensure that the status of the diplomatic courier and the diplomatic bag would not be affected in cases where diplomatic relations had been severed or did not exist. At the Headquarters of the United Nations in New York, for example, there were a number of missions of States not recognized by the host country which used diplomatic bags. The references to "host State" in draft article 41 should be deleted in view of the definitions contained in article 3 as provisionally adopted.

109. As to draft article 42,[104] the Special Rapporteur said it underlined three basic points: first, that the draft articles were complementary to the four codification conventions; secondly, that the draft articles should not prejudice any other international agreements in force; and thirdly, that the draft articles should not prevent States from concluding international agreements on the topic under consideration. There was a temptation to set ground rules, as it were, on the diplomatic courier and the diplomatic bag, but draft article 42 had a far more modest purpose.

110. In conclusion, the Special Rapporteur stated that the set of draft articles which he had submitted was not exhaustive, but he understood that the Commission was in favour of a reduction rather than an increase in their number.

[103] Draft article 41 as presented by the Special Rapporteur read:

"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 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 its Government, nor shall it imply recognition by the receiving State, the host State or the transit State of the sending State or of its Government."

[104] Draft article 42 as presented by the Special Rapporteur read:

"Article 42. Relation of the present articles to other conventions and international agreements

"1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

"2. The provisions of the present articles are without prejudice to other international agreements in force as between States parties thereto.

"3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

2. General views expressed in the Commission on the Special Rapporteur's fifth report and on the set of draft articles

111. Appreciation was generally expressed for the Special Rapporteur's fifth report, which, it was said, provided the Commission with a very useful set of materials for further work. The clarity, precision and richness of the documentation submitted to the Commission were underlined, and particular mention was made of section III of his report, which, it was said, contained a very useful compilation of relevant State practice.

112. Views differed as to the orientation of the draft articles concerning the degree of protection they proposed to accord to the diplomatic courier and the privileges and immunities they proposed to grant him.

113. In the view of some members of the Commission, since the whole purpose of the Commission's endeavour was to protect and safeguard freedom of communication by means of the diplomatic bag, it was the diplomatic bag that should be the focus of attention, for the diplomatic courier required protection only in so far as protection was absolutely necessary to ensure free communication via the bag. Furthermore, the diplomatic courier was not a diplomatic official and did not need the same degree of privileges and immunities. He was simply the vehicle for the delivery of the bag. Any protection accorded to the courier was intended to facilitate free communication and not to protect the inviolability of the courier as such. The guiding principle, therefore, should be to what extent the protection accorded to the courier was necessary for the performance of all his functions, in the light of the delicate balance between the sending State's interest in maintaining free communication with its missions and the receiving State's interest in preserving its integrity and security. Furthermore, Governments were highly reluctant to confer privileges and immunities upon additional categories of persons, particularly when, as recent events had amply demonstrated, privileges and immunities could be gravely abused.

The Commission should be realistic, for there was no point in preparing far-reaching proposals on the basis of a particular doctrinal approach if it was convinced that the proposals would not be accepted by the majority of Governments. There was no objection in principle to the Special Rapporteur making comparisons with other codification conventions; indeed, it was his duty to do so, but it was important to adopt a cautious approach. The Commission should not risk a conflict with existing law, in which respect it had to be borne in mind that not all of the four relevant codification conventions represented existing law. Moreover, it was highly dangerous to equate the diplomatic courier with other diplomatic or consular agents who lived a more settled life in the receiving State. The Commission was not engaged in a wholesale review of diplomatic law. It should be borne in mind that the question of the status of the diplomatic courier was dominated by two considerations, namely the courier's functions and their transient nature.

114. Some other members felt that there was a tendency to minimize the status of the diplomatic courier.

Yet the diplomatic courier was an indispensable link in diplomatic relations, essential to the proper functioning of diplomatic and consular missions. If the courier was to be exposed to intolerable interference merely because he was an alien on the soil of a receiving or a transit State, an entire institution might well be placed in jeopardy. If he did not receive adequate protection, his task itself would inevitably be hindered. Some members believed that all the efforts undertaken to expand the scope of the draft so as to include the couriers of recognized national liberation movements would be meaningless in such a case. Again, protection of the diplomatic courier was important for countries unable materially to equip themselves with the most modern means of communication. The diplomatic courier played a very important part in international relations, since his main function was to carry the diplomatic bag; by putting the sending State and the receiving State in contact he helped to bring peoples and nations closer together.

The Special Rapporteur had been more or less directly and unfairly reproached for a tendency in his draft articles to assimilate the position of the diplomatic courier to that of the members of diplomatic missions. The practice of States bore witness to such an assimilation, although that practice might not perhaps extend to all States, particularly developing countries. Besides, even if the Special Rapporteur's proposals were not strictly based on practice, the Commission could contribute to the progressive development of international law, as it had done, for instance, by giving a mandatory character, in its draft articles on diplomatic intercourse and immunities, to exemptions which had previously been based only on courtesy and reciprocity. Moreover, it should not be forgotten that a diplomatic courier could at the same time be a member of a diplomatic mission. If the draft articles gave the diplomatic courier a status entirely different from that of a diplomatic agent, one and the same person might enjoy greater or lesser privileges according to the functions he was performing. Consequently, in view of the specific nature of the diplomatic courier's functions, it would be advisable to depart as little as possible from what was provided in the codification conventions regarding diplomatic agents. The purpose of granting privileges and immunities was not to benefit the persons enjoying them, but to facilitate the performance of their official functions in the ultimate interest of States. In that respect, the fact that the diplomatic courier's functions were performed during a rather short time should not influence his status. The misdeeds from which some States had quite recently suffered had caused an emotional reaction in the international community which could not, however, justify the desire to impose restraints on the diplomatic courier that would hinder the performance of his functions. Lastly, it should be borne in mind that every State could at the same time be a sending State, a transit State and a receiving State.

115. Still other members felt that the discussion had revealed a division of opinion that recalled the lack of unanimity among Governments in their comments prior to the General Assembly's decision to invite the Commission to consider the topic. Some Governments had thought the exercise useful, others had had reservations, and yet others had believed that the exercise would be counter-productive and might even affect the application of the existing provisions on the subject of diplomatic couriers contained in the four relevant codification conventions. The purpose of the draft articles should be threefold: first, to consolidate the existing provisions of the codification conventions dealing with the courier; secondly, to unify the rules so as to ensure the same treatment for all diplomatic couriers; and thirdly, to develop rules to cover practical problems not dealt with in existing provisions. It was on that basis that the Commission should proceed with its work on the topic. Although the paramount question was that of the diplomatic bag, that in itself did not detract from the importance of protecting the courier and of affording him certain minimum guarantees. Although it was important not to glamorize the role of the diplomatic courier, the importance of his role should not be minimized. Normally, the courier's task was a comparatively easy one, but difficulties could arise on the journey or even at the destination. Therefore adequate guarantees were needed from both the receiving State and the transit State.

116. It was generally felt that the role and functions of the diplomatic courier and the inviolability of the diplomatic bag should be dealt with in such a way as to foster smooth and friendly relations between the sending State and the receiving State, while at the same time ensuring that the privileges and immunities conferred in that respect were not used to cloak abuses. The point, therefore, was how to achieve a balance between the twin aims of promoting smooth relations between States and avoiding abuse. In that connection, it was necessary to bear in mind the need to develop the functional aspects of the topic and to include in the draft only articles that would serve that end. The courier should have adequate protection for the proper exercise of his functions. In that connection it was pointed out that the courier's functions were necessarily of a transient nature inasmuch as he remained for only short periods in the transit State or the receiving State. His privileges and immunities, which were necessary only in connection with the delivery and collection of the diplomatic bag, could not be equated with those of diplomatic agents, who were accredited to a specific Government and whose privileges and immunities were of necessity required for a longer period. The draft should therefore not be unduly voluminous: as a general principle, the fewer the articles the better, since the more articles there were the greater the difficulty would be in striking a balance between the two aspects the Special Rapporteur had mentioned. Where possible, any provisions pertaining to a single matter should be combined in one article rather than be scattered throughout the draft.

117. One member of the Commission elaborated on the position of the transit State in the draft articles. From the standpoint of the receiving State, he said, it was quite easy to extend the privileges and immunities granted to diplomatic and consular staff to the diplomatic courier. That was particularly true in the case of countries which had a large diplomatic and consular presence in each

other's territories and where couriers travelled fairly regularly; there was then scope to treat the institution of the diplomatic courier as an important accessory to diplomatic and consular relations, and the normal incidents of diplomatic and consular relations applied. For instance, a diplomatic courier could, like any diplomatic official, be declared *persona non grata*. To that extent, therefore, some aspects of the proposed rules were eminently workable. If, however, it was really of importance for States which relied on diplomatic couriers to have the co-operation of States in which they had no diplomatic, consular or other representation — and the member in question was uncertain about that — then the Commission should take a very close look at the proposed rules in the ultimate context of the transit State, as defined under paragraph 1 (5) of article 3 as provisionally adopted, which was in a far worse position than the receiving State. A transit State, for example, was not invited, under the rules, to declare that any particular diplomatic courier passing through its territory was *persona non grata*. On the other hand, it was required, somewhat unrealistically, by article 4, paragraph 2, as provisionally adopted to model its practice on that of a receiving State, which seemed to be a rather tall order. Moreover, the feeling of reciprocity which could perhaps be developed in the case of a receiving State and might justify new provisions would be hard to achieve in the case of a transit State. The problem was not one of diplomatic passports, which always commanded respect, but of the kind of minimum arrangements that served the actual need and would not build up resistance in Governments. States would normally do a lot for the travelling representative of a foreign Government, but it was quite another matter to require them to do so, and in all circumstances. He made those comments in the light of the fact that many Governments attached great importance to the introduction of new provisions and that, in order to fulfil their purpose, such provisions would have to have the support of a number of other Governments which were not nearly so keen on the idea. The practical equation was very difficult.

118. Views expressed in the Commission on the inviolability of the diplomatic bag, which also have a bearing on the general approach of the set of draft articles, are reflected in subsection 3, under draft article 36 (paras. 136—143 below).

3. Views expressed in the Commission regarding specific draft articles submitted by the Special Rapporteur

119. With reference to draft article 20 (Personal inviolability),[105] it was suggested that paragraph 1 thereof, although acceptable, should be reworded to make it clear that the inviolability applied to both clauses of the paragraph. It was also suggested that the word "official" should be deleted before the word "functions". Regarding paragraph 2, the view was held that abuses of the inviolability of the person of the courier could take different forms. If minor disputes with airport customs officers or slight delays due to verification of certifying papers were held to be infringements of the dignity and freedom of the diplomatic courier that called for prosecution and punishment by the receiving State, they would give rise to many unnecessary negotiations. Accordingly, it would be preferable to delete the phrase "and shall prosecute and punish persons responsible for such infringements" or, if the Special Rapporteur deemed that provision to be necessary, to insert the words "when appropriate" after the word "shall", thereby providing for some flexibility in the application of the provision. Some speakers felt that the whole of paragraph 2 was unnecessary and that paragraph 1 was enough to cover the subject-matter of the draft article.

120. Regarding draft article 21 (Inviolability of temporary accommodation),[106] the view was expressed that paragraphs 1 and 2 thereof were unnecessary and should be deleted. According to another view, while paragraph 2 could be deleted, paragraphs 1 and 3 could become, respectively, paragraphs 2 and 3 of draft article 19, which also deals with temporary accommodation. The suggestion was made that, in paragraph 3, the words "shall be immune from inspection or search" should be replaced by "shall not be subject to inspection or search", to avoid any reference to the concept of "immunity" and hence any analogy with the diplomatic agent, and to reflect a functional approach. Still another view was that the entire article was unnecessary.

121. Concerning draft article 22 (Inviolability of the means of transport),[107] the view was held that the occasions on which a courier would use a personal means of transport were so rare that a separate draft article was unnecessary and might even irritate receiving and sending States. It was observed that the vehicle of a diplomatic mission, which would normally be used by the courier, already enjoyed inviolability under the 1961 Vienna Convention on Diplomatic Relations and that it was going too far to accord inviolability to any vehicle that the courier might use. The suggestion was made that inviolability of the means of transport could be covered in draft article 21 by adding immunity from attachment or execution. By combining the provisions in that way, they would be closer to article 25 of the 1969 Convention on Special Missions. If the draft article was nevertheless retained, it was proposed that paragraph 1 should be amended to provide that the immunity would last only for the period during which the diplomatic courier performed his functions. As in the case of draft article 21, and for the same reasons, it was suggested that, in paragraph 1, the phrase "shall be immune from inspection, search, requisition, seizure and measures of execution" should be replaced by "shall not be subject to inspection or search".

122. Several suggestions were also made with respect to draft article 23 (Immunity from jurisdiction).[108] Some members felt that the draft article should be deleted. It

[105] See footnote 79 above.

[106] See footnote 80 above.

[107] See footnote 81 above.

[108] See footnote 82 above.

was suggested that the Special Rapporteur had given no real instance of any attempt having been made to arrest or serve process on a diplomatic courier. The Commission should seek to regulate such problems as had arisen in practice, rather than try to solve all the theoretical difficulties. On the other hand, the view was also expressed that the draft article was of special importance in protecting the diplomatic courier and that, for it to be effective, it had to cover all categories of jurisdiction, including criminal jurisdiction as contemplated in paragraph 1. With regard to this paragraph, while some other members favoured its deletion, others suggested that immunity from criminal jurisdiction should be confined to "acts performed by the courier in the exercise of his official functions". Concerning paragraph 3, it was noted that, if the phrase "except in cases not covered by paragraph 2 of this article" was intended to allow execution in cases where a judgment had been validly rendered under paragraph 2 of the article,it might be clearer to spell that out. It was also suggested that the clause in paragraph 3 beginning with the words "and provided that" should be deleted. The remark was also made that the paragraph was not very clear because it was drafted in the negative and in the form of a condition. It could be replaced by a more concise formulation stipulating that "no measures of execution may be taken against the diplomatic courier for any acts performed or property used in the exercise of his functions". With regard to paragraph 4, the remark was made, in accordance with the concern voiced in the Sixth Committee of the General Assembly, that the paragraph seemed contrary to the decision in the *Juan Ysmael* case[109] and to article 44 of the 1963 Vienna Convention on Consular Relations. If it was not deleted, a provision could perhaps be added along the lines of that article to allow the receiving State or transit State to call upon a courier to give evidence as a witness, but specifying that the authorities should avoid interfering with the performance of the courier's official functions. Another suggestion was to add at the end of the paragraph the words "in cases involving the exercise of his functions", so as to allay the above-mentioned concern.

As to paragraph 5 of the draft article, it was suggested that, in addition to vehicles used or owned by the courier, a reference should be included to vessels or aircraft, in line with article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States. It was noted that paragraph 5 also limited the courier's amenability to jurisdiction to cases in which the loss in question was not covered by insurance. In that regard, it was likewise proposed that the language of article 60, paragraph 4, of the 1975 Vienna Convention should be used and some consideration be given to including in the draft a provision along the lines of article 56 of the 1963 Vienna Convention on Consular Relations whereby couriers would be required to comply with any applicable laws of the receiving State or transit State regarding insurance coverage. It was also suggested that the words "if such damages cannot be covered" should be replaced by the words "if such damages are not covered". The view was also expressed that paragraph 5 should be placed immediately after paragraph 2.

123. Observations were also made regarding draft article 24 (Exemption from personal examination, customs duties and inspection).[110] Some members thought that paragraph 1, on exemption from personal examination, was unrealistic and unnecessary; not only did it go beyond conventional provisions on treatment accorded to diplomatic agents, but also its content was already covered by the provision on personal inviolability of the courier. It was also suggested by several members that paragraph 1 should be confined to the exemption from personal examination and that the words "including examination carried out at a distance by means of electronic or other mechanical devices" should be deleted. One member suggested that the remaining part of the paragraph should be qualified by the words: "when accompanied by a diplomatic bag". It was also suggested that paragraph 2 of the draft article should be redrafted along the lines of paragraph 1 of article 35 of the 1969 Convention on Special Missions. As to paragraph 3, it was suggested that it could be amplified and combined with the first part of paragraph 1. Another view was that the reference to the exemptions mentioned in paragraph 2 should be deleted.

124. With reference to draft article 25 (Exemption from dues and taxes),[111] it was pointed out that, although based on article 34 of the 1961 Vienna Convention on Diplomatic Relations, it incorporated only two of the exceptions provided for under that article. The effect was to confer more favourable treatment upon the diplomatic courier than upon the diplomatic agent. Furthermore, the draft article did not seem necessary, given the short stay of the courier in the receiving State or transit State, which would preclude his exercising activities subject to taxation. Another suggestion was to include in the draft article all six exceptions to the exemption principle contained in the 1961 Vienna Convention and other conventions on diplomatic law. The view was also held that draft article 25 should reflect a functional approach to exemption from taxation, for instance by adding the words "in the performance of his functions" after the words "the diplomatic courier". Finally, it was also proposed that draft article 25 should be combined with draft articles 26 and 27, forming a single provision equating the privileges and exemptions enjoyed by the courier in relation to taxation, personal services and social security with those enjoyed by the administrative and technical staff of the diplomatic mission of his country in the receiving State or transit State.

125. Regarding draft article 26 (Exemption from personal and public services),[112] the view was held that the limited duration of the diplomatic courier's stay made it doubtful that a given State might press him into public service. Furthermore, the situation, however hypothetical it might be, appeared to be already covered by other provisions, such as article 4 (Freedom of official com-

[109] *Juan Ysmael & Co.* v. *SS "Tasikmalaja"* (1952) (*International Law Reports, 1952* (London), vol. 19 (1957), p. 400, case No. 94).

[110] See footnote 84 above.

[111] See footnote 85 above.

[112] See footnote 86 above.

munications) as provisionally adopted, draft article 17 (Freedom of movement) and draft article 20 (Personal inviolability). It was also pointed out that draft article 26 could create problems in the case of a courier who was a national or citizen or permanent resident of the receiving State or transit State. The draft article should be deleted, but if it was retained, the words "when he is performing his functions" should be added at the end. Among members supporting deletion of draft article 26 it was also argued either that the matter could be left to regulation by State practice, or that, eventually, the subject-matter of the draft article could be transferred to the commentary to another appropriate provision. Views were also expressed to the effect that, if retained, the draft article should be merged with draft article 27 or with draft articles 25 and 27.

126. Observations similar to those made with respect to draft article 26 were also expressed, *mutatis mutandis*, with reference to draft article 27 (Exemption from social security provisions)[113] and there were numerous suggestions to the effect that the draft article should be either deleted, or combined with draft article 26 or draft articles 25 and 26, as stated above with regard to those draft articles.

127. Concerning draft article 28 (Duration of privileges and immunities),[114] various observations were made. It was noted that paragraph 1 as currently drafted did not cover the case of the diplomatic courier *ad hoc* appointed by a mission to transport and deliver a diplomatic bag to another mission of the sending State or to the sending State itself. Furthermore, a regular courier might well move on from the territory of the receiving State with another diplomatic bag. In those cases, the functions of the courier commenced when he left the receiving State or the transit State rather than when he entered its territory. With reference to paragraph 2, one member observed that it should make clear whether the expression "If the official functions of a diplomatic courier come to an end" referred to each specific mission of the courier on return to his country of origin, or whether it referred to the end of his continuous missions as a courier. Another member suggested that, along the lines of other codification conventions, the paragraph should specify that, even in the event of an armed conflict, the privileges and immunities subsisted until the beneficiary left the territory of the receiving State, or until the expiry of a reasonable period in which to leave. International tension and the frequency of armed conflicts warranted the proposed addition. Other members found paragraph 2 acceptable. A concrete proposal was made to reword draft article 28 so that three different cases would be dealt with in three separate paragraphs: the first paragraph would deal with the professional diplomatic courier, the second with the diplomatic courier *ad hoc* and the third with a diplomatic courier declared *persona non grata* under the proposed article 14. The wording should also take into account the fact that a diplomatic courier could be a national of the sending State appointed while in the territory of the receiving State and that his immunity should apply as from the notification of his appointment, and also that a diplomatic courier could return to the territory of the receiving State or the transit State as a private traveller.

128. With regard to draft article 29 (Waiver of immunity),[115] the observation was made that, if draft article 23 was deleted, draft article 29 was unnecessary. Various suggestions were made in connection with several of the paragraphs. On paragraph 1, the view was held that it should cover waiver of both criminal jurisdiction and civil and administrative jurisdiction. It was generally agreed that the enumeration of persons qualified to authorize the waiver of immunity should be deleted. Furthermore, the suggestion was made that paragraph 2 should be incorporated in paragraph 1 as an additional sentence. With specific reference to paragraph 2, it was suggested that, if paragraphs 1 and 2 were not combined, paragraph 2 should be amended to read: "The waiver provided for in paragraph 1 must be express." It was also proposed that the words "and in writing" be added at the end of paragraph 2. One member observed that paragraph 3 reflected a generally recognized practice of implied waiver and that paragraph 2 should therefore be amended accordingly. As to paragraph 4, one member wondered why the exact wording of article 32, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations had not been used. With regard to paragraph 5, some members felt that it should not be confined to a "civil suit". It was suggested that a parallel provision should be introduced for criminal proceedings brought against the courier, in which case the sending State, if it did not waive the courier's immunity so as to allow him to be tried by the local courts, was under a duty to have him prosecuted and tried by its own courts. A more concrete suggestion was the inclusion of a provision along the lines of article 41, paragraph 1, of the 1963 Vienna Convention on Consular Relations, which provided for prosecution and even imprisonment in the case of a "grave crime". On the other hand, some other members felt that that provision merited consideration but would be difficult to implement and called for further study. It was also suggested that the sending State should not have recourse to judicial proceedings, which might be implied by the words "it shall make every effort to settle the matter justly". It should be specified that such efforts should not include litigation. Any civil claim should be settled between the sending State and the claimant; on no account should the paragraph make any reference to litigation under internal law, though that could perhaps be mentioned in the commentary.

129. Several suggestions were made with respect to draft article 30 (Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew).[116] Several members suggested that the words "authorized member of the crew" should be deleted throughout the draft article, since the responsibility was always the captain's or the master's. If those words were retained, it was stressed that the draft article

[113] See footnote 87 above.

[114] See footnote 88 above.

[115] See footnote 89 above.

[116] See footnote 90 above.

should also make it clear that a member of the crew of a commercial aircraft or merchant ship entrusted with the custody and transport of a diplomatic bag was appointed in an official capacity, or, in other words, that the crew member in question had to be authorized by the captain or master to ensure the custody and transport of the bag. Yet one member pointed out that in the practice of his country the relevant official documents were not given to the captain or made out in his name, but were given to the member of the crew entrusted with the diplomatic bag. And it was that crew member who handed over the bag to the officer of the diplomatic mission who was appointed to take delivery of it. The captain of the aircraft or ship played no part, and the receiving State did not know whether it was the captain or another person who was responsible for transporting the diplomatic bag and for delivering it to its destination. Some members suggested that, if the mention of an authorized member of the crew was deleted from the draft article, that matter, as well as variations in State practice with respect thereto, could be dealt with in the commentary. As a point of drafting, it was suggested that the word "master" be replaced by the word "captain" for the sake of uniformity with other conventions codifying diplomatic law. Still another suggestion referred to the draft article as a whole and proposed an alternative formulation. Paragraph 1 should be amended to bring it into line with the corresponding provisions of the codification conventions. It could, for example, be worded:

> "1. A diplomatic bag may be entrusted to the captain of a commercial aircraft or of a merchant ship scheduled to arrive at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a diplomatic courier. By arrangement with the appropriate authorities of the receiving State, the mission, consular post or delegation may send one of its members to take possession of the bag directly and freely from the captain of the aircraft or of the ship."

The draft article should also specify that the official document for the captain of the ship or aircraft would also be delivered to the member of the mission, consular post or delegation. Finally, a separate paragraph should be added, reading:

> "By arrangement with the appropriate authorities of the receiving State, the mission, consular post or delegation of the sending State may entrust a diplomatic bag to the captain of a commercial aircraft or of a merchant ship scheduled to arrive at an authorized port of entry."

130. Other observations concerned specific paragraphs of draft article 30. Thus, with reference to paragraph 1, it was suggested that the words "on his scheduled itinerary" should be deleted. It was also pointed out that the paragraph could be simplified in the light of the definitions which had already been given in article 3 as provisionally adopted. Therefore the part of the paragraph following the expression "territory of the receiving State" could be replaced by the expression "or, as the case may be, in the territory of the sending State". It was also suggested that the order of paragraphs 1 and 2 could be reversed and that paragraphs 2 and 3 could be combined. With reference to paragraph 4, the suggestion was made that it should refer to "members of the diplomatic mission or consular post", since in view of the definitions given by article 3 as provisionally adopted, one notion did not include the other. It was also pointed out that the emphasis of the paragraph should lie in the free and direct access of the authorized member of a mission or consular post to the tarmac and aircraft, or port and ship, in order to take delivery of the bag in a free and unimpeded manner, rather than on the facilities to be accorded to the captain or master. It was therefore proposed that the paragraph should be redrafted as follows:

> "4. The receiving State shall permit duly authorized members of the mission, consular post or delegation to have direct and unimpeded access to the aircraft or ship in order to take possession of the diplomatic bag from the captain or master (or authorized member of the crew) to whom it was entrusted."

131. Draft article 31 is the first article of part III of the draft articles, which deals with the status of the diplomatic bag. It was suggested that the title of part III should be redrafted as follows: "Content, characteristics and status of the diplomatic bag". As to draft article 31 (Indication of status of the diplomatic bag),[117] some observations were made on the provision as a whole. The need for the draft article (and for draft article 32) was questioned, since they had been elaborated before the Commission had provisionally adopted article 5 (Duty to respect the laws and regulations of the receiving State and the transit State) and article 3 (Use of terms). It was also observed that draft article 31 (and draft article 32) should be considered in conjunction with draft article 36, since it was necessary to approach the question of prevention of abuses from two angles: that of inviolability and that of practical procedure. The suggestion was also made that the order of draft articles 31, 32 and 36 should be altered: article 32, on the content of the bag, should come first, followed by article 31, on indication of status of the bag, and then by article 36, on the inviolability of the diplomatic bag. As to paragraph 1 of draft article 31, a view was expressed to the effect that it was a repetition in another form of paragraph 1 (2) of article 3. It was also observed that its wording departed from corresponding provisions in the four codification conventions which had proved to be in conformity with State practice. It was also suggested that paragraphs 1 and 2 could be merged into a single paragraph by the addition of the clause "whether accompanied or not", referring to the bag. With specific reference to paragraph 2, while one view suggested that the words "where necessary" could be inserted between the words "as well as" and "of any intermediary points on the route or transfer points", a more general view supported the deletion of those words, given the contingent and not always foreseeable character of intermediary or transfer

[117] See footnote 93 above.

points. Concerning paragraph 3, it was pointed out by many members that there should be no obligation on sending and receiving States to agree on the maximum size or weight of the diplomatic bag. If the paragraph was not deleted, then it should be made discretionary rather than mandatory. Reciprocity was also mentioned as one possible criterion for determining the maximum size and weight of the bag. Some other members continued to believe that an effective way to prevent abuses of the diplomatic bag and the inclusion therein of forbidden articles would be a regulation in the draft article itself of the maximum size and weight of the bag. It was also suggested that the paragraph should refer only to the maximum weight or size allowed by the rules that governed the means of transport used.

132. Draft article 32 (Content of the diplomatic bag)[118] was the subject of some of the same general observations made in respect of draft article 31, such as those concerning reordering or joint consideration of draft articles. With regard to paragraph 1, doubts were expressed concerning the meaning and actual scope of the expression "article intended exclusively for official use". It was wondered, for instance, how that expression might be distinguished from the expression "articles for the official use of the mission" used in article 36, paragraph 1 (*a*), of the 1961 Vienna Convention on Diplomatic Relations, or whether any article for the official use of the mission, however bulky, could be sent in a diplomatic bag. The remark was also made that the terminology of paragraph 1 should be brought into line with that of article 27 of the 1961 Vienna Convention, since the retention of the word "exclusively" was of no great importance. Other members, on the other hand, found that the inclusion of that word was a useful addition. It was also suggested that paragraph 1 must specify that on no account should the diplomatic bag contain articles whose export or import was prohibited by the law or controlled by the quarantine regulations of the receiving State. Several suggestions were made to delete paragraph 2 of draft article 32. It was pointed out in that respect that paragraph 2 gave the impression that abuses of the diplomatic bag were always committed without the knowledge of the sending State and perhaps by negligence. Actually it was possible that the sending State might not punish anyone because it had committed the abuse itself. This made paragraph 2 quite ineffective; its deletion would leave the matter to be regulated on the basis of the responsibility of the State for breach of its obligations. It was also suggested that, if the paragraph was to be retained, it should include a safeguard clause which could be based on article 36, paragraph 2, of the 1961 Vienna Convention and provide that the diplomatic bag could be opened in case of doubt about its contents. A more general suggestion concerned the deletion of the second part of paragraph 2, regarding prosecution and punishment of any person responsible for misuse of the diplomatic bag. It was noted that, in the case of really grave abuses, such as using the diplomatic bag for illicitly conveying arms, drugs or foreign currency, it might well be the responsible high-level authorities of the sending State that had permitted and ordered the abuse and, in such circumstances, it was unrealistic to suppose that prosecution proceedings would ever be brought. Finally, it was suggested that, with a view to preventing misuse, it might be advisable to recommend that official correspondence and other documents and articles for official use should be contained in separate bags. Such a division would facilitate the adoption of agreed methods of inspection.

133. Draft article 33 (Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)[119] was considered by some members to be unnecessary because its contents were covered by articles 31, 32 and 35 to 39, relating to the status of the diplomatic bag itself. The means by which the bag was dispatched, it was said, was not important enough to warrant an entire provision. It could be deleted and replaced by adding to the reference to the diplomatic bag in the appropriate articles the words "whether accompanied or not". Other members felt that the acceptability of draft article 33 depended ultimately on the disposition of articles 35 to 39, to which article 33 made reference. It was also pointed out that draft article 33, rather than paragraph 4 of draft article 30, could contain a provision to the effect that the necessary facilities should be accorded to members of missions, consular posts or delegations to enable them to take possession of or to deliver the bag.

134. Draft article 34 (Status of the diplomatic bag dispatched by postal services or other means)[120] was also the subject of some comment. With regard to paragraph 1, it was suggested that the words "shall comply" should be replaced by the words "shall conform". It was also generally pointed out that the mention of earlier articles contained in the paragraph should include article 32 as well as article 31. As to paragraphs 2 and 3, it was suggested that the first sentence of both could be deleted and the remainder of both be either combined in a single paragraph or merged with draft article 34 or 35. Alternatively, it was suggested that paragraphs 2 and 3 should be deleted altogether, and that draft article 35, on general facilities accorded to the diplomatic bag, should be expanded, so as to make it clear that the latter article applied to whatever means were employed to dispatch the bag.

135. As to draft article 35 (General facilities accorded to the diplomatic bag),[121] the view was expressed that the Commission should explain, at least in the commentary, that the article did not refer to additional obligations of the receiving State or transit State, which had to accord all necessary facilities in any case and discharge its responsibilities in the event of damage to the diplomatic bag in accordance with the relevant rules in force, such as the conventions adopted by UPU and IMO. It was also suggested that the article should follow the relevant provisions of the 1961 Vienna Convention on

[118] See footnote 94 above.

[119] See footnote 95 above.

[120] See footnote 96 above.

[121] See footnote 97 above.

Diplomatic Relations and the 1963 Vienna Convention on Consular Relations and that the last part of the French text, after the words *toutes les facilités voulues,* should be amended to read: *pour le transport et la remise rapide et en toute sécurité de la valise diplomatique.* With regard to the position in the draft of article 35, which embodied a general principle, it was proposed that the order of the provisions on facilities should be reconsidered so as to determine whether it might not be preferable for general provisions to precede specific applications of that principle.

136. Draft article 36 (Inviolability of the diplomatic bag)[122] was called the key provision of the whole set of draft articles and gave rise to lengthy discussions and numerous proposals for amendment, which revolved mainly around paragraph 1. It was criticized from different angles. Among those members supporting the concept of the inviolability of the diplomatic bag, the provision left much to be desired because it might give rise to problems in cases where the diplomatic bag was not accompanied by a diplomatic courier. It was wondered how the word "detained" would be interpreted if the bag was dispatched by postal services. It was suggested that two separate provisions could be drafted, one relating to the diplomatic bag accompanied by a diplomatic courier and the other relating to the unaccompanied diplomatic bag.

137. Other members questioned the advisability of applying the concept of inviolability to the diplomatic bag, as well as the scope that that concept was given in the provision under discussion. The practical difficulties arose from the need to reconcile the principle of the inviolability of the diplomatic bag with the security of the receiving State or transit State. Inviolability of the diplomatic bag was necessary for the maintenance of good diplomatic relations, but current events demonstrated conclusively that the bag could be and frequently was used for illicit purposes or in contravention of the laws of the receiving State. Several ways of achieving the above-mentioned balance of interests were advanced and examined.

138. The formulation proposed by the Special Rapporteur, "unless otherwise agreed by the States concerned", was criticized for several reasons. Such a possibility, it was pointed out, was quite unlikely, since bilateral diplomatic relations were based on the relative positions and interests of the States concerned. If the States concerned were of almost equal strength or had similar interests, they would be able to conclude such agreements. If not, they would be less free to do so. That was particularly true of the developing countries, which were necessarily dependent and would not be in a good position to propose the conclusion of agreements of that kind. Account also had to be taken of a psychological factor: it was difficult to see how two States could agree to allow their diplomatic bags to be inspected or searched, because in so doing they would be basing their diplomatic relations not on presumed trust, but on distrust. The element of reciprocity referred to by the Special Rapporteur would also not come into play, since reciprocity was also based on the relative positions and interests of the States concerned. The developing countries would be placed at a disadvantage, for they would never take the initiative of requesting such reciprocity. In such circumstances, the rich countries would have nothing to lose: they had highly sophisticated means of determining the content of other countries' diplomatic bags without even opening them, whereas the developing countries did not possess such means. The restriction proposed by the Special Rapporteur would thus have the practical effect of preserving the absolute inviolability of the diplomatic bag and making it impossible to put an end to the abuses of the diplomatic bag that were, unfortunately, so common at the present time. From another perspective, the above-mentioned clause was also criticized because paragraph 2 (*b*) of article 6 as provisionally adopted already contained a provision to that effect and its repetition in article 36 was unnecessary.

139. Some members wondered whether the concept of inviolability should apply to the bag itself or to the confidentiality of its contents. Thus a bag could be examined to determine, for instance, whether it contained weapons or drugs, provided that the means used did not intrude into the confidentiality of the communications carried by the bag, the protection of which was at the very root of the origin of the concept of a diplomatic bag. In the latter connection, for example, electronic means could discover a device used to change the cipher in certain decoding appliances, which could legitimately be sent by diplomatic bag, and therefore such means of examination should be opposed.

140. Taking into account the present international situation regarding the diplomatic bag, the régime prior to the 1961 Vienna Convention on Diplomatic Relations was more in accordance with the safeguard régime created by the 1963 Vienna Convention on Consular Relations than with the régime of absolute protection of the bag established by the 1961 Vienna Convention and later conventions on diplomatic law. The suggestion was thus made that, in draft article 36, a modality should be established whereby States would be able to apply to all bags—diplomatic bags, consular bags, special mission bags and delegation bags—the régime which now governed the consular bag alone. Draft article 36 should contain an escape clause which would enable States to apply to all bags the safeguard provided for in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations.

141. It was stressed that the concept of inviolability in connection with the diplomatic bag was not to be found anywhere in existing conventions. The rules on the diplomatic bag were formulated in the context of freedom of communication. Any attempt to elevate the protection of the diplomatic bag to the level of "inviolability" would be bound to attract resistance on the part of States. In more concrete terms, it was suggested that draft article 36 should consist of three parts. The first part would state the rule that the diplomatic bag must not be opened or detained—a rule that would be applicable to all bags other than the consular bag. The second part would deal with the consular bag and would

[122] See footnote 98 above.

reaffirm the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention. The third part would provide that States could make a declaration reserving the right to apply to all bags the régime of article 35, paragraph 3, of the 1963 Vienna Convention. That would not involve any conflict with any existing convention. In that connection, attention was drawn to draft article 42, which specified that the present draft articles "shall complement the provisions" of the 1961 Vienna Convention, the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The above suggestion, therefore, did not constitute a derogation from any of those conventions, but would merely supplement them.

142. Still another approach insisted on the connection between draft article 36 and draft article 32, on the content of the diplomatic bag. It was recalled that the original *raison d'être* of the inviolability of the diplomatic bag had been to safeguard the confidentiality of official correspondence and documents, the practice of giving the same protection to "articles intended exclusively for official use" having developed later as a matter of convenience. The sending State might therefore be requested to divide the diplomatic bag into two separate bags, one containing only official correspondence and documents and the other articles exclusively for official use. Some differences could be introduced in the procedures for dealing with the two different categories of diplomatic bag, while maintaining the principle of inviolability applicable to both. The receiving State might stipulate in advance that official correspondence and documents must be contained in one bag and "articles intended exclusively for official use" in another. It would then be possible to apply a stricter procedure to the bag containing articles. Both bags should be appropriately marked on the outside: one as "official correspondence and documents only", and the other as "articles intended exclusively for official use", with their description and number. The bag containing official correspondence and documents would be exempt from examination, either directly or by indirect methods capable of revealing the contents of the correspondence and documents. The receiving State would not be permitted to use electronic or mechanical devices, but might be allowed to measure or weigh the bag or have a dog smell it. As to the bag containing articles for official use, the sending State would not be entitled to refuse examination by electronic or mechanical devices, since there would be no risk of intrusion into the secrecy of official correspondence. As had been mentioned several times, X-ray examination of the baggage or even of the person of a diplomatic agent was conducted routinely by airline companies without evoking any protest. With respect to this bag, a régime similar to that established for consular bags by article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations would be applied.

143. While some members supported this initiative, others found that it had drawbacks. For if a State was prepared to send prohibited articles by diplomatic bag, it would also be prepared to declare that the bag contained only correspondence. Thus the absolute inviolability of the bag declared to contain only correspondence would protect the quite dangerous smuggling of small objects such as diamonds, forged banknotes and propaganda literature. It was also pointed out that the distinction between the bag used for the conveyance of official correspondence and documents and the bag used to carry articles overlooked the fact that the latter did not truly constitute a diplomatic bag. It should be borne in mind, it was said, that for the transport of articles to be used for the normal operation of a mission, the four codification conventions provided sufficient privileges and immunities. Packages of that kind must be distinguished from those for which the diplomatic bag was intended to be used. The bag should merely facilitate communication between a State and its missions, and to accept the notion of a diplomatic bag used solely for the transport of articles would be to recognize a function other than that naturally assigned to it. That would involve a danger of legalizing the very abuses which the Commission's codification work was intended to prevent.

144. Many members of the Commission chose not to elaborate on draft articles 37 to 42 and to reserve their comments for the Commission's next session. Some members did, however, express views on those draft articles.

145. Regarding draft article 37 (Exemption from customs and other inspections),[123] one view was that it was unnecessary; since the diplomatic bag was inviolable, it was said, it was quite clear that it should be exempt from customs and other inspections. Another view was that, since abuses of the diplomatic bag were all too common, the security of States must not be sacrified to the interests of the diplomatic bag itself. Therefore draft article 37 should be brought into line with article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. According to yet another view, both draft article 37 and draft article 38 had their place in the draft, but in the light of their similar subject-matter and the relative simplicity of their wording it might be advisable to combine them into one.

146. With reference to draft article 38 (Exemption from customs duties and all dues and taxes),[124] it was pointed out that, in view of the provisions embodied in article 4 (Freedom of official communications) as provisionally adopted, the expression "The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit or exit of a diplomatic bag" should not be included in article 38. Furthermore, according to this opinion, customs duties did not apply to the diplomatic bag, which was only an abstraction or a collection of packages. The articles it contained might, strictly speaking, be subject to customs duties, but since the diplomatic bag itself was inviolable it could not be opened and its contents could not therefore be determined. Moreover, by definition it contained only official correspondence or documents and articles intended for official use, which were, in

[123] See footnote 99 above.

[124] See footnote 100 above.

principle, all exempt from customs duties. That reasoning also applied to dues and taxes. Draft article 38 as a whole was therefore unnecessary. The suggestion to combine draft article 38 with draft article 37 was noted above in connection with the latter article.

147. As to draft article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag),[125] the view was held that, if the circumstances referred to in paragraph 1 included the death of the diplomatic courier or some other exceptional circumstances, such as an illness or an accident that might prevent him from performing his functions, the wording of that provision would have to be amended because, as it stood, it did not apply to all the cases referred to in draft article 13 or to the case referred to in draft article 14. It was, for example, not clear whether a professional courier or an *ad hoc* courier who was declared *persona non grata* or not acceptable by the receiving State or the transit State while in its territory would immediately have to surrender the diplomatic bag or whether the receiving State or the transit State would then be able to take possession of it. In any event, the diplomatic courier had to be able to perform the functions entrusted to him and deliver the diplomatic bag in his custody to its final destination. As to paragraph 2 of draft article 39, it should not be retained, because if the captain of a commercial aircraft or the master of a merchant ship was prevented from performing his functions, the diplomatic bag in his custody could be handed over to the person designated to replace him. Another member, while expressing support for the general idea on which draft article 39 was based, suggested that the provision could be shortened by combining paragraphs 1 and 2. A distinction did not have to be made between the case in which the functions of the diplomatic courier were terminated before the diplomatic bag was delivered to its final destination and other circumstances that prevented him from delivering the diplomatic bag to its final destination. The same situation, namely that in which the diplomatic bag did not arrive at its final destination, was being dealt with in both cases and, whatever its cause, it called for appropriate measures. The words "appropriate measures to ensure the integrity and safety of the diplomatic bag" in paragraph 1 referred only to measures to take care of the diplomatic bag, not measures designed to facilitate its onward journey, which were dealt with in draft article 40. The wording of draft article 39 should make it clear that the obligation provided was only an obligation under civil law, not one which would entail the international responsibility of the receiving State or transit State. The view was also expressed that draft article 39 had no parallel in the codification conventions. Although the circumstances envisaged might not arise frequently, the possibility nevertheless had to be covered. A case could be made out, however, for incorporating article 39 into article 40, dealing with cases of *force majeure* or fortuitous event, or at least for transferring it to part IV of the draft.

148. Draft article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)[126] is the first article in part IV of the draft: "Miscellaneous provisions". As a general remark it was stated that draft articles 40 and 41 should probably be placed elsewhere than in part IV. Those articles were too important to be placed under a heading which generally grouped provisions of secondary importance. With specific reference to draft article 40, the opinion was expressed that the obligations therein were incumbent not on the State which had initially been foreseen as the transit State and whose obligations were clearly defined, but on a "third State", which was not the sending State, the receiving State or the transit State. The wording of draft article 40 should therefore be amended to refer specifically to that "third State". Another view was that, while draft article 40 was acceptable, it should provide that when the diplomatic bag was not accompanied by a diplomatic courier the transit State had an obligation to notify the authorities of the sending State of difficulties due to *force majeure* or fortuitous event. It was also to be understood that the facilities to be extended for the continuation of the journey would be those that were normally extended, and that the transit State did not, for example, have to charter an aircraft or ship for that purpose.

149. Regarding draft article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations),[127] it was noted that there would be no diplomatic relations and hence no diplomatic courier if the receiving State did not recognize the sending State or its Government. A problem would arise only in the case where a diplomatic bag, whether accompanied or not by a diplomatic courier, was being dispatched to or by a delegation in that receiving State. Unless that point was made clear, it was added, draft article 41 would be incomprehensible. However, the most important and serious problem which arose in that connection was that of the non-recognition of States or Governments or the absence of diplomatic or consular relations between the transit State, on the one hand, and the sending State or receiving State, on the other, when the territory of the transit State had to be used to dispatch the diplomatic bag. Special provisions would therefore be needed to take account of that situation. According to another view, although the draft article did not raise any great difficulty, in paragraph 1 thereof it might be necessary to indicate that the granting of facilities, privileges and immunities was not affected by "subsequent" non-recognition of the sending State by the receiving State, the host State or the transit State, or by "subsequent" non-existence or severance of diplomatic or consular relations between them, since it was the subsequent change of circumstances that was relevant. If the receiving State granted facilities, privileges and immunities despite lack of recognition, there would be no need for the provision. In addition, the wording of paragraph 2 of the draft article should be simplified.

150. As to draft article 42 (Relation of the present articles to other conventions and international agree-

[125] See footnote 101 above.

[126] See footnote 102 above.

[127] See footnote 103 above.

ments),[128] it was observed that its only counterpart was to be found in article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations. If the draft articles under consideration eventually took the form of a convention, such a convention would, under draft article 42 as proposed by the Special Rapporteur, be only of a supplementary nature and hence of a less universal character, particularly if States concluded agreements that were not in keeping with its provisions. If draft article 42 was retained, it would have to be made clear, as had in fact been done in article 73, paragraph 2, of the 1963 Vienna Convention, what effect such agreements that might be concluded could have. Another observation was that paragraphs 1 and 3 of draft article 42 seemed to state the obvious and could perhaps be deleted, in which case paragraph 2 could be amplified to read:

> "2. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or to those in international agreements in force as between States parties thereto."

4. Comments and observations of the Special Rapporteur in the light of views expressed in the Commission

151. The Special Rapporteur expressed his appreciation to the members who had spoken both at the previous session and at the present session for their constructive criticisms and concrete suggestions.

152. He wanted first to refer to certain general observations relating to the nature and scope of the privileges, facilities and immunities of the diplomatic courier.

153. Regarding possible government reactions to the draft articles, he wished to stress that he had adopted an empirical approach, taking into account in the process not only the four existing codification conventions[129] but also current State practice on the subject. Admittedly, the case-law was not very abundant, but that was not because of any lack of cases, or indeed of practice in the matter. It was due, in fact, to the delicacy of the subject, for in most cases Governments preferred to settle problems through diplomatic channels instead of referring them to the courts. Hence the existing practice was not readily apparent. The question of the possible reaction of receiving States and transit States was very much in his mind. It must be remembered, however, that those States would also be sending States in other circumstances, so that the element of reciprocity was particularly important. The field of privileges and immunities was one in which reciprocity was particularly effective as a method of striking a balance between opposing interests.

154. He wished to reiterate that his intention was to apply the functional approach throughout the draft and to avoid assimilating the status of the courier to that of a diplomat. In that connection, he had endeavoured to take into consideration, as the law now in force, the 1961 Vienna Convention on Diplomatic Relations, which had been ratified or acceded to by 141 States, and the 1963 Vienna Convention on Consular Relations, with 108 States parties. In addition, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, which were not yet in force, provided models closer to the subject-matter under discussion.

155. The important point to remember was that, in the draft, the treatment accorded to the diplomatic courier was not better than that granted to a member of the administrative and technical staff of a mission or delegation. In practice, there was little difference between administrative and technical staff of a special mission or a delegation, who stayed in a country for a few days, and a diplomatic courier, who might well stay much longer if he was required to take back some correspondence after delivering the bag. It was therefore appropriate to grant the courier, as a minimum degree of protection, a status similar to that of administrative and technical staff. A courier's task was much more delicate than that of most clerks in a mission, since the courier was called upon to convey instructions to a head of delegation or to carry confidential documents. During the discussion, the courier had been described as a "vehicle", but he was more than that: he had legal status as an officer of the State and he performed an official function. He was entrusted with a mission which was sometimes a critical one for the sending State. The essential criterion with regard to the privileges and immunities of the courier was that of functional necessity. In the application of that criterion, the short duration of the courier's functions in the receiving State was not the primary consideration. It did not necessarily mean that he required less protection; in fact, he might well require more protection for that reason.

156. Reference had been made to the distinction between the diplomatic courier and the diplomatic bag. He appreciated the reasoning behind that distinction, but cautioned that an attempt to dissociate the status of the courier from that of the bag entrusted to the courier should not be taken too far. The facilities, privileges and immunities were granted to the courier not *ad personam*, but precisely because of his functions. Consequently, if the courier was not afforded proper protection, the result would be to defeat the whole purpose of the diplomatic bag.

157. As had been pointed out, the Commission's objective should be threefold: first, to consolidate existing law; secondly, to unify the rules applicable to all diplomatic couriers; and thirdly, to develop rules on matters not covered by existing law. The Commission would have to make an effort to devise rules that were acceptable, viable and useful.

158. A number of general observations had been made proposing simplifications of the texts of certain draft articles. He was prepared to consider, and to discuss in the Drafting Committee, all concrete proposals to that end, but the simplifications should not in any way deprive the courier of the protection necessary for the discharge of his duties.

[128] See footnote 104 above.

[129] See footnote 83 above.

159. With regard to draft article 20,[130] a number of drafting proposals had been made for paragraph 1, which the Special Rapporteur believed should be referred to the Drafting Committee. As for paragraph 2, he would be prepared to accept the suggestion to delete the concluding phrase "and shall prosecute and punish persons responsible for such infringements", or alternatively to amend it to "and shall, where appropriate, prosecute ...".

160. The drafting proposals regarding draft article 21[131] should also be referred to the Drafting Committee and careful consideration should be given to the suggestions for harmonizing draft article 21 with draft article 15 or for combining draft articles 21 and 19. However, the substance of article 21 had to be retained; otherwise, there would be a gap in the draft, since the courier, particularly in view of the difficult conditions in which he had to work, needed protection for his temporary accommodation.

161. The observations made in connection with draft article 22[132] were similar to those concerning articles 20 and 21.

162. With regard to draft article 23, on immunity from jurisdiction,[133] he stressed that the Commission would not be fulfilling its task properly if it failed to provide for immunity from jurisdiction for the diplomatic courier. It must be emphasized that the degree of immunity specified in draft article 23 was the same as that enjoyed by a member of the administrative and technical staff of a delegation. There was no justification for depriving the courier of the immunity from criminal jurisdiction enjoyed by staff in that grade. As for the immunity from civil and administrative jurisdiction, it followed the pattern of the existing codification conventions.

163. The Special Rapporteur observed that most of the critical comments concerning draft article 24[134] had centred on paragraph 1, and mainly on the last phrase of that paragraph: "including examination carried out at a distance by means of electronic or other mechanical devices". He was quite prepared to accept the deletion of those words. The remaining proposals on article 24 mainly concerned drafting and would be duly considered by the Drafting Committee.

164. The discussion on draft article 25[135] had shown that the simplified text he had put forward was open to misunderstanding. He had, of course, had no intention of conferring any additional tax privileges on the courier. He had taken article 34 of the 1961 Vienna Convention on Diplomatic Relations as a basis, and out of the six categories of taxes which that article placed outside the exemption, he had mentioned only the two which appeared to him relevant to the case of the courier. Unfortunately he had given a false impression of the purpose of the draft article, which was to make the courier's level of tax exemption equivalent to that of a member of the administrative or technical staff of a mission who was neither a national of, nor permanently resident in, the receiving State. Draft article 25 should therefore be thoroughly re-examined by the Drafting Committee in the light of the constructive criticisms put forward.

165. Several members had proposed the deletion of draft article 26.[136] His own view was that, although the article dealt with a rather remote possibility, it was nevertheless desirable to keep it in the draft. If the majority of the Commission was in favour of deleting it, however, he would suggest that the subject-matter be transferred to the commentary. The question was not one which could be ignored altogether.

166. As to draft article 27,[137] in view of the discussion which had taken place he was prepared to delete it. Nevertheless, he urged that the question of the exemption of the courier from social security provisions in respect of any income accruing to him in the receiving State should be dealt with in the commentary.

167. The discussion had shown that the explanations he had given in his fourth report in support of draft article 28[138] (A/CN.4/374 and Add.1-4, para. 183) had not proved very convincing. The wording of the draft article had been the subject of considerable criticism and he welcomed the many useful drafting proposals made, which would be taken into account by the Drafting Committee. He found most of those proposals acceptable and thought that the Drafting Committee could take as a basis for its work the following redraft put forward during the Commission's debate:

"1. The diplomatic courier shall enjoy the privileges and immunities to which he is entitled from the moment he enters the territory of the receiving State or the transit State for the purpose of performing his functions or, if he is already in the territory of the receiving State, from the moment his appointment is notified to that State. Such privileges and immunities shall cease at the moment the diplomatic courier leaves the territory of the receiving State or, as the case may be, the transit State. However, in respect of acts performed by the courier in the exercise of his functions, immunity shall continue to subsist.

"2. The privileges and immunities of the diplomatic courier *ad hoc* shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge. However, in respect of acts performed by the courier *ad hoc* in the exercise of his functions, immunity shall continue to subsist.

"3. When the functions of the diplomatic courier have come to an end in accordance with article 14, his privileges and immunities shall cease at the moment he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so. However, in respect of acts performed by the courier in the

[130] See footnote 79 above.

[131] See footnote 80 above.

[132] See footnote 81 above.

[133] See footnote 82 above.

[134] See footnote 84 above.

[135] See footnote 85 above.

[136] See footnote 86 above.

[137] See footnote 87 above.

[138] See footnote 88 above.

exercise of his functions, immunity shall continue to subsist."

168. He was opposed to the proposal to delete draft article 29,[139] which would leave a gap in the draft. With regard to paragraph 1 of the article, he could accept the deletion of the second sentence, the contents of which could be moved to the commentary. As to the rest, a number of drafting proposals had been made, many of them relating to paragraph 5, and these would be considered by the Drafting Committee.

169. Referring generally to the debate on draft articles 30 to 35, the Special Rapporteur stated that the discussion had not revealed any marked differences in approach to the substance of the articles, and their practical importance had been widely recognized. The debate had shown a general feeling that some of the draft articles should be made more concise and brought closer to the text of the corresponding articles of the four codification conventions. The critical remarks had centred mainly on the extent to which it was desirable to go into detail. Those remarks would be taken into account, for although the technical nature of the subject-matter made it necessary to go into detail in some of the provisions, the draft articles might perhaps have gone too far in that direction.

170. Draft article 30[140] had given rise to much discussion and it had been suggested that the reference to an "authorized member of the crew" should be deleted. Of course, the term "authorized" meant authorized by the captain of the commercial aircraft or the master of the merchant ship concerned. If the reference to an "authorized member of the crew" was omitted from the article, however, it would have to be retained in the commentary, because it reflected existing practice of States. In the case of very large aircraft, it was not feasible to give the captain an additional responsibility; the sending State usually entrusted the diplomatic bag to an authorized member of the crew or, in some cases, to an airline official. There had been a number of drafting suggestions —in particular for shortening the last part of paragraph 1 —which the Drafting Committee would take into consideration. No comments had been made on the substance of paragraph 2 and 3 but it had been suggested that they be merged. He himself would not favour that change, because the two paragraphs dealt with different matters: paragraph 2 described the official document to be supplied to the person entrusted with the bag, whereas paragraph 3 stated the important rule that the person entrusted with the bag was not to be considered as a diplomatic courier.

171. Most of the discussion on draft article 30, however, had centred on paragraph 4, the main purpose of which was to set out the obligation of the receiving State to facilitate delivery of the diplomatic bag to members of the sending State's mission. Paragraph 4 stated two rules: first, that the captain should be allowed to hand over the bag to members of the mission; and secondly, that the members of the mission must be allowed access to the aircraft or ship in order to take possession of the bag. The discussion had shown a need to redraft paragraph 4 so as to emphasize the second and more important requirement, namely free access for taking direct and unimpeded possession of the bag, without, of course, neglecting the first requirement. The question had been raised whether the member of the sending State's mission should not have a document entitling him to take possession of the bag. State practice showed that, while in a few countries the member of the mission was provided with a special pass for access to the aircraft, most countries preferred to rely on the general identification card of the diplomat concerned. In any case, the matter was one to be settled by local regulations. Lastly, the debate had shown that it was necessary to make provision in article 30 not only for the outgoing journey of the diplomatic bag, but also for its return to the sending State. At first sight, such a provision might appear to be neccessary, since on its return journey the bag would be delivered in the territory of the sending State. Difficulties could arise, however, if the diplomatic bag was carried on a foreign aircraft. There was also the question of the obligations, if any, of the transit State when more than one airline was used.

172. As to draft article 31,[141] while one member of the Commission had maintained that both that article and draft article 32 were unnecessary because their substance was contained in the relevant definitions set out in article 3 as provisionally adopted, other members had held that, even if draft articles 31 and 32 were, strictly speaking, redundant, they should be included in the draft because of the importance of their subject-matter. Paragraph 1 of draft article 31 was modelled on article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations except that it used the verb form "shall bear" instead of "must bear". He had examined the corresponding provisions of more than 100 bilateral consular conventions and had found that the words "shall" and "must" were both commonly used to convey the idea of obligation. It had been suggested that the concluding words of the paragraph, "of their official character", could be shortened to "of their character", since that change would not alter the meaning. The discussion had shown that the concluding phrase of paragraph 2, "as well as of any intermediary points on the route or transfer points", was not essential and the Drafting Committee would consider omitting it. It would also consider introducing a reference to any other visible markings that might be required. Several members had proposed the deletion of paragraph 3, but the prevailing view had been that its substance should be retained, since a great many bilateral agreements contained provisions on the maximum size or weight of the bag. The words "shall be determined" should, however, be replaced by "may be determined"; he had not intended to suggest that the States concerned were under an obligation to enter into an agreement.

173. With regard to draft article 32,[142] he had accepted during the discussion the deletion of the concluding

[139] See footnote 89 above.

[140] See footnote 90 above.

[141] See footnote 93 above.

[142] See footnote 94 above.

phrase of paragraph 2, "and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag". The article dealt with the content of the diplomatic bag, and his fourth report dwelt at length on the importance of that matter in relation to verifiability and good faith (A/CN.4/374 and Add.1-4, paras. 274-289). No legal definition of the expression "official correspondence and documents", used in paragraph 1, was to be found in any of the four relevant codification conventions. Article 27, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations merely stated: "Official correspondence means all correspondence relating to the mission and its functions." The formula "articles intended exclusively for official use" involved even greater difficulties. The protection was designed essentially for articles of a confidential nature, but any attempt to define what was confidential would create more problems than it solved. He advised retention of the substance of draft article 32, but agreed that the final clause of paragraph 2 should be deleted.

174. The purpose of draft article 33[143] was to set out the same requirements and the same treatment for the unaccompanied diplomatic bag as for the bag accompanied by diplomatic courier. The article, which was mainly concerned with the protection of the bag, had proved generally acceptable in substance, although it had also been pointed out that its acceptability depended on that of article 36. It had been suggested that article 33 might be merged with draft article 30, but he would not recommend that change, because the two provisions had different subjects: article 30 dealt with the status of the captain or master entrusted with the diplomatic bag, whereas article 33 concerned the protection of the bag itself.

175. In draft article 34,[144] paragraph 1, the reference to "article 31" should be replaced by a reference to "articles 31 and 32". The draft article had been criticized as being unduly detailed and the Drafting Committee would endeavour to shorten it. He wished to point out, however, that the reference to postal agreements had been introduced on the recommendation of UPU itself; moreover, the practice of States showed that many bilateral conventions provided for arrangements between postal administrations. A number of useful drafting suggestions had been made in regard to paragraphs 2 and 3. The Drafting Committee would consider the possibility of deleting the whole or part of the first sentence of each of those paragraphs. The merging of paragraphs 2 and 3, although they dealt with different means of transport of the diplomatic bag, would also be considered.

176. Draft article 35[145] dealt with the general facilities to be accorded to all diplomatic bags. It reflected State practice. Many bilateral conventions contained provisions on the carriage and clearance of diplomatic bags and formalities relating thereto. It had been suggested that article 35 should be moved to the beginning of part III; but since it concerned all diplomatic bags and not only unaccompanied bags, it seemed preferable to leave it where it was.

177. The Special Rapporteur referred next to the discussion held on draft articles 36 to 42, and particularly on draft article 36,[146] which dealt with the inviolability of the diplomatic bag and which had been called the key provision of the draft articles.

178. The central idea of achieving a proper balance between protection of the confidential nature of the diplomatic bag and the prevention of abuses, as well as between the interests of the sending State and those of the receiving or transit State, had, he said, been in the forefront of his mind throughout the preparation of his five reports on the topic. As many speakers had rightly pointed out, the main practical problem that arose in connection with all aspects of the draft articles, but most of all in connection with the inviolability of the diplomatic bag, was that of providing safeguards that were both realistic and effective.

179. On the question whether the principle of inviolability of the archives and documents of a diplomatic mission was applicable to the diplomatic bag, he had been guided by the provisions of article 24 and article 27, paragraphs 2, 3 and 4, of the 1961 Vienna Convention on Diplomatic Relations, which in his view were interrelated and had to be considered together. The confidential nature of articles intended exclusively for official use, as well as of official correspondence and documents, required special protection. Attention had been drawn to the highly confidential nature of articles such as codebooks or equipment for coding and decoding procedures which might legitimately be contained in the diplomatic bag.

180. As to the question whether opening the diplomatic bag constituted an infringement of the principle of inviolability, he explained that he had avoided using such adjectives as "absolute" or "complete" to qualify the concept of inviolability, because that concept did not seem to require qualification. The purpose of not permitting the diplomatic bag to be opened was to ensure that its contents were not revealed. Similarly, detention of the diplomatic bag was considered to be an infringement of its inviolability because it presupposed an opportunity to ascertain its contents. No useful purpose would be served by trying to distinguish between the inviolability of the diplomatic bag's contents and that of the bag itself. If the contents of the bag could be ascertained by the use of electronic or mechanical devices, as seemed to be the case at the highest level of current technological development, the possibility of infringing the inviolability of the diplomatic bag without opening it would have to be faced somehow, whether or not a provision such as article 36, paragraph 1, was included in the draft. On that issue as on all others, however, he was prepared to accept the majority view in the Commission.

181. Another point he wished to bring to the Commission's attention was the possible adverse effects of

[143] See footnote 95 above.

[144] See footnote 96 above.

[145] See footnote 97 above.

[146] See footnote 98 above.

returning the diplomatic bag to its place of origin if a request to open it was refused by the sending State. The delays, suspicions and retaliatory measures to which such action might give rise would not be in the interests of either party. Of course, the 1963 Vienna Convention on Consular Relations, ratified by more than 100 States, contained an explicit provision on procedures for opening the bag, whose existence could not be ignored. On the other hand, the Commission should, he thought, be very careful about applying that provision to the diplomatic bags of permanent diplomatic missions and other missions which were not within the framework of that Convention. A compromise solution should be sought, bearing in mind all the advantages and disadvantages involved.

182. The Commission should, of course, take account of the concern felt over abuses of the diplomatic bag; but it should also bear in mind that the rule of confidentiality and protection of official correspondence had always been a recognized safeguard for official communications. It was far from his intention to belittle the gravity of the various offences committed by persons protected by their diplomatic status, but it would be a mistake to ascribe all such offences to the shortcomings of the status of the diplomatic bag. Without being overoptimistic, he continued to believe that the Commission would succeed in producing an article on the inviolability of the diplomatic bag which was satisfactory to all members.

183. Some speakers had questioned the necessity of including draft articles 38 and 39,[147] but both those articles were based on State practice. Similar provisions were to be found among the national laws and regulations of several countries, as well as in bilateral agreements. The question had been raised in connection with article 39 whether, in addition to the obligation of the receiving State or the transit State to take appropriate protective measures in circumstances preventing the delivery of the diplomatic bag, a further obligation should not also be placed on the sending State to assist in the delivery of the bag. His own view was that the protective measures proposed in the article were sufficient, but there again, it was for the Commission to decide. He was quite willing to consider the suggestion that articles 39 and 40 should be combined.

184. With regard to the comment that, in draft article 40,[148] it would be more in line with other conventions to speak of a "third State" rather than the "transit State", he reminded the Commission of the discussion which had taken place in connection with paragraph 1 (5) of article 3 as provisionally adopted, as a result of which it had been decided to adopt the term "transit State" as meaning "a State through whose territory a diplomatic courier or a diplomatic bag passes in transit", whether or not such passage had been originally foreseen. Thus the concept of a third State was covered by that of the transit State.

185. He had no comments to make on draft articles 41 and 42 at the present stage, but could assure the Commission that the title "Miscellaneous provisions" given to part IV was purely tentative and could be changed if it was so desired.

186. Lastly, he understood it to be the majority view that the consideration of articles 36 to 42 should be continued at the next session.

5. Discussion of the report of the Drafting Committee

187. As already indicated (para. 76 above), the Commission devoted its 1862nd to 1864th meetings to a discussion of the report of the Drafting Committee, which was introduced by the Chairman of the Committee. The Drafting Committee reported on the texts of 12 draft articles, based on its consideration of 19 draft articles submitted by the Special Rapporteur and referred to it, having deleted some draft articles and merged others. The draft articles presented in the Committee's report were the following: 10[9], 11[10], 13[11], 14[12], 15[13], 16[14], 17[15], 20[16], 21[17], 23[18], 24[19] and 25[20].[149] The Committee also reported that draft articles 9, 12, 22, 26 and 27 had been deleted and that draft articles 15, 18 and 19 had been merged. The comments, observations and reservations made by members of the Commission during its discussion are reflected—with the exception of those made on draft article 23—in the commentaries accompanying the texts of the articles provisionally adopted by the Commission at the present session (see section C.2 of this chapter, below).

188. With reference to draft article 23, the Drafting Committee had proposed to the Commission the following text:

Article 23 [18]. Immunity from jurisdiction

[1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.]

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.]

[147] See footnotes 100 and 101 above.

[148] See footnote 102 above.

[149] The new numbers given to these articles appear between brackets.

5. Any 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.

Paragraphs 1 and 4 appeared between brackets because the Drafting Committee had not been able to arrive at a conclusion on them, and it had therefore referred to the Commission the question of the disposition of both paragraphs.

189. A prolonged discussion took place in the Commission on draft article 23 and revolved mainly around paragraph 1, concerning immunity from criminal jurisdiction, although reference was also made to some other paragraphs and to the article as a whole.

190. One body of opinion felt that paragraph 1 was superfluous and functionally unnecessary. Article 16 (Personal protection and inviolability), as provisionally adopted, already laid down that the courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention; this was sufficient to ensure that the courier would not be disturbed in the fulfilment of his mission to deliver the bag safely and speedily. The equation between the diplomatic courier and the members of the administrative and technical staff of a diplomatic mission was not warranted, since the latter stayed for a much longer period in the receiving State and performed different functions. As to their families, they could conceivably be used as a means of exerting pressure on members of the administrative and technical staff, and this explained why they had also been granted immunity from criminal jurisdiction under the 1961 Vienna Convention on Diplomatic Relations. It was also wrong to compare a diplomatic courier with a member of a short-term special mission, because, unlike the case of the courier, special missions were sent by agreement between the States concerned. Furthermore, the norms of the 1969 Convention on Special Missions, including the one regarding immunity from criminal jurisdiction, were of a residual character, and that Convention was not yet in force. It was also maintained that the inclusion of such a rule in the draft could only damage its acceptability among Governments, which would be reluctant, in the light of abuses which had recently occurred, to accord the courier an excessive degree of privileges and immunities not justified by the needs of his functions. It was also pointed out that the actual object of the protection should be the bag, not the courier, who was just the vehicle or messenger charged with the task of its transportation and delivery. Even if the fact of accompanying the bag could lead to granting the courier a measure of functional protection, that reason ceased to exist once the bag had been delivered. There was, for instance, no conceivable reason why a courier who committed a serious offence in the receiving or transit State while returning to his sending State without a bag should be granted any extent of immunity from criminal jurisdiction.

191. Another body of opinion felt that the granting of immunity from criminal jurisdiction to the courier was entirely justified because of his position and his functions. The courier was an official agent of the sending State, acting on its behalf, who performed official tasks of a highly confidential nature which were an extension of the State's own functions. His mission was indispensable for the normal functioning of international relations. To deny him a degree of immunity which was enjoyed even by the family of a member of the administrative and technical staff of a mission was not coherent from the juridical and logical points of view. In order to achieve safe and speedy performance of his functions, in an extremely short period of time, the courier needed to be free from the disturbance and pressure that his being subjected to criminal proceedings would bring upon him. Depending on the circumstances, such disturbance and pressure could be even greater than that caused by arrest or detention and exemption therefrom was not guaranteed by article 16 as provisionally adopted. Furthermore, criminal proceedings in one receiving State could affect the performance of the courier's functions in other receiving States when he had not only one but several missions to perform. It was not possible to dissociate the courier from the bag. If a bag was entrusted to a courier, then he, as the responsible official, should be as much the subject of protection as the bag itself. Otherwise, the bag should be considered as unaccompanied. Moreover, the short duration of the courier's stay in the receiving or host State was not relevant for denying him immunity from criminal jurisdiction, as was demonstrated by the fact that the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States granted immunity from criminal jurisdiction to members of special missions and to members of a delegation, respectively, without taking into account the duration of their functions. It was also stressed that to grant the courier personal inviolability but to deny him immunity from jurisdiction would lack any practical effect, since even if he was found guilty the courier could not be arrested or detained. Therefore it was more appropriate to accord him a degree of immunity in accordance with his dignity and the importance of his functions. Abuses of legal norms, including those on privileges and immunities, had existed in the past and aroused justified concern. But the task of the Commission was to place itself above the over-dramatization of, and the over-reaction to, certain recent events and to prepare drafts endowed with the objectivity and adequate perspective which could only result from a dispassionate and serene analysis.

192. Some members felt that compromise formulations could be found, such as to grant the courier immunity from criminal jurisdiction except for "serious offences" or to confine it to "acts within the performance of his functions". Other members felt that such compromise formulations would in practice deny the courier immunity from criminal jurisdiction, since he would have to be subjected to such jurisdiction before a court of the receiving State could decide whether the offence was "serious" or whether the act performed was "within the performance of his functions".

193. The Commission could reach no decision on draft article 23 at the present stage and decided to consider the article again at its next session.

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

1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION[150]

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;

(*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 of 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.

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[150] For the commentaries to articles 1 to 7, provisionally adopted by the Commission at its thirty-fifth session, see *Yearbook... 1983*, vol. II (Part Two), pp. 53 *et seq.* For the commentaries to articles 8 to 17, 19 and 20, see subsection 2 below.

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. 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. Appointment of the diplomatic courier*[151]

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

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 that State, which may be withdrawn at any time.

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

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

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

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.][152]

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 accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

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

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

* Provisional numbering.

[151] The amendments made at the present session to the text of article 8 and to the commentary thereto, provisionally adopted by the Commission at its thirty-fifth session, are set out in paragraph 194 below.

[152] See footnote 167 below.

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.

2. TEXT OF ARTICLE 8, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-FIFTH AND THIRTY-SIXTH SESSIONS, AND TEXTS OF ARTICLES 9 TO 17, 19 AND 20, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SIXTH SESSION, WITH COMMENTARIES THERETO

194. At its present session (1862nd and 1864th meetings), the Commission adopted, on first reading, the draft articles which follow. It should be noted, however, that the text of article 8 and the commentary thereto had been provisionally adopted by the Commission at its thirty-fifth session.[153] At the present session, the Commission decided to delete draft article 9 (Appointment of the same person by two or more States as a diplomatic courier)[154] submitted by the Special Rapporteur and to include in the commentary to article 8 a reference to the subject-matter covered by draft article 9. The deletion of draft article 9 affected not only the text of the commentary to article 8, but also certain cross-references contained in the text of article 8. Therefore the text of article 8 and its full commentary, reflecting the necessary consequential adjustments, are reproduced below, without prejudice to possible later adjustments arising from the renumbering of the whole set of draft articles.

Article 8. Appointment of the diplomatic courier*

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

* Provisional numbering.

[153] *Yearbook ... 1983*, vol. II (Part Two), p. 60-61.

[154] *Ibid.*, p. 46, footnote 189.

Commentary

(1) The terminology employed in article 8 indicating that the diplomatic courier may be freely appointed by the competent authorities of the sending State is consistent with that used in the corresponding provisions of the four conventions codifying diplomatic law concerning the appointment of diplomatic or consular staff other than the head of the mission or the head of the consular post. Those provisions are article 7 of the 1961 Vienna Convention on Diplomatic Relations, article 19, paragraph 1, of the 1963 Vienna Convention on Consular Relations, article 8 of the 1969 Convention on Special Missions and article 9 of the 1975 Vienna Convention on the Representation of States.

(2) The appointment of a diplomatic courier is an act of the competent authorities of the sending State or its mission abroad directed at designating a person for the performance of an official function, namely the custody, transportation and delivery of the diplomatic bag. The appointment is an act in principle within the domestic jurisdiction of the sending State. Accordingly the word "freely" has been used in the text of the draft article. Therefore the requirements for appointment or special assignment, the procedure to be followed in the issuance of the act, the designation of the relevant competent authorities and the form of act are governed by national laws and regulations and established practices.

(3) Nevertheless, the appointment of a diplomatic courier by the sending State has certain international implications affecting the receiving State or the transit State. There is a need for some international rules to strike a balance between the rights and interests of the sending State and the rights and interests of the receiving or transit States where the diplomatic courier is to exercise his functions. That is the purpose of articles 9 and 12 mentioned in the present article. The commentaries to those articles will elaborate on the ways of achieving the above-mentioned balance.

(4) A professional and regular diplomatic courier is, as a general rule, appointed by an act of a competent organ of the Ministry of Foreign Affairs of the sending State; he thus becomes or may become a member of the permanent or temporary staff of that Ministry, with rights and duties deriving from his position as a civil servant. On the other hand, a diplomatic courier *ad hoc* is not necessarily a diplomat or a member of the staff of the Ministry of Foreign Affairs. His functions may be performed by any official of the sending State or any person freely chosen by its competent authorities. His designation is for a special occasion and his legal relationship with the sending State is of a temporary nature. He may be appointed by the Ministry of Foreign Affairs of the sending State, but is very often appointed by the latter's diplomatic missions, consular posts or delegations.

(5) The original text of draft article 8[155] contained *in fine* the phrase "and are admitted to perform their functions on the territory of the receiving State or the transit State". Without prejudice to recognizing that this state-

[155] *Ibid.*, footnote 188.

ment was in itself correct, it was generally felt that its place was not in draft article 8, which dealt exclusively with the appointment of the diplomatic courier. Other articles, particularly article 14, will deal with the matter of admission into the territory of the receiving State and the transit State.

(6) The Commission was of the view that article 8 did not exclude the practice whereby, in exceptional cases, two or more States could jointly appoint the same person as a diplomatic courier. The Commission also considered that the foregoing should be understood subject to the provisions of articles 9 and 12, although the requirement of paragraph 1 of article 9 would be met if the courier had the nationality of at least one of the sending States.

Article 9. Nationality of the diplomatic courier[156]

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 that State, which may be withdrawn at any time.

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

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

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

Commentary

(1) Paragraphs 1, 2 and 3 (*b*) of article 9 are modelled on article 8 of the 1961 Vienna Convention on Diplomatic Relations, article 22 of the 1963 Vienna Convention on Consular Relations, article 10 of the 1969 Convention on Special Missions and article 73 of the 1975 Vienna Convention on the Representation of States.

Paragraphs 1 and 2

(2) The similar provisions contained in the above-mentioned codification conventions point to the long-standing consideration that, as a rule, diplomatic agents should be nationals of the sending State, owing to the political importance and confidential nature of their diplomatic functions. The question of nationality with respect to all kinds of diplomatic officials has always had great political and legal significance, and the same considerations apply to the diplomatic courier. The general rule, therefore, is that diplomatic couriers should in principle be nationals of the sending State. This principle is already to be found as established for consular couriers in paragraph 5 of article 35 of the 1963 Vienna Convention on Consular Relations. The immediate application of this principle, as laid down in paragraph 2, is that diplomatic couriers may not, in principle, be appointed from among persons having the nationality of the receiving State.

(3) Paragraph 1, in keeping with the terminology used in all four codification conventions, uses the word "should" instead of "shall". This is due to the fact that the principle in question may suffer exceptions to be determined by agreement between the sending State and the receiving State, in which case, as arises from paragraph 2 of article 9, the consent of the receiving State is required for the appointment of one of its nationals as a diplomatic courier of the sending State. In this connection, it is to be noted that, for the sake of uniformity with the terminology used in most of the parallel provisions mentioned in paragraph (1) of the present commentary, the Commission decided to delete the word "express" before the word "consent". Paragraph 2 lays down that this consent may be withdrawn "at any time". It was felt in the Commission that, although the words "at any time" had been included in article 9 for the sake of consistency with article 12, they were not intended to legitimize any arbitrary withdrawal of consent, such as on the basis of nationality only, or the interruption or interference with the performance of a mission already begun. A withdrawal of that nature, under normal circumstances, ought to take place only prior to the commencement of the mission concerned. Furthermore, the provision had to be interpreted in the light of the fact that the diplomatic courier performs his official functions in the territory of the receiving State and, for that purpose, is entitled to enjoy certain facilities, privileges and immunities which are normally granted by States to foreign subjects and not to its own nationals. The withdrawal should proceed in serious circumstances, such as those related to grave abuses of the above-mentioned privileges and immunities or in circumstances which may lead the receiving State to declare the courier *persona non grata* in acordance with article 12.

Paragraph 3

(4) In accordance with paragraph 3 of article 9, the receiving State may extend the legal régime established in paragraph 2 concerning the need for consent and the possibility of withdrawal of consent at any time to two other categories of persons: (*a*) nationals of a third State who are not also nationals of the sending State (this category is already contained in the respective articles of the four codification conventions mentioned above); and (*b*) nationals of the sending State who are permanent residents of the receiving State (this category appears in paragraph 5 of article 35 of the 1963 Vienna Convention on Consular Relations). It was stated in the Commission that the expression "permanent residents of the receiving State" was to be understood in the light of the internal law of the receiving State, since the determination of the status of permanent resident was a matter of domestic law rather than international law.

[156] Text corresponding to article 10 as originally submitted by the Special Rapporteur; *ibid.*, footnote 190.

(5) The original draft article contained a paragraph 4 reading:

4. The application of this article is without prejudice to the appointment of the same person by two or more States as a diplomatic courier, as provided in article 9.

The purpose of that paragraph was to clarify that, in the case of a joint appointment of the same diplomatic courier by two or more States, as had been contemplated in former draft article 9, later omitted, the rule that in principle the courier should have the nationality of the sending State was satisfied by his bearing the nationality of one of the joint sending States.[157] Draft article 9 having been deleted, the proposed paragraph 4 lost its main point of reference, although its content and purpose should be borne in mind in connection with what is stated in paragraph (6) *in fine* of the commentary to article 8.

Article 10. Functions of the diplomatic courier[158]

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

Commentary

(1) The existing codification conventions do not contain adequate definitions regarding the scope and content of the official functions of the diplomatic courier, although they may be inferred from certain provisions of those conventions and remarks of the Commission on the draft articles which formed the basis for those provisions. It was therefore necessary to devise an adequate formulation of those functions, which has been attempted in article 10, as well as in paragraph 1 of article 3 as provisionally adopted.

(2) A careful definition of the scope and content of the official functions of the diplomatic courier is of great importance for distinguishing between activities inherent in the courier's status and necessary for the performance of his task, and activities which may go beyond or abuse his functions. The latter case may prompt the receiving State to declare the courier *persona non grata* or not acceptable. Although, in accordance with article 12, this declaration is a discretionary right of the receiving State, the latter in its own interest does not usually exercise this right in an unwarranted or arbitrary manner, an adequate definition of the official functions providing States with a reasonable criterion for the exercise of this right.

(3) The main task of the diplomatic courier is the safe delivery of the diplomatic bag at its final destination. To that end, he is in charge of the the custody and transportation of the accompanied bag from the moment he receives it from the competent organ or mission of the sending State until he delivers it to the consignee indicated in the official document and on the bag itself. The diplomatic bag, as a means of the freedom of official communications, is the main subject of legal protection, for the legal status of the diplomatic bag derives from the principle of the inviolability of the official correspondence of the diplomatic mission. The facilities, privileges and immunities accorded to the diplomatic courier are closely connected with his functions.

(4) The original draft article defined the functions of the courier as "taking care of and delivering to its destination the diplomatic bag ...". Without intending to reflect a change in the substance of the courier's functions, the Commission, for the sake of uniformity, adopted the present terminology, which corresponds to that employed in defining the diplomatic courier in paragraph 1 (1) of article 3 as provisionally adopted.

(5) Article 10 should be read in conjunction with the scope of the draft articles as defined in article 1 and referred to in paragraph 1 (2) of article 3, which defines the diplomatic bag. In diplomatic practice, the sender and the consignee of the bag may be not only States and their diplomatic missions, but also consular posts, special missions and permanent missions or delegations. This arises clearly from the fact that all four codification conventions, dealing respectively with diplomatic relations, consular relations, special missions and the representation of States, contain provisions on the diplomatic courier. Furthermore, there has been a widespread practice by States to use the services of one diplomatic courier to deliver and/or collect different kinds of official bags from diplomatic missions, consular posts, special missions, etc. of the sending State situated in several countries or in several cities of the receiving State on his way to or from an official assignment for the sending State. For reasons of economy of drafting, the Commission deleted from the original draft article the words which tended to reflect those varieties of practice. However, this was done on the understanding that the deletion in no way affected the two-way as well as the *inter se* character of the communications between the sending State and its missions, consular posts or delegations by means of a diplomatic bag entrusted to the diplomatic courier, as reflected in article 1 and the commentary thereto, particularly paragraphs (3) and (4) of the commentary[159].

(6) The Commission decided to delete draft article 12 as submitted by the Special Rapporteur, dealing with the commencement of the functions of the diplomatic courier,[160] on the grounds that the matter would be better dealt with in the context of draft article 28, on the duration of privileges and immunities.[161]

[157] See paragraph 194 above and paragraph (6) of the commentary to article 8.

[158] Text corresponding to article 11 as originally submitted by the Special Rapporteur; see *Yearbook ... 1983*, vol. II (Part Two), p. 46, footnote 191.

[159] *Ibid.*, p. 53-54.

[160] *Ibid.*, p. 46, footnote 192.

[161] See footnote 88 above.

Article 11. End of the functions of the diplomatic courier[162]

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.

Commentary

(1) Although none of the existing codification conventions contains any specific provision on the end of the functions of the diplomatic courier, the wording of article 11 was inspired by several provisions contained in those conventions regarding the end of the functions of the diplomatic agent or the consular officer, namely article 43 of the 1961 Vienna Convention on Diplomatic Relations, article 25 of the 1963 Vienna Convention on Consular Relations, article 20 of the 1969 Convention on Special Missions and articles 40 and 69 of the 1975 Vienna Convention on the Representation of States.

(2) A clear determination of the end of the courier's functions is important not only for establishing greater certainty with respect to his status at any specific moment in time, but also for determining the moment when he will cease to enjoy the facilities, privileges and immunities granted to him after the expiration of a reasonable period to leave the territory of the receiving State or, as applicable, the transit State, as provided in draft article 28.[163] This is so because the legal basis for his legal protection and his favourable treatment is precisely his official functions.

Subparagraph *a*

(3) The end of the courier's functions may come about through acts of the sending State. Subparagraph *a* of the draft article has been directly modelled upon article 43, subparagraph *a*, of the 1961 Vienna Convention on Diplomatic Relations. Although the acts of the competent authorities of the sending State which could bring about the termination of the courier's functions may vary in their substance or motivation and may take the form of recall, dismissal, etc., *vis-à-vis* the receiving State they should be expressed by a notification to the courier service or relevant unit of the Ministry of Foreign Affairs of the receiving State or, where necessary, of the transit State.

Subparagraph *b*

(4) The end of the courier's functions may also come about through an act of the receiving State. Subparagraph *b* of the draft article has been directly modelled upon subparagraph *b* of article 43 of the 1961 Vienna Convention on Diplomatic Relations. The act of the receiving State is a declaration to the effect that the diplomatic courier is either *persona non grata* or not acceptable, as explained in more detail in the commentary to article 12 below. The receiving State should notify the sending State of this declaration, the purpose of the notification being to request the sending State to terminate the functions of its courier. It was stated in the Commission that the link between article 11, subparagraph *b*, and paragraph 2 of article 12 might have to be re-examined at the time of reconsidering the latter paragraph.[164]

(5) As evidenced by the words *"inter alia"* in its introductory phrase, article 11 does not intend to produce an exhaustive rehearsal of all the possible reasons leading to the end of the courier's functions. The end of the courier's functions may also come about through events or facts which may differ greatly in their legal nature or origin; some of them could be physical phenomena, while others could derive from personal actions. The most frequent and usual fact having such an effect is fulfilment of the courier's mission. In the case of the regular or professional courier, this fact would be marked by the return of the courier to the sending State. A more specific example would be the case of the diplomatic courier *ad hoc* whose functions end upon the delivery of the diplomatic bag entrusted to him. A physical event which may bring about the end of the courier's functions is his death during the performance of his duties. It must be pointed out that in such a case, in spite of the termination of the courier's functions, the protection of the diplomatic bag must still by secured by the receiving or transit State, as will be explained in more detail in the commentary to draft article 39.[165] The original draft article spelt out in separate additional subparagraphs the two examples given in the present paragraph of the commentary. Given the non-exhaustive character of the provision, as indicated by the words *"inter alia"*, the Commission felt that it was more appropriate to limit the subparagraphs of the draft article to the two instances expressly provided for in the provisions of existing codification conventions on which the present article is modelled.

Article 12. The diplomatic courier declared persona non grata *or not acceptable*[166]

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

[162] Text corresponding to article 13 as originally submitted by the Special Rapporteur; see *Yearbook ... 1983*, vol. II (Part Two), p. 46, footnote 193.

[163] See footnote 88 above.

[164] See paragraph (2) of the commentary to article 12 below.

[165] See footnote 101 above.

[166] Text corresponding to article 14 as originally submitted by the Special Rapporteur; see *Yearbook ... 1983*, vol. II (Part Two), p. 46, footnote 194.

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.][167]

Commentary

Paragraph 1

(1) Paragraph 1 of article 12 extends to the diplomatic courier's legal régime the institution of the declaration of *persona non grata*. This right of the receiving State established by international customary law has been reiterated in various provisions of the codification conventions, namely article 9 of the 1961 Vienna Convention on Diplomatic Relations, article 23 of the 1963 Vienna Convention on Consular Relations and article 12 of the 1969 Convention on Special Missions.

(2) This institution, in principle, constitutes one form of termination of the diplomatic courier's functions and represents an effective means at the disposal of the receiving State to protect its interests by terminating the functions of a foreign official on its territory. But it may also serve the purpose of preventing a foreign official objectionable to the receiving State from effectively assuming his functions. Since the diplomatic courier is not a head of mission, the institution of *agrément* prior to his appointment does not apply, as explained in the commentary to article 8. He is in principle freely chosen by the sending State and therefore his name is not submitted in advance to the receiving State for approval. But if the receiving State, before the courier's arrival in its territory, finds that it has objections to him, that State may, as in the case of a head of mission who has not been approved, inform the sending State that he is *persona non grata* or not acceptable, with the same effect as in the case of the head of mission. This might happen, for instance, if the sending State deemed it suitable to notify the receiving State of the appointment of the courier, or in the event of an application for an entry visa if such a visa was required by the receiving State. This is why the Commission considered it advisable to add to the text of paragraph 1 as originally submitted by the Special Rapporteur a third sentence laying down that "a person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State". This sentence is to be found in the parallel provisions of the codification conventions mentioned in paragraph (1) of the present commentary.

(3) In accordance with the terminology used in article 9 of the 1961 Vienna Convention on Diplomatic Relations, article 12 speaks of declaration of "*persona non grata* or not acceptable", depending on whether the diplomatic courier objectionable to the receiving State possesses diplomatic rank (*persona non grata*) or not (not acceptable).

(4) Whether the decision of the receiving State to declare a diplomatic courier *persona non grata* or not acceptable takes place before he enters its territory or after his entry during his stay there, in both cases the solution arising from the draft article is that the receiving State is not obliged to explain or justify its decision, unless it decides otherwise. This discretion is not only an expression of the sovereignty of the receiving State but, in many instances, is justified by political or security interests or other considerations.

(5) As provided in paragraph 1 of article 12 the declaration by the receiving State that a diplomatic courier is *persona non grata* or not acceptable should lead the sending State to recall its courier. The possibility also exists that the courier cannot be recalled because he is a national of the receiving State, as contemplated in paragraph 2 of article 9. That is why paragraph 1 of the present article provides the alternative that the sending State shall "terminate his functions to be performed in the receiving State". The latter clause also covers the case in which the courier is not yet in the territory of the receiving State but in transit towards it. The clause also conveys the notion that the termination of functions refers to those to be performed in the specific receiving State which has declared the courier *persona non grata* or not acceptable and does not refer to those functions that a courier with multiple missions may perform in another receiving State.

Paragraph 2

(6) Article 12 contains a second paragraph which appears between brackets. This paragraph, which did not appear in the original draft article, is based on comparable provisions contained in the corresponding articles of the codification conventions cited in paragraph (1) of the present commentary. Some members of the Commission expressed doubts as to the advisability of including in article 12 a paragraph essentially related to a question dealt with in draft article 28 as submitted by the Special Rapporteur, namely the duration of the privileges and immunities of the courier. Consequently, the Commission decided to include the paragraph between brackets, with the proviso that it would revert to the consideration of paragraph 2 at the time of considering draft article 28.

Article 13. Facilities[168]

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.

[167] The Commission decided to return to this paragraph after the examination of draft article 28 (see footnote 88 above).

[168] Text based on articles 15, 18 and 19 as originally submitted by the Special Rapporteur; see *Yearbook ... 1983*, vol. II (Part Two), p. 48-49, footnotes 202, 205 and 206.

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.

Commentary

(1) Article 13 combines under the heading "Facilities", with certain modifications, draft articles 15 (General facilities), 18 (Freedom of communication) and 19 (Temporary accommodation) as originally submitted by the Special Rapporteur.

Paragraph 1

(2) Paragraph 1 is of a generic character. Its direct source is to be found in article 25 of the 1961 Vienna Convention on Diplomatic Relations, article 28 of the 1963 Vienna Convention on Consular Relations, article 22 of the 1969 Convention on Special Missions and articles 20 and 51 of the 1975 Vienna Convention on the Representation of States.

(3) The diplomatic courier, as an official of the sending State, may, while exercising his functions in the territory of the receiving State or transit State, need some assistance in connection with his journey. The facilities which he may need could include various means of help or co-operation from the authorities of the receiving State or transit State in order for him to perform his duties expeditiously and without undue difficulties. Some of these facilities could be conceived well in advance, due to their essential and repetitive character, while others might be unpredictable in nature, so that their explicit formulation in an article is neither easy nor convenient. The main requirement with respect to the nature and scope of the facilities is their close dependence upon the courier's need to be able to perform his functions properly. The facilities could be granted by the central or the local authorities, as the case may be. They may be of a technical or administrative nature, relating to the admission or entry into the territory of the transit State or the receiving State, or to the provision of assistance in securing the safety of the diplomatic bag. As the Commission stated in paragraph (2) of the commentary to the corresponding provision (art. 33) of its 1961 draft articles on consular relations:

> It is difficult to define the facilities which this article has in view, for this depends on the circumstances of each particular case. It should, however, be emphasized that the obligation to provide facilities is confined to what is reasonable, having regard to the given circumstances.[169]

It should be added that the nature and scope of the facilities accorded to the diplomatic courier for the performance of his functions constitute a substantial aspect of his legal status and they must be regarded as an important legal means for the protection of the freedom of communication between the sending State and its missions, consular posts and delegations. At least one member of the Commission was opposed to paragraph 1.

Paragraph 2

(4) Paragraph 2 deals with two specific facilities to be granted to the courier by the receiving State or the transit State. Its subject-matter was the object of two separate draft articles submitted by the Special Rapporteur, namely draft article 18, on freedom of communication, and draft article 19, on temporary accommodation. The Commission felt that reasons of logic as well as of economy of drafting made it advisable to combine both provisions into a single one as a second paragraph to article 13.

(5) Within the scope of the practical facilities which may be accorded by the receiving State or the transit State to the diplomatic courier for the performance of his functions on their territories, paragraph 2 refers specifically to the assistance to be rendered to him in obtaining temporary accommodation when requested under certain circumstances. Normally, the diplomatic courier has to resolve himself all the practical problems that may arise during his journey, including his accommodation. However, in certain special situations the diplomatic courier may not be able to find suitable temporary accommodation for himself and for the protection of the diplomatic bag, such as when he is compelled either to change his original itinerary or to stop over in a certain place. In that exceptional case, the receiving State or the transit State may be requested to assist him in obtaining such temporary accommodation. It is of great importance that the diplomatic courier and the diplomatic bag carried by him be housed in a safe and secure place, protected against any intrusion or access by unauthorized persons who may endanger the safety and integrity of the diplomatic bag. Hence this provision providing for facilities to be rendered by the receiving State or the transit State for the proper performance of his functions. The words "to the extent practicable" contained in the paragraph point to the fact that the obligation to provide this facility is to be understood within reasonable terms, the obligation being one of providing the means rather than ensuring the result. The Commission felt that while the internal organization of some States could be such that an intervention from a State organ could ensure the easy availability of a hotel room or other accommodation, the internal organization of other States placed the State on an equal footing with private persons in that connection. In the latter case, the obligation to assist couriers in obtaining temporary accommodation might prove on certain occasions or under certain circumstances to be a particularly burdensome one and therefore had to be kept within reasonable bounds.

(6) The other facility expressly spelt out in paragraph 2 is the obligation for the receiving State or the transit State, as the case may be, to assist the courier at his request and to the extent practicable in establishing con-

[169] *Yearbook ... 1961*, vol. II p. 111, document A/4843, chap. II, sect. IV.

tact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated. This facility should be conceived in direct connection with the functions of the courier. This might be the case when the diplomatic courier *en route* or at a certain point on his temporary stopover might need to communicate directly with the competent authorities of the sending State or its missions abroad to seek instructions or inform them about delays or deviations from the original way-bill, or to convey any other information in connection with the performance of his functions. This assistance by the receiving State or transit State entails the facilitation, when necessary, of the courier's use of the appropriate means of telecommunication, including telephone, telegraph, telex and other available services. Assistance should in principle not be requested from the receiving or transit State in normal circumstances, when the means of communication are generally accessible. The request for assistance must be justified on the grounds of existing difficulties or obstacles which the courier could not overcome without the direct help or co-operation of the authorities of the receiving State or transit State. In this connection, a possible implementation of the obligation of assistance might be the ensuring of a priority call for the diplomatic courier over the public telecommunications network or, in urgent cases, the placing of other telecommunications networks (such as the police network, etc.) at the courier's disposal. It should also be noted that the qualification introduced by the words "to the extent practicable", as explained in paragraph (5) of the present commentary, also applies to this obligation of assistance.

(7) Some members of the Commission reserved their position with regard to paragraph 2 of the article, as well as to the article as a whole.

Article 14. Entry into the territory of the receiving State or the transit State[170]

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.

Commentary

(1) Article 14, which reproduces with only minor drafting changes draft article 16 as submitted by the Special Rapporteur, is basically modelled on article 79 of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) The admission of the diplomatic courier into the territory of the receiving State or his crossing the territory of the transit State is an indispensable condition for him to perform his functions. The facilities for the entry or transit rendered to the courier by the receiving State or transit State constitute an essential prerequisite for the fulfilment of the task with which the courier is entrusted—the transportation and delivery of the diplomatic bag. Therefore the obligation of States to permit the entry into their territory of diplomatic couriers has become well established in international law and State practice as an essential element of the principle of freedom of communication for official purposes effected through diplomatic couriers and diplomatic bags and as a corollary of the freely appointed character of the courier, as stated in article 8 and the commentary thereto, particularly its paragraph (2). It is obvious that, if a diplomatic courier is refused entry into the territory of the receiving State, then he is prevented from performing his functions.

Paragraph 2

(3) The facilities for entry into the territory of the receiving State or the transit State rendered by those States to the diplomatic courier depend very much upon the régime established by them for admission across their frontiers of foreigners in general, and members of foreign diplomatic and other missions and official delegations in particular. The main purpose of those facilities is to ensure unimpeded and expeditious passage through the immigration and other checking offices at the frontier. Where the régime for admission requires an entry or transit visa for all foreign visitors or for nationals of some countries, it should be granted to the diplomatic courier by the competent authorities of the receiving or transit State as promptly as possible and, where possible, with reduced formalities. There has been abundant State practice—established through national regulations and international agreements—on simplified procedures for the issuance of special visas to diplomatic couriers valid for multiple journeys and long periods of time.

Article 15. Freedom of movement[171]

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.

Commentary

(1) The direct source of article 15 is to be found in the pertinent provisions of the four codification conven-

[170] Text corresponding to article 16 as originally submitted by the Special Rapporteur; see *Yearbook ... 1983*, vol. II (Part Two), p. 49, footnote 203.

[171] Text corresponding to article 17 as originally submitted by the Special Rapporteur; *ibid.*, footnote 204.

tions, namely article 26 of the 1961 Vienna Convention on Diplomatic Relations, article 34 of the 1963 Vienna Convention on Consular Relations, article 27 of the 1969 Convention on Special Missions and articles 26 and 56 of the 1975 Vienna Convention on the Representation of States.

(2) Freedom of movement and travel within the territory of the receiving State or transit State is another essential condition for the proper performance of the functions of the diplomatic courier. It also constitutes an important element of the general principle of freedom of diplomatic communication. Any impediment to the exercise of free movement and travel inevitably leads to retardation of the delivery of the diplomatic correspondence and thus adversely affects official communications. To ensure this freedom of movement and travel, the authorities of the receiving or transit State should, save in exceptional circumstances, assist the diplomatic courier in overcoming possible difficulties and obstacles which could be caused by routine police, customs or other inspection or control during his travel. As a rule, the diplomatic courier has to make all the necessary travel arrangements for his entire journey in the exercise of his tasks. In exceptional circumstances, the courier may be compelled to address a request for assistance to the authorities of the receiving or transit State to obtain an appropriate means of transportation when he has to face insurmountable obstacles which may delay his journey and which could be overcome, to the extent practicable, with the help or co-operation of the local authorities.

(3) Freedom of movement and travel entails the right of the diplomatic courier to use all available means of transportation and to have access to any appropriate itinerary in the territory of the receiving State or transit State. However, having in mind the fact that the freedom of movement and travel of the diplomatic courier is subordinated to his function of carrying the diplomatic bag, it should be assumed that he has to follow the most appropriate itinerary, which usually should be the most convenient journey for the safe, speedy and economical delivery of the bag to its destination. It was to emphasize this functional approach of article 15 that the Commission replaced the original formulation submitted by the Special Rapporteur, "shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions ...", by the more precise wording, "shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions", which reproduces the formulation of the corresponding provision of the 1969 Convention on Special Missions (art. 27).

(4) Furthermore, certain limitations could be established on the courier's freedom of movement and travel with regard to certain zones in the receiving State or transit State into which entry is prohibited or regulated for reasons of national security. Such a restriction on freedom of movement and travel has been generally acknowledged by international law and State practice with regard to foreign nationals, including members of diplomatic and other missions, and is explicitly recognized in the provisions of the existing codification conventions cited in paragraph (1) of the present commentary. It was precisely for the sake of maintaining uniformity with the text of those provisions that the Commission introduced certain amendments to the original formulation of the draft article as submitted by the Special Rapporteur. The phrase "zones where access is prohibited or regulated for reasons of national security" was replaced by "zones entry into which is prohibited or regulated for reasons of national security". It was felt that the Commission should keep to that formula, if only to avoid possible misinterpretations. By the same token, the phrase at the end of the original draft article, "or when returning to the sending State", was deleted. In the view of the Commission that phrase added nothing to the meaning of the article and could lead to misguided interpretations of the conventions which contained no corresponding phrase. On the other hand, the point should also be made, in accordance with the commentary to the corresponding provision (art. 24) of the Commission's 1958 draft articles on diplomatic intercourse and immunities,[172] that the establishment of prohibited zones must not be so extensive as to render freedom of movement and travel illusory.

Article 16. Personal protection and inviolability[173]

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.

Commentary

(1) The direct source of article 16, as regards obligations of both the receiving State and the transit State, is to be found in the following provisions of the codification conventions, which deal with the personal inviolability of the courier: article 27, paragraph 5, and article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 5, and article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 6, and article 42, paragraph 3, of the 1969 Convention on Special Missions; and article 27, paragraph 5, article 57, paragraph 6, and article 81, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

(2) A comparison between the above-mentioned provisions on which the present article is based and the provision on personal inviolability of the diplomatic agent in article 29 of the 1961 Vienna Convention on Diplomatic Relations leads to the conclusion that the personal inviolability of the diplomatic courier comes very close in its scope and legal implications to that of a diplomatic agent, due primarily to the courier's function

[172] *Yearbook ... 1958*, vol. II, p. 96, document A/3859, chap. III, sect. II.

[173] Text corresponding to article 20 as originally submitted by the Special Rapporteur; see footnote 79 above.

with regard to the custody, transportation and delivery of the diplomatic bag and the legal protection of the confidential character of the official correspondence. This inviolability of the courier arises not only from the provisions of the codification conventions cited above, but also from numerous other manifestations of State practice, such as bilateral consular conventions and provisions of national legislation.

(3) The principle of the inviolability of the courier has a twofold nature. On the one hand, it implies for the receiving State and the transit State obligations of a preponderantly negative nature, where the duties of abstention predominate. Thus the courier shall not be liable to arrest, detention or any other form of restriction on his person and is exempted from measures that would amount to direct coercion.

(4) The other aspect of the twofold nature of the courier's personal inviolability entails a positive obligation on the part of the receiving and transit States. In this connection, the original draft article contained a second paragraph reading:

> 2. The receiving State or, as applicable, the transit State shall treat the diplomatic courier with due respect and shall take all appropriate measures to prevent any infringement of his person, freedom or dignity and shall prosecute and punish persons responsible for such infringements.

For various reasons the Commission felt that it was more appropriate to delete this second paragraph and to draft the article in the way in which it was provisionally adopted. The concept of protection to be found in the article already covered the fundamental part of the deleted paragraph, consisting in the duty for the receiving and transit States to take all appropriate measures to prevent any infringement of the courier's person, freedom or dignity. Furthermore, for the sake of uniformity with parallel provisions of the codification conventions, the Commission felt that it was more convenient to delete the proposed second paragraph, to draft the article in as close a manner as possible to the above-mentioned provisions and to elaborate on the concept of protection in the commentary to the article. Therefore the receiving State and the transit State have the obligation to respect and to ensure respect for the person of the diplomatic courier. They must take all reasonable steps to that end.

(5) Notwithstanding the broad character of the duty of protection and respect for the inviolability of the diplomatic courier, some qualifications are in order. As provided in article 16, the courier shall be protected by the receiving State or the transit State "in the performance of his functions". Furthermore, and in accordance with paragraph (1) of the commentary to article 27 of the Commission's 1958 draft on diplomatic intercourse and immunities[174] (which served as the basis for article 29 of the 1961 Vienna Convention on Diplomatic Relations, dealing with the personal inviolability of the diplomatic agent), it should be understood that the principle of the courier's inviolability does not exclude in respect of him either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.

Article 17. Inviolability of temporary accommodation[175]

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

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

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

Commentary

(1) There are no specific rules regarding the inviolability of the temporary accommodation of the diplomatic courier in any of the four codification conventions nor in other international agreements in the field of diplomatic or consular law. However, there exist in those conventions provisions relating to the status of the private residence of a member of a diplomatic mission, and of the private accommodation of members of special missions, permanent missions to international organizations or members of delegations to international conferences. These provisions are article 30 of the 1961 Vienna Convention on Diplomatic Relations, article 30 of the 1969 Convention on Special Missions and articles 29 and 59 of the 1975 Vienna Convention on the Representation of States.

(2) Normally, couriers are housed in the premises of the mission, in private apartments owned or used by the mission or in the private accommodation of a member of the mission. In such instances, the inviolability of the temporary accommodation of the diplomatic courier will be protected under the relevant provisions of the above-mentioned conventions or customary international law. When the courier's temporary accommo-

[174] *Yearbook ... 1958*, vol. II, p. 97, document A/3859, chap. III, sect. II.

[175] Text corresponding to article 21 as originally submitted by the Special Rapporteur; see footnote 80 above.

dation happens to be in a hotel, motel, guest house, private apartment or other similar common facilities for lodging visitors on a temporary stay, then the question arises whether special rules on the inviolability of the temporary accommodation of the diplomatic courier should apply.

(3) The Commission was divided as to the answer to this question. In the view of some of its members it was not possible, as far as inviolability was concerned, to equate the temporary accommodation of a diplomatic courier—transient in nature—with the premises of a mission or the private accommodation of a member of a mission. Furthermore, the functional need for the proposed inviolability was very doubtful, since on many occasions the courier might not have the diplomatic bag in his temporary accommodation—because he had already delivered it, or for other reasons—which would render the granting of inviolability to the courier's temporary accommodation an excessive privilege not necessary for the protection of the bag. Moreover, the task of safeguarding the inviolability of the temporary accommodation of a substantial number of diplomatic couriers at the same time and in different locations could well prove an intolerable burden for many receiving or transit States. In this connection, the special difficulties that transit States might face were stressed by one member of the Commission.

(4) In the view of other members, however, taking into account the fact that the diplomatic courier performs an official duty of practical significance for the normal functioning of the diplomatic or other missions of the sending State in the territory of the receiving State or the transit State, his accommodation, though temporary, should enjoy protection similar to that accorded to the premises of a mission or to the private accommodation of a member of a mission. This would also be the case when the courier stopped over at an intermediate station or reached the final point of his official journey. Furthermore, the "temporary" character of his accommodation was "temporary" only in a relative sense as compared with the private residence of the member of a mission, which was also "temporary" in the final analysis. Duration was not really a decisive factor. A special mission might last for only two or three days, shorter perhaps than most trips of diplomatic couriers, and yet article 30 of the 1969 Convention on Special Missions granted inviolability to the temporary accommodation of a member of a special mission. The temporary accommodation of the courier, in his capacity as such, was the only one known to him and therefore his real private residence. In this connection, it was recalled that paragraph (1) of the commentary to article 28 of the Commission's 1958 draft on diplomatic intercourse and immunities (which served as the basis for article 30 of the 1961 Vienna Convention on Diplomatic Relations) expressly stated that "the expression 'the private residence of a diplomatic agent' necessarily includes even a temporary residence of the diplomatic agent",[176] thus equating "temporary residence" with "private residence". Moreover, the rationale for according inviolability to the courier's temporary accommodation was not the protection of the bag; it was an extension of his personal inviolability as provided for in article 16.

(5) In view of the division of opinions reflected above, the Commission, although it has provisionally adopted the present article on first reading, wishes to leave on record that, after an extensive discussion, it decided on a formulation that did not gather the agreement of all of its members on all paragraphs of the article. While certain members expressed reservations with regard to the first sentence of paragraph 1, others expressed reservations with regard to paragraph 3. Some members also expressed reservations on the article as a whole.

Paragraph 1

(6) From the point of view of the receiving State and the transit State, the inviolability of the courier's temporary accommodation provided for in the first sentence of paragraph 1 has two aspects. In a negative sense, they are obliged to prevent their agents from entering the premises for any official purpose whatsoever, except with the consent of the courier, as laid down in the second sentence of the paragraph. This covers immunity from any search, requisition, attachment or execution and therefore the accommodation may not be entered even in pursuance of a judicial order. Of course, measures of execution could be taken against the private owner of the accommodation, provided that it is not necessary to enter the temporary accommodation.

(7) The third sentence of paragraph 1 is based on similar provisions contained in two codification conventions, namely article 31 of the 1963 Vienna Convention on Consular Relations and article 25 of the 1969 Convention on Special Missions. This presumption of the courier's consent is qualified by the words "requiring prompt protective action" as applied to fire or other disasters. Such action should obviously be directed only at the suppression of the disaster, which may constitute a public hazard jeopardizing public safety or the safety of the courier himself and the bag, and should stop short of any measure which would exceed this original purpose.

(8) The inviolability of the courier's temporary accommodation also implies for the receiving and transit States a more positive obligation. They should secure the inviolability of his temporary accommodation from any intrusion by unauthorized persons. Such protective measures regarding the privacy, personal security and safety of the property of guests are common in hotels and other housing facilities open to visitors. They are considered to be the main features of law and order in establishments accessible to the general public. However, the official functions of the courier, and more particularly the protection of the diplomatic bag carried by him, might in exceptional circumstances justify the undertaking of special measures of protection. In this connection, the original draft article contained a second paragraph which read as follows:

[176] *Yearbook ... 1958*, vol. II, p. 98, document A/3859, chap. III, sect. II.

2. The receiving State or the transit State has the duty to take appropriate measures to protect from intrusion the temporary accommodation used by the diplomatic courier.

Although the paragraph was deleted for reasons of economy of drafting when the article was provisionally adopted, the Commission felt that the gist of its contents should be appropriately reflected in the commentary. Some members were opposed to paragraph 1 of the article for the reasons stated in paragraph (3) of the present commentary.

Paragraph 2

(9) Paragraph 2 did not exist in the original draft article. Its addition reflects the Commission's view that compliance by the receiving State and the transit State with the obligations contained in paragraph 1 of the article has to be facilitated by the courier's informing the States concerned of the location of his temporary accommodation. Paragraph 2 is therefore mainly aimed at facilitating the discharge by the authorities of the receiving and transit States of their obligations in implementing the inviolability of the courier's temporary accommodation. It was also felt that, in case of a violation of those obligations, the international responsibility of the States concerned might not exist if the requirement of paragraph 2 had not been met. The words "to the extent practicable" point to the fact that, in exceptional circumstances, and owing to factual impossibilities, the courier might be prevented from giving such information.

Paragraph 3

(10) Paragraph 3 tends to establish a balance between the interest of the sending State in protecting the courier and the bag and the interest of the receiving or transit State in protecting its safety and security. It creates some exceptions and limitations under certain conditions to the rule of inviolability of the temporary accommodation. Accordingly, inspection or search of the temporary accommodation could be undertaken when there are serious grounds to believe that there are in the room or apartment used by the courier, apart from the sealed diplomatic bag, articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving or transit State. In such cases, the inspection should be conducted only in the presence of the diplomatic courier and shall not affect in any way the inviolability of the diplomatic bag. A provision of this kind is aimed, on the one hand, at ensuring observance of the laws and regulations of the receiving or transit State and respect for their legitimate interests, and on the other hand, at protecting the inviolability of the diplomatic bag. It may be added that the application of the exceptions to the inviolability of the temporary accommodation of the diplomatic courier should not cause any unreasonable delays or impediments in the dispatch of the diplomatic bag. It should also be pointed out that, in the view of some members, the paragraph was unjustified and excessive, since a control on imported or exported articles should, in their view, be exercised only at the points of entry into, or exit from, the receiving or transit State's territory.

(11) As a rule, diplomatic couriers employ public means of transportation in their long-distance journeys. When they make use of personal motor vehicles between cities within the same country, for example between Geneva and Bern, New York and Washington, Rome and Milan, or Paris and Marseilles, in which the sending State may have diplomatic missions and consular posts or other missions, couriers normally utilize the means of transport of those missions. In such cases, the protection of that vehicle is covered by the relevant provisions of the codification conventions or other agreements. In instances when the courier would employ an individual means of transport of his own in the exercise of his functions, a question could arise concerning the application of a special rule with regard to the inviolability of that means of transport. The set of draft articles as originally submitted by the Special Rapporteur contained a draft article 22,[177] paragraph 1 of which read as follows:

1. The individual means of transport used by the diplomatic courier in the performance of his official functions shall be immune from inspection, search, requisition, seizure and measures of execution.

Paragraph 2 thereof was similar, *mutatis mutandis*, to the present paragraph 3 of article 17. As a result of the discussions held both in plenary and in the Drafting Committee, the Special Rapporteur suggested that, since those discussions had not evidenced enough support for draft article 22, it could be deleted. The Commission, while deciding to delete the draft article, felt that the commentary to article 17 should reflect the notion that, whenever the diplomatic courier used a means of transport in the performance of his functions, that means of transport should not be subject to measures which might impede or delay that performance, particularly the delivery of the bag.

Article 19. Exemption from personal examination, customs duties and inspection[178]

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

[177] See footnote 81 above.

[178] Text corresponding to article 24 as originally submitted by the Special Rapporteur; see footnote 84 above.

inspection shall be conducted only in the presence of the diplomatic courier.

Commentary

(1) The direct source for paragraphs 2 and 3 of article 19 is in article 36 of the 1961 Vienna Convention on Diplomatic Relations, article 50 of the 1963 Vienna Convention on Consular Relations, article 35 of the 1969 Convention on Special Missions and articles 35 and 65 of the 1975 Vienna Convention on the Representation of States.

Paragraph 1

(2) The main reasons behind the exemption of a diplomatic courier from personal examination have been the recognition of his official functions, deriving from the fundamental principle of freedom of communication of States for official purposes, and the inviolability of the person entrusted with the carrying out of those functions. Exemption from personal search has also been considered as a courtesy accorded to a State official.

(3) The original text of paragraph 1 contained the following phrase: "including examination carried out at a distance by means of electronic or other mechanical devices". There was a general feeling in the Commission that this phrase represented an unjustified extension of the principle, which would run counter to security measures adopted by almost all States and to which, in usual practice, even diplomatic agents submit without protest. Apart from certain forms of delinquency which had reached alarming dimensions, such as illicit traffic in foreign currency, narcotic drugs, arms and other goods, the spread of international terrorism and the unlawful seizure of aircraft and other forms of air piracy had justified special measures of increased scrutiny of passengers and their baggage, including the regular use of electronic and mechanical devices for examination and screening.

Paragraph 2

(4) National laws and regulations and other forms of State practice have shaped a distinct trend to accord to diplomatic couriers customs privileges and immunities similar to those granted to members of diplomatic missions, although tailored in some aspects to the specific situation of the courier. The commentaries to the draft articles which served as the basis for the provisions cited in paragraph (1) of the present commentary are therefore, *mutatis mutandis*, useful for the interpretation of article 19.

(5) Given the characteristically short stay of the courier in the receiving or transit State, the permission for entry and customs exemption applies to articles for personal use imported by the courier in his personal baggage only, and does not apply to later imports. This, however, should not be interpreted as excluding the case of unaccompanied personal luggage, which, because of the means of transport chosen, traffic delays or mix-ups, or other circumstances, may arrive later than the courier himself.

(6) The paragraph is qualified by the expression "in accordance with such laws and regulations as [the receiving State or transit State] may adopt". It was understood in the Commission that that expression referred to those laws and regulations which might be in force at the time of the courier's entry into the receiving or transit State. The laws and regulations for admission of persons and goods across the frontier, including immigration, customs and sanitary control at frontier check-points, are within the national jurisdiction of the State. They are aimed at protecting the security, economic, fiscal and other legitimate interests of the State. Although not specified in the article, it should be understood that they relate basically to the formal and other procedural requirements aimed at preventing possible abuses of the exemptions. As stated in paragraph (3) of the commentary to article 34 of the Commission's 1958 draft on diplomatic intercourse and immunities (which served as the basis for article 36 of the 1961 Vienna Convention on Diplomatic Relations),

> Because these exemptions are open to abuses, States have very frequently made regulations, *inter alia*, restricting the quantity of goods imported or the period during which the imported articles for the establishment of the agent must take place, or specifying a period within which goods imported duty-free must not be resold. Such regulations cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question. ...[179]

The same principles, *mutatis mutandis*, should apply to the diplomatic courier.

(7) The exception to the exemption from duties, which in the original draft article read "charges other than charges for storage, cartage and similar services", was replaced by the expression "charges on such articles other than charges levied for specific services rendered" because the latter was felt to be better adapted to the situation of the courier, who would normally not need storage or cartage services but only contingent and incidental services for which he was supposed to pay. This change of expression was also in keeping with the terminology used in other articles in the draft, such as article 20.

Paragraph 3

(8) Paragraph 3, which provides for exemption from inspection of the personal baggage of the diplomatic courier, seeks to curtail abuses of this privilege when there are serious grounds for presuming that the baggage contains articles not for official or personal use, but for lucrative purposes, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. However, there is one important requirement and guarantee for the courier specifically indicated in the case when such an exception becomes operative: it stipulates that the inspection shall be conducted only in the presence of the courier.

[179] *Yearbook ... 1958*, vol. II, p. 100, document A/3859, chap. III, sect. II.

Article 20. Exemption from dues and taxes[180]

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.

Commentary

(1) There is no specific provision in the codification conventions concerning the exemption from dues and taxes of the diplomatic courier. Article 20 is based on the consideration that the diplomatic courier should be accorded in all aspects a treatment befitting his status as a person exercising official functions and that, with reference to tax exemption, the courier's level should therefore not be inferior to that of a member of the administrative or technical staff of a mission, who is neither a national of, nor permanently resident in, the receiving State. Taking the foregoing into account, the sources for this provision are article 34 of the 1961 Vienna Convention on Diplomatic Relations, article 49 of the 1963 Vienna Convention on Consular Relations, article 33 of the 1969 Convention on Special Missions and articles 33 and 63 of the 1975 Vienna Convention on the Representation of States.

(2) Notwithstanding the foregoing, the provision has been drafted bearing in mind that the short stay of the diplomatic courier in a given country places him in a somewhat different position from that of members of a mission and renders much less likely and almost impossible the exercise by him of certain activities or his entering into legal relationships which would expose him to liability for particular forms of taxation. Therefore the drafting technique used has been less casuistic with respect to the exceptions to the principle of exemption than the technique adopted for the above-mentioned source provisions, and certain qualifications have been introduced in the general statement of the exemption principle.

(3) The remarks made in the preceding paragraph are reflected in the several departures in the text as provisionally adopted by the Commission from the text as originally submitted by the Special Rapporteur, which read as follows:

Article 25. Exemption from dues and taxes

The diplomatic courier shall be exempt from taxes, dues and charges, personal or real, national, regional and municipal, 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.

In the first place, the expression "in the performance of his functions" has been added, to indicate clearly the functional approach to the exemptions concerned, which excludes all possible private activities of the courier and compensates for the shortening of the number of express exceptions to the exemption principle provided for in article 20. Secondly, the words "personal or real" were also deleted, since they did not seem to fit the specific factual situation of the short stay of the courier, which could hardly afford him the opportunity, for instance, to exercise private rights relating to real property. Thirdly, the words "for which he might otherwise be liable" were included in the sense of dues and taxes for which he would be liable if it were not for the exemptions granted by the present article. It was stated in the Commission that, as a result of these additions and certain clarifications in the text of article 20, the article should be interpreted in the sense that the exemption principle would apply to those dues and taxes which the diplomatic courier might encounter in the course of his travels in his capacity as a courier, such as hotel and airport taxes, but not to those for which he would only become liable after a period of residence in the receiving or transit State.

(4) Two exceptions to the exemption principle are expressly provided for in article 20 because they apply whether or not the courier acts in the performance of his functions. They are indirect taxes of a kind which are normally incorporated in the price of goods or services, and charges levied for specific services rendered. Both exceptions are also to be found in the relevant provisions of the codification conventions mentioned in paragraph (1) above.

(5) The Commission has provisionally adopted the present article taking note of the Special Rapporteur's announced intention to submit at a later stage a specific provision on the courier who is a national or permanent resident of the receiving or transit State, stipulating the non-applicability to his situation of the exemption from dues and taxes provided for in the present article.

(6) The set of draft articles as submitted by the Special Rapporteur contained an article 26, on exemption from personal and public services.[181] The Commission decided to delete the draft article, but not because it disagreed with the basic idea that a courier should not be subject to any personal or public services in the receiving or transit State, particularly taking into account that the safe and speedy delivery of the bag was his main obligation, which should not be hampered. Rather, the Commission felt that the sojourn of a courier in the receiving or transit State was so short that, in practice, it almost discarded the possibility that a courier might be called upon to perform personal or public services of whatever nature; an express article for a hypothetical situation far removed from reality was therefore not warranted.

(7) The set of draft articles as submitted by the Special Rapporteur also contained an article 27, on exemption from social security provisions.[182] The inclusion of such an article would, however, lead beyond the realistic factual matter which the Commission had been called upon to codify. As was the case with the proposed article 26, the Commission decided not to include draft article 27.

[180] Text corresponding to article 25 as originally submitted by the Special Rapporteur; see footnote 85 above.

[181] See footnote 86 above.

[182] See footnote 87 above.

Chapter IV

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

195. The topic entitled "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by the decision of the Commission at its thirtieth session, in 1978,[183] on the recommendation of the Working Group which it had established with a view to starting work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

196. At its thirty-first session, in 1979, the Commission had before it a preliminary report[184] 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.

197. 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 themselves knew best their own practice, wants and needs as to immunities in respect of their activities and that the views and 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.[185]

198. Following the preliminary report, the Special Rapporteur submitted the second report[186] for the consideration of the Commission at its thirty-second session, in 1980,[187] in which he introduced six draft articles: "Scope of the present articles" (art. 1); "Use of terms" (art. 2); "Interpretative provisions" (art. 3); "Jurisdictional immunities not within the scope of the present articles" (art. 4); "Non-retroactivity of the present articles" (art. 5); and "The principle of State immunity" (art. 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, on the recommendation of the Drafting Committee, the Commission provisionally adopted draft article 1, entitled "Scope of the present articles", and article 6, entitled "State immunity".

199. In his third report,[188] submitted at the thirty-third session of the Commission, in 1981, the Special Rapporteur proposed the following five draft articles: "Rules of competence and jurisdictional immunity" (art. 7); "Consent of State" (art. 8); "Voluntary submission" (art. 9); "Counter-claims" (art. 10); and "Waiver" (art. 11). These five draft articles, together with article 6 as already provisionally adopted, constituted part II of the draft, entitled "General principles". The 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 the original five draft articles, which he reduced to four articles as follows: "Obligation to give effect to State immunity" (art. 7); "Consent of State" (art. 8); "Expression of consent" (art. 9); and "Counter-claims" (art. 10).[189] Owing to lack of time, the Drafting Committee was unable to consider these articles at the thirty-third session.

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[183] *Yearbook ... 1978*, vol. II (Part Two), pp. 152-153, paras. 179-190.

[184] *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

[185] 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 and 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 either English or French) in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), hereinafter referred to as *Materials on Jurisdictional Immunities...*

[186] *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add. 1.

[187] See *Yearbook ... 1980*, vol. I, pp. 195-205 and 214-220, 1622nd to 1626th meetings; and *Yearbook ... 1980*, vol. II (Part Two), pp. 138 *et seq.*, paras. 112-122.

[188] *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add. 1.

[189] *Yearbook ... 1981*, vol. II (Part Two), pp. 157-158, para. 226.

200. In his fourth report,[190] 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 immunity", and proposed two draft articles: "Scope of the present part" (art. 11); and "Trading or commercial activity" (art. 12). The Commission decided to refer draft articles 11 and 12 to the Drafting Committee. It further decided that article 6, already provisionally adopted, should be re-examined by the Drafting Committee in the light of the discussions on the rest of the draft articles constituting part II of the draft, and that the Drafting Committee should also examine the provisions of articles 2 and 3 concerning the problem of the definition of "jurisdiction" and "trading or commercial activity".[191] At the same session, on the recommendation of the Drafting Committee, the Commission provisionally adopted draft articles 7, 8 and 9, as well as paragraph 1 (*a*) of draft article 2 and a revised version of draft article 1.[192] The Drafting Committee re-examined article 6 as provisionally adopted and, while not proposing a new formulation thereof, agreed to re-examine the article at the following session.

201. In his fifth report,[193] 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 the draft. They were "Contracts of employment" (art. 13); "Personal injuries and damage to property" (art. 14); and "Ownership, possession and use of property" (art. 15). The Commission also had before it a memorandum on the topic submitted by one of its members.[194] At the conclusion of its debate on the topic, the Commission decided to refer draft articles 13, 14 and 15 to the Drafting Committee.[195] On the recommendation of the Drafting Committee, the Commission provisionally adopted draft articles 10, 12 and 15, as well as paragraph 1 (*g*) of article 2 and paragraph 2 of article 3.[196] 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) and draft article 14 (Personal injuries and damage to property).[197] 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.

2. Consideration of the topic at the present session

202. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/376 and Add.1 and 2).[198] The report dealt with part III of the draft articles, concerning exceptions to State immunity, and contained five draft articles: "Patents, trade marks and other intellectual properties" (art. 16); "Fiscal liabilities and customs duties" (art. 17); "Shareholdings and membership of bodies corporate" (art. 18); "Ships employed in commercial service" (art. 19, alternatives A and B); and "Arbitration" (art. 20).

203. The Commission considered the sixth report of the Special Rapporteur at its 1833rd to 1841st meetings, from 4 to 15 June 1984, and the report of the Drafting Committee at its 1868th and 1869th meetings, on 20 and 23 July 1984.

204. In presenting his report, the Special Rapporteur noted comments and suggestions made in the Sixth Committee at the thirty-eighth session of the General Assembly in relation to the draft articles so far proposed.[199] He also referred to the discussions at the latest meeting of Legal Advisers of the Asian-African Legal Consultative Committee in November 1983 on this subject, as well as to more recent national judicial decisions. He stated that he had taken into account all those comments, suggestions and State practice, and with that in mind he had proposed the draft articles contained in his sixth report.

205. At its 1838th meeting, the Commission decided to refer draft articles 16, 17 and 18 to the Drafting Committee for consideration. Owing to lack of time, the Commission was not in a position to conclude its deliberations on draft article 19 or to take up draft article 20. It decided to consider those articles in 1985, at its thirty-seventh session.

206. As recommended by the Drafting Committee, the Commission, at its 1868th and 1869th meetings, provisionally adopted draft articles 13, 14, 16, 17 and 18.

207. With regard to the provisional adoption by the Commission of draft article 16, the Special Rapporteur submitted to it the text of paragraph 2 of draft article 11.[200] At its 1869th meeting, the Commission decided to refer paragraph 2 of draft article 11 to the Drafting Committee for consideration.

208. For the benefit of the General Assembly, a short summary of the Commission's debate on draft article 19 at its present session is provided below.

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[190] *Yearbook ... 1982,* vol. II (Part One), p. 199, document A/CN.4/357.

[191] *Yearbook ... 1982,* vol. II (Part Two), p. 99, para. 198.

[192] *Ibid.*

[193] *Yearbook ... 1983,* vol. II (Part One), p. 25, document A/CN.4/363 and Add.1.

[194] *Ibid.*, p. 53, document A/CN.4/371.

[195] *Yearbook ... 1983,* vol. II (Part Two), p. 20, para. 94.

[196] *Ibid.*, para. 95.

[197] *Ibid.*, footnotes 58 and 59.

[198] Reproduced in *Yearbook ... 1984,* vol. II (Part One).

[199] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-eighth session of the General Assembly" (A/CN.4/L.369), sect. C.

[200] A/CN.4/L.381. The text of paragraph 2 of article 11 proposed by the Special Rapporteur read as follows:

"Article 11. Scope of the present part

"...

"2. Nothing in the present part shall prejudice the question of extraterritorial effects of measures of nationalization taken by a State in the exercise of governmental authority with regard to property, movable or immovable, industrial or intellectual, which is situated within its territory."

209. Introducing draft article 19, concerning ships employed in commercial service,[201] the Special Rapporteur pointed out that this was a subject possibly more familiar in its detail to common-law lawyers than to civil-law lawyers. He explained that his emphasis on the examination of British and American admiralty practice was prompted by the existence of abundant case-law favouring the adoption of immunity in the early nineteenth century. Maritime law had largely developed in the context of the legal systems of maritime powers and British and American admiralty practice had played a leading role in legal developments. He stated that he had examined the practice of other States and conventional régimes. They all revealed some initial fluctuation but ultimately an abandonment of any adherence to the doctrine of absolute immunity even in the British and American practice and a growing trend in judicial and governmental practice in favour of a more restrictive doctrine of immunity in regard to government-owned and operated vessels employed in commercial and non-government service.

210. The debate on draft article 19 revealed certain reservations on the part of some members of the Commission about its effect on the maritime trade of developing countries. It was pointed out that maritime trade in developing countries was basically controlled by Governments and did not quite correspond to the notion of commercial activities in relation to the same form of trade by the private sector. Hence a Government's trading as a maritime carrier or operator of a merchant marine was not always motivated by profit-making. Therefore, in their opinion, article 19 would put the maritime transport and trade of developing countries in a disadvantageous position.

211. Some other members, however, did not share that position. They stated that it should be recognized that the present world economic system comprised different degrees of control by private and public sectors. For States whose private sectors were predominantly involved in trade including carriage of goods by sea or maritime transport in general, granting any privileges to their governmental counterparts—in foreign States—would put them in a disadvantageous position. It would not be fair in the context of international shipping to expect a private merchant ship to deal or compete with a governmental one while the latter was enjoying complete immunity from jurisdiction. It was also pointed out that to accord jurisdictional immunity to government ships used for commercial service in fact ignored the complicated reality of shipping. Events could occur in connection with a ship, such as collision or an accident on the high seas. Salvors might then come on the scene. If they salvaged a ship and, after a few days in port for repairs, the ship disappeared, they were left without remedy. They would run few risks to rescue seamen or salvage ships in the case of government-owned or operated merchant vessels. Immunity could then backfire. It was also mentioned that, in the normal practice of suits in admiralty, upon a vessel being arrested to enforce a maritime lien in connection with a dispute a bail-bond was immediately posted, so that the ship was released and could continue its voyage.

212. It was suggested by a number of members that the Special Rapporteur, in drafting article 19, particularly alternative A, had put too much emphasis on Anglo-American systems of law and particularly admiralty law. For example, references to the distinctions between actions *in rem* and *in personam* as well as current admiralty procedures had no equivalent in the laws of other States. It would therefore be preferable to use more general terms which could more easily be understood by those not acquainted with the particularities of admiralty law.

213. As already mentioned (para. 205 above), the Commission was unable to conclude its discussion on draft article 19. The Special Rapporteur stated that he withdrew alternative A and would submit a revised draft

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[201] Alternatives A and B of draft article 19, as submitted by the Special Rapporteur in his sixth report, read as follows:

"Article 19. Ships employed in commercial service

"ALTERNATIVE A

"1. This article applies to:

"(*a*) admiralty proceedings; and

"(*b*) proceedings on any claim which could be made the subject of admiralty proceedings.

"2. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in:

"(*a*) an action *in rem* against a ship belonging to that State; or

"(*b*) an action *in personam* for enforcing a claim in connection with such a ship

"if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

"3. When an action *in rem* is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, paragraph 2 (*a*) above does not apply in regard to the first-mentioned ship unless, at the time when the cause of action arose, both ships were in use for commercial purposes.

"4. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in:

"(*a*) an action *in rem* against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

"(*b*) an action *in personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

"5. In the foregoing provisions, references to a ship or cargo belonging to a State include a ship or cargo in its possession or control or in which it claims an interest; and, subject to paragraph 4 above, paragraph 2 above applies to property other than a ship as it applies to a ship."

"ALTERNATIVE B

"1. If a State owns, possesses or otherwise employs or operates a vessel in commercial service and differences arising out of the commercial operations of the ship fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in admiralty proceedings *in rem* or *in personam* against that ship, cargo and owner or operator if, at the time when the cause of action arose, the ship and/or another ship and cargo belonging to that State were in use or intended for use for commercial purposes, and accordingly, unless otherwise agreed, it cannot invoke immunity from jurisdiction in those proceedings.

"2. Paragraph 1 applies only to:

"(*a*) admiralty proceedings; and

"(*b*) proceedings on any claim which could be made the subject of admiralty proceedings."

of alternative B for reconsideration by the Commission.

214. In the light of the discussions held in the Commission, the Special Rapporteur prepared and submitted to it a revised version of draft article 19 (Ships employed in commercial service).[202]

B. Draft articles on jurisdictional immunities of States and their property

1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

PART I
INTRODUCTION

Article 1. Scope of the present articles[203]

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[204]

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 of 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.

...

Article 3. Interpretative provisions[205]

...

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[206]

Article 7. Modalities for giving effect to State immunity[207]

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.

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 a 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.

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[202] A/CN.4/L.380. The revised text of draft article 19 proposed by the Special Rapporteur read as follows:

"Article 19. Ships employed in commercial service

"1. Unless otherwise agreed between the States concerned, a State which owns, possesses, employs or operates a ship in commercial service cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to the commercial operation of that ship and cargo, whether the proceeding is instituted against its owner or operator or otherwise, provided that, at the time when the cause of action arose, the ship and cargo belonging to that State were in use or intended for use for commercial purposes.

"2. Paragraph 1 does not apply to:

"(*a*) warships or ships operated or employed by a State in governmental service;

"(*b*) cargo belonging to a State which is destined for non-commercial use."

[203] Text 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. An earlier version of the article was provisionally adopted by the Commission at its thirty-second session (*ibid.*, p. 94, footnote 209).

[204] The Commission adopted the text of paragraph 1 (*a*) at its thirty-fourth session during its consideration of article 7, dealing with the modalities for giving effect to State immunity. For the commentary to that text, *ibid.*, p. 100. The Commission adopted the text of paragraph 1 (*g*) at its thirty-fifth session during its consideration of article 12, dealing with commercial contracts. For the commentary to that text, see *Yearbook ... 1983*, vol. II (Part Two), p. 34-35.

[205] The Commission adopted the text of paragraph 2 of article 3 at its thirty-fifth session during its consideration of article 12, dealing with commercial contracts. For the commentary to that text, see *Yearbook ... 1983*, vol. II (Part Two), p. 35-36.

[206] Article 6 as provisionally adopted 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. 142 *et seq.*

Article 6 was further discussed by the Commission at its thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee, the Commission agreed to re-examine article 6 at its future sessions. Owing to lack of time, however, the Drafting Committee was not in a position to consider the question during the present session.

[207] Provisionally adopted by the Commission at its thirty-fourth session; for the commentary, see *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*

Article 8. Express consent to the exercise of jurisdiction[208]

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[209]

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.

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[210]

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[211]

Article 12. Commercial contracts[212]

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.

Article 13. Contracts of employment[213]

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[214]

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.

Article 15. Ownership, possession and use of property[215]

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

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[208] Provisionally adopted by the Commission at its thirty-fourth session; for the commentary, *ibid.*, pp. 107 et seq.

[209] Provisionally adopted by the Commission at its thirty-fourth session; for the commentary, *ibid.*, pp. 109 *et seq.*

[210] Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

[211] The title of part III will be re-examined after the Commission has considered all possible exceptions.

[212] Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*

[213] Provisionally adopted by the Commission at its present session; for the commentary, see subsection 2 below.

[214] Provisionally adopted by the Commission at its present session; for the commentary, *ibid.*

[215] Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), p. 36 *et seq.*

(*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.

Article 16. Patents, trade marks and intellectual or industrial property[216]

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[217]

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[218]

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.

[216] Provisionally adopted by the Commission at its present session; for the commentary, see subsection 2 below.

[217] Provisionally adopted by the Commission at its present session; for the commentary, *ibid.*

[218] Provisionally adopted by the Commission at its present session; for the commentary, *ibid.*

2. TEXTS OF ARTICLES 13, 14, 16, 17 AND 18, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SIXTH SESSION

PART III

EXCEPTIONS TO STATE IMMUNITY[219] *(continued)*

Article 13. Contracts of employment

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.

Commentary

(a) *Nature and scope of the exception of "contracts of employment"*

(1) Article 13 as provisionally adopted by the Commission covers an area commonly designated as "con-

[219] See footnote 211 above.

tracts of employment", which has recently emerged as an exception to State immunity. This exception follows logically from the exception of "commercial contracts" provided for in article 12 of the present draft articles.

(2) "Contracts of employment" have been excluded from the expression "commercial contracts" as defined in article 2 of the present draft articles.[220] They are thus different in nature from commercial contracts, which constitute the first and principal exception to the rule of State immunity in part III, dealing with "Exceptions to State immunity".

(3) Without technically defining a contract of employment, it is useful to note some of the essential elements of such a contract for the purposes of article 13. The area of exception under this article concerns a contract of employment or service beween a State and a natural person or individual for services or work performed or to be performed in whole or in part in the territory of another State. Two sovereign States are involved, namely the employer State and the State of the forum. An individual or natural person is also an important element as a party to the contract of employment, being recruited in the State of the forum for services or work to be performed in that State. The exception to State immunity applies to matters arising out of the terms and conditions contained in the contract of employment.

(4) With the involvement of two sovereign States, two legal systems compete for application of their respective laws. The employer State has an interest in the application of its administrative law in regard to the selection, recruitment and appointment of an employee by the State or one of its organs, agencies or instrumentalities acting in the exercise of governmental authority. It would also seem justifiable that, for the exercise of disciplinary supervision over its own staff or government employees, the employer State has an overriding interest in ensuring compliance with its internal administrative regulations and the prerogative of appointment or dismissal which results from unilateral decisions taken by the State.

(5) On the other hand, the State of the forum appears to retain exclusive jurisdiction if not, indeed, an overriding interest in matters of domestic public policy regarding the protection to be afforded to its local labour force, including enforcement of its social security provisions and enhancement of contributions to social security funds. Questions relating to medical insurance, insurance against certain risks, minimum wages, entitlement to rest and recreation, vacation with pay, compensation to be paid on termination of the contract of employment, etc., are of primary concern to the State of the forum, especially if the employees were recruited in that State and at the time of recruitment were its nationals or habitual or permanent residents there. Beyond that, the State of the forum may have less reason to claim an overriding or preponderant interest in exercising jurisdiction. The basis for jurisdiction is distinctly and unmistakably the closeness of territorial connection between the contracts of employment and the State of the forum, namely recruitment or engagement and performance of services in the territory of the State of the forum, as well as the nationality or habitual or permanent residence of the employees.

(b) *The rule of non-immunity or an exception to State immunity*

(6) Article 13 therefore endeavours to maintain a delicate balance between the competing interests of the employer State with regard to the application of its administrative law and the overriding interests of the State of the forum in the application of its labour law and, in certain exceptional cases also, in retaining exclusive jurisdiction over the subject-matter of a proceeding.

(7) Paragraph 1 thus represents an effort to state the rule of non-immunity or another exception to the general rule of State immunity. In its formulation, the basis for the exercise of jurisdiction by the competent court of the State of the forum is apparent from the place of recruitment of the employee and the place of performance of services under the contract of employment being in the territory of the State of the forum, strengthened as appropriate by the coverage of its social security provisions, especially in cases where the employer State has chosen or opted to place the employee under the social security system of the State of the forum in preference to its own.[221]

(8) Examples of the application of the rule of non-immunity as contained in paragraph 1 are contracts of employment of individuals for the cleaning or maintenance of an office, a library, a cemetery or a museum. In short, the State of the forum has an interest in protecting its labour force, especially employees of lower echelons performing menial tasks, such as those of domestic servants.

(9) Paragraph 1 is formulated as a residual rule, since States can always agree otherwise, thereby adopting a different solution by waiving local labour jurisdiction in favour of immunity, thus permitting the exercise of administrative jurisdiction or indeed disciplinary or supervisory jurisdiction by the employer State, as envisaged for instance in the provisions of a number of status

[220] See paragraph 1 (*g*) (iii) of article 2 (subsection 1 above).

[221] See, for instance, article 33, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations (see footnote 83 above), which provides that:

"... a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State."

Paragraph 2 of that article extends this exemption to

"private servants who are in the sole employ of a diplomatic agent, on condition:

"(*a*) That they are not nationals of or permanently resident in the receiving State; and

"(*b*) That they are covered by the social security provisions which may be in force in the sending State or a third State."

Where there is exemption from the application of social security provisions of the State of the forum, the employer State would appear to have an option to place the locally recruited employee under the available local social security system.

of forces agreements.[222] Respect for treaty régimes and for the consent of the States concerned is of paramount importance, since they are decisive in resolving the question of waiver or of exercise of jurisdiction by the State of the forum or of the maintenance of jurisdictional immunity of the employer State.

(c) *Circumstances justifying maintenance of the rule of State immunity*

(10) Paragraph 2 strives to establish and maintain an appropriate balance by introducing important limitations to the application of the rule of non-immunity or the exception to State immunity, by enumerating circumstances where the rule of immunity still prevails.

(11) Paragraph 2 (*a*) enunciates the rule of immunity for the engagement of government employees of rank whose functions are associated with or closely related to the exercise of governmental authority. Examples of such employees are librarians of an information service, code clerks, security guards, watchmen, interpreters, translators and other administrative or technical staff of higher echelons. Officials of established accreditation are, of course, covered by this subparagraph. Proceedings relating to their contracts of employment will not be allowed to be instituted or entertained before the courts of the State of the forum.

(12) Paragraph 2 (*b*) is designed to confirm the existing practice of States[223] in support of the rule of immunity in the exercise of the discretionary power of appointment or non-appointment by the State of an individual to any official post or position of employment. This includes actual appointment which, under the law of the employer State, is considered to be a unilateral act of governmental authority. So also are the acts of "dismissal" or "removal" of a government employee by the State, which normally take place after the conclusion of an inquiry or investigation as part of supervisory or disciplinary jurisdiction exercised by the employer State. This subparagraph also covers cases where the employee seeks the renewal of his employment or reinstatement after untimely termination of his engagement. The rule of immunity applies to proceedings for recruitment, renewal of employment and reinstatement of an individual only. It is without prejudice to the possible recourse which may still be available in the State of the forum for compensation or damages for "wrongful dismissal" or for breaches of obligation to recruit or to renew employment.

(13) Paragraph 2 (*c*) also favours the application of State immunity where the employee was neither a national nor a habitual or permanent resident of the State of the forum, the material time for either of these requirements being set at the conclusion of the contract of employment. If a different time were to be adopted, for instance the time when the proceeding is initiated, further complications would arise as there could be incentives to change nationality or to establish habitual or permanent residence in the State of the forum, thereby unjustly limiting the immunity of the employer State. Besides, the protection of the State of the forum is confined essentially to the local labour force, comprising nationals of the State of the forum and non-nationals who habitually reside in that State. Without the link of nationality or habitual residence, the State of the forum lacks the essential ground for claiming priority for the exercise of its applicable labour law and jurisdiction in the face of a foreign employer State, in spite of the territorial connection in respect of place of recruitment of the employee and place of performance of services under the contract.

(14) Another important safeguard to protect the interest of the employer State is provided in paragraph 2 (*d*). The fact that the employee has the nationality of the employer State at the time of the initiation of the proceeding is conclusive and determinative of the rule of immunity from the jurisdiction of the courts of the State of the forum. As between a State and its own nationals, no other State should claim priority of jurisdiction on matters arising out of contracts of employment. Remedies and access to courts exist in the employer State.

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[222] A general saving clause will be included in another part of the draft articles excluding from the Commission's study the continuing application of certain multilateral agreements or bilateral arrangements regarding the status of foreign visiting forces or other special régimes.

[223] See, for example, in the judicial practice of Italy, the interesting decision rendered in 1947 by the United Sections of the Supreme Court of Cassation in *Tani* v. *Rappresentanza commerciale in Italia dell'U.R.S.S.* (*Il Foro Italiano* (Rome), vol. LXXI (1948), p. 855; *Annual Digest and Reports of Public International Law Cases, 1948* (London), vol. 15 (1953), p. 141, case No. 45), in which the Soviet Trade Delegation was held to be exempt from jurisdiction in matters of employment of an Italian citizen, being *acta jure imperii*, notwithstanding the fact that the appointing authority was a separate legal entity, or for that matter a foreign corporation established by a State. Also in this case, no distinction was made between diplomatic and commercial activities of the trade agency. Similarly, in 1955, in *Department of the Army of the United States of America* v. *Gori Savellini* (*Rivista di diritto internazionale* (Milan), vol. XXXIX (1956), pp. 91-92; *International Law Reports, 1956* (London), vol. 23 (1960), p. 201), the Court of Cassation declined jurisdiction in an action brought by an Italian citizen in respect of his employment by a United States military base established in Italy in accordance with the North Atlantic Treaty, this being an *attività pubblicistica* connected with the *funzioni pubbliche o politiche* of the United States Government. The act of appointment was performed in the exercise of governmental authority, and as such considered to be an *atto di sovranità*.

In *Rappresentanza commerciale dell'U.R.S.S.* v. *Kazmann* (1933) (*Rivista* ... (Rome), 25th year (1933), p. 240; *Annual Digest* ..., *1933-1934* (London), vol. 7 (1940), p. 178, case No. 69), concerning an action for wrongful dismissal brought by an ex-employee of the Milan branch of the Soviet Trade Delegation, the Italian Supreme Court upheld the principle of immunity. This decision became a leading authority followed by other Italian courts in other cases, such as *Little* v. *Riccio e Fischer* (Court of Appeal of Naples, 1933) (*Rivista* ..., 26th year (1934), p. 110), (Court of Cassation, 1934) (*Annual Digest* ..., *1933-1934, op. cit.*, p. 177, case No. 68); the Court of Appeal of Naples and the Court of Cassation disclaimed jurisdiction in this action for wrongful dismissal by Riccio, an employee in a cemetery the property of the British Crown and "maintained by Great Britain *jure imperii* for the benefit of her nationals as such, and not for them as individuals". In another case, *Luna* v. *Repubblica socialista di Romania* (1974) (*Rivista* ... (Milan), vol. LVIII (1975), p. 597), concerning an employment contract concluded by an economic agency forming part of the Romanian Embassy, the Supreme Court dismissed Luna's claim for 7,799,212 lire as compensation for remuneration based on the employment contract. The court regarded such labour relations as being outside Italian jurisdiction.

Whether the law to be applied is the administrative law or the labour law of the employer State, or of any other State, would appear to be immaterial at this point.

(15) Finally, paragraph 2 (*e*) provides for the freedom of contract, including the choice of law and the possibility of a chosen forum or *forum prorogatum*. This freedom is not unlimited. It is subject to considerations of public policy or *ordre public* or, in some systems, "good moral and popular conscience", whereby exclusive jurisdiction is reserved for the courts of the State of the forum by reason of the subject-matter of the proceeding.

(16) The rules formulated in article 13 appear to be consistent with the emerging trend in the recent legislative and treaty practice of a growing number of States.[224]

(17) A few members of the Commission expressed reservations concerning article 13. In their opinion, the article was contrary to the principle of the sovereignty and equality of States and also militated against the interests of the State of the forum, by discouraging the employer State from recruiting its employees locally.

Article 14. Personal injuries and damage to property

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.

Commentary

(1) While the two preceding articles (arts. 12 and 13) relate to exceptions to State immunity in the realm of contracts, article 14 deals with a different area where the rule of non-immunity prevails. It covers an exception to the general rule of State immunity in the field of delict or civil liability resulting from an act or omission which has caused personal injury to a natural person or damage to or loss of tangible property.

(2) This exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*. Although the State is as a rule immune from the jurisdiction of the courts of another State, for this exceptional provision immunity is withheld.

(3) The exception contained in this article is therefore designed to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State. Since the damaging act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed. A court foreign to the scene of the delict might be considered as a *forum non conveniens*. The injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity.

(4) Furthermore, the physical injury to the person or the damage to tangible property, resulting in death or total loss or other lesser injury, appears to be confined principally to insurable risks. The areas of damage envisaged in article 14 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives, or speedboats. In other words, the article covers most areas of accidents involved in the transport of goods and persons by rail, road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals. In addition, the scope of article 14 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.[225]

(5) Article 14 does not cover cases where there is no physical damage. Damage to reputation or defamation is not personal injury in the physical sense, nor is interference with contract rights or any rights, including economic or social rights, damage to tangible property.

(6) The existence of two cumulative conditions is necessary for the application of this exception. The act

[224] The United Kingdom *State Immunity Act 1978* (*The Public General Acts, 1978*, part 1, chap. 33, p. 715; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 41 *et seq.*) provides in subsection (2) (*b*) of section 4 that the non-immunity provided for in subsection (1) of that section does not apply if:

> "(*b*) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; ..."

Subsection (2) (*b*) of section 6 of Pakistan's *State Immunity Ordinance, 1981* (*The Gazette of Pakistan* (Islamabad), 11 March 1981; reproduced in United Nations, *Materials ...*, pp. 20 *et seq.*), subsection (2) (*b*) of section 6 of Singapore's *State Immunity Act, 1979* (*1979 Supplement to the Statutes of the Republic of Singapore;* reproduced in United Nations, *Materials ...*, pp. 28 *et seq.*), subsection (1) (*b*) of section 5 of South Africa's *Foreign States Immunities Act, 1981* (reproduced in United Nations, *Materials ...*, pp. 34 *et seq.*) and paragraph 2 (*b*) of article 5 of the 1972 European Convention on State Immunity (Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series (Strasbourg), No. 74 (1972)) are worded in similar terms.

The United Kingdom *State Immunity Act 1978* (sect. 4, subsect. (2) (*a*)), Pakistan's *State Immunity Ordinance, 1981* (sect. 6, subsect. (2) (*a*), Singapore's *State Immunity Act, 1979* (sect. 6, subsect. (2) (*a*)), South Africa's *Foreign States Immunities Act, 1981* (sect. 5, subsect. (1) (*c*)) and the 1972 European Convention (art. 5, para. 2 (*a*)) grant immunity to the employer State if the employee is a national of that State at the time when the proceeding is instituted.

[225] See, for example, the possibilities unfolded in *Letelier* v. *Republic of Chile* (1980) (United States of America, *Federal Supplement*, vol. 488 (1980), p. 665); see also H.D. Collums, "The *Letelier* case: Foreign sovereign liability for acts of political assassination", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 21 (1981), p. 251.

or omission causing the death, injury or damage must occur in whole or in part in the territory of the State of the forum so as to locate the *locus delicti commissi* within the territory of that State. In addition, the author of such act or omission must also be present in that State at the time of the act or omission so as to render even closer the territorial connection between the State of the forum and the author or individual whose act or omission was the cause of the damage in the State of the forum.

(7) The second condition, namely the presence of the author of the act or omission causing the injury or damage within the territory of the State of the forum at the time of the act or omission, has been inserted to ensure the exclusion from the application of this article of cases of transboundary injuries or transfrontier torts or damage, such as letter-bombs or the export of explosives, fireworks or dangerous substances which could explode or cause damage through negligence, inadvertence or accident, or indeed with intent to inflict physical injury upon a person or cause damage to tangible property. Thus cases of shooting or firing across a boundary or of spill over across the border of shelling as a result of an armed conflict, which constitute clear violations of the territory of a neighbouring State under public international law, are excluded from the areas covered by article 14. The article is primarily concerned with accidents occurring routinely within the territory of the State of the forum, which in many countries may still require specific waiver of State immunity to allow suits for recovering damages to proceed, even though compensation is sought from, and would ultimately be paid by, an insurance company.[226]

(8) The basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality. The *locus delicti commissi* offers a substantial territorial connection regardless of the motivation of the act or omission, whether intentional or even malicious, or whether accidental, negligent, inadvertent, reckless or careless, and indeed irrespective of the nature of the activities involved, whether *jure imperii* or *jure gestionis*. This distinction has been maintained in the case-law of some States[227] involving motor accidents in the course of official or military duties. While immunity has been maintained for acts *jure imperii*, it has been rejected for acts *jure gestionis*. The exception proposed in article 14 makes no such distinction, subject to a wider reservation originally contained in paragraph 2 of the revised text of draft article 14 proposed by the Special Rapporteur,[228] which the Drafting Committee has agreed should be included in another part of the draft articles. The reservation in fact allows different rules to apply to questions specifically regulated by treaties, bilateral agreements, regional arrangements or international conventions specifying or limiting the extent of liabilities or compensation, or providing for a different procedure for settlement of disputes.[229]

(9) In short, article 14 is designed to allow normal proceedings to stand and to provide relief for the individual who has suffered an otherwise actionable physical damage to his own person or his deceased ancestor, or to his property. The cause of action relates to the occurrence or infliction of physical damage occurring in the State of the forum, with the author of the damaging act or omission physically present therein at the time, and for which a State is answerable under the law of the State of the forum, which is also the *lex loci delicti commissi*.

(10) A few members of the Commission expressed reservations concerning the substance of article 14. In their opinion, this article was contrary to the principle of the sovereignty and equality of States and lent itself to multiple interpretations.

Article 16. Patents, trade marks and intellectual or industrial property

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.

Commentary

(1) Article 16 deals with an exception to the rule of State immunity which is of growing practical importance. The article is concerned with a specialized branch of internal law in the field of patents, trade marks and

[226] In some countries, where proceedings cannot be instituted directly against the insurance company, this exception is all the more necessary. In other countries, there are legislative enactments making insurance compulsory for representatives of foreign States, such as the *United States Foreign Missions Amendments Act of 1983* (public law 98-164 of 22 November 1983, title VI, sect. 603 (*United States Statutes at Large, 1983*, vol. 97, p. 1042)), amending the *United States Code*, title 22, section 204.

[227] See, for example, the judgments delivered in Belgium, in *S.A. "Eau, gaz, électricité et applications"* v. *Office d'aide mutuelle* (1956) (*Pasicrisie belge* (Brussels), vol. 144 (1957), part 2, p. 88; *International Law Reports, 1956* (London), vol. 23 (1960), p. 205); in the Federal Republic of Germany, in *Immunity of United Kingdom from Jurisdiction (Germany)* (1957) (*International Law Reports, 1957* (London), vol. 24 (1961), p. 207); in Egypt, in *Dame Safia Guebali* v. *Colonel Mei* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 55 (1942-1943), p. 120; *Annual Digest ..., 1943-1945* (London), vol. 12 (1949), p. 164, case No. 44); in Austria, in *Holubek v. Government of the United States* (1961) (*Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; *International Law Reports* (London), vol. 40 (1970), p. 73).

[228] See *Yearbook ... 1983*, vol. II (Part Two), p. 20, footnote 59.

[229] Examples include the various status of forces agreements and international conventions on civil aviation or on the carriage of goods by sea.

intellectual or industrial property. It covers wide areas of interest from the point of view of the State of the forum in which such rights to industrial or intellectual property are protected. In certain specified areas of industrial or intellectual property, measures of protection under the internal law of the State of the forum are further strengthened and reinforced by international obligations contracted by States in the form of international conventions.[230]

(2) The exception provided in article 16 appears to fall somewhere between the exception of "commercial contracts" provided in article 12 and that of "ownership, possession and use of property" in article 15. The protection afforded by the internal system of registration in force in various States is designed to promote inventiveness and creativity and, at the same time, to regulate and secure fair competition in international trade. An infringement of a patent of invention or industrial design or of any copyright of literary or artistic work may not always have been motivated by commercial or financial gain, but invariably impairs or entails adverse effects upon the commercial interests of the manufacturers or producers who are otherwise protected for the production and distribution of the goods involved. "Patents, trade marks and intellectual or industrial property" in their collective nomenclature constitute a highly specialized form of property rights which are intangible or incorporeal, but which are capable of ownership, possession or use as recognized under various legal systems.

(3) The terms used in the title of article 16 are broad and generic expressions intended to cover existing and future forms, types, classes or categories of intellectual or industrial property. In the main, the three principal types of property that are envisaged in this article include: patents and industrial designs which belong to the category of industrial property; trade marks and trade names which pertain more to the business world or to international trade and questions relating to restrictive trade practices and unfair trade competition (*concurrence déloyale*); and copyrights or any other form of intellectual property. The generic terms employed in this article are therefore intended to include the whole range of forms of intellectual or industrial property which may be identified under the groups of intellectual or industrial property rights. Some rights are still in the process of evolution, such as in the field of computer science or other forms of modern technology and electronics which are legally protected. Such rights are not readily identifiable as industrial or intellectual. For instance, hardware in a computer system is perhaps industrial, whereas software is more clearly intellectual, and firmware may be in between. Literary and culinary arts, which are also protected under the name of copyright, could have a separate grouping as well. Copyrights in relation to music, songs and the performing arts, as well as other forms of entertainment, are also protected under this heading.

[230] See, for example, the Universal Copyright Convention, revised at Paris on 24 July 1971 (United Nations, *Treaty Series*, vol. 943, p. 178). There is also a United Nations specialized agency, WIPO, involved in this field.

(4) The rights in industrial or intellectual property under article 16 are protected by States, nationally and also internationally. The protection provided by States within their territorial jurisdiction varies according to the type of industrial or intellectual property in question and the special régime or organized system for the application, registration or utilization of such rights for which protection is guaranteed by domestic law.

(5) The voluntary entrance by a State into the legal system of the State of the forum, for example by submitting an application for registration of, or registering, etc., a copyright, as well as the legal protection offered by the State of the forum, provide a strong legal basis for the assumption and exercise of jurisdiction. Protection is generally consequential upon registration, or even sometimes upon the deposit or filing of an application for registration. In some States, prior to actual acceptance of an application for registration, some measure of protection is conceivable. Protection therefore depends on the existence and scope of the national legislation, as well as on a system of registration. Thus, in addition to the existence of appropriate domestic legislation, there should also be an effective system of registration in force to afford a legal basis for jurisdiction. The practice of States appears to warrant the inclusion of this article.[231]

(6) Subparagraph (*a*) of article 16 deals specifically with the determination of any rights of the State in a legally protected intellectual or industrial property. The expression "determination" is used here to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent of such rights.

(7) Furthermore, the proceeding contemplated in article 16 is not confined to an action instituted against the State or in connection with any right owned by the State, but may also concern the rights of a third person, and only in that connection would the question of the rights of the State in a similar intellectual or industrial property arise. The determination of the rights belonging to the State may be incidental to, if not inevitable for, the establishment of the rights of a third person, which is the primary object of the proceeding.

[231] Domestic legislation adopted since 1970 supports this view; see section 7 of the United Kingdom *State Immunity Act 1978* (see footnote 224 above); section 9 of Singapore's *State Immunity Act, 1979 (ibid.)*; section 8 of Pakistan's *State Immunity Ordinance, 1981* (*ibid.*); and section 8 of South Africa's *Foreign States Immunities Act, 1981* (*ibid.*). The United States *Foreign Sovereign Immunities Act of 1976* (*United States Code, 1976 Edition*, vol. 8, title 28, chap. 97, p. 206; reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 55 *et seq.*) contains no direct provision on this. Section 1605 (*a*) (2) of the Act may in fact be said to have overshadowed, if not substantially overlapped, the use of copyrights and other similar rights. There has, of course, so far been no clear judicial decision to reject or support this proposition. The 1972 European Convention on State Immunity (see footnote 224 above), in its article 8, also supports the above view. A leading case in support of this view is the decision of the Austrian Supreme Court in *Dralle* v. *Republic of Czechoslovakia* (1950) (*Österreichische Juristen Zeitung* (Vienna), vol. 5 (1950), p. 341, case No. 356; *International Law Reports, 1950* (London), vol. 17 (1956), p. 155, case No. 41; *Journal du droit international* (Clunet) (Paris), vol. 77 (1950), p. 749; reproduced (in English) in United Nations, *Materials ...*, pp. 183 *et seq.*).

(8) Subparagraph (*b*) of article 16 deals with an alleged infringement by a State in the territory of the State of the forum of any such right as mentioned above which belongs to a third person and is protected in the State of the forum. The infringement under this article does not necessarily have to result from commercial activities conducted by a State as stipulated under article 12 of the draft articles; it could also take the form of activities for non-commercial purposes. The existence of two conditions is essential for the application of this paragraph. First, the alleged infringement by a State of a copyright, etc., must materialize in the territory of the State of the forum. Secondly, such a copyright, etc., of a third person must be legally protected in the State of the forum. Hence there is a limit to the scope of the application of the article. Infringement of a copyright by a State in its own territory, and not in the State of the forum, does not establish a sufficient basis for jurisdiction in the State of the forum under this article.

(9) Article 16 expresses a residual rule and is without prejudice to the rights of States to formulate their own domestic laws and policies regarding the protection of any intellectual or industrial property and to apply them domestically according to their national interests.

(10) Article 16 is also without prejudice to the extraterritorial effect of nationalization by a State of intellectual or industrial property within its territory. The Special Rapporteur suggested, and the Commission agreed, that a general reservation to this effect be included as paragraph 2 of article 11,[232] so as not to prejudge the question of the precise extent of the extraterritorial effects of compulsory acquisition, expropriation or other measures of nationalization brought about by the State in regard to such rights within its own territory in accordance with its internal laws.

(11) The view was expressed that the exception formulated in subparagraph (*b*) might operate to hinder the economic and industrial development of developing countries in regard to their competence to expropriate or to take measures of compulsory acquisition or nationalization of the rights mentioned in this article. It should be observed, however, that the application of the exception to State immunity in subparagraph (*b*) of this article is confined to infringements occurring in the State of the forum. Every State, including any developing State, is free to pursue its own policy within its own territory. Infringement of such rights in the territory of another State, for instance the unauthorized reproduction or distribution of copyrighted publications, cannot escape the exercise of jurisdiction by the competent courts of that State in which measures of protection have been adopted. The State of the forum is also equally free to tolerate or permit such infringments or to deny remedies thereof in the absence of an organized system of protection for the rights violated or breached in its own territory.

(12) Some members of the Commission expressed reservations concerning article 16, even with the safeguard contained in article 11, paragraph 2, proposed by the Special Rapporteur. They expressed the hope that the provisions of article 16, and particularly subparagraph (*b*), could be improved so as to take more fully into account the needs of the developing countries for transfer of technology essential to their economic and social development.

[232] See footnote 200 above.

Article 17. Fiscal matters

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.

Commentary

(1) Article 17 deals with the exception to the immunity of States from jurisdiction in respect of proceeding regarding fiscal obligations such as taxes, customs or excise duties for the purchase, sale or importation of goods, including agricultural products, *ad valorem* stamp duties, charges or registration fees for transfer of property registered in the State of the forum, income tax derived from commercial activities conducted in the State of the forum, rates or taxes on premises occupied by the State for commercial purposes in the State of the forum, or other similar charges. This exception is recog-. ized in State practice.[233] It should be understood that the enumeration is not meant to be exhaustive: the words "similar charges" include all other forms of duties and taxes in force in the State of the forum.

(2) The immunity from the jurisdiction of the courts is to be distinguished from exemptions from fiscal liabilities or obligations which may be accorded to a foreign State. Such liabilities or obligations, which are substan-

[233] National legislation on jurisdictional immunities of States adopted since 1970 has been consistent in support of this formulation. See section 11 of the United Kingdom's 1978 Act (see footnote 224 above); section 13 of Singapore's 1979 Act (*ibid.*); section 12 of Pakistan's 1981 Ordinance (*ibid.*); and section 12 of South Africa's 1981 Act (*ibid.*). In the United States of America, the liability of foreign Governments to pay income tax is to be regulated by income tax regulations on "Income of Foreign Governments". The United States Department of the Treasury's "Notice of proposed rulemaking" provides guidance for taxing foreign sovereigns on their income from commercial activities within the United States (see United States of America, *Federal Register*, vol. 43, No. 158 (15 August 1978), pp. 36111 *et seq.*). Roughly speaking, income of foreign Governments from investments in the United States in stocks, bonds or other domestic securities owned by an integral part or a controlled entity of a foreign sovereign, or from interest on bank deposits belonging to such an integral part or controlled entity, is exempt from taxation under section 892 of the *Internal Revenue Code* (see *United States Code, 1976 Edition*, vol. 7, title 26, p. 572), whereas amounts derived from commercial activities in the United States are taxable under sections 881 or 882 (*ibid.*, pp. 569-570). According to the proposed new rules, certain activities are regarded as non-commercial and income derived therefrom is exempt from taxation. Apart from investments and interest on bank accounts or dividends not connected with the conduct of trade or business, performances of exhibitions devoted to the promotion of acts by cultural organizations and mere purchase of goods for the use of the foreign sovereign are not treated as commercial.

tive liabilities, do not normally arise for a foreign State, except in cases where the State establishes a business, official or commercial, or maintains an office or agency in the territory of another State. Thus the maxim *par in parem imperium [jurisdictionem] non habet* must be read in the context where there is no overlapping of the activities of a State in the territory or under the territorial jurisdiction of another State.

(3) The basis for the rule of non-immunity and the exercise of jurisdiction by the courts of the State of the forum is territoriality; the sovereign and unchallenged power of a State to tax any person, including foreign States, lies in the territorial connection of the source of the income or the importation or entry of goods into the territory of that State.

(4) Article 17 does not apply to proceedings regarding attachment of or execution upon State property. The application of the article is therefore without prejudice to the immunity that the State may have in regard to proceedings for foreclosure, sequestration or freezing of diplomatic or consular premises or any other State property otherwise internationally protected. Such immunities are accorded to States in respect of their property from measures of execution as well as prejudgment attachments.

(5) Article 17 is also without prejudice to the exemptions or special privileges, such as nil or reduced tariffs, which may be granted to a State through bilateral agreements or through courtesy by a unilateral decision of the State of the forum. The States concerned are free to agree, on the basis of reciprocity or otherwise, to give special or generalized preferences to each other.

(6) Some members of the Commission expressed reservations concerning the substance of this article. One member thought the article was superfluous.

Article 18. Participation in companies or other collective bodies

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.

Commentary

(1) Article 18 contains an exception to the rule of jurisdictional immunity of a State in a proceeding before the courts of another State relating to the participation by the State in a company or other collective body which has been established or has its headquarters or principal place of business in the State of the forum. Such a body in which the State participates may be incorporated, i.e. with a legal personality, or unincorporated with limited legal capacity.

(2) Like most other exceptions in the preceding articles, the exception regarding the State's participation in companies or other collective bodies is also formulated as a residual rule. It is thus subject to a different or contrary agreement between the States concerned, namely the State of the forum, which in this case is also the State of incorporation or of the principal place of business, on the one hand, and the State against which a proceeding is instituted on the other. Such a reservation, which is provided in the opening phrase in several articles in part III, dealing with "exceptions to State immunity", might be deleted from all the articles and included in the introductory article to that part.[234]

(3) The expression "company or other collective body, whether incorporated or unincorporated", used in article 18, has been deliberately selected to cover a wide variety of legal entities as well as other bodies without legal personality. The formulation is designed to include different types or categories of bodies, collectivities and groupings known under different nomenclatures, such as corporations, associations, partnerships and other similar forms of collectivities which may exist under various legal systems with varying degrees of legal capacity and status.

(4) The collective body in which the State may thus participate with private partners or members from the private sector may be motivated by profit-making, such as a trading company, business enterprise or any other similar commercial entity or corporate body. On the other hand, the State may participate in a collective body which is inspired by a non-profit-making objective, such as a learned society, a temple, a religious congregation, a charity or charitable foundation, or any other similar philanthropic organization.

(5) Article 18 is thus concerned with the legal relationship within the collective body or the corporate relations —more aptly described in French as *rapports sociétaires* —or legal relationship covering the rights and obligations of the State as participant in the collective body in relation to that body, on the one hand, and in relation to other participants in that body on the other.

[234] The revised text of draft article 11 presented by the Special Rapporteur at the Commission's thirty-fourth session (*Yearbook ... 1982*, vol. II (Part Two), p. 99, footnote 237) would read, as paragraph 1 of the article:

"Article 11. Scope of the present part

"1. The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned."

For the text of paragraph 2 of the article, proposed by the Special Rapporteur at the present session, see footnote 200 above.

(6) The rule of non-immunity or the exception to State immunity as enunciated in paragraph 1 of article 18 depends in its application upon the concurrence or coexistence of two important conditions. First, the body must have participants other than States or international organizations; in other words, it must be a body with participation from the private sector. Thus international organizations and other forms of collectivity which are composed exclusively of States and/or international organizations without participation from the private sector are excluded from the scope of article 18.

(7) Secondly, the body in question must be incorporated or constituted under the law of the State of the forum, or be controlled from, or have its seat or principal place of business in that State. The place of control may be determined by reference to a factual or a legal criterion. Sometimes the constituent instrument of the company or collective body may indicate the exact place, seat or headquarters from which the body is directed, managed or otherwise controlled. Such an indication may also be prescribed by the law of the State of incorporation or registration. At other times, the place of control may also ascertained by the examination of factual references, such as the actual location from which the power or authority to manage, direct, administer or otherwise control the operation of the body in question is exercised.

(8) When a State participates in a collective body, such as by acquiring or holding shares in a company or becoming a member of a body corporate which is organized and operated in another State, it voluntarily enters into the legal system of that other State and into a relationship recognized as binding under that legal system. Consequently, the State is of its own accord bound and obliged to abide by the applicable rules and internal law of the State of incorporation, of registration or of the principal place of business. The State also has rights and obligations under the relevant provisions of the charter of incorporation, articles of association or other similar instruments establishing limited or registered partnerships. The relationship between shareholders *inter se* or between shareholders and the company or the body of any form in matters relating to the formation, management, direction, operation, dissolution or distribution of assets of the entity in question is governed by the law of the State of incorporation, of registration or of the principal place of business. The courts of such States are best qualified to apply this specialized branch of their own law.

(9) It has become increasingly clear from the practice of States[235] that matters arising out of the relationship between the State as participant in a collective body and that body or other participants therein fall within the areas covered by this exception to the rule of State immunity. To sustain the rule of State immunity in matters of such a relationship would inevitably result in a jurisdictional vacuum. One of the three links based on substantial territorial connection with the State of the forum must be established to warrant the assumption and exercise of jurisdiction by its courts. These links are: the place of incorporation indicating the system of incorporation, charter or other type of constitution; the place of control (*siège réel de direction*); or the principal place of business (*siège social ou statutaire*).

(10) Paragraph 2 of article 18 recognizes the freedom of the parties to the dispute or to the corporate relationship (*rapports sociétaires*) to agree differently or contrary to the rule of non-immunity as enunciated in paragraph 1. Paragraph 2 also recognizes other possibilities for the State to reach an agreement with the collective body in which it participates or with other participants therein to an effect different from or contrary to the rule contained in paragraph 1. The members of and participants in the body may themselves agree that the State as a member or participant continues to enjoy immunity or that they may choose or designate any competent courts or procedures to resolve the differences that may arise between them or with the body itself. Furthermore, the constituent instrument of that body itself may provide another possibility, as it may contain provisions different from or contrary to the rule of non-immunity for the State, in its capacity as a member, shareholder or participant, from the jurisdiction of the courts so chosen or designated. Subscription by the State to the provisions of the constituent instrument constitutes an expression of consent to abide by the rules contained in such provisions, including the choice of law or jurisdiction.

(11) If it is admitted that the State is free to enter into an agreement with that body or other participants therein regarding matters pertaining to the operation of that body or the relationship arising from its participation therein, it follows that whatever the State agrees to do is binding upon it. Thus it may agree to retain its immunity or to waive it.

(12) Thus, at first sight, paragraph 2 of article 18 appears to contain an ambiguity or to be in conflict or inconsistent with paragraph 1, which embodies the rule of non-immunity, subject to the reservation that the States concerned could agree otherwise. According to the reservation or saving clause in paragraph 1, the rule is that the State is not immune in matters of corporate relationship which it has entered into with the private sector unless otherwise agreed between itself and the State of incorporation, of registration or of the principal place of business of the body corporate. With such an agreement, the State may have its immunity saved or retained. Paragraph 1 cannot and does not preclude the possibility of consent of the State foreign to the forum to submit to the jurisdiction of that forum which is otherwise competent. Upon reflection therefore, the possible conflict between paragraph 1 and paragraph 2 is readily resolved. If, by virtue of paragraph 1, the State is not immune and there was no contrary agreement between

[235] Recent national legislation on jurisdictional immunities of States may be cited in support of this exception. See, for example, section 8 of the United Kingdom's 1978 Act (see footnote 224 above); section 10 of Singapore's 1979 Act (*ibid.*); section 9 of Pakistan's 1981 Ordinance (*ibid.*); and section 9 of South Africa's 1981 Act (*ibid.*).

This exception appears to have been included in the broader exception of trade or commercial activities conducted or undertaken in the State of the forum provided in the United States of America's 1976 Act (see footnote 231 above), section 1605 (*a*) (2), in the 1972 European Convention (see footnote 224 above), and in the Inter-American Draft Convention on Jurisdictional Immunity of States (OEA/Ser.G-CP/doc.1352/83 of 30 March 1983; distributed at the Commission's thirty-fifth session as document ILC (XXXV)/Conf. Room Doc.4).

the States concerned to retain immunity, the agreement between the parties to the dispute or their adherence to the constituent instrument could provide for the retention of immunity by the State participant in the body. Conversely, if under paragraph 1 the States concerned have agreed to retain immunity, and under paragraph 2 the State party to the dispute or participant in the body corporate has expressly consented to the exercise of jurisdiction by the court of the State of the forum which is at the same time the State of incorporation, either by mutual agreement or by subscription to the constituent instrument of that body, this expression of consent by the State constitutes a valid waiver of its immunity under article 8.

(13) Some members of the Commission expressed reservations concerning article 18. In their view, the article was contrary to the principle of the sovereignty and equality of States. An observation was also made that not all the different forms of corporations and associations, with or without legal personality, exist under every legal system. Therefore the formulation of this provision has had to make allowance for differences, or the absence of equivalent terms, in some of the languages used. Hence a wider generic term such as "collective body" in English and *groupement* in French has been used for want of a more readily acceptable expression. The problem may therefore remain of the adaptation of such generic terms in the internal law of each State. The Commission decided to look more closely at the precise terminology of this article on second reading.

Chapter V

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

A. Introduction

215. The topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" was included in the current programme of work of the Commission at its thirtieth session, in 1978. At that session, the Commission established a Working Group to consider the question of future work by the Commission on the topic and, after considering the Working Group's report, appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.[236]

216. The Special Rapporteur submitted a preliminary report[237] to the Commission at its thirty-second session, in 1980. That year, and each subsequent year, the Commission considered the topic[238] on the basis of the preliminary report and the other reports[239] submitted annually by the Special Rapporteur. Accordingly, the reports of the Commission to the General Assembly on the work of its thirty-second and subsequent sessions have contained chapters[240] dealing with this topic. Relevant resolutions of the General Assembly[241] have invited the Commission to continue its work on all the topics included in its current programme.

217. At its thirty-fourth session, in1982, the Commission considered the third report[242] of the Special Rapporteur. That report contained two chapters, the second of which introduced and set out a schematic outline of the topic.[243] Chapter I traced the relationship between the schematic outline and the principles that had been identified, and had gained majority support, in earlier debates both in the Commission and in the Sixth Committee of the General Assembly. The schematic outline gave rise to a valuable discussion in the Sixth Committee as well as in the Commission.

218. The main purpose of the Special Rapporteur's fourth report,[244] submitted in 1983 towards the end of the Commission's thirty-fifth session, was to re-evaluate the schematic outline taking into account the Commission's and the Sixth Committee's debates of the previous year, and to provide a better and more complete commentary. During the thirty-fifth session, the Commission gave preliminary consideration to the fourth report,[245] on the understanding that there would be an opportunity for fuller consideration at the Commission's thirty-sixth session, in 1984. It was agreed that the time would then be ripe to appraise the development of the topic, and to take decisions about its future.

219. At its thirty-fifth session, the Commission took note that the third and final part of the Secretariat's study of State practice relevant to the present topic was nearing completion. It was agreed that the third part should, like the earlier parts, be put in the form of an analytical survey; and it was hoped that the three-part study, in which a number of members of the Commission and representatives in the Sixth Committee had expressed interest, could be made widely available.[246] In response to this decision and request, the study prepared by the Secretariat, entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law", was issued in its original language, English, as a Secretariat document (ST/LEG/15).

220. During the Commission's thirty-fifth session, it was also agreed, in response to a proposal contained in the Special Rapporteur's fourth report,[247] that the Special Rapporteur should, with the help of the Secretariat, prepare a questionnaire to be addressed to selected international organizations. The principal object of the ques-

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[236] See *Yearbook ... 1978*, vol. II (Part Two), pp. 149 *et seq.*, paras. 170-178.

[237] *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2.

[238] See *Yearbook ... 1980*, vol. II (Part Two), pp. 158 *et seq.*, paras. 131-144; *Yearbook ... 1981*, vol. II (Part Two), pp. 146 *et seq.*, paras. 165-199; *Yearbook ... 1982*, vol. II (Part Two), pp. 83 *et seq.*, paras. 108-156; *Yearbook ... 1983*, vol. II (Part Two), pp. 82 *et seq.*, paras. 283-302.

[239] Preliminary report: see footnote 237 above; second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360; fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373.

[240] See footnote 238 above.

[241] See the following resolutions of the General Assembly: 34/141 of 17 December 1979; 35/163 of 15 December 1980; 36/114 of 10 December 1981; 37/111 of 16 December 1982; and 38/138 of 19 December 1983.

[242] Document A/CN.4/360 (see footnote 239 above).

[243] The schematic outline is reproduced in the report of the Commission on its thirty-fourth session: *Yearbook ... 1982*, vol. II (Part Two), pp. 83 *et seq.*, para. 109. In paragraphs 63 and 64 of his fourth report, the Special Rapporteur introduced three major modifications to the schematic outline, which were noted in the report of the Commission on its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), p. 84-85, para. 294.

[244] Document A/CN.4/373 (see footnote 239 above).

[245] See *Yearbook ... 1983*, vol. I, pp. 260 *et seq.*, 1800th and 1801st meetings.

[246] *Yearbook ... 1983*, vol. II (Part Two), p. 83, para. 286.

[247] Document A/CN.4/373 (see footnote 239 above), para. 64.

tionnaire would be to ascertain whether obligations which States owe to each other, and discharge, as members of international organizations may, to that extent, fulfil or replace some of the procedures indicated in sections 2, 3 and 4 of the Special Rapporteur's schematic outline. In compliance with this decision, a questionnaire was in due course prepared and was addressed by the Legal Counsel, acting on behalf of the Secretary-General of the United Nations, to 16 international organizations, selected on the basis of activities which might bear on the subject-matter of the inquiry.

B. Consideration of the topic at the present session

221. At the present session, the documents before the Commission included the above-mentioned survey of State practice prepared by the Secretariat (ST/LEG/15), the questionnaire prepared by the Special Rapporteur with the assistance of the Secretariat and the replies received so far (A/CN.4/378),[248] the Special Rapporteur's fourth report (A/CN.4/373) held over from the Commission's previous session for further consideration, and the Special Rapporteur's fifth report (A/CN.4/383 and Add.1).[249] The latter report presented, and commented upon, a draft scope article and other articles broadly corresponding to section 1 of the schematic outline. The topic was considered by the Commission at its 1848th to 1853rd meetings, from 26 June to 3 July 1984.

222. In the debate, some members devoted their main attention to the Special Rapporteur's fourth report and to questions concerning the nature of the topic and its future treatment by the Commission. Other members, while not neglecting these fundamental issues, found it convenient to relate their remarks to the development of the topic in the Special Rapporteur's fifth report and in particular to the articles proposed in that report.[250] A number of members of the Commission expressed appreciation for the Secretariat's comprehensive survey of State practice relevant to the topic; several drew upon material contained in the survey. In accordance with a recommendation by the Commission's Planning Group,[251] it was decided to ask that the survey be made available as soon as possible in other working languages, so that it could take its place in the Commission's regular documentation for the topic; the Legal Counsel was thanked for the Secretariat's willingness to comply with this request.

1. General issues

223. The range of views expressed by members of the Commission in relation to various issues of substance affecting the articles proposed by the Special Rapporteur will be recorded later in this chapter. Though significant differences of opinion and emphasis remain, there was almost unanimous agreement that the Commission's work on the topic, as now delineated, should continue. Many who spoke stressed the difficulty and novelty of the topic, but concluded that the challenges must be met, if only because scientific progress could not be stopped and because the traditional rules of international responsibility for wrongful acts were no longer responsive to all of the international community's needs. The heart of the topic, therefore, perhaps lay in circumstances of human intervention in the natural order, including advanced technologies that threatened to escape from human control.

224. There was complete agreement that these needs could be met only by increased measures of international co-operation of the kind exhibited in multilateral treaty régimes designed to regulate particular transboundary dangers. There were, however, different views about the possibility of translating the duty of co-operation, or the principle of international solidarity, into a framework treaty. One member was not persuaded that this was possible, and he therefore regarded the topic as a dead end. Another observed that the duty to co-operate was sometimes regarded as a procedural obligation without any marked legal character. Several others wondered whether the concept of abuse of rights could be helpful in describing the nature of the obligation; some of them described a similar, though not identical, concept in Islamic law. Most members believed that State practice already offered enough evidence that States recognize a duty to prevent and, if necessary, repair transboundary loss or injury arising as a physical consequence of activities within their territory or control. A number of members saw in the element of a physical consequence—that is, the interplay between human activity and the forces of nature which disregard political boundaries—the mainspring of the legal duty of co-operation in matters falling within the ambit of the present topic.

225. There is, in any case, no disagreement that the topic as now delineated hinges upon the element of a physical consequence producing transboundary effects. There is, however, a range of opinions—broadly corresponding to the differences of outlook described in the preceding paragraph—as to the content of the proposed set of articles. Somewhere near the centre of this spectrum of opinion is the comment of one member that the topic lies in an intermediate zone between the traditional concept of substantive obligations and the idea of solidarity, which the international community accepts because a limitation of sovereign rights is in its interest. The topic will therefore place a heavy emphasis—some would say a predominant emphasis—upon procedural obligations, forming a code of conduct that assists and encourages States to establish régimes which regulate particular dangers with due regard to each State's freedom of action, as well as its freedom from transboundary loss or injury.

226. Yet, although it is generally agreed that the procedural aspects of the topic are very important, members have also insisted that there must be guarantees to preserve the balance between the freedom to act and the freedom from harm. A number of members have ob-

[248] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[249] *Ibid.*

[250] See subsection 2 below.

[251] See chapter VIII, paragraph 391, below.

served that, without these guarantees, developing States would always be gravely disadvantaged in the negotiation of claims or treaty régimes. Guarantees are equally important to the preservation of a proper balance between obligations to avoid transboundary loss or injury and obligations to provide reparation, if such loss or injury does occur. As one member put the matter, the real measure of the Commission's success would depend upon its ability to distil a few authoritative principles from the mass of relevant factors and modalities of which States make optional use. In his view, the Commission should not be afraid to lay down primary rules of no-fault liability.

227. Another theme in the Commission's debate was a natural concern that the regulatory duties of the State should not entail a higher level of supervision and vigilance than would ordinarily be considered reasonable in other contexts. One member felt that the point would be reasonably well covered by the terms of the proposed scope article and by the principle that a State's answerability for matters within its territory or control must be related to the means at its disposal. Some other members expressed varying degrees of concern, one questioning the implicit assumption that a source State, if not responsible in the strict sense, was at least answerable and perhaps required to assume a quasi-vicarious liability for the injurious transboundary effect of a physical consequence arising from a private activity carried on lawfully within its territory or control. Several other members made the point that the exclusion of such cases would prove to be a two-edged sword because it would reduce correspondingly the protection a State received from transboundary loss or injury generated outside its own territory or control.

228. The Special Rapporteur agreed that this question—which had been described as one of causality or attribution, but which could perhaps be better regarded as relating to the extent of an obligation—would need to be kept under careful consideration. In so far as concerned the construction of régimes, the question would not arise because such régimes could deal only with identifiable or foreseeable harm. In so far as procedures were prescribed in the draft articles, they would tend to ensure that the source State had knowledge of any circumstance which might later give rise to transboundary loss or injury. Moreover, States often included in treaty régimes provisions, for example in relation to permissible pollution levels, which were designed to limit their liability for transboundary loss or injury. Failing any such provision, the source State would no doubt have a duty to answer in respect of transboundary loss or injury, but the duty of reparation would be governed by applicable principles and factors. It is perhaps premature to speculate about the formulation of principles which the Commission may in due course wish to consider. One would, however, expect that among such principles there might, for example, be those which in some way relate the duty of reparation to the means at the source State's disposal, or to the means the State had of foreseeing the danger, or, as one member of the Commission suggested, to the remedies available to an injured party within the source State under the municipal law of that State.

229. Not surprisingly, at this intermediate stage in the development of the present topic, there also continue to be different perceptions about the relationship of the topic with obligations which, if violated, will engage the responsibility of the State for a wrongful act. Members of the Commission have recognized that there are several aspects to this question. First and foremost, there are circumstances in which the occurrence of transboundary loss or injury, or exposure to risk of such loss or injury, cannot be designated as wrongful because the loss or injury, or the risk of such loss or injury, is incidental to the reasonable conduct of a legitimate activity. Nevertheless, the conduct may not be reasonable if the source State fails to ensure that adequate precautions are taken both to avoid the danger of transboundary loss or injury and to provide that reparation will be made, if transboundary loss or injury does ensue. This essential purpose has been described in different ways and with emphasis upon different applications. Thus some members have attached particular importance to activities that are often called "ultra-hazardous"—for example, activities relating to the peaceful uses of atomic energy, or to the carriage of oil by sea—but most members have considered that the topic has a much broader field of application. One member said that the topic could fittingly be described as comprising the methods devised by States to avoid and resolve transboundary environmental problems.

230. Although one member of the Commission felt that the present topic was not relevant to the topic dealing with the non-navigational uses of international watercourses—as, in his view, the latter topic could be fully regulated by rules the breach of which would engage the responsibility of the source State for a wrongful act—a number of members saw a very close connection between the two topics. This difference of perspective invites attention to two other aspects of the relationship between the present topic and rules the breach of which entails the responsibility of the State. On the one hand, there are circumstances in which rules engaging State responsibility are ineffectual, because the risks inherent in a course of action, though foreseeable as a statistical possibility, are precipitated by incidents which the source State cannot be expected to prevent. Thus the award of the arbitral tribunal in the *Trail Smelter* case[252] provided that Canada would indemnify the United States of America for transboundary loss or injury arising from the activity of the smelter, even if the loss or injury occurred in a way which did not engage the responsibility of Canada for a wrongful act. On the other hand, the essential problems with which the present topic deals cannot be avoided merely by formulating a rule entailing a balance of interest test as an obligation the breach of which will engage the responsibility of the State for a wrongful act. The *Trail Smelter* tribunal was able to reach its major finding—namely that Canada would act wrongfully if it allowed the smelter to be operated in a way which gave rise to loss or injury in the United States—only when it had been ascertained, with

[252] United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

the help of scientific referees, that the loss or injury could be avoided by measures which were economically and technically within the capacity of the smelting enterprise.

231. Several members asked whether the terms of his mandate prevented the Special Rapporteur from proposing that the breach of certain important obligations with which he was dealing, for example the obligation to provide information about an activity which might give rise to transboundary loss or injury, should entail the responsibility of the State. The Special Rapporteur replied that he saw no doctrinal reason which prevented him from making such a proposal; the question was simply one of deciding which forms of obligation were likely to prove acceptable to States and effective in their application. In establishing treaty régimes, States often accepted firm obligations to provide information and they should be encouraged to do so. In some circumstances, however, and especially if it were claimed that a question of national or industrial security was involved, States might not be willing to provide information or to agree that a failure to do so would constitute a breach of an international obligation. Yet a State which failed to provide information sought would not, in the event of subsequent transboundary loss or injury, be well placed to deny responsibility in respect of that loss or injury. It therefore seemed to the Special Rapporteur that such a provision would be extremely useful both as a residual rule and as a guide to régime-building, even if neglect of the rule did not in itself engage the responsibility of the State.

232. Other general issues were canvassed in the course of the Commission's debate. There was concern that developing countries, in particular, could not afford elaborate fact-finding or negotiating procedures, that no State should have to pay to ensure its own freedom from transboundary loss or injury, and that a weaker State could actually be placed at a disadvantage by an obligation to engage in what might prove to be an exhausting and frustrating negotiation. One member spoke specifically of unregulated conditions in parts of Africa, where political boundaries cut through tribal areas and inhabitants were absolutely dependent for life and livelihood on non-interference with the transboundary seasonal flow of water. Procedures should therefore be simple, inexpensive and informal. Another member commented that, when negotiating States were not equal in economic and industrial terms, overall beneficial results should not be sacrificed to equality in cost-sharing.

233. At the other end of the scale, it was pointed out that many of the world's gravest environmental problems could not be reduced to simple equations, relating a measurable loss or injury within the territory or control of one State to an identified physical consequence of an activity within the territory or control of another State. Pollution of the high seas and degradation of the world's oxygen supply were mentioned as examples of transboundary problems which could be tackled only by international co-operation and by measures of cost-sharing that took into account relative sacrifices and relative needs. In such cases and in many others, it was not possible to envisage progress except within the framework or under the auspices of appropriate international organizations. One member suggested that it might also be necessary to distinguish circumstances in which transboundary loss or injury was chronic or insidious from those in which it was occasional and catastrophic; he suggested that in the latter cases the burden should perhaps fall upon the international community as a whole, rather than upon an individual State.

234. In short, cost-sharing has many dimensions, and community interests, regional and global, will often overtake an exclusively bilateral approach to a problem of transboundary loss or injury. Even when such a problem has a marked bilateral character, solutions may depend upon acceptance of international standards established under the auspices of international organizations, and sometimes upon technical and economic assistance furnished in pursuance of international programmes. Therefore the schematic outline of the topic took the wide view rather than the narrow one, presenting fact-finding and régime-building—both to avoid dangers and to ensure reparation for any which materialize—as a goal more desirable than that of cost allocation after loss or injury has occurred. Similarly, when the draft articles are called upon to perform the function of residual rules, the emphasis of reparation will be upon the elimination or reduction of the danger, rather than merely upon compensation for loss or injury suffered. For this emphasis, State practice offers sufficient precedent. With such guidance as can be afforded by international standards and by the proposed articles, the costs and difficulties of fact-finding and negotiation should at least be reduced; often there could be some input from or through the appropriate international organizations. It has not, however, been proposed to provide any special sanction for a failure to engage in fact-finding or negotiation; sovereign States can be helped to conclude régimes that are to their mutual advantage but they cannot be relieved of discretion to decide whether negotiation is profitable, either in reducing dangers to themselves or in defining and limiting the extent of their responsibilities for dangers to other States.

235. Some of the issues mentioned in preceding paragraphs may influence the Commission's future decisions as to the character and scope of the proposed articles. There is, however, already general agreement that the topic is correctly centred on the need to avoid—or to minimize and, if necessary, repair—transboundary loss or injury arising as a physical consequence of an activity within the territory or control of another State. Some members were disposed to feel that earlier debates in the Sixth Committee had already signified the General Assembly's endorsement of a topic conceived along these lines. Some took the view—though not with disapproval—that this marked a change in the original conception of the topic, which was much concerned with the principle of strict liability; but others pointed out that the Commission, in choosing a title for the topic, was careful not to make any assumption about the role of the strict liability principle. It has been noted that, in modern treaty practice, a rule of strict liability is often allowed to operate, under prescribed conditions, both as a means of

implementing liability and as a basis for limiting liability. It has also been suggested that the title of the topic should now be changed so as to correspond more closely with the essential focus of the topic as described in the opening sentences of this paragraph.

236. These are questions for the future and, in order that the Commission may be better prepared to deal with them, the Special Rapporteur was encouraged to continue his research by reference to the full range of treaty and other materials relevant to the avoidance and repair of physical transboundary harm. Bearing in mind all these considerations, the Commission took note that it was not proposed to refer draft articles 1 to 5 to the Drafting Committee at the present stage, but invited the Special Rapporteur to continue to prepare draft articles which could be considered together with draft articles 1 to 5.

2. Draft articles submitted by the Special Rapporteur

237. In his fifth report, the Special Rapporteur submitted the following five draft articles, broadly corresponding to section 1 of the schematic outline, modified in accordance with paragraph 63 of the fourth report:

Chapter I

General provisions

Article 1. Scope of the present articles

The present articles apply with respect to activities and situations which are within the territory or control of a State and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State.

Article 2. Use of terms

In the present articles:

1. "Territory or control"

(*a*) in relation to a coastal State, extends to maritime areas in so far as the legal régime of any such area vests jurisdiction in that State in respect of any matter;

(*b*) in relation to a State of registry, or flag-State, of any ship, aircraft or space object, extends to the ships, aircraft and space objects of that State while exercising a right of continuous passage or overflight through the maritime territory or airspace of any other State;

(*c*) in relation to the use or enjoyment of any area beyond the limits of national jurisdiction, extends to any matter in respect of which a right is exercised or an interest is asserted;

2. "Source State" means a State within the territory or control of which an activity or situation occurs;

3. "Affected State" means a State within the territory or control of which the use or enjoyment of any area is or may be affected;

4. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a source State, and which affect the use or enjoyment of any area within the territory or control of an affected State;

5. "Transboundary loss or injury" means transboundary effects constituting a loss or injury.

Article 3. Relationship between the present articles and other international agreements

To the extent that activities or situations within the scope of the present articles are governed by any other international agreement, whether it entered into force before or after the entry into force of the present articles, the present articles shall, in relations between States parties to that other international agreement, apply subject to that other international agreement.

Article 4. Absence of effect upon other rules of international law

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

Article 5. Cases not within the scope of the present articles

The fact that the present articles do not apply to the obligations and rights of international organizations, in respect to activities or situations which either are within their control or affect the use or enjoyment of areas within which they may exercise any right or assert any interest, shall not affect:

(*a*) the application to international organizations of any of the rules which are set forth in the present articles in reference to source States or affected States, and to which international organizations are subject under international law independently of the present articles;

(*b*) the application of the present articles to the relations of States as between themselves.

238. As a number of members of the Commission noted, all five of these draft articles are concerned with the question of scope. Draft article 1 is the key provision. Draft article 2 provides a definition of "territory or control" which is necessary to an understanding of draft article 1. The other definitions in draft article 2 are merely terms of convenience, which avoid a need for lengthy paraphrases in later articles and in commentaries. Draft articles 3 and 4 give assurances that the present draft articles do not affect the freedom of States to make their own treaty arrangements and do not modify any treaty régime, or existing rule of law, already in force. Draft article 5 draws attention to the fact that an international organization, rather than a State, may be in control of an activity with which the present topic is concerned.

239. It was pointed out that draft article 1 contains three distinct limitations or conditions, that is criteria which have to be fulfilled in order that any given circumstance may fall within the scope of the draft articles. There is, first, the transboundary element: effects felt within the territory or control of one State must have their origin in something which takes place within the territory or control of another State. Secondly, there is the element of a physical consequence: this implies a connection of a specific type, a consequence which arises or may arise out of the very nature of the activity or situation in question by reason of a natural law. These two limitations together create the possibility of the present topic: it arises because nature takes no account of political boundaries. Winds blow and water flows; light and sound and radiation waves travel; fire, pestilence and explosive forces spread. In areas beyond

national jurisdiction, such as the high seas, things done under the auspices of one State may have physical consequences which affect the rights or interests of other States.

240. The first two limitations are, however, only necessary pre-conditions. Before the principles or rules contained in the present topic are engaged, it must be shown also that the physical consequence, to use the words of the *Lake Lanoux* arbitral award,[253] "change[s] a state of affairs organized for the working of the requirements of social life" in another State. That is to say, one of the pre-conditions is a physical consequence—a natural phenomenon; but the transboundary effects of that phenomenon are to be measured by the needs and interests, economic as well as social, of the people affected in the other State. It could be said that the phrase "activities and situations" amounts to a fourth limitation or condition, because it describes the kind of circumstance in the source State which may create an obligation for that source State. Each of these aspects of the scope article must be considered in its turn.

241. As to the transboundary element, it is of course not the function of the proposed articles to make any pronouncement about the rules of law which establish the authority of a State in relation to its territory or to persons or things in areas beyond the limits of national jurisdiction. On the contrary, these articles must attach themselves to the general law and to any future changes or developments in that law. Therefore the definition of "territory or control" in draft article 2 is by no means a complete definition: it is merely an indication of the connections between the law relating to a State's authority over territory, persons and things, and the subject-matter of the draft articles. The definition would not be necessary—and the phrase "territory or control" could, as one member of the Commission has suggested, be reduced to the single word "territory"—if it were decided to confine the articles to activities and situations which occur within the territory of a State, and which give rise or may give rise to physical consequences which produce effects within the territory of another State. Such a restriction, however, would wholly or partially exclude from the scope of the topic many of the human activities—including ultra-hazardous activities—which pose the greatest dangers for mankind. At the present stage in the development of the topic, there is little evidence of support for any such curtailment.

242. Indeed, some members of the Commission, looking to the broad intention of the defined phrase "territory or control", have found it to be satisfactory; most speakers have endorsed the policy of applying the articles to dangers which arise, or have adverse effects, on the high seas or elsewhere beyond the limits of national jurisdiction. Nevertheless, the wording of the definition raises considerable drafting difficulties and must be regarded as unsettled. Its purpose is to recognize that the modern law of the sea does not merely draw a line between the territory of a coastal State and the high seas; it recognizes, for example, that an exclusive economic zone has the character of national territory for certain limited purposes and the character of high seas for other purposes. Thus an encounter between the authorities of the coastal State and a foreign ship fishing without authorization in the exclusive economic zone is not a transboundary matter, but the relationship between the same authorities and a foreign ship engaged in navigation through the exclusive economic zone is a transboundary matter.

243. Conversely, when a foreign ship exercises a right of innocent passage through the territorial sea of a coastal State, it is for certain purposes within the territorial jurisdiction of the State through whose maritime territory it is travelling; but for most purposes it is treated as remaining outside the criminal and civil jurisdiction of the coastal State. Subparagraphs (*a*) and (*b*) of the draft definition of "territory or control" are concerned, respectively, with the extent of the coastal State's jurisdiction outside the territorial sea, and the extent of the flag-State's jurisdiction over ships in passage through the territorial or internal sea of another State. They carry no implication—as one member of the Commission feared—that the terms "coastal State" and "flag-State" are identified with the terms "source State" and "affected State". The reference to "continuous passage" may well be unsatisfactory, but should be regarded only as a first attempt to find a term broad enough to comprehend the various rights of passage contemplated by the 1982 United Nations Convention on the Law of the Sea.[254]

244. Similarly, subparagraph (*c*) of the definition merely recognizes that, on the high seas or in other areas beyond the limits of national jurisdiction, the relationship between ships, aircraft or persons within the control of different States is always a transboundary relationship. Naturally, a high-seas fishing stock, for example, is not within the legal control of any State, but is a matter in respect of which States make treaties to protect their own interests and those of their ships and nationals. The definition therefore attempts to adapt the concept of "territory or control" to such a transboundary situation. It is not—as one member thought possible—intended to suggest a distinction between public and private rights; freedoms of the high seas, like rights of passage, are exercisable by the subjects of States as well as by States themselves.

245. Setting aside the drafting difficulties, which should not be minimized and were usefully discussed, there is little difference of opinion within the Commission as to the policy to be followed in respect of the transboundary element. It is largely a matter of recognizing the political world as it is: divided into distinct sovereignties but with relatively complex criteria for drawing the maritime boundary line between matters which belong to the sphere of State responsibility for the treatment of aliens and those which belong to the sphere

[253] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*; see especially p. 304, para. 8.

[254] *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.

of the present topic. The Special Rapporteur explained that the only discretionary element of which he had been aware related to the case of ships in innocent passage and the similar—though not identical—case of aircraft and space objects in authorized overflight. Treaty practice, for example the international conventions on the carriage of oil by sea or the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952),[255] in effect treated the relationship between the ship or aircraft and the State of transit as a transboundary relationship. It seemed desirable and even necessary that the Commission should do the same.

246. At its thirty-fifth session, in 1983, the Commission decided—without any difference of opinion, since the matter had been much canvassed at earlier sessions of the Commission and of the Sixth Committee of the General Assembly—"that the scope of the present topic should be confined to the duty to avoid, minimize and repair physical transboundary harm resulting from physical activities within the territory or control of a State".[256] That decision having been taken, the element of a physical consequence becomes a corner-stone in the construction of a set of draft articles. It has already been noted that the term "physical consequence" represents the operation of a natural law, and that the present topic arises because the forces of nature disregard political boundaries. A physical consequence is always the product of an activity—or perhaps of an unstable situation which may be related to a present or past activity. Either a water storage dam bursts, or the gates have to be opened to prevent it from bursting; in either case the physical consequence is a devastating flood. In the second of these alternative cases, there is human intervention to open the floodgates, but that does not change the characterization of the consequence. There was an inherent danger that, perhaps in abnormal weather conditions, the dam would be unable to contain the weight and volume of water which poured into it—and that danger materialized.

247. The Special Rapporteur pointed out that the criterion of a physical consequence is rigorous, allowing little room for doubt in its practical application. Several members of the Commission discussed the point—one noting a United States municipal court ruling that even imperceptible particles of matter contaminating the atmosphere could constitute a physical invasion. Some members, however, were not satisfied that the wording of draft article 1 was satisfactory in this respect. In part, these doubts were due to concern that the use of the phrase "physical consequence", rather than "material consequence", would deprive the victims of transboundary loss or injury of compensation for economic losses. On that point, discussed in paragraph 252 below, there can be complete reassurance; but a different question, arising from the difficulty of obtaining exact equivalences in the various working languages, may remain. One member observed that the French expression *conséquence matérielle* did not perhaps fully render the idea of a physical link, physical event or physical cause, which was the basis of the proposed régime; the English expression "physical consequence" appeared to him to convey that idea better.

248. Together, the transboundary element und the element of a physical consequence circumscribe the scope of the draft articles, excluding various activities or circumstances that do not exhibit one or other element, though they have affinities with the present topic. In this connection, some members of the Commission have shown a particular interest in the problem of industries which are "exported" from developed to developing countries, partly to take advantage of lower environmental standards and smaller capacity to enforce such standards. In the strict sense, this problem does not fall within the scope of the present topic, because the transboundary element is missing: the "exported" industry settles into its new location with the acquiescence of the receiving State, which is sovereign in its own territory. Yet the matter directly concerns the purposes and possibilities of rules and guidelines elaborated in pursuance of the present topic. Developing—and other—countries cannot undertake to protect neighbouring countries from the adverse transboundary effects of polluting industries that are tolerated because they make a contribution to the economy, but which cannot be efficiently regulated, or even monitored, within the technical, administrative and budgetary capabilities of the receiving State.

249. A first step is to acknowledge that the problem is multifaceted, and cannot be dismissed merely because it does not fall squarely within the proposed scope article. There is perhaps a possibility, with the help of appropriate international organizations, of establishing an acceptable code of conduct to cover such cases. In some circumstances, the "exporting" State—like the flag-State of a nuclear ship—might be persuaded to retain a measure of responsibility for the regulation, inspection and good behaviour of the "exported" industry. In other circumstances, international organizations may have the means to prescribe suitable minimum standards and the technical expertise to ensure the observance of those standards. Meeting the costs of such arrangements, in accordance with ability to pay, is well within the principles of cost-sharing and is illustrated by certain examples in State practice.

250. More generally, the Special Rapporteur has shown that there is compensation in State practice for the strictness of the scope article. The transboundary element and the element of a physical consequence provide the best conditions for elaborating a set of draft articles that is coherent and has support in the richest areas of State practice. The tendency of this practice is always to move outwards to embrace larger areas. Thus States find it sensible to apply the international régime of safeguards against oil spillage even when ships are in port and the transboundary element is absent. States find it convenient to apply a régime to an activity that has no physical consequence—for example, the manufacture of particular grades of household detergent—because that is the best way of ensuring that inter-

[255] United Nations, *Treaty Series*, vol. 310, p. 181.

[256] *Yearbook ... 1983*, vol. II (Part Two), p. 83, para. 287; see also p. 86, para. 300.

national watercourses are not polluted. States sometimes choose to treat a problem which, strictly speaking, has no physical consequence and no transboundary element as if it had both—for example, when they decide to combat the illicit trade in drugs at one of its points of origin by finding alternative cash crops to replace the opium poppy. All such cases are outside the scope of the proposed set of articles, but not beyond its sphere of influence.

251. The third element in the scope clause is the effect of the physical consequence upon use and enjoyment. In the *Lake Lanoux* arbitral award (see paragraph 240 above), it was held that the substitution of one water supply for another, though undoubtedly the physical consequence of an activity within the territory of another State, had no transboundary effects because the new source of water supply was equal in quantity and quality to the old. There was therefore no potential loss or injury which could be the subject of negotiation between the States. Several members of the Commission, following this line of reasoning, wondered why article 1 should not confine the scope of the draft articles to a physical consequence "adversely" affecting the use or enjoyment of areas within the territory or control of any other State. The Special Rapporteur recalled that the *Lake Lanoux* award also dealt with that point. It was for the affected State to make its own judgment as to the adverse or beneficial nature of what had been done. A great deal of régime-building—especially in such matters as the regulation of short-range transboundary pollution—was devoted to establishing a scale of priorities, preferring some uses to others and balancing benefits against costs. Later in the draft articles, reference would be made to adverse effects, and ultimately to "transboundary loss or injury", but at the beginning the goal of equality between the parties required that there be no prejudgment. Questions were also raised about the phrase "use or enjoyment of areas", but this matter is related to the problems of the partial definition of "territory or control", discussed in paragraphs 241 to 245.

252. A different and more fundamental question has already been touched upon in paragraph 247. If the phrase "a physical consequence affecting the use or enjoyment of areas" is read as a single criterion, there is a tendency to suppose that the word "physical", with its attendant problems of finding an exact equivalent in other working languages, governs and restricts the measurement of effects. State practice clearly establishes the opposite result. The requirement of a physical consequence is a gateway; once through that gateway, there is the utmost freedom to take full account of benefits and disadvantages, whether social or economic. Indeed—and here again the *Lake Lanoux* award is a *locus classicus*—States take into account all manner of rights and interests, often agreeing to the curtailment of a right, for instance by accepting a restriction on a land use, in return for a benefit; as a number of members of the Commission have noted, monetary adjustments are frequently an additional factor in weighing the evenness of a bargain.

253. In the phrase "activities and situations", much attention was paid by members of the Commission to the word "situations". About half of those who referred to the question had a tentative preference for a word with more dynamic overtones, such as "occurrences", and one or two wondered whether the word "activities" was wide enough to cover all cases. Once again, the underlying question is that of maintaining a complete equality between the State which asserts its freedom of action and the State which demands its freedom from transboundary harm. Usually, the initiative lies with the former, but, as several members of the Commission insisted, it was important that the affected State should have every opportunity to take the initiative, complaining of a source or risk of adverse effects which it believes to emanate from the territory of another State. The Special Rapporteur's reading of State practice was that in the early stages of consultation or negotiation, and especially when the affected State may be dependent upon the maintenance of a state of affairs from which it benefits, it is necessary to provide a wider frame of reference than is comprised in the word "activities", though the duties of the source State will be much less onerous in the cases not covered by the word "activities". At the present stage in the development of the topic, it is sufficient that most members of the Commission envisage a need to supplement the term "activities", though it is common ground that the main focus of the draft articles will always be upon activities within the territory or control of the source State.

254. Members of the Commission devoted relatively little attention to draft articles 3 and 4, some dismissing the provisions of these articles as saving clauses which should come much later in the draft. Others, however, considered that the two draft articles contained vital guarantees establishing the relationship of the topic with the general body of law and must be given a place at the beginning of the draft. Especially in relation to draft article 3, much depends on the reader's conception of the main thrust of the proposed set of articles. If the emphasis is upon a residual set of rules to operate when the States concerned have not foreseen a problem or have chosen not to regulate it, article 3 may be regarded as little more than a necessary saving clause. If, however, it is remembered that the first objective of the draft articles is to promote the regulation of transboundary problems—and that in this sense they will by no means be residual rules—article 3 assumes greater prominence. It is certainly true, as some members of the Commission pointed out, that the content of article 3 will need to be considered more carefully, because the simple formula it contains may not be adequate in all circumstances to define the relationship between the draft articles and other agreements and régimes. Even so, article 3 is in a sense the heart of the draft articles: it encourages States to deal with unregulated problems by fixing for themselves the points of intersection of harm and wrong, so that they can make the best adjustment of freedom of action with freedom from harm.

255. The Special Rapporteur explained that the purpose of draft article 4 followed from the foregoing. States engaged in régime-building, or even in the retrospective construction of a régime to settle a question of reparation, do so not in a vacuum, but against a background of

existing rules of law. Without this background, the affected State would always be a supplicant or would find that its only source of strength lay in assuming an equal indifference to its own generation of transboundary loss or injury. In some contexts, and especially in those that attract the classic test of a violation of sovereignty, the law is hard-edged and clear. Concessions of a territorial nature, such as a decision to allow a neighbouring State a special land use or to accept a régime which lessens a receiving State's authority or discretion in matters arising within its own territory, always entail the conscious modification of a legal right in pursuance of a larger interest. It is not open to serious doubt that international law also limits drastically the right of any State to use, or allow the use of, its territory in ways that cause transboundary loss or injury. Yet, as was discussed earlier in paragraphs 229 and 230, the application of the latter rule may involve margins of appreciation that can be resolved only by the principles and methods with which the present topic is concerned. Thus the whole of a State's conduct in relation to the matters dealt with in the present topic may ultimately be relevant to the question whether it has acted wrongfully.

256. The Commission's discussion of draft article 5 raised a point of particular interest. In view of the roles envisaged for international organizations in régimes such as those contained in the outer space treaties and the 1982 United Nations Convention on the Law of the Sea, it was not doubted that the proposed articles must take some account of this question. What was doubted by almost all members of the Commission who considered the point was whether the time-honoured formula contained in article 3 of the 1969 Vienna Convention on the Law of Treaties[257] was adequate in the present context. There was no disposition to decide the point quickly, but the Commission considers it an open question whether and to what extent the proposed set of articles should differentiate between the cases of States and of international organizations.

257. In final summary, subject to questions of drafting and subject also to the right to take a longer and harder look when the project is more advanced, the Commission found no major fault in the five draft articles and agreed that, on the basis of those articles, the elaboration of further articles should proceed. Nevertheless, some members of the Commission did not consider that questions of scope had yet been resolved. Several members noted that the Special Rapporteur had chosen the widest possible scope, consistent with the decision to limit the topic to activities and situations entailing a physical consequence with transboundary effects. While this was a useful method of exploring the subject, it might become necessary to make further distinctions. It might even be wise, one member of the Commission thought, simply to exclude certain matters, for example some matters treated in the United Nations Convention on the Law of the Sea, on the pragmatic ground that the international community had taken these matters about as far as it was willing to do at the present time. Those are questions to which the Commission will no doubt return in several years' time. The answers may depend upon the balance of emphasis between procedural guidelines and more substantive obligations.

[257] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

Chapter VI

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction

258. Paragraph 1 of General Assembly resolution 2669 (XXV) of 8 December 1970 recommended that the Commission should

> take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate.

259. At its twenty-third session, in 1971, the Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work.[258] In section I, paragraph 5, of resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that the Commission

> in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses.

At its twenty-fourth session, in 1972, the Commission indicated its intention to take up the foregoing recommendation of the General Assembly when it came to discuss its long-term programme of work.[259] In section I, paragraph 5, of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission's intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic.

260. At its twenty-fifth session, in 1973, the Commission, taking into account the fact that a supplementary report on international watercourses would be submitted to members by the Secretariat in the near future, considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report.[260] By paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973, the General Assembly recommended that the Commission

> should at its twenty-sixth session commence its work on the law of non-navigational uses of international watercourses by, *inter alia*, adopting preliminary measures provided for under article 16 of its statute.

261. At its twenty-sixth session, in 1974, the Commission had before it the supplementary report on legal problems relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV).[261] Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII), the Commission, at its twenty-sixth session, set up a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, composed of Mr. Richard D. Kearney (Chairman), Mr. Taslim O. Elias, Mr. Milan Sahović, Mr. José Sette Câmara and Mr. Abdul Hakim Tabibi, which was requested to consider the question and report to the Commission. The Sub-Committee submitted a report which proposed the submission of a questionnaire to States. At the same session, the Commission adopted the report of the Sub-Committee without amendment and appointed Mr. Richard D. Kearney Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses.[262]

262. In section I, paragraph 4 (*e*), of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the Commission should:

> Continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the International Law Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the Commission's report.

By a circular note dated 21 January 1975, the Secretary-General invited Member States to communicate to him, if possible by 1 July 1975, the comments on the Commission's questionnaire referred to in the above-mentioned paragraph of General Assembly resolution 3315 (XXIX) and the final text of which, as communicated to Member States, read as follows:[263]

A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?

B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?

C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?

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[258] *Yearbook ... 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

[259] *Yearbook ... 1972*, vol. II, p. 324, document A/8710/Rev.1, para. 77.

[260] *Yearbook ... 1973*, vol. II, p. 231, document A/9010/Rev.1, para. 175.

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

[262] See the report on the Commission's work on the topic at its twenty-sixth session, in *Yearbook ... 1974*, vol. II (Part One), pp. 300-301, document A/9610/Rev.1, chap. V, paras. 155-159; for the report of the Sub-Committee, *ibid.*, pp. 301 *et seq.*, annex.

[263] *Yearbook ... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

D. Should the Commission adopt the following outline for fresh water uses as the basis of its study:

(*a*) Agricultural uses:

1. Irrigation;
2. Drainage;
3. Waste disposal;
4. Aquatic food production;

(*b*) Economic and commercial uses:

1. Energy production (hydroelectric, nuclear and mechanical);
2. Manufacturing;
3. Construction;
4. Transportation other than navigation;
5. Timber floating;
6. Waste disposal;
7. Extractive (mining, oil production, etc.);

(*c*) Domestic and social uses:

1. Consumptive (drinking, cooking, washing, laundry, etc.);
2. Waste disposal;
3. Recreational (swimming, sport, fishing, boating, etc.)?

E. Are there any other uses that should be included?

F. Should the Commission include flood control and erosion problems in its study?

G. Should the Commission take account in its study of the interaction between use for navigation and other uses?

H. Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?

I. Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?

263. The Commission did not consider the topic at its twenty-seventh session, in 1975, pending receipt of the replies from Governments of Member States to the Commission's questionnaire.[264] The General Assembly, by paragraph 4 (*e*) of resolution 3495 (XXX) of 15 December 1975, recommended that the Commission should continue its study of the law of the non-navigational uses of international watercourses.

264. In 1976, at its twenty-eighth session, the Commission had before it replies to the questionnaire from the Governments of 21 Member States.[265] It also had before it a report submitted by Mr. Richard D. Kearney, then Special Rapporteur for the topic.[266] At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from Governments and discussed in the report of the Special Rapporteur concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The report noted that there were considerable differences in the replies of Governments to the questionnaire regarding the use of the geographical concept of the international drainage basin as the appropriate basis for the proposed study, with regard both to uses and to the special problems of pollution. Differences also appeared in the views expressed by members of the Commission in the debate on the Special Rapporteur's report. A consensus emerged that the problem of determining the meaning of the term "international watercourses" need not be pursued at the outset of the Commission's work. The relevant paragraphs of the report of the Commission on the work of its twenty-eighth session read as follows:

> 164. This exploration of the basic aspects of the work to be done in the field of the utilization of fresh water led to general agreement in the Commission 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. In so doing, every effort should be made to devise rules which would maintain a delicate balance between those which were too detailed to be generally applicable and those which were so general that they would not be effective. Further, the rules should be designed to promote the adoption of régimes for individual international rivers and for that reason should have a residual character. Efforts should be devoted to making the rules as widely acceptable as possible, and the sensitivity of States regarding their interests in water must be taken into account.
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> 165. It would be necessary, in elaborating legal rules for water use, to explore such concepts as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment, which would need to be taken into account in addition to the requirements of reparation for responsibility.[267]

The discussion in the Commission showed general agreement with the views expressed by Governments in response to the questions dealing with other issues.

265. The General Assembly, in paragraphs 4 (*d*) and 5 of resolution 31/97 of 15 December 1976, recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses and urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject.

266. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, to succeed Mr. Richard D. Kearney, who had not stood for re-election to the Commission.[268] In paragraph 4 (*d*) of resolution 32/151 of 19 December 1977, the General Assembly recommended that the Commission should continue its work on the law of the non-navigational uses of international watercourses. This recommendation was reiterated by the General Assembly in resolution 33/139 of 19 December 1978.

267. In 1978, at its thirtieth session, the Commission had before it the replies received from four Member

[264] *Yearbook ... 1975*, vol. II, pp. 183-184, document A/10010/Rev.1, para. 138.

[265] *Yearbook ... 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1.

[266] *Ibid.*, p. 184, document A/CN.4/295.

[267] *Yearbook ... 1976*, vol. II (Part Two), p. 162.

[268] *Yearbook ... 1977*, vol. II (Part Two), p. 124, para. 79.

States in accordance with General Assembly resolution 31/97.[269] Also at that session, the Special Rapporteur made a statement on the topic. At its thirty-first session, in 1979, the Commission had before it the first report on the topic submitted by the Special Rapporteur,[270] as well as the reply of one Member State[271] to the Commission's questionnaire. In that first report, the Special Rapporteur proposed the following draft articles: "Scope of the present articles" (art. 1); "User States" (art. 2); "User agreements" (art. 3); "Definitions" (art. 4); "Parties to user agreements" (art. 5); "Relation of these articles to user agreements" (art. 6); "Entry into force for an international watercourse" (art. 7); "Data collection" (art. 8); "Exchange of data" (art. 9); and "Costs of data collection and exchange" (art. 10). At that session, the Commission engaged in a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole. The debate concerned the following matters: the nature of the topic; the scope of the topic; the question of formulating rules on the topic; the methodology to be followed in formulating rules on the topic; the collection and exchange of data with respect to international watercourses; and future work on the topic.[272]

268. In paragraph 4 (*d*) of resolution 34/141 of 17 December 1979, the General Assembly recommended that the Commission should continue its work on the topic, taking into account the replies from Governments to the questionnaire prepared by the Commission and the views expressed on the topic in debates in the General Assembly.

269. At its thirty-second session, in 1980, the Commission had before it the second report of the Special Rapporteur,[273] as well as replies received from the Governments of four Member States.[274] In his second report, the Special Rapporteur submitted the following six draft articles: "Scope of the present articles" (art. 1); "System States" (art. 2); "System agreements" (art. 4); "Parties to the negotiation and conclusion of system agreements" (art. 5); "Collection and exchange of information" (art. 6); and "A shared natural resource" (art. 7). Also mentioned in the report was a draft article 3 on "Meaning of terms", the drafting of which had been deferred. After consideration of the second report, the Commission referred to the Drafting Committee the draft articles on the topic submitted by the Special Rapporteur.

270. On the recommendation of the Drafting Committee, the Commission provisionally adopted at the same session draft articles 1 to 5 and X, which read as follows:[275]

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.

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 of one system State affects the use of

[269] *Yearbook ... 1978*, vol. II (Part One), p. 253, document A/CN.4/314.

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

[271] *Ibid.*, p. 178, document A/CN.4/324.

[272] *Yearbook ... 1979*, vol. II (Part Two), pp. 163 *et seq.*, paras. 111-148.

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

[274] *Ibid.*, p. 153, document A/CN.4/329 and Add.1.

[275] It was indicated that the Drafting Committee had been unable to consider draft article 6, on "Collection and exchange of information", as it had found that the important issues raised therein could not be adequately dealt with in the short time at the Committee's disposal. Furthermore, the Commission accepted the Drafting Committee's proposal to align the terminology used in the various language versions of the title of the topic so as to reflect more faithfully in the French version the intended meaning. Thus the French expression *voies d'eau internationales* had been replaced by *cours d'eau internationaux*.

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 articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

On the recommendation of the Drafting Committee, the Commission also adopted as a working hypothesis, at least in the early stages of its work on the topic, the following note describing its tentative understanding of what was meant by the term "international watercourse system":

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.

271. In its report to the General Assembly on its thirty-second session, the Commission drew attention to the fact that, from the outset of its work on the topic, it had recognized the diversity of international watercourses: their physical characteristics and the human needs they serve are subject to geographical and social variations similar to those found in other connections throughout the world. Yet it has also been recognized that certain common watercourse characteristics exist, and that it is possible to identify certain principles of international law already existing and applicable to international watercourses in general. Mention was made of such concepts as the principle of good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as the sovereign rights of riparian States. What was needed was a set of draft articles that would lay down principles regarding the non-navigational uses of international watercourses in terms sufficiently broad to be applied to all international watercourses, while at the same time providing the means by which the articles could be applied or modified to take into account the singular nature of an individual watercourse and the varying needs of the States in whose territory part of the waters of such a watercourse were situated.

272. In 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 the law of the non-navigational uses of international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

273. Due to the resignation from the Commission of the Special Rapporteur for the topic upon his election to the ICJ, the Commission was not in a position to take up the study of the topic at its thirty-third session, in 1981. In resolution 36/114 of 10 December 1981, the General Assembly recommended that the Commission, taking into account the written comments of Governments, as well as views expressed in debates in the General Assembly, should continue its work aimed at the preparation of draft articles on the topic.

274. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.[276] The Commission had before it at that session replies received from the Governments of two Member States to its questionnaire.[277] Also circulated at that session was the third report on the topic submitted by the former Special Rapporteur, who had started preparing it prior to his resignation from the Commission in 1981.[278] In resolution 37/111 of 16 December 1982, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or in debates in the General Assembly, the Commission should continue its work aimed at the preparation of drafts on all topics in its current programme.

275. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by the newly appointed Special Rapporteur.[279] It contained, as a basis for discussion, an outline for a draft convention on the law of the non-navigational uses of international watercourses, consisting of 39 articles contained in six chapters as follows:

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse system" as applied in the present Convention

Article 2. Scope of the present Convention

[276] *Yearbook ... 1982*, vol. II (Part Two), p. 121, para. 250.

[277] *Yearbook ... 1982*, vol. II (Part One), p. 192, document A/CN.4/352 and Add. 1.

As of 27 July 1984, the Governments of the following 32 Member States had submitted replies to the Commission's questionnaire: Argentina; Austria; Bangladesh; Barbados; Brazil; Canada; Colombia; Ecuador; Finland; France; Germany, Federal Republic of; Greece; Hungary; Indonesia; Libyan Arab Jamahiriya; Luxembourg; Netherlands; Nicaragua; Niger; Pakistan; Philippines; Poland; Portugal; Spain; Sudan; Swaziland; Sweden; Syrian Arab Republic; United States of America; Venezuela; Yemen; Yugoslavia.

[278] *Ibid.*, p. 65, document A/CN.4/348. That report contained, *inter alia*, the following draft articles: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

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

The texts of the draft articles contained in the Special Rapporteur's first report were included, for the information of the General Assembly, in the report of the Commission on the work of its thirty-fifth session.[280]

276. The Commission also had before it at its thirty-fifth session a note presented by one of its members concerning the "Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States" approved by the Governing Council of UNEP.[281]

277. The first report of the Special Rapporteur was considered by the Commission at its thirty-fifth session.[282] Noting that the Special Rapporteur's intention was to present a comprehensive outline for a draft convention, in order to facilitate concrete discussion of the scope, approach and methodology to be followed with regard to the topic, as well as of specific draft articles and the principles to be reflected therein, the Commission proceeded to a discussion of the report as a whole. Within that framework, it focused attention on the approach suggested by the Special Rapporteur concerning definition of the term "international watercourse system" (art. 1 of the outline) and the question of an international watercourse system as a shared natural resource (art. 6 of the outline), as well as on other general principles to be reflected in the draft. A brief indication of the main trends of the debate and possible conclusions deriving therefrom, in particular as regards the matters just mentioned, was given in the report of the Commission on the work of its thirty-fifth session for the information of the General Assembly.[283]

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[280] *Yearbook ... 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 255 and 258.

[281] *Yearbook ... 1983*, vol. II (Part One), p. 195. document A/CN.4/L.353.

[282] *Yearbook ... 1983*, vol. I, pp. 172 *et seq.*, 1785th to 1794th meetings.

[283] *Yearbook ... 1983*, vol. II (Part Two), pp. 66 *et seq.*, paras. 210-260.

278. At the conclusion of the debate at that session, the Special Rapporteur said that, as to the future programme of work, he hoped to revise his proposals in the light of the proceedings in the Commission and in the Sixth Committee of the General Assembly and to submit his second report to the Commission for consideration at its thirty-sixth session. In 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 Commission should continue its work on all the topics in its current programme.

B. Consideration of the topic at the present session

279. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/381).[284] It contained the revised text of the outline for a draft convention on the law of the non-navigational uses of international watercourses, comprising 41 draft articles contained in six chapters as follows:

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention

Article 2. Scope of the present Convention

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 of 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. Content 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* [based on article 27 of the original draft]

Article 15 ter. *Use preferences* [based on article 29 of the original draft]

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 27 of the original draft was revised to become article 15 *bis*]

Article 28. Safety of international watercourses, installations and constructions, etc.

Article 28 bis. *Status of international watercourses, their waters and constructions, etc. in armed conflicts* [new article]

[Article 29 of the original draft was revised to become article 15 *ter*]

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* [new article]

Article 32. Settlement of disputes by consultations and negotiations

Article 33. Inquiry 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.

280. The Commission considered the second report of the Special Rapporteur at its 1831st, 1832nd, 1853rd to

[284] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

1857th, 1859th and 1860th meetings, on 30 May, 1 June, from 3 to 9 and on 11 and 12 July 1984. On the suggestion of the Special Rapporteur, the Commission focused its discussion on draft articles 1 to 9 and questions related thereto. At the conclusion of its debate, the Commission decided to refer to the Drafting Committee draft articles 1 to 9 as contained in the second report, for consideration in the light of the discussion.[285] Owing to lack of time, the Drafting Committee was unable to consider those articles at the present session. For the information of the General Assembly, a brief indication of some of the main points which arose in the course of the Commission's consideration of the general approach suggested by the Special Rapporteur and of draft articles 1 to 9 and questions related thereto is provided below.

1. The general approach suggested by the Special Rapporteur

281. In introducing his second report, the Special Rapporteur felt that the topic, although essentially of a legal nature, had certain political and economic overtones. These aspects would also have to be taken into consideration in order to arrive at a viable instrument of international law on the non-navigational uses of international watercourses.

282. Thus the right balance must be struck between the interdependence of riparian States on the one hand, and their sovereign independence and right to benefit from the natural resources within their territories on the other, between upper riparian States and lower riparian States, and between the various uses of the waters. The Commission should bear in mind the relationship between non-navigational uses and other uses, for example navigation, as well as the varying issues posed by different watercourses. One must constantly remember that the nature and importance of the various issues and elements vary from watercourse to watercourse.

283. The discussions at the Commission's thirty-fifth session and in the Sixth Committee at the thirty-eighth session of the General Assembly gave the Special Rapporteur considerable guidance with regard to the general approach, as well as to the formulation of concrete articles. On the basis of those discussions, he had made certain tentative changes in and amendments to the draft articles contained in his first report. He also felt the need to include a few additional articles or additional paragraphs in existing articles in order to meet pertinent observations made during the discussions on the first report.

284. The outline proposed in the first report seemed to be broadly acceptable. Consequently, in his second report, the Special Rapporteur made only minor changes in and a few additions to this outline. During the discussion at the present session of the Commission, however, it was suggested that it might be preferable to transfer articles 11 to 14 on notification, etc., from chapter III (Co-operation and management in regard to international watercourses) to chapter II (General principles, rights and duties of watercourse States). A view was expressed that an additional article should be added to chapter II expressly prohibiting the diversion of waters, even though this issue was implicitly dealt with in articles 6 to 9.

285. The framework agreement approach seemed to be broadly accepted by the Commission. It was also the approach endorsed by the Sixth Committee of the General Assembly. Other possible approaches, such as codes of conduct, declarations or resolutions, were not contemplated. The question was raised during the present session whether the elaboration of model rules should not be contemplated as an alternative approach. However, it seemed to be generally recognized that, over the years, the general opinion held both in the Commission and in the Sixth Committee of the General Assembly had been that the task of the Commission should focus on the elaboration of a framework agreement. As early as in the first report of the previous Special Rapporteur, submitted to the Commission at its thirty-first session, in 1979, it was assumed that the task of the Commission was to draw up such a framework agreement. Such an agreement would, in combination with the specific watercourse agreements dealing with unique watercourses and specific uses thereof, become a means of achieving "a marriage of general principles and specific rules".[286]

286. One question touched upon during the discussion was how to define or rationalize the term "framework agreement". The discussion seemed to demonstrate that there exists no clear definition of the term. In the view of the Special Rapporteur, a framework agreement in this field should contain basic legal principles generally accepted with regard to international watercourses, but should also encourage the progressive development of international law and the conclusion of specific watercourse agreements. The specific agreements should deal with the unique problems arising with regard to specific watercourses or regions and with regard to specific uses or specific constructions, installations and watercourse regulations. Consequently, the Special Rapporteur felt that the general framework instrument might also contain certain guidelines and recommendations for watercourse States which might be adaptable to specific watercourse agreements. This might be especially true with regard to guidelines and recommendations on the necessary co-operation, joint management and administrative procedures to be followed in connection with specific watercourses. Furthermore, provisions laying down the obligation to settle disagreements and disputes in accordance with the procedures for peaceful settlement of disputes envisaged, *inter alia*, in the Charter of

[285] It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis adopted by the Commission at its thirty-second session, in 1980 (see paragraph 270 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (*ibid.*), and the texts of articles 1 to 9 as proposed by the Special Rapporteur in his first report (*Yearbook ... 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250).

[286] *Yearbook ... 1979*, vol. II (Part One), p. 165, document A/CN.4/320, para. 86.

the United Nations or in State practice might also be formulated in such a manner.

287. The Special Rapporteur felt that, in regard to the present topic, the term "framework agreement" should be applied in a broad and flexible manner. The previous Special Rapporteur seemed to have been of the same opinion. Thus, in his third report, he had stated, *inter alia,* that

> ... the product of the Commission's work should serve to provide ... the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. ...[287]

288. It seemed to be generally recognized by the Commission that, in a framework text, it would be necessary or useful to use—to a reasonable extent—general legal formulations: legal standards such as references to "good-neighbourly relations", "good faith", the sharing of resources "in a reasonable and equitable manner", and the duty not to cause "appreciable harm" to the rights or interests of others. Some members supported this broader approach to the topic, while others felt that the legal principles proposed were formulated in somewhat too general a manner. Certain members felt that recommendations and guidelines did not belong in a framework agreement, while others held the opinion that such recommendations and guidelines might be useful for the elaboration of specific watercourse agreements. It was also suggested that these parts of the draft could be considerably shortened.

289. Some members suggested that it was premature to introduce the term "the present Convention" in the draft articles contained in the Special Rapporteur's second report. The wording "the present articles" should be retained until the Commission had further decided on the character and form of the instrument.

290. Finally, it was recognized that the general approach suggested by the Special Rapporteur in his second report was based on certain changes which he had introduced in his revised draft articles, most notably in article 1, where the term "international watercourse system" had been replaced by the term "international watercourse", and in article 6, where the expression "the watercourse system and its waters are... a shared natural resource" had been changed to "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". Together with the general questions alluded to in the preceding paragraphs, these changes were the subject of divergent views within the Commission. While no final resolution of the various issues involved was achieved during the present session, it is expected that there will be further discussions thereon and that these will assist the Commission in its future work. Thus the Commission anticipates that it will continue its work on this topic in the light of the debate to be held in the Sixth Committee of the General Assembly on the report of the Commission on the work of its present session, in the light of future proposals and suggestions to be made by the Special Rapporteur, and on the basis of future reports of the Drafting Committee on its consideration of draft articles 1 to 9.

[287] *Yearbook ... 1982,* vol. II (Part One), p. 67, document A/CN.4/348, para. 2.

2. Articles 1 to 9 proposed by the Special Rapporteur in his second report

291. While many members limited their remarks to draft articles 1 to 9, a few members also referred to other specific articles or chapters submitted by the Special Rapporteur in his second report. Those remarks will be taken into account at future sessions of the Commission when the other articles and chapters contained in the second report will be the subject of specific consideration. Thus the following paragraphs relate principally to articles 1 to 9.

292. In addition, various drafting and terminological suggestions, sometimes concerning the appropriate terminology to be used in a particular language version, were put forward during the course of the debate. Those suggestions will be taken into account by the Drafting Committee and the Special Rapporteur in due course.

(*a*) Chapter I. Introductory articles

Article 1 (Explanation (definition) of the term "international watercourse" as applied in the present Convention)[288]

293. In introducing article 1 as proposed in his second report, the Special Rapporteur recalled that, in his first report, he had submitted a text for article 1[289] which was closely based on the provisional working hypothesis adopted by the Commission at its thirty-second session, in 1980, as to what was meant by the term "international watercourse system" (see paragraph 270 above). While he had stressed in his first report that that expression was merely a descriptive tool from which no legal principles

[288] Article 1 as proposed by the Special Rapporteur in his second report read as follows:

> *"Article 1. Explanation (definition) of the term 'international watercourse' as applied in the present Convention*
>
> "1. For the purposes of the present Convention, an 'international watercourse' is a watercourse—ordinarily consisting of fresh water—the relevant parts or components of which are situated in two or more States (watercourse States).
>
> "2. To the extent that components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State, they shall not be treated as being included in the international watercourse for the purposes of the present Convention.
>
> "3. Watercourses which in whole or in part are apt to appear and disappear (more or less regularly) from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.
>
> "4. Deltas, river mouths and other similar formations with brackish or salt water forming a natural part of an international watercourse shall likewise be governed by the provisions of the present Convention."

[289] *Yearbook ... 1983,* vol. II (Part Two), p. 68, footnote 245.

could be distilled, it had nevertheless, he said, met with opposition, both in the Commission and in the Sixth Committee of the General Asssembly, as representing a doctrinal approach similar to the "drainage basin" concept earlier discarded by the Commission. The "system" concept had also been viewed as being too vague, as introducing a legal superstructure from which unforeseen principles might be inferred, and as placing undue emphasis on land areas. The Special Rapporteur therefore concluded that the concept of an "international watercourse system" might prove to be a serious hurdle in the search for a generally acceptable set of draft articles. He therefore suggested in his revised version of draft article 1 an abandonment of the "system" concept in favour of the simpler notion of an "international watercourse". That represented, in the opinion of the Special Rapporteur, a change in terminology from the text of article 1 as proposed in his first report, as well as from the text of the provisional working hypothesis adopted by the Commission in 1980. However, this suggested change was not intended to put in doubt the inherent unity of an international watercourse or the interdependence of the various parts and components thereof. None the less, while international watercourses naturally have a wide variety of source components, their nature, type and relevance vary from one watercourse to another and from one region to another; hence he deemed it best not to itemize such components in the text of the article, but rather to provide for a detailed enumeration thereof in the commentary.

294. Some members of the Commission endorsed the change in approach suggested by the Special Rapporteur in his revised version of article 1. They believed the abandonment of the "system" concept removed a major stumbling-block to progress on the topic and resulted in a purely geographical definition which could form the basis of a comprehensive draft. Emphasis was placed on the need to find a politically acceptable and flexible definition. This approach also avoided the territorial connotations which the "system" concept had implied. The new definition was a flexible one, placing emphasis on the essential matter: to know the modifications in quantity and quality of the waters of an international watercourse at the moment such waters pass from the territory of one State into that of another State. The new formulation might also alleviate the difficulty of combining functional aspects which could be foreseen with precision and conceptual aspects which involved unforeseen and perhaps uncontrollable consequences.

295. Certain members, moreover, believed the change to be principally one of terminology and that actually the "international watercourse" concept more adequately expressed the relativist approach taken by the Commission in its 1980 provisional working hypothesis than did the former "system" concept. Thus, provided the original objective could be achieved without prejudicing anyone's position, there was no reason why the new formulation should not be attempted. The important point to be kept constantly in mind, it was urged, was to reinforce the search for the best means of encouraging co-operation between watercourse States.

296. While viewing the abandonment of the "system" concept as regrettable, some members indicated appreciation of the reasons advanced by the Special Rapporteur for that proposed change and said they did not object to it, provided it represented nothing more than a change of wording and on the understanding that it would in no sense adversely affect the element of development and co-operation, but would reconcile differing viewpoints. However, the deletion of the "system" concept presented the conceptual problem of dealing with the relativity aspect highlighted in the provisional working hypothesis adopted by the Commission in 1980: there could be different systems in respect to different uses of the same watercourse at one and the same time. It was said that the definition could be accepted for the time being as the best that could be achieved in the circumstances and had no legal strings attached. The suggestion was made that scientific and technical advice was needed with a view to amplifying the definition.

297. To other members, the Special Rapporteur's revised version of article 1 represented a major departure from the approach adopted by the Commission at its thirty-second session in 1980. Indeed, the articles provisionally adopted by the Commission in 1980 had constituted a coherent and consistent whole. Those articles had been based on the "system" concept and, if that pillar was removed, it was necessary to rethink all the provisions, in particular articles 4, 5 and 6. The background to the Commission's adoption of the provisional working hypothesis in 1980 should be borne in mind, it was urged. Apart from making a general reference to Sixth Committee debates on the question, the Special Rapporteur had offered no justification for the course of action he had proposed. Another important factor was the vagueness of a definition as "floating" as that proposed, which would not necessarily serve the interests of States when faced with concrete problems. Caution was urged, because if some members attached great importance to a change of wording there was reason to believe that the change was not purely one of terminology. The revised text of article 1 was also seen as falling short, since it concentrated on the water element to the exclusion of the geographic and economic context in which such water was found. Most importantly, the human aspect and that of solidarity among peoples appeared to be overlooked. Questions of sovereignty and the international character of the river were highlighted to the detriment of the indispensable and progressive aspect of the regionalization of an international watercourse, which was particularly important for developing countries. The draft articles appeared to be conceived in a context of antagonism and conflict rather than in one of a community of interests.

298. Certain members voiced concern as to the real significance and meaning of the changes proposed by the Special Rapporteur and believed further clarification was necessary. Flexibility might be a valuable tool in seeking to overcome particular problems, but clarity was essential in what was supposed to be a basic article indicating what was meant by the expression "international watercourse".

299. In that connection, certain members questioned the omission from the text proposed by the Special Rapporteur of an indication, even a non-exhaustive one, of the possible hydrographic components of an international watercourse. It was considered not sufficient simply to refer to "relevant" parts or components. Without an indication of what those components might be, the combined effect of paragraphs 1 and 2 of article 1 only added to the confusion. It was thought preferable to include in the text of the article the examples given in the Special Rapporteur's second report (rivers, lakes, canals, tributaries, streams, brooks and springs, glaciers and snow-capped mountains, swamps, ground water and other types of aquifers) (A/CN.4/381, para. 24), with a view to their closer examination to determine whether they should form the subject of separate articles or at least a very detailed commentary. With regard to ground water, while some members agreed with the Special Rapporteur's suggestion to exclude ground water which was totally independent from, and unrelated to, a specific surface watercourse, other members questioned whether this was justified from the scientific and technical point of view. The importance of ground water in border areas was also emphasized. Reference was also made to the need to clarify the definition as it related to canals.

300. Another view expressed was that the definition should be simplified to provide merely that an "international watercourse" meant a watercourse which crossed the territory of two or more States and whose components were defined by agreement between the watercourse States concerned. In addition, paragraph 2 was particularly inadequate, as it did not take into consideration the geographic situation of States, whether upstream or downstream.

301. In his concluding remarks, the Special Rapporteur recalled that he had found the "international watercourse system" quite acceptable initially, but had abandoned the "system" concept in the interest of preparing a generally acceptable draft. The effects of this change on the texts of other articles would require careful study. Article 1 as revised appeared to provide a suitable basis for further discussion, even if it had not gathered enthusiastic support from all quarters. He also expressed willingness to enumerate in a future commentary to the article the various components and parts of an international watercourse, as well as to include a provision on independent ground-water resources, should the Commission so desire.

ARTICLE 2 (Scope of the present Convention)[290]

302. Article 2 as proposed by the Special Rapporteur gave rise to little specific comment, although a few members expressed agreement therewith. Reference was also made to the need, in the context of article 8, for a proper reflection of the importance and relevance of navigational uses interacting with non-navigational uses.

ARTICLE 3 (Watercourse States)[291]

303. Certain members referred to the text of article 3 as proposed by the Special Rapporteur in his second report in connection with comments on article 1, particularly in relation to the abandonment of the "system" concept and the reference to "relevant" components or parts. The question was raised whether or not it was appropriate to formulate the text, as had been suggested by the Special Rapporteur, in such a manner as to avoid any implication that legal rules or principles could be derived therefrom.

ARTICLE 4 (Watercourse agreements)[292]

304. The Special Rapporteur noted in his introductory statement that he had proposed substantial changes to paragraph 1 of article 4, since a number of States had expressed concern that article 3 as provisionally adopted in 1980 (see paragraph 270 above), and as proposed

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[290] Article 2 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 2. Scope of the present Convention*

"1. The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourses and their waters.

"2. The use of the waters of international watercourses for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation."

[291] Article 3 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 3. Watercourse States*

"For the purposes of the present Convention, a State in whose territory relevant components or parts of the waters of an international watercourse exist is a watercourse State."

[292] Article 4 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 4. Watercourse agreements*

"1. Nothing in the present Convention shall prejudice the validity and effect of a special watercourse agreement or special watercourse agreements which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof.

"The provisions of this article apply whether such special agreement or agreements are concluded prior to or subsequent to the entry into force of the present Convention for the watercourse States concerned.

"2. A special watercourse agreement should define the waters to which it applies. It may be entered into with respect to an international watercourse in its entirety, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other watercourse States of the waters of such international watercourse is not, to an appreciable extent, affected adversely.

"3. In so far as the uses of an international watercourse may require, watercourse States shall negotiate in good faith for the purpose of concluding one or more watercourse agreements or arrangements."

without change as article 4 in his first report,[293] could have seriously undermined existing agreements. Some members endorsed the new formulation of paragraph 1 as being useful and necessary to alleviate misgivings as to whether States bound by the articles would be required to amend existing special watercourse agreements. The possibility of conflict between the draft articles and the numerous existing international agreements was real and should be avoided. The Commission should safeguard and protect agreements already entered into, leaving the parties to enter into any further agreements needed in the light of their special needs and circumstances.

305. However, other members questioned the revised formulation of paragraph 1 and urged a return to the text as provisionally adopted in 1980. The overlapping of the new paragraph 1 of article 4 with article X as provisionally adopted in 1980 (see paragraph 270 above), as well as with article 39[294] as proposed in the second report of the Special Rapporteur, was noted and the suggestion was made that its contents be examined in connection with those articles. Attention was also drawn to the fact that the revised text seemed to give some undefined higher status to the draft articles over agreements already concluded. For example, the phrase in the first clause of paragraph 1 beginning "which ... provide measures for..." seemed to impose a rigid condition which would raise doubts as to the continuing validity of certain treaties or agreements. It was presumably not the intention that the provisions included in the framework agreement should constitute norms of *jus cogens*. What was essential was to give every possible encouragement to the States of a watercourse to make agreements governing its uses. In addition, with the abandonment of the "system" concept, the article was unlikely to have the effect of promoting agreements between States having water problems; it called for radical restructuring. Finally, it was urged that the text of paragraph 1 should include a provision along the lines of paragraph 1 of article 3 as provisionally adopted in 1980 (*ibid.*). The most this article should do was to encourage States to enter into special watercourse agreements taking into account the principles and procedures set forth in the draft articles and the special characteristics of the watercourse concerned. Questions of interpretation were raised with regard to paragraph 1, as well as with regard to the other paragraphs of the article.

306. The use of the expression "to an appreciable extent" in paragraph 2 was questioned, as it was unclear how the use of the waters of an international watercourse could be "affected adversely" unless such effect was by necessity appreciable. The need for and position of paragraph 3 were also questioned.

307. The Special Rapporteur took note of the various suggestions made and agreed that paragraph 1 of the new version could be reformulated, taking into account the text of paragraph 1 of article 3 as provisionally adopted by the Commission in 1980. He noted that paragraphs 2 and 3 of his revised text, which had attracted some criticism, were in fact based on the corresponding paragraphs of the text provisionally adopted in 1980.

ARTICLE 5 (Parties to the negotiation and conclusion of watercourse agreements)[295]

308. In introducing the revised text of article 5, the Special Rapporteur indicated that it had been modelled closely on that of article 4 as provisionally adopted by the Commission in 1980 (see paragraph 270 above), except for the deletion of the "system" concept. Some members expressed support for the article, as it provided for the case of a watercourse agreement that applies to the international watercourse as a whole, as well as that of a watercourse agreement applying to only a part of such a watercourse or to a particular project, programme or use.

309. Questions were raised, however, with regard to paragraph 2 of the article, which provided that the right of a watercourse State to participate in the negotiation of a watercourse agreement that applies to only part of a watercourse or to a particular project, etc., was conditional on the implementation of such a proposed agreement affecting "to an appreciable extent" that State's use of the waters of such a watercourse. The expression "to an appreciable extent" was considered vague and perhaps meaningless in the light of paragraph 2 of article 1 and articles 2 and 3. The question posed was at what point the criterion "affected to an appreciable extent" would start to operate. It was urged that the Commission seek technical advice with a view to incorporating the necessary quantitative element into the text to dispel ambiguity. The question was also raised as to which watercourse State or States were entitled to decide when that threshold had been reached, thus allowing participation in the negotiation of the watercourse agreement concerned. Finally, it was observed that the article had left out the position of watercourse States whose use of the waters of the watercourse might be affected, but not

[293] *Yearbook ... 1983*, vol. II (Part Two), p. 70, footnote 247.

[294] Article 39 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 39. Relationship to other conventions and international agreements*

"The provisions of the present Convention do not affect conventions or other international agreements in force relating to a particular international watercourse or any part thereof, to international or regional watercourses or to a particular project, programme or use."

[295] Article 5 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 5. Parties to the negotiation and conclusion of watercourse agreements*

"1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to that international watercourse as a whole.

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

"to an appreciable extent". In any event, the relationship between that expression and the term "appreciable harm" found in article 9 (see paragraphs 336 *et seq.* below) required clarification.

310. Further reflection was urged with regard to the differences between paragraphs 1 and 2. The former afforded the watercourse State concerned the right not only to participate in the negotiation of a watercourse agreement applying to the watercourse as a whole, but also to become a party thereto. Such was not the case, apparently, under paragraph 2, where a watercourse State, in the circumstances described therein, was not entitled expressly to become a party to the relevant agreement. It was also suggested that the reference to article 4 of the draft, which had been omitted by the Special Rapporteur in his revised version, be reinstated in the text of paragraph 2.

311. The novel nature of the article was that it provided for a right of a State to participate in the negotiation of an agreement between other States. It was thought essential, therefore, to provide for practical means of implementation. It was urged that some organizational framework, such as an international organization, must be provided in order to stipulate the context within which such negotiations could take place.

312. On the other hand, the view was expressed that, with the abandonment of the "system" concept, the article had lost its utility and meaning. It was said that paragraph 1 now constituted a tautology and was hence meaningless, and that paragraph 2 was unlikely to encourage watercourse States to conclude watercourse agreements concerning that part of the watercourse which affected their uses.

313. In his concluding remarks, the Special Rapporteur indicated his willingness to reinsert the reference to article 4, paragraph 2, at the appropriate place in paragraph 2 of article 5. In his view, both paragraphs of the article should be retained, as the fact that certain changes had been made in earlier articles did not alter the basic reality that the various parts and components of a watercourse formed an entity with regard to the utilization of the waters thereof. While criticism had been voiced concerning the expression "to an appreciable extent", he recalled that it had been employed by the Commission in articles 3 and 4 as provisionally adopted in 1980 (see paragraph 270 above). Thus the wording "may be affected to an appreciable extent" in the proposed text of article 5, paragraph 2, had been taken verbatim from article 4, paragraph 2, as provisionally adopted by the Commission in 1980.

(*b*) CHAPTER II. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES

314. Chapter II, containing articles 6 to 9, was considered by some members as the most important chapter of the draft, as it set out rights and obligations of watercourse States. It was emphasized that its provisions would have to be read together with those of chapter III, entitled "Co-operation and management in regard to international watercourses", in which important procedures, linked to the rights and obligations of chapter II, were set forth.

ARTICLE 6 (General principles concerning the sharing of the waters of an international watercourse)[296]

315. The Special Rapporteur noted that article 5 as provisionally adopted by the Commission in 1980 (see paragraph 270 above) and article 6 as proposed in his first report and closely based thereon had met with considerable opposition in the Commission and perhaps even more so in the Sixth Committee of the General Assembly. It had been accepted that watercourse States were entitled to a reasonable and equitable share of the benefits arising from uses of an international watercourse. But what had given rise to strong objection was the use of the term "shared natural resource" as a concept. One argument against it had been that it would establish a superstructure from which unforeseeable legal rules could be inferred, with the implicit risk of far-reaching allegations and claims being made in given situations. Other criticisms had been that the article was somewhat unbalanced in form and content, that the waters of an international watercourse should be shared by users in a reasonable and equitable manner, and that a watercourse State should be entitled within its territory to a reasonable and equitable share of the uses of the waters of an international watercourse. He had therefore redrafted article 6, deleting the term "shared natural resource". In so doing he had tried to lay down in a more concretely drafted provision the underlying principle that watercourse States must share in the use of the waters of an international watercourse in a reasonable and equitable manner. In order to obtain the right balance, he had also added a new paragraph 1 stating that a watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

316. Some members of the Commission considered that the revised version of article 6 constituted a major improvement; discussions in the Commission and the Sixth Committee had shown that the "shared natural resource" concept was highly controversial. The new wording provided a more acceptable basis for an equitable international watercourse régime. The essential

[296] Article 6 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 6. General principles concerning the sharing of the waters of an international watercourse*

"1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

"2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner in accordance with the articles of the present Convention and other agreements and arrangements entered into with regard to the management, administration or uses of the international watercourse."

point was not "dividing" or "apportioning" the waters of a watercourse among watercourse States, but recognizing that, once each State received its equitable share in the uses of such waters, it had sovereign powers to use that share provided no injury was done to others.

317. Some members thought it should not be excluded that a watercourse agreement for a certain project, such as development of a dam, could be facilitated by using the concept of shared natural resources, if the watercourse States concerned so agreed. Therefore it was suggested that a new paragraph could be added to the effect that: "To the extent that the watercourse States concerned agree, an agreement for special projects may be made on the basis of the concept of shared natural resources within the framework of that agreement." The Special Rapporteur, however, believed such a provision to be unnecessary.

318. It was emphasized, however, that although the concept of a "shared natural resource" had been deleted, the basic starting-point and content of the article had been retained: each watercourse State was entitled within its territory to a reasonable and equitable share of the uses of the waters of an international watercourse. It was necessary to remember that the subject involved limitations on the territorial sovereignty of States; upper riparian States had a right to use the waters in their territory but must not do so in such a way as to deny the rights of the lower riparian States also to share in the utilization of the waters in their territories. Consequently, it was essential to regulate uses in a reasonable and equitable manner with a view to eliminating injustice and conflict. This approach in turn must recognize reciprocal rights and obligations. The notion of sharing had thus been retained in a more flexible and more practical manner, avoiding the doctrinal overtones implicit in the concept of a shared natural resource, together with its undefined legal consequences.

319. A view was none the less expressed that, while the reference to "sharing in the uses" was less objectionable than "shared natural resource" or "sharing in the waters", it was questionable whether any reference to "sharing" should be made at all. It was sufficient to indicate that every State was entitled and obliged to use the waters of an international watercourse within its territory in a reasonable and equitable manner.

320. Other members, however, questioned the deletion of the "shared natural resource" concept. It was said that that concept had been consecrated in various United Nations fora and documents, such as the Mar del Plata Action Plan adopted by the United Nations Water Conference,[297] the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[298] and various resolutions, such as that containing the Charter of Economic Rights and Duties of States.[299] According to this view, it was not possible to ignore that concept and replace it with vague notions based on what was considered equitable, reasonable or fair, which rendered the article devoid of meaning. The proposition that water constituted a shared natural resource was only logical and a reflection of a fact of nature: waters flow through more than one country and must be shared. Moreover, although that concept did not possess the character of a principle, it did reflect a legal reality from which applicable principles could be derived, such as the right to a reasonable and equitable share of the uses of the waters of an international watercourse. Such principles did not derive from other, irrelevant concepts such as good-neighbourly relations.

321. Another remark made was that it was a difficult but necessary task to see how the removal of the "shared natural resource" concept, which had been at the centre of the whole draft and of the Commission's work on the topic for years, would affect the remainder of the draft.

322. Certain members observed that the new formulation clarified that what was to be shared in a reasonable and equitable manner was not the waters of an international watercourse, but rather the uses of such waters. Support was expressed for that clarification, as well as for adding to it the concept of the sharing of benefits of such waters, in order to make clear that the article guaranteed more than a share in the water itself, but could also include such shared benefits as electricity, power generated by a project, compensation for detriment caused by a project, fish, navigation and environmental benefits. On the other hand, it was said that the emphasis should be on the sharing of the waters themselves, as water was the commodity in short supply. The means of distributing the water were many and varied, but the thing to which States had a claim was water, although they could give up some part of that claim in return for something else, for instance electric power from a dam. What was being allocated was, nevertheless, water.

323. In addition, certain members questioned the reference to "reasonable" and suggested it either be removed as being redundant, given the reference to "equitable", or be replaced by "fair". Other members believed the formulation "reasonable and equitable" should be maintained. Difficulties inherent in the use of the notion of equity were, however, noted. While the use of such vague notions as "reasonable" and "equitable" was considered necessary when dealing with limitations of territorial sovereignty, it was also considered necessary to avoid confusion by specifying that the right of the territorial State to an equitable and reasonable use of the waters and the obligation not to interfere with the equitable and reasonable uses of others must be concordant. Because of the vagueness of such terms as "equitable" and "reasonable", there came into being the duty to co-operate and the duty to negotiate with regard to the extent of the rights involved.

[297] *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), chap. I.

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

[299] General Assembly resolution 3281 (XXIX) of 12 December 1974.

324. Finally, certain members observed that, in the light of the wording of paragraph 2, it was unnecessary and confusing to retain paragraph 1.

325. The Special Rapporteur, in his concluding remarks, said that the discussion had indicated that the deletion of the "shared natural resource" concept in the revised text of article 6 appeared to be generally acceptable. He could not, however, accept the suggestion made during the discussion that all references to "sharing" should be removed from article 6. The whole idea of drawing up a framework agreement was that there existed a unity of interests and an interdependence between watercourse States which, by its very nature, entailed the sharing of the utilization and benefits of the waters of an international watercourse.

ARTICLE 7 (Equitable sharing in the uses of the waters of an international watercourse)[300]

326. With the exception of the deletion of the "system" concept, the text of article 7 as proposed by the Special Rapporteur in his second report remained the same as that proposed in his first report. Some members expressed general support for the article, noting that it introduced the notion of development, use and sharing of the waters of an international watercourse in a reasonable and equitable manner. That was considered an important element in the draft.

327. While certain members noted with approval the inclusion in the article of the principles of good faith and good-neighbourly relations, certain other members questioned or opposed the inclusion of such vague notions, in particular that of good-neighbourly relations. It was said that the abandonment of the "system" concept, in part in order to avoid implying the introduction of a legal superstructure from which unforeseen principles might be inferred, could not be sustained if at the same time another legal superstructure based on the "good-neighbourly relations" concept was inserted. Unforeseen principles might also be inferred from that superstructure and thus that concept should be deleted.

328. Doubts were also expressed with regard to the inclusion of the reference to "optimum utilization" of the waters of an international watercourse. That expression could be interpreted in a manner at variance with the basic concept of the development, use and sharing of such waters in a reasonable and equitable manner. Indeed, it could imply that priority was to be awarded to the most efficient user, which would obviously prejudice technologically less developed watercourse States. In addition, optimum utilization might not be a desirable objective if it was achieved at the expense of the conservation of the resource as a whole.

329. A few members doubted whether the article said anything significant at all and believed it contained language ill-suited for a legal instrument, expressing only wishes and declarations of good intentions.

330. Although the Special Rapporteur had at some stage been attracted to the idea of deleting article 7, or combining it with article 6, he believed that at least the first part of the article had received considerable support and thus merited retention, although the remaining portion of the text posed difficulties which he hoped could eventually be resolved to everyone's satisfaction. He also felt that the concept of "good-neighbourly relations" had emerged as an international legal concept. Although of a general nature, the idea deserved in his opinion to be retained in the law of international watercourses. However, he realized that doubts could be voiced with regard to the term "optimum utilization".

ARTICLE 8 (Determination of reasonable and equitable use)[301]

331. A number of members of the Commission stressed the importance and essential character of article 8, which provided a non-exhaustive list of factors to be taken into account in determining reasonable and equitable utilization of the waters of an international water-

[300] Article 7 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 7. Equitable sharing in the uses of the waters of an international watercourse*

"The waters of an international watercourse shall be developed, used and shared by watercourse States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the international watercourse and its components."

[301] Article 8 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 8. Determination of reasonable and equitable use*

"1. In determining whether the use by a watercourse State of the waters of an international watercourse is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the international watercourse concerned. Among such factors are:

"(*a*) the geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse concerned;

"(*b*) the special needs of the watercourse State concerned for the use or uses in question in comparison with the needs of other watercourse States;

"(*c*) the attainment of a reasonable and equitable balance between the relevant rights and interests of the watercourse States concerned;

"(*d*) the contribution by the watercourse State concerned of waters to the international watercourse in comparison with that of other watercourse States;

"(*e*) development and conservation by the watercourse State concerned of the international watercourse and its waters;

"(*f*) the other uses of the waters of an international watercourse by the State concerned in comparison with the uses by other watercourse States, including the efficiency of such uses;

"(*g*) co-operation with other watercourse States in projects or programmes to obtain optimum utilization, protection and control of the watercourse and its waters, taking into account cost-effectiveness and the costs of alternative projects;

(*Continued on next page.*)

course. In determining the application of such general concepts as "reasonable and equitable" in a concrete situation and in balancing the interests involved, States would no doubt find useful, if not indispensable, a list of factors to be taken into account. The factors listed in the text proposed by the Special Rapporteur were not given in any order of priority; their relative importance would vary with the situation involved. It was recognized, moreover, that an exhaustive list could not be prepared. According to certain members, however, such a non-exhaustive list was of limited value. Inclusion of some factors and omission of others would only complicate matters; it should be for the States concerned, when they negotiated, to decide which factors should be taken into consideration. Thus article 8 should be limited basically to the first sentence of paragraph 1 and the factors now listed in that paragraph should appear in the commentary.

332. Another remark made was that the factors as listed had no relationship to each other, were listed in no order of priority, and appeared unrelated to the various uses of the waters of an international watercourse and to the priorities between such uses. The article demonstrated the difficulty of elaborating, for the purposes of determining what is reasonable and equitable in a concrete case, general rules in the abstract whose importance would vary depending on the circumstances of the case. What was required if the article was to be meaningful was to consider fundamental criteria or factors which would apply in virtually all situations. Reference was made to paragraph 1 (*b*) and (*d*), where both the special needs of watercourse States and their contribution of waters to the watercourse were mentioned. From such basic factors, a few dominant legal principles could be distilled.

333. Several members referred to the need to distinguish between the various uses of waters and to indicate priorities. Mention was made of the desirability of distinguishing between consumption and non-consumption uses. In that connection, numerous references were made to the overriding factor of the dependence of a population on the watercourse for drinking water and survival itself, particularly in the light of expanding populations.

334. Concerning the list of factors provided in paragraph 1 of article 8, a few members made remarks with regard to specific subparagraphs; the new subparagraph (*c*) proposed in the revised version was supported by some speakers. In addition to the suggestions mentioned above, some members supported the inclusion of additional factors such as the following: the existence of special regional or bilateral agreements concerning the watercourse; the possibility of employing alternative uses of the waters; the possibility of providing money damages or compensation in kind, perhaps on a regular basis; the planning of long-term projections and programmes; the establishment of quantifiable criteria; and the effect on navigational uses.

335. The Special Rapporteur expressed appreciation for the various suggestions regarding the existing factors and those which might be added, as well as the suggestions regarding the structure of the article; all those remarks would be taken into account in due course. As to the order of the factors, he reaffirmed his belief that it would not be appropriate to establish any order of priority and noted that the question of population dependence might already be covered by paragraph 1 (*b*), which referred to the special needs of the watercourse State concerned. He also drew attention to the fact that an enumeration similar to that contained in draft article 8 had also been established in article V of the Helsinki Rules prepared by the International Law Association[302] and in article 7 as proposed by the previous Special Rapporteur in his third report.[303]

ARTICLE 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States)[304]

336. Certain members registered their general approval of the text of article 9 as proposed by the Special Rapporteur in his second report. It was said that the whole draft could be built upon the basic principle enunciated therein, which constituted the foundation of the principles contained in articles 7 and 8. It went without

(*Footnote 301, continued.*)

"(*h*) pollution by the watercourse State or States concerned of the international watercourse in general or as a consequence of the particular use, if any;

"(*i*) other interference with or adverse effects, if any, of such use for the uses, rights or interests of other watercourse States including, but not restricted to, the adverse effects upon existing uses by such States of the waters of the international watercourse and its impact upon protection and control measures of other watercourse States;

"(*j*) availability to the State concerned and to other watercourse States of alternative water resources;

"(*k*) the extent and manner of co-operation established between the watercourse State concerned and other watercourse States in programmes and projects concerning the use in question and other uses of the waters of the international watercourse in order to obtain optimum utilization, reasonable management, protection and control thereof.

"2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the watercourse States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

"If the watercourse States concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention."

[302] ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 488; see also *Yearbook ... 1974*, vol. II (Part Two), pp. 357-358, document A/CN.4/274, para. 405.

[303] *Yearbook ... 1982*, vol. II (Part One), p. 90, document A/CN.4/348, para. 106.

[304] Article 9 as proposed by the Special Rapporteur in his second report read as follows:

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

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

saying that the maxim *sic utere tuo ut alienum non laedas* should occupy a proper place in the draft.

337. Further clarifications, however, were urged by some members. If the purpose of article 9 was to prohibit certain activities relating to the uses which a watercourse State made of its share of the waters of a given watercourse, that should be made clear. Furthermore, the concern was expressed that article 9 could enter into conflict with a number of agreements which provided for reparation in the event of appreciable harm. Some members questioned the use of the expression "cause appreciable harm to". It was suggested that the term could be replaced by "have an adverse effect on" or that another, less rigorous text be employed.

338. It was noted that the benefits of a project, if shared between the watercourse States concerned, could outweigh the resultant harm to other uses of the waters. Possibly the rule could be retained, but it should be made clear that the obligation to refrain from an activity that might cause appreciable harm was not applicable where a watercourse agreement or arrangement provided for the equitable apportionment of benefits resulting from that activity.

339. The main point, according to certain members, was to reconcile the duty under article 9 not to cause "appreciable harm" to the rights or interests of other watercourse States with the right enunciated in articles 6 and 7 to an equitable share in the utilization of the waters of an international watercourse. The text of article 9 as it now stood did not make clear that the obligation in question constituted the counterpart of the right of another State to a reasonable and equitable share in the use of the waters. Indeed, it tended to give more protection to the State which was already making use of the resources of the international watercourse, irrespective of whether or not other watercourse States had obtained an equitable share in those resources, and could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from their use. The result would be that the most developed States, which would be the first to derive benefit from the watercourse, would be favoured to the detriment of the developing States, which would normally be late comers in developing and utilizing international watercourses. Solutions must be envisaged with a view to achieving a balanced régime that would ensure that the freedom of a State to use its watercourse was not unduly restricted and that the freedom of other States from being harmed thereby was adequately safeguarded.

340. Certain members felt that the criterion "appreciable harm" was too strict. In that connection, it was suggested that the formula "causing appreciable harm" be replaced by "exceeding a State's equitable share" or "depriving another State of its equitable share". The use of the term "harm" could give rise to a conflict between the concept of "equitable share" under article 6 and that of not causing "appreciable harm" under article 9. Alternatively, drawing inspiration from article 8 as proposed by the previous Special Rapporteur in his third report,[305] the article could prohibit the infliction of appreciable harm, except to the extent allowable under a determination of equitable allocation of the watercourse concerned. Furthermore, the present draft did not make clear that harm should be interpreted as including not only present harm to existing uses, but also future harm in the sense of lost opportunity to construct a project or to put the water to a given use, for example. It was essential to take such "opportunity costs" into account in order to provide some protection against the loss by one State of future benefits as a result of action taken by another State.

341. Reference was also made by certain members to the relationship between the provisions of article 9 and the topic "International liability for injurious consequences arising out of acts not prohibited by international law". Although the rule in article 9 appeared to provide strong protection and involve State responsibility, the factual situations which would arise would often involve circumstances precluding wrongfulness under State responsibility and thus the only remedy left was that provided by the principles of liability. Article 9 dealt with more than transboundary "harm"; it carried the element of "sharing", which then required the introduction of the concept of equity. There was no automatic formula for determining what constituted "harm" and the problems involved could not be solved merely by using words like "appreciable". It was urged that the Commission should take the same approach with regard to both article 9 and the international liability topic. Watercourse States should negotiate and conclude agreements relating to reparation or compensation for transfrontier injury, i.e. causing appreciable harm, should it occur.

342. In connection with the discussion on chapters I and II, some members, as indicated earlier, touched upon articles in subsequent chapters, including the new article 28 *bis* (Status of international watercourses, their waters and constructions, etc. in armed conflicts),[306] article 30 (Establishment of international watercourses or parts thereof as protected national or regional sites)[307]

[305] *Yearbook ... 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156.

[306] Article 28 *bis* as proposed by the Special Rapporteur in his second report read as follows:

> "*Article 28* bis. *Status of international watercourses, their waters and constructions, etc. in armed conflicts*
>
> "International watercourses and their waters, including relevant sites, installations, constructions and works, shall be used exclusively for peaceful purposes consonant with the principles embodied in the United Nations Charter and shall enjoy status of inviolability in international as well as in internal armed conflicts."

[307] Article 30 as proposed by the Special Rapporteur in his second report read as follows:

> "*Article 30. Establishment of international watercourses or parts thereof as protected national or regional sites*
>
> "1. A watercourse State or watercourse States may—for environmental, ecological, historic, scenic or other reasons—proclaim an international watercourse or part or parts thereof a protected national or regional site.
>
> "2. Other watercourse States and regional and international organizations or agencies should in a spirit of good faith and friendly neighbourly relations co-operate and assist such watercourse State or States in preserving, protecting and maintaining such protected site or sites in their natural state."

and the new paragraph 1 of article 34 (Conciliation).[308] It was felt, however, that such discussion was of a preliminary nature and that no conclusions should be drawn therefrom at the present stage.

343. In his summing-up, the Special Rapporteur pointed to the fact that, on certain basic issues concerning the articles contained in chapters I and II, opinions seemed to vary considerably. Therefore he proposed that the articles in these two chapters should be provisionally referred to the Drafting Committee so as to give him the opportunity to receive guidance from the Committee as to the drafting of formulations that might be more acceptable to the Commission for its future work. It was so agreed by the Commission. Furthermore, the Special Rapporteur proposed that in 1985 the Commission should focus its attention on subsequent chapters of the outline, for example chapters III and IV. This proposal likewise seemed acceptable.

[308] Alternative A of paragraph 1 of article 34 as proposed by the Special Rapporteur in his second report read as follows:

"*Article 34. Conciliation*

"PARAGRAPH 1–ALTERNATIVE A

"1. If watercourse States or other States or other States Parties to the present Convention have not been able to resolve a dispute concerning the interpretation or application of the present Convention by the other procedures for peaceful settlement provided for in articles 31, 32 and 33, they shall submit the dispute to conciliation in accordance with articles 34 to 36, unless they agree otherwise."

Chapter VII

STATE RESPONSIBILITY

A. Introduction

344. At its thirty-second session, in 1980, the Commission provisionally adopted on first reading part 1 of the draft articles on State responsibility.[309] Part 1 was composed of 35 draft articles in five chapters and, under the general plan adopted by the Commission[310] for the structure of the draft articles on the topic, concerned "the origin of international responsibility". The comments and observations of Member States on the provisions of part 1 were requested. The replies received from Governments of Member States since the thirty-second session have been issued as documents of the Commission.[311] It is hoped that more comments will be received before the Commission begins its second reading of part 1.

345. At its thirty-second session, the Commission began its consideration of part 2 of the draft articles. Part 2, 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, for example reparative and punitive consequences, the relationship between those two types of consequences, material forms which reparation and sanction may take, etc. The Commission had before it the preliminary report[312] submitted by the Special Rapporteur, Mr. Willem Riphagen. The 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 1 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.[313]

346. At its thirty-third session, in 1981,[314] the Commission had before it the second report[315] of the Special Rapporteur. The report proposed five draft articles for inclusion in part 2 of the draft, as follows: chapter I, "General principles" (arts. 1-3), and chapter II, "Obligations of the State which has committed an internationally wrongful act" (arts. 4 and 5). The Commission decided to refer the draft articles to the Drafting Committee.[316] The Drafting Committee was, however, unable to consider the draft articles at the thirty-third session.

347. At its thirty-fourth session, in 1982, the Commission had before it the third report[317] of the Special Rapporteur, in which he submitted six draft articles (arts. 1-6) for inclusion in part 2 of the draft articles on the topic. The Commission decided to refer the draft articles to the Drafting Committee. It also confirmed[318] the referral to the Drafting Committee of articles 1 to 3 as proposed in the second report of the Special Rapporteur in 1981, 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.[319] The Drafting Committee was, however, unable to consider the draft articles at the thirty-fourth session.

348. At its thirty-fifth session, in 1983, the Commis-

[309] *Yearbook ... 1980*, vol. II (Part Two), pp. 26-62.

[310] 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 as follows: part 1 would concern the origin of international responsibility; part 2 would concern the content, forms and degrees of international responsibility; and a possible part 3, 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.)

[311] See *Yearbook ... 1980*, vol. II (Part One), p. 87, document A/CN.4/328 and Add.1-4; *Yearbook ... 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add.1-4; *Yearbook ... 1982*, vol. II (Part One), p. 15, document A/CN.4/351 and Add.1-3; *Yearbook ... 1983*, vol. II (Part One), p. 1, document A/CN.4/362.

[312] *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

[313] For the views expressed in the Commission, see *Yearbook ... 1980*, vol. I, pp. 73-98, 1597th to 1601st meetings.

[314] 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 part 2 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 1 of the draft. Similar recommendations were made by the General Assembly in its resolution 36/114 of 10 December 1981 and, in general terms, in its resolutions 37/111 of 16 December 1982 and 38/138 of 19 December 1983.

[315] *Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

[316] 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.

[317] *Yearbook ... 1982*, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2.

[318] 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.

[319] *Yearbook ... 1982*, vol. II (Part Two), p. 82, para. 103.

sion had before it and considered the fourth report[320] of the Special Rapporteur. On the recommendation of the Drafting Committee, the Commission provisionally adopted for inclusion in part 2 of the draft articles on the topic articles 1, 2, 3 and 5 as follows:

Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, 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.

B. Consideration of the topic at the present session

349. At the present session, the Commission had before it the fifth report (A/CN.4/380)[321] submitted by the Special Rapporteur.

350. The fifth report consisted mainly of 12 new draft articles (arts. 5-16)[322] to follow the four articles provisionally adopted by the Commission at its thirty-fifth session. By way of provisional commentaries, reference

[320] *Yearbook ... 1983*, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1.

[321] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[322] The 12 new draft articles read as follows (article 5 as provisionally adopted at the thirty-fifth session was renumbered as article 4):

"*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 a breach of an obligation imposed by a judgment 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, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

"(*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 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 measures of protection;

(*Continued on next page.*)

was made to the parts of earlier reports dealing with the various matters addressed in the new draft articles. The new draft articles submitted were meant to replace all earlier draft articles proposed by the Special Rapporteur.

351. In his oral introduction of his report, the Special Rapporteur recalled that, while the Commission had provisionally adopted articles 2 and 3 of part 2 at its previous session (see paragraph 348 above), the question whether or not those articles should contain on opening phrase, reserving the effect of possible rules of *jus cogens,* had been left in abeyance.

352. As to article 2, which allows a deviation from the legal consequences as set out in part 2, the Special Rapporteur still considered it useful—though perhaps not strictly necessary—to mention the possibility that a rule of *jus cogens* excluded such deviation, both in the direction of providing for a legal consequence consisting of an act *prohibited* by such rule of *jus cogens,* and in the direction of excluding a course of conduct in response to an internationally wrongful act, which course of conduct was *prescribed* by a rule of *jus cogens.* Thus, taking into account his new draft articles, he proposed modifying the reference "articles [4] and 5" in the opening phrase to read "articles 4 and 12".

353. As to article 3, dealing with "the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part", an opening proviso, reserving the effect of the provisionally adopted article concerning "the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security" and reserving the effect of *jus cogens,* seemed to the Special Rapporteur to be less indicated. He had, however, suggested in his fifth report that the double reference be retained in view of the fact that the first reservation had already been provisionally adopted by the Commission. Thus, taking into account his new draft articles, he proposed modifying the reference "articles [4] and 5" in the opening phrase to read "articles 4 and 12".

354. In any case, article 3 would have to be reconsidered in the light of the decisions the Commission might take in regard to draft article 16, which put specific legal consequences outside the ambit of the draft articles of part 2.

355. In respect of draft article 5 as submitted in his fifth report, the Special Rapporteur commented that, since the whole of part 2 was supposed to deal with new rights

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(Footnote 322, continued.)

"(*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, paragraph 1 (*a*) and (*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 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."

"*Article 13*

"If the internationally wrongful act committed constitutes 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, paragraph 1 (*a*) and (*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."

and obligations arising between States as a consequence of an internationally wrongful act committed by one of them, a determination of which State (or States) was (or were) to be considered as the "injured State(s)" should appear at the outset. Such a determination did not seem to raise difficulties in the cases mentioned in subparagraphs (*a*) and (*c*).

356. As to subparagraph (*b*), he felt that even though, at least in respect of the judgments of the ICJ, Article 94 of the Charter of the United Nations and the writings of some authors suggested an interest of States other than the States parties to the dispute in the performance of the obligations imposed by such judgments, a general deviation from the rule that a judgment was binding only on the parties to the dispute seemed unwarranted.

357. As to subparagraph (*d*), the Special Rapporteur pointed out that, in view of the wide variety of multilateral treaties, it might be difficult to ascertain which State party or States parties were injured in the case of a breach of an obligation imposed by a particular treaty. While some multilateral treaties purported to lay down general rules concerning the bilateral legal relationship between States parties, for example a coastal State and a flag-State in some conventional provisions relating to the law of the sea, others might also purport to give legal protection to "third" States and, in any case, in the situations mentioned under subparagraph (*d*) (iii) and (iv) no *particular* State party to the treaty could be considered to be the "injured" State.

358. Subparagraph (*e*) corresponded to the qualification by both the ICJ and the Commission of an international crime as one committed *erga omnes;* in this respect, reference should be made to draft article 14, paragraph 3.

359. While a detailed commentary on draft articles 6 to 16 could be made only after their consideration by the Commission, the Special Rapporteur, referring to observations made in previous reports, indicated the system underlying those draft articles. While a sliding scale of responses to internationally wrongful acts was set out in articles 6 and 7 relating to reparation, article 8 relating to reciprocity, and article 9 relating to reprisals—reserving article 15 relating, *inter alia,* to self-defence—a sliding scale as to the seriousness of the internationally wrongful act was meant to be reflected in articles 6, 8 and 9 relating to *all* internationally wrongful acts, article 14 relating to additional legal consequences flowing from international crimes, and article 15 relating to particular additional legal consequences of the international crime of aggression.

360. In conclusion, the Special Rapporteur stated the view that the rights and obligations of States under international law could be seen as a set of three concentric circles, the outer one representing the régime of aggression and self-defence, the middle one representing the régime of internationally wrongful acts and the responses to them, and the inner one representing the régime of prevention and compensation in respect of acts not prohibited by international law. In between those régimes there were certain "twilight zones". In this connection, the Special Rapporteur drew attention to the relationship between part 2 of the draft articles and articles 30, 33 and 34 of part 1.[323]

361. States had sometimes resorted to measures involving a use of armed force, limited in time, place and purpose, within the territory of another State in order to protect and rescue their nationals, ships or official representatives, brought or held within the territory of the other State through a previous and continuing internationally wrongful act of that State. Such States had then tried to justify their action by invoking "the inherent right of self-defence", or the right to take "reprisals" in response to the internationally wrongful act, or something akin to a "state of necessity" as a circumstance preceding the wrongfulness of their responsive action. While some writers conclude from the practice of the Security Council that such measures may avoid condemnation and other writers point to the judgment of the ICJ in the *Corfu Channel* case[324] as admitting, in exceptional cases, a form of "armed reprisal", still other writers draw a different conclusion from this judgment and consider the relevant practice of the Security Council as an expression of policy rather than as a description of the law.

362. The Special Rapporteur continued to feel that the Commission could not be expected to take a definite stand on this issue, as indeed it had abstained from doing in dealing with articles 30, 33 and 34 of part 1. In any case, under article 12, subparagraph (*b*), as proposed, there could be no suspension of the performance of obligations by way of reprisal if the obligation resulted from a peremptory norm of general international law. If it was agreed that there was such a norm prohibiting all forms of armed reprisals in all circumstances, the point would be covered by that rule. But even if such a general prohibition was not admitted in all cases, reprisals always remained subject to the rule proposed in article 9, paragraph 2, providing that such a reprisal "... shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed".

363. The Commission considered the fifth report at its 1858th, 1860th, 1861st and 1865th to 1867th meetings, on 10, 12, 13, 18 and 20 July 1984.

364. The overall structure of the set of draft articles was generally considered acceptable. As to the sequence of the articles, some members would have a slight preference for dealing first with the legal consequences of international crimes. Others favoured a special chapter devoted to those consequences as constituting a "self-contained régime", while one member felt that the Commission should concentrate on the other internationally wrongful acts, the legal consequences of which were better known from a long-standing practice of States. Some members, on the other hand, wished the draft articles to elaborate more on the particular legal consequences of international crimes and, more specifically, on the legal

[323] *Yearbook ... 1980,* vol. II (Part Two), p. 33.

[324] Judgment of 9 April 1949, *I.C.J. Reports 1949,* p. 4.

consequences of aggression, including the content of the right of self-defence, and the duty of all States to render assistance to the victim State.

365. Several members stressed the link between part 2 of the draft under consideration and part 3, relating to the "implementation" of international responsibility. They pointed out that part 2, setting out the legal consequences of an internationally wrongful act, necessarily presupposed that such an act had been committed, a point on which the States involved would be likely to disagree. The question then would arise whether the alleged injured State or States would be entitled "provisionally" to invoke articles 6, 8 and 9 and, as the case might be, articles 14 and 15, before the existence of the relevant internationally wrongful act or international crime had been legally established. A similar question would arise as to the application of article 13, which purported to take away some of the limitations on the entitlement of the alleged injured State to react to the alleged internationally wrongful act by way of reciprocity or by way of reprisal, in the case of a "manifest" violation of obligations arising from a multilateral treaty, which destroyed "the object and purpose of that treaty".

366. In this connection, it was pointed out that the Commission had decided to take up the question of the "implementation" of international responsibility only *after* dealing with part 2 as a whole, and that, in the mean time, draft article 10 and draft article 11, paragraph 2, to a certain extent already took into account the possibility of *existing* "international procedures for peaceful settlement" of disputes and "procedure[s] of collective decisions for the purpose of enforcement of the obligations"; procedures of the latter kind were also referred to in draft article 14, paragraph 3, and implicitly in draft article 15. In the absence of such dispute-settlement and other procedures, the articles in part 2 necessarily left their "provisional" interpretation and application to the States concerned.

367. In respect of draft article 5, some members stressed the difficulties inherent in determining the "injured State" in view of the great variety of internationally wrongful acts, and therefore suggested a general formula flexible enough to cover all cases. Other members, though questioning the drafting of some subparagraphs of this article, could support the attempt made in the article to determine, at the outset, the meaning of the term "injured State" for the purposes of the subsequent articles. Several members, however, expressed doubt as regards the inclusion and wording of subparagraph (*e*), relating to international crimes, and considered either that, as a consequence of their views in respect of the separate treatment to be given to international crimes (see paragraph 364 above), this subparagraph should be deleted, or that a distinction should be made between directly affected States and other States, particularly in view of the entitlement of those States individually to invoke the legal consequences indicated in the articles that followed.

368. In this connection it was pointed out, however, that an international crime might well be, at the same time, an internationally wrongful act as referred to in one or more of the other subparagraphs of article 5, so that "all other States" were not necessarily *equally* affected, that in such a case legal consequences as described in draft articles 6, 8 and 9 could not be excluded, and that the question of individual or collective reaction was addressed in other provisions of the draft, notably article 14, paragraph 3.

369. In respect of draft article 6, paragraph 1, some members questioned the advisability of entering into a detailed description of the possible elements of "reparation". As to the individual subparagraphs, the possible relationship between subparagraph (*b*) and article 22 of part 1 of the draft[325] was evoked, and the nature and effect of the "appropriate guarantees" mentioned in subparagraph (*d*) was questioned.

370. While recognizing that draft article 6, paragraph 2, embodied the standard set out in the *Factory at Chorzów* case,[326] some members would prefer a more flexible formula, allowing in particular cases "exemplary damages" or, as the case may be, a lower standard of compensation.

371. Some members suggested the deletion of draft article 7, which was concerned with a particular type of internationally wrongful act and, as such, was less suitable for inclusion in the present draft articles.

372. In respect of draft articles 8 and 9, some members pointed out the difficulties of distinguishing between measures by way of reciprocity and measures by way of reprisal. One member suggested that the limitations of the right to take reprisals set out in draft article 9, paragraph 2, and draft article 10 should also be applicable to measures taken by way of reciprocity.

373. Other members drew attention to the relationship between the present draft articles, particularly draft article 11, and the articles of the 1969 Vienna Convention on the Law of Treaties[327] relating to the *exceptio non adimpleti contractus*. While admitting that, as suggested in draft article 16, subparagraph (*a*), the invalidity, termination and suspension of the operation of treaties fell outside the ambit of the legal consequences dealt with in part 2 of the draft, they pointed to the fine and somewhat formalistic distinction between that question and the suspension of the *performance* of treaty obligations.

374. With regard to draft article 12, subparagraph (*a*), several members questioned whether this subparagraph corresponded fully to the actual rules of diplomatic law, in particular as to the exclusion of measures taken by way of reciprocity. While recognizing that, according to the judgment of the ICJ of 24 May 1980,[328] in cases such as that dealt with in that judgment an abuse of immunity could not be countered by an infringement of that

[325] *Yearbook ... 1980*, vol. II (Part Two), p. 32.

[326] Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17.*

[327] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

[328] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3.

immunity, they questioned whether the rule as proposed in this subparagraph was not drafted in too general a way. On the other hand, one other member suggested including facilities and privileges in this provision and extending it to other persons enjoying immunities under international law.

375. Draft article 12, subparagraph (*b*), according to one member, should be a separate article. Another member doubted the wisdom of including any reference at all to *jus cogens* within the context of the articles on State responsibility.

376. One member objected to the exclusion of the applicability of article 10 in the case referred to in article 13. Another member doubted whether, in such a case, where the object and purpose of the treaty was destroyed by a manifest violation of the obligations imposed by it, article 11, paragraph 1 (*c*), should continue to apply in respect of *all* "obligations ... stipulated for the protection of individual persons irrespective of their nationality".

377. Several members questioned the separate treatment of international crimes in general and of the international crime of aggression in particular in draft articles 14 and 15, respectively, and favoured combining them. One member stressed the necessity of making clear in draft article 14 that paragraph 2 could not be deviated from by the rules referred to in paragraph 1, and of adding to paragraph 2 the general obligation of all States to render assistance to the victims of aggression. The same member considered paragraph 3 of the article a considerable weakening of the effect of the first two paragraphs.

378. As to draft article 16, one member suggested that there might be other topics to be excluded from the ambit of the present draft articles. One other member suggested an extension of subparagraph (*c*) to cover the laws of war generally, including the use of nuclear arms.

379. In conclusion, several members commented generally that the submission of this new set of draft articles marked a major breakthrough in the consideration of part 2 of the topic by the Commission. It should enable the Commission to make progress in the drafting of articles within a measurable time-scale.

380. At the end of its debate, the Commission referred draft articles 5 and 6 to the Drafting Committee on the understanding that members who had not had the opportunity to comment on those articles at the present session could do so at an early stage in the next session, in order that the Drafting Committee could also take those comments into account.

Chapter VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme and methods of work of the Commission

381. The Commission established the Planning Group of its Enlarged Bureau at its 1817th meeting, on 10 May 1984, to review the programme and methods of work of the Commission.

382. The Planning Group was composed of Mr. Sompong Sucharitkul (Chairman), Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. S. P. Jagota, Mr. Abdul G. Koroma, Mr. Zhengyu Ni, Mr. Frank X. Njenga, Mr. Robert Q. Quentin-Baxter, Mr. Paul Reuter, Mr. Constantin A. Stavropoulos, Mr. Doudou Thiam and Mr. Nikolai A. Ushakov.

383. The Planning Group held five meetings, on 16 and 21 May and 2, 16 and 19 July 1984, and considered questions relating to the organization of work of sessions of the Commission, the Drafting Committee, documentation and other matters.

384. The Enlarged Bureau considered the report of the Planning Group on 23 July 1984. On the basis of proposals made by the Planning Group, the Enlarged Bureau recommended to the Commission that paragraphs 385 to 397 below be included in the report of the Commission to the General Assembly. This recommendation was adopted by the Commission at its 1874th meeting, on 26 July 1984.

Organization of work of sessions of the Commission

385. The question was raised whether it was feasible for the Commission, in view of the number of topics in its current programme, to endeavour to give major consideration at annual sessions to all topics in its programme. In answer to that question, experience had shown that, in the light of priorities and other relevant factors, the Commission should give major consideration at an annual session only to some of the topics in its programme and postpone major consideration of the other topics to the next annual session; in other words, the Commission should stagger its major consideration of topics from year to year. The suggestion was made with reference to the remaining years of the present term of membership in the Commission, namely 1985 and 1986, that the Commission ought to determine first what could realistically be achieved on each of the topics in its programme before completion of its present term in 1986, and that it should then plan its work in such a way that major consideration would be given, in the remaining years 1985 and 1986, to topics on which most progress could be made, taking into account the importance of each topic.

386. The Commission agreed that it should, as far as possible and in the light of all relevant factors, and allowing also for the necessary flexibility, consider how available time could best be allocated between the topics in its current programme at its two forthcoming sessions, having regard in particular to the topics on which most progress could be achieved before conclusion of its present term of membership. Nevertheless, there was agreement that all topics in the present programme of the Commission might need to be considered, however briefly, at an annual session, particularly as special rapporteurs would wish to have the guidance of the Commission with respect to the course of their future work.

387. The Commission decided that, at its thirty-seventh session, it should continue its work on all the topics in its current programme, but in doing so bear in mind the clear desirability of its achieving as much progress as possible in the way of preparation of draft articles on topics in the remaining two years of the present five-year term of membership of the Commission. It appears to the Commission, in this connection, that it might be in a position to complete, before conclusion of the present term of membership, a 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", and possibly also—and this would be highly desirable—a first reading of part 2 and part 3 of the draft articles on "State responsibility". It seemed to the Commission that it should take these possibilities into account when deciding on allocation of time for consideration of topics at the beginning of its thirty-seventh session, in 1985, and its thirty-eighth session, in 1986.

388. The question was raised whether it would be desirable for the present annual sessions of the Commission to be divided into two parts, alternating between Geneva and New York. It was suggested that such an arrangement would facilitate the attendance of those members of the Commission who might find it difficult to be present throughout a session. If combined with a staggering of consideration of items, as noted in paragraph 385 above, it might also lead to better organization of the Commission's programme of work. On the other hand, the view was expressed that the present practice of one annual session should be maintained and that division of the session into two might create difficulties for those members of the Commission who found the present arrangement satisfactory. Such a division

would also have effects on the organization of the Commission's programme of work and the preparation of pre-session and post-session documentation. The view was expressed that a change in the traditional practice of the Commission would involve an amendment of its statute and certainly ought not to take effect in the course of, but rather at the beginning of, a five-year term of membership in the Commission. The Commission noted that there had been an occasion in the past when the length of a session of the Commission had been extended and had been held in two places on two different dates; exceptional circumstances may require that the Commission do likewise in the future. The possibility of a particular annual session being held in two parts if there were exceptional tasks should not be excluded. Nevertheless, having considered the matter in the light of the factors mentioned above, the Commission did not feel it was in a position to suggest any change in the present practice of one annual session.

Drafting Committee

389. The Commission, having in mind the number of draft articles already referred and likely to be referred to the Drafting Committee, emphasized the importance of the 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 had been established and had convened its first meeting in the first week of the session and had, in consequence, greatly reduced its backlog. 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 Committee to deal with draft articles referred to it at that particular session as well as any other draft articles left pending. It was also noted 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 been done on occasion on an *ad hoc* basis. The need may arise for the formation of such a working group in regard to draft articles on some topics, such as "International liability for injurious consequences arising out of acts not prohibited by international law" and "The law of the non-navigational uses of international watercourses".

Documentation

390. The Commission, while appreciating the efforts made by special rapporteurs to complete their reports to the Commission as early as possible and the efforts made by the Secretariat to have all pre-session documentation distributed to members of the Commission in due time, continued to reiterate the great importance of early submission of reports by special rapporteurs and early distribution of all pre-session documentation, as far in advance of the commencement of a session as possible.

391. Several requests, it was noted, had been made in the Commission for translation of the Secretariat study entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law" (ST/LEG/15) into other official languages. The Commission requested that necessary arrangements be made by the Secretariat to ensure translation of the study into the other official languages in time for the thirty-seventh session of the Commission, in 1985.

392. 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 1983 relating to the report of the Commission had been issued earlier than in previous years. This had enabled the Codification Division of the Office of Legal Affairs as usual to prepare and make available to members of the Commission an excellent topical summary of the discussions (A/CN.4/L.369) 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, and from the point of view of enabling all members of the Commission to undertake the necessary studies prior to the convening of a session.

393. The Commission noted that there had been delays in the publication of the *Yearbook of the International Law Commission* owing to technical causes. 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 following the work of the Commission.

Other matters

394. 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. A number of members of the Planning Group recalled that, at the thirty-fifth session of the Commission, several members of that Group had suggested that senior experts should be added to the staff of the Codification Division with a view to assisting special rapporteurs in the form of research and studies, analysis and assistance in compiling and classifying relevant State practice, doctrine and judicial decisions. The view was expressed that this was a matter which the Secretariat might wish to explore. This suggestion, it was reaffirmed, in no way diminished the Commission's appreciation of the excellent work of the special rapporteurs and the assistance provided by the Codification Division.

395. The Codification Division had, it was noted, prepared a study in 1971 entitled "Survey of international law". [329] Though not of immediate relevance to any particular topic on the Commission's present agenda, the study was of considerable value to the codification of international law and updating it at this stage would, it was felt, be useful. The Commission also expressed its appreciation of the value of the *United Nations Juridical Yearbook* and its hope that production of the annual volume of that publication could be expedited.

396. The question of the preparation of a consolidated index to the present 18 volumes of the *United Nations Reports of International Arbitral Awards* was also mentioned. The Commission noted that a consolidated index for the first three volumes of the *Reports* had been prepared by the United Nations and that the Secretariat might wish to consider how an appropriate consolidated index to the *Reports* could best be undertaken.

397. The Commission agreed that it should continue at its 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. Inter-American Juridical Committee

398. The Commission was represented at the August 1983 session of the Inter-American Juridical Committee in Rio de Janeiro by Mr. Khalafalla El Rasheed Mohamed Ahmed, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The Commission was also represented at the January 1984 session of the Inter-American Juridical Committee in Rio de Janeiro by Mr. Paul Reuter, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission.

399. The Inter-American Juridical Committee was represented at the Commission's thirty-sixth session by Mr. Herrera Marcano. Mr. Herrera Marcano addressed the Commission at its 1849th meeting, on 27 June 1984. He referred, among other matters, to the work of the Inter-American Juridical Committee at its August 1983 and January 1984 sessions, which, he noted, had been in preparation for the Third Inter-American Specialized Conference on Private International Law, held at La Paz, Bolivia, in May 1984. That Conference, on the basis of drafts prepared by the Committee, had adopted the Inter-American Convention on the Legal Personality and Capacity of Juridical Persons in Private International Law; a Protocol to the Inter-American Convention on the Taking of Evidence Abroad; and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards. A draft inter-American convention on conflicts of laws concerning the adoption of minors had also, Mr. Herrera Marcano said, been prepared by the Inter-American Juridical Committee in January 1984. The Committee had considered, Mr. Herrera Marcano noted, proposals for the limitation and inspection of armaments and military forces. Other matters considered by the Committee included the question of an appeals procedure for decisions of the Administrative Tribunal of OAS.

400. The Commission, having a standing invitation to send an observer to the sessions of the Inter-American Juridical Committee, requested its Chairman, Mr. Alexander Yankov, to attend the next session of the Committee or, if he were unable to do so, to designate another member of the Commission for that purpose.

2. Asian-African Legal Consultative Committee

401. The Asian-African Legal Consultative Committee was represented at the Commission's thirty-sixth session by Mr. Ki Nemoto. Mr. Nemoto addressed the Commission at its 1869th meeting, on 23 July 1984.

402. Mr. Nemoto referred to the fact that co-operation between the Commission and the Asian-African Legal Consultative Committee now extended over two decades. The Committee at this stage, he stated, was particularly interested in two topics under consideration in the Commission, namely "Jurisdictional immunities of States and their property" and "The law of the non-navigational uses of international watercourses". Mr. Nemoto referred, in this connection, to the November 1983 meeting in New York of Legal Advisers of States members of the Asian-African Legal Consultative Committee. The Legal Advisers had expressed the hope that the Commission would authoritatively settle such matters, on which there was divergent State practice. The Legal Advisers were of the view that it might be appropriate for the principle of reciprocity to be made a governing factor in the application of jurisdictional immunity. The Committee had decided to continue its work on the non-navigational uses of international watercourses in the light of the work being done by the Commission. Mr. Nemoto referred to the current programme of work of the Committee, which concerned such matters as the 1982 United Nations Convention on the Law of the Sea and the work of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea; the promotion and protection of investments; the status and treatment of refugees; mutual co-operation in judicial assistance; and the role of the ICJ in the settlement of disputes. The Committee was expected, at its next session, to have a preliminary exchange of views on the concept of peace zones in international law.

403. The Commission, having a standing invitation to send an observer to the sessions of the Asian-African Legal Consultative Committee, requested its Chairman, Mr. Alexander Yankov, to attend the next session of the Committee or, if he were unable to do so, to designate another member of the Commission for that purpose.

3. Arab Commission For International Law

404. The Arab Commission for International Law was represented at the Commission's thirty-sixth session by

[329] *Yearbook ... 1971*, vol. II (Part Two), p. 1, document A/CN.4/245.

Mr. Iyadh Ennaifer and Mr. Osman Hajje. Mr. Ennaifer addressed the Commission at its 1869th meeting, on 23 July 1984.

405. Mr. Ennaifer stated that he wished to emphasize the importance the Arab Commission for International Law placed on its co-operation with the International Law Commission and on its participation through an observer in the deliberations of the International Law Commission. Mr. Ennaifer stated that there was a complementarity between the work of the two Commissions in that the Arab Commission sought to pursue on a regional basis objectives that were similar to those of the International Law Commission. Mr. Ennaifer conveyed the good wishes of the Arab Commission for International Law to the International Law Commission.

4. European Committee on Legal Co-operation

406. The Commission was represented at the December 1983 session of the European Committee on Legal Co-operation in Strasbourg by Mr. Jens Evensen, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission.

407. The European Committee on Legal Co-operation was unable to be represented at the Commission's thirty-sixth session.

408. The Commission, having a standing invitation to send an observer to the sessions of the European Committee on Legal Co-operation, requested its Chairman, Mr. Alexander Yankov, to attend the next session of the Committee or, if he were unable to do so, to designate another member of the Commission for that purpose.

C. Date and place of the thirty-seventh session

409. The Commission decided to hold its next session at the United Nations Office at Geneva from 6 May to 26 July 1985.

D. Representation at the thirty-ninth session of the General Assembly

410. The Commission decided that it should be represented at the thirty-ninth session of the General Assembly by its Chairman, Mr. Alexander Yankov.

E. International Law Seminar

411. Pursuant to General Assembly resolution 38/138 of 19 December 1983, the United Nations Office at Geneva organized the twentieth session of the International Law Seminar during the Commission's thirty-sixth session. 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.

412. A selection committee met on 9 April 1984 to select the participants in this session of the Seminar from among more than 60 candidates. The committee comprised Mr. P. 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. E. Chrispeels (UNCTAD).

413. Twenty-four candidates, all of different nationalities and mostly from developing countries, were selected. In addition, three UNITAR fellowship holders and three observers were admitted to this session of the Seminar.

414. During the session of the Seminar, which was held at the Palais des Nations from 4 to 22 June 1984, the participants had access to the facilities of the United Nations Library. There were given copies of the basic documents necessary for following the discussions of the Commission and the Seminar lectures 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. At the end of the session, the Chairman of the Commission presented participants with a certificate testifying to their diligent work at the twentieth session of the Seminar.

415. During the three weeks of the session, the following nine members of the Commission gave lectures, which were followed by discussions: Mr. Laurel B. Francis, "Introduction to the work of the International Law Commission"; Mr. Sompong Sucharitkul, "Questions relating to the jurisdictional immunity of States"; Mr. José M. Lacleta Muñoz, "International law after the Second World War (development, codification, application)"; Mr. Jens Evensen, "Introduction to the Convention on the Law of the Sea"; Mr. Ahmed Mahiou, "Reflections on the international law of development"; Mr. Stephen C. McCaffrey, "The work of the International Law Commission relating to the environment"; Sir Ian Sinclair, "*Jus cogens* and the law of treaties: later developments"; Mr. Paul Reuter, "The treaties of international organizations"; and Mr. Nikolai A. Ushakov, "International crimes".

416. In addition, talks were given by Mr. D. I. Carter on the activities of the Office of the United Nations Disaster Relief Co-ordinator and by Mr. C. Swinarski on international humanitarian law as a branch of public international law. After the latter talk, the participants in the Seminar visited the headquarters of ICRC where they were received by Mr. J. Moreillon, Director for General Affairs, and Mr. Alexandre Hay, President of ICRC.

417. As at the last two 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.

418. 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.

419. With the award of fellowships it is possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from participating in the session. This year, fellowships were awarded to 15 participants. Of the 447 participants, representing 108 nationalities, who have been accepted since the beginning of the Seminar, 213 have been awarded fellowships.

420. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable the young lawyers selected to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva.

421. In order to ensure that the International Law Seminar can hold its twenty-first session in 1985, i.e. to make it possible for fellowships to be awarded to a sufficient number of candidates from developing countries, many of which are very far from Geneva, the Commission most strongly urges that as many States as possible should make a contribution, if only a token one, to the travel and living expenses which have to be met, thus demonstrating their interest in the sessions of the International Law Seminar.

CHECK-LIST OF DOCUMENTS OF THE THIRTY-SIXTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/375	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 6 above, paragraph 8.
A/CN.4/376 and Add.1 and 2	Sixth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	Reproduced in *Yearbook ... 1984*, vol. II (Part One).
A/CN.4/377 [and Corr.1]	Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	*Idem.*
A/CN.4/378	International liability for injurious consequences arising out of acts not prohibited by international law: replies received in response to the questionnaire prepared by the Special Rapporteur with the assistance of the Secretariat	*Idem.*
A/CN.4/379 and Add.1	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: information received from Governments	*Idem.*
A/CN.4/380 [and Corr.1]	Fifth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	*Idem.*
A/CN.4/381 [and Corr.1]	Second report on the law of the non-navigational uses of international watercourses, by Mr. Jens Evensen, Special Rapporteur	*Idem.*
A/CN.4/382	Fifth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	*Idem.*
A/CN.4/383 and Add.1	Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	*Idem.*
A/CN.4/L.369	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-eighth session of the General Assembly	Mimeographed.
A/CN.4/L.370	Draft report of the International Law Commission on the work of its thirty-sixth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10* (A/39/10). For the final text, see p. 5 above.
A/CN.4/L.371 and Add.1	*Idem:* chapter II (Draft Code of Offences against the Peace and Security of Mankind)	*Idem*, see p. 7 above.
A/CN.4/L.372 and Add.1	*Idem:* chapter III (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	*Idem*, see p. 18 above.
A/CN.4/L.373 [and Corr.1] and Add.1 and 2	*Idem:* chapter IV (Jurisdictional immunities of States and their property)	*Idem*, see p. 58 above.
A/CN.4/L.374 and Add.1	*Idem:* chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	*Idem*, see p. 73 above.
A/CN.4/L.375 and Add.1 [and Add.1/Corr.1] and Add.2	*Idem:* chapter VI (The law of the non-navigational uses of international watercourses)	*Idem*, see p. 82 above.
A/CN.4/L.376 and Add.1	*Idem:* chapter VII (State responsibility)	*Idem*, see p. 99 above.
A/CN.4/L.377	*Idem:* chapter VIII (Other decisions and conclusions of the Commission)	*Idem*, see p. 105 above.
A/CN.4/L.378	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee: articles 10, 11, 13 to 17, 20, 21, 23 (paragraphs 2, 3 and 5), 24 and 25	Texts reproduced in *Yearbook ... 1984*, vol. I, summary records of the 1862nd and 1864th meetings.

A/CN.4/L.379	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: articles 13, 14, 16, 17 and 18	*Idem*, 1868th and 1869th meetings.
A/CN.4/L.380	*Idem*, revised text of article 19 proposed by the Special Rapporteur	Mimeographed. See p. 61 above, footnote 202.
A/CN.4/L.381	*Idem*, text of paragraph 2 of article 11 proposed by the Special Rapporteur	*Idem*, see p. 59 above, footnote 200.
A/CN.4/SR.1814-A/CN.4/SR.1874	Provisional summary records of the 1814th to 1874th meetings of the International Law Commission	Mimeographed. The final text appears in *Yearbook ... 1984*, vol. I.

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