

YEARBOOK
OF THE
INTERNATIONAL
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1984

Volume II
Part One

Documents of the thirty-sixth session

UNITED NATIONS



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NOTE

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

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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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CONTENTS

	<i>Page</i>
Abbreviations	iv
Note concerning quotations	iv
State responsibility (agenda item 2)	
<i>Document A/CN.4/380</i> . Fifth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	1
Jurisdictional immunities of States and their property (agenda item 3)	
<i>Document A/CN.4/376 and Add.1 and 2</i> . Sixth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	5
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (agenda item 4)	
<i>Document A/CN.4/379 and Add.1</i> . Information received from Governments	59
<i>Document A/CN.4/382</i> . Fifth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	72
Draft Code of Offences against the Peace and Security of Mankind (agenda item 5)	
<i>Document A/CN.4/377</i> . Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	89
The law of the non-navigational uses of international watercourses (agenda item 6)	
<i>Document A/CN.4/381</i> . Second report on the law of the non-navigational uses of international watercourses, by Mr. Jens Evensen, Special Rapporteur	101
International liability for injurious consequences arising out of acts not prohibited by international law (agenda item 7)	
<i>Document A/CN.4/378</i> . Replies received in response to the questionnaire prepared by the Special Rapporteur with the assistance of the Secretariat	129
<i>Document A/CN.4/383 and Add.1</i> . 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	155
Check-list of documents of the thirty-sixth session	174

ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance
ECE	Economic Commission for Europe
EEC	European Economic Community
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IANEC	Inter-American Nuclear Energy Commission
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IEA	International Energy Agency (OECD)
ILA	International Law Association
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization (now IMO)
IMO	International Maritime Organization
ITU	International Telecommunication Union
NEA	Nuclear Energy Agency (OECD)
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization

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<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (beginning in 1931)

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NOTE CONCERNING QUOTATIONS

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

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

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/380*

Fifth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur

[Original: English]
[4 April 1984]

CONTENTS

Section	Paragraphs	Page
I. INTRODUCTION	1-8	1
II. DRAFT ARTICLES		2

I. Introduction

1. In order to expedite the study of the topic, the Special Rapporteur herewith submits 16 draft articles, based on his previous reports¹ and on the discussions relating thereto at previous sessions of the International Law Commission and of the Sixth Committee of the General Assembly.

2. At a later stage the Special Rapporteur will submit the commentaries to these draft articles. This course of action is dictated by the following considerations. First, parts of the appropriate commentaries are already contained in previous reports; secondly, the final commentary depends on the final drafting of the articles and the observations made in the Drafting Committee and the Commission itself in the course of the adoption of the draft articles.

3. Obviously, apart from remarks concerning the content and drafting of the articles submitted in the present report,

the Commission may wish to elaborate in greater detail some or all of these texts and may consider it useful to treat in part 2 of the draft subtopics not addressed in these draft articles (such as the quantum of damages or the so-called nationality of claims).

4. The draft articles submitted in this report are meant to replace all earlier articles proposed by the Special Rapporteur.

5. On further reflection, the Special Rapporteur has come to the conclusion that the matter dealt with in draft article 4 as submitted in his third report (*jus cogens*),² which the Commission discussed and referred to the Drafting Committee but on which the Committee did not make a proposal to the Commission, could very well be dealt with within the framework of the articles on reciprocity and reprisals (see articles 8 and 9 as submitted below).

6. Moreover, since the majority of the Commission apparently is of the opinion that aggression and self-defence are matters falling within the scope of the topic of State

* Incorporating document A/CN.4/380/Corr.1.

¹ See (a) second report: *Yearbook* . . . 1981, vol. II (Part One), p. 79, document A/CN.4/344;

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

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

² Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 148.

responsibility, the Special Rapporteur wishes to withdraw his proposal, made in the third report, to insert a general article on "proportionality" (article 2).³ Here again, the matter would seem to be more properly dealt with within the framework of the article on reprisals (see article 9, paragraph 2, as submitted below).

7. There has been some discussion at previous sessions of the Commission on the order in which the various sub-topics should be treated. The draft articles now presented deal with the legal consequences of international crimes and, in particular, with the legal consequences of aggression at the very end, just before the saving clause (see articles 14 and 15). Obviously this is not because of any lesser importance of those wrongful acts. On the contrary, if one arranges the articles on the legal consequences of internationally wrongful acts in increasing order of gravity, and if one recognizes that such legal consequences are cumulative in the sense that the legal consequences of international crimes are added to the legal consequences of internationally wrongful acts in general, such an order seems to be indicated. However, this is a mere matter of drafting and another order may well be envisaged.

8. In view of the above, the Special Rapporteur will, at the present stage, limit himself to the following commentaries:

Article 1: text and commentary provisionally adopted by the Commission at its thirty-fifth session.⁴

Article 2: idem; the reference between square brackets to article 4 is now replaced by a reference to new article 12 (see paragraph 5 above) and the reference to article 5 is replaced by a reference to new article 4 (see the commentary to article 4 below).

Article 3: idem.

Article 4: idem; previously adopted as article 5 (see paragraph 5 above).

Article 5: new; compare paragraphs 112 *et seq.* and paragraphs 122-123 of the fourth report.⁵

³ *Ibid.*, para. 146.

⁴ *Yearbook . . . 1983*, vol. II (Part Two), p. 42.

⁵ See footnote 1 (c) above.

Article 6: compare article 4 as submitted in the second report.⁶

Article 7: compare article 5 as submitted in the second report.⁷

Article 8: compare paragraphs 95 *et seq.* of the fourth report.⁸

Article 9, paragraph 1: idem.

Article 9, paragraph 2: compare article 2 as submitted in the third report⁹ (see also paragraph 6 above).

Article 10: compare paragraphs 102 *et seq.* of the fourth report.¹⁰

Article 11: compare paragraphs 84 *et seq.* and paragraph 124 of the fourth report.¹¹

Article 12: compare article 4 and commentary, as submitted in the third report;¹² see also paragraph 59 of the second report.¹³

Article 13: compare paragraphs 109 and 130 of the fourth report.¹⁴

Article 14, paragraph 1: idem; see also article 6 and commentary, as submitted in the third report.¹⁵

Article 15: idem (see also paragraphs 6 and 7 above).

Article 16: compare paragraphs 126 and 127 of the fourth report;¹⁶ see also article 12, subparagraph (a), as submitted below.

⁶ Document A/CN.4/344 (see footnote 1 (a) above), para. 164.

⁷ *Ibid.*

⁸ See footnote 1 (c) above.

⁹ Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 146.

¹⁰ See footnote 1 (c) above.

¹¹ *Ibid.*

¹² Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 148.

¹³ See footnote 1 (a) above.

¹⁴ See footnote 1 (c) above.

¹⁵ Document A/CN.4/354 and Add.1 and 2 (see footnote 1 (b) above), para. 150.

¹⁶ See footnote 1 (c) above.

II. Draft articles

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 12, the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where

and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

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

Article 4

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

Article 5

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;

(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 prejudice 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.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 3]

DOCUMENT 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

[Original: English]
[31 January and 18 April 1984]

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTORY NOTE	1-50	7
A. Status of the draft articles already submitted	2-18	8
1. Part I. Introduction	3-8	8
2. Part II. General principles	9-12	8
3. Part III. Exceptions to State immunity	13-18	9
B. Debate in the Sixth Committee at the thirty-eighth session of the General Assembly	19-37	11
1. Irrelevance of continuing differences in ideology	20-22	11
2. Emergence of subtle differences in practice and procedure	23-26	12
3. Diminishing criticism and growing acceptance of the necessity for international control of State immunity	27-29	13
4. Comments on the draft articles	30-37	13
C. Continuing progress in legal developments	38-50	14
1. Sharp increase in restrictive practice	39-44	14
2. Absence of judicial practice upholding absolute immunity	45-47	15
3. Continuing pursuit of the current programme	48-50	16
DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (<i>continued</i>)	51-256	16
PART III. EXCEPTIONS TO STATE IMMUNITY (<i>continued</i>)	51-256	16
Article 16 (Patents, trade marks and other intellectual properties)	51-80	16
A. General considerations	51-59	16
1. Scope of "patents, trade marks and other intellectual properties"	51-52	16
2. Protection as a basis for jurisdiction	53-55	17
3. Closeness to trade and use of property	56-57	17
4. Consent as an alternative basis for the exercise of jurisdiction	58-59	17
B. The practice of States	60-79	18
1. General observations	60-63	18
2. Judicial practice	64-68	18
3. Governmental practice	69-75	19
(a) National legislation	70-72	19
(b) International or regional conventions	73-75	20
(i) 1972 European Convention on State Immunity	73-74	20

	<i>Paragraphs</i>	<i>Page</i>
(ii) Inter-American Draft Convention on Jurisdictional Immunity of States	75	20
4. International opinion	76-77	20
5. A clear trend	78-79	21
C. Formulation of draft article 16	80	21
Article 17 (Fiscal liabilities and customs duties)	81-104	21
A. General considerations	81-89	21
1. Scope of "fiscal liabilities and customs duties"	81-85	21
2. Jurisdiction to tax or collect import duties	86-87	22
3. Marginal utility of an express provision	88-89	22
B. The practice of States	90-103	22
1. Judicial practice	90-95	22
2. Governmental practice	96-101	24
(a) National legislation	99-100	24
(b) International or regional conventions	101	24
3. International opinion	102	25
4. A twilight zone	103	25
C. Formulation of draft article 17	104	25
Article 18 (Shareholdings and membership of bodies corporate)	105-118	25
A. General considerations	105-111	25
1. Scope of "shareholdings and membership of bodies corporate"	105-106	25
2. Applicability of the law of incorporation as a sound basis for exercise of jurisdiction	107-109	25
3. Presumption of consent to the exercise of sole jurisdiction by the State of incorporation	110	26
4. An acquired place	111	26
B. The practice of States	112-117	26
1. Judicial practice	112	26
2. Governmental practice	113-116	26
(a) National legislation	113-115	26
(b) International or regional conventions	116	27
3. International opinion	117	27
C. Formulation of draft article 18	118	27
Article 19 (Ships employed in commercial service)	119-233	27
A. General considerations	119-135	27
1. Special status of ships	119-123	27
2. Ownership, possession or control	124-127	28
3. Classification of vessels	128-131	29
4. The extent of State immunity	132-133	30
5. The basis for jurisdiction	134-135	30
B. The practice of States	136-230	30
1. General observations	136-141	30
2. Judicial practice	142-185	32
(a) A brief historical sketch of relevant practice	142-177	32
(i) United Kingdom	145-156	32
(ii) United States of America	157-163	36
(iii) France	164-167	39
(iv) Germany	168-169	40
(v) Netherlands	170	40
(vi) Italy	171	40
(vii) Belgium	172	41
(viii) Egypt	173	41
(ix) Portugal	174	41
(x) Scandinavian States	175-176	42
(xi) Latin American States	177	42
(b) A tentative indication	178-185	42

	<i>Paragraphs</i>	<i>Page</i>
3. Governmental practice	186-215	44
(a) Relative relevance of views and attitudes of Governments	186-189	44
(b) National legislation	190-197	45
(c) International or regional conventions	198-214	47
(i) The Brussels Convention of 10 April 1926 and its Additional Protocol of 24 May 1934	199-207	47
(ii) Codification conventions prepared by the United Nations Conference on the Law of the Sea, Geneva, 1958	208-210	48
(iii) The 1982 United Nations Convention on the Law of the Sea	211-212	49
(iv) Other miscellaneous conventions	213-214	49
(d) Treaty practice	215	50
4. International opinion	216-228	50
(a) Absolute immunity	217-221	50
(b) Restricted immunity	222-228	51
5. An undeviating trend	229-230	53
C. Formulation of draft article 19	231-233	53
1. Alternative A	232	53
2. Alternative B	233	54
Article 20 (Arbitration)	234-256	54
A. General considerations	234-246	54
1. Scope of arbitration	234-236	54
2. Types of arbitration	237-245	55
(a) Arbitration under internal law	238-242	55
(b) International commercial arbitration	243	55
(c) Arbitration for investment disputes	244	55
(d) International arbitration	245	56
3. Arbitration clause	246	56
B. The practice of States	247-255	56
1. Judicial practice	247-248	56
2. Governmental practice	249-253	56
(a) National legislation	249-250	56
(b) International or regional conventions	251-253	57
(i) 1972 European Convention on State Immunity	251	57
(ii) 1923 Protocol on Arbitration Clauses	252	57
(iii) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards	253	57
3. International opinion	254	57
4. An irresistible implication of consent	255	57
C. Formulation of draft article 20	256	58

Introductory note

1. The sixth report on jurisdictional immunities of States and their property is a continuation of the five successive reports¹ already submitted to the International Law Commission. The introductory note in the fifth report on this topic² is still applicable as a practical guide to the present

report, which will cover the remaining exceptions to State immunity in part III. As an introduction to the substantive parts of the present report, which will bring the Commission closer to the conclusion of its study and preparation of

¹ The five previous reports were: (a) preliminary report, *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323; (b) second report, *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; (c) third report, *Yearbook* . . . 1981, vol. II (Part One), p. 12, docu-

ment A/CN.4/340 and Add.1; (d) fourth report, *Yearbook* . . . 1982, vol. II (Part One), p. 199, document A/CN.4/357; (e) fifth report, *Yearbook* . . . 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1.

² Document A/CN.4/363 and Add.1 (see footnote 1 (e) above), paras. 1-27.

draft articles on the topic, section A below gives the updated status of the draft articles so far submitted, some of which have been considered and provisionally adopted, and indeed further adjusted and revised, while others are still under active examination by the Drafting Committee, and yet others have been set aside for the time being for consideration after the submission of the rest of the draft articles.

A. Status of the draft articles already submitted

2. To date, 15 draft articles have been submitted to the Commission in the five reports already considered. Of these 15 draft articles, the first five are contained in part I, "Introduction", the second five in part II, "General principles", and the third five in part III, "Exceptions to State immunity".

1. PART I. INTRODUCTION

3. In part I (Introduction), *article 1* (Scope of the present articles) as provisionally adopted in 1980³ has been revised and readjusted so as to confine the scope of the draft articles more explicitly to "the immunity of one State and its property from the jurisdiction of the courts of another State".⁴

4. *Article 2* (Use of terms), as submitted in the second report of the Special Rapporteur for temporary guidance, has been partially considered in at least two separate connections.⁵ First, following the revision of draft article 1, limiting the scope of the draft articles, a definition of the term "court" was introduced in paragraph 1 (a) of article 2.⁶ Secondly, paragraph 1 (f), defining "trading or commercial activity",⁷ has been withdrawn and replaced by the new paragraph 1 (g), defining "commercial contract".⁸

³ "Article 1. Scope of the present articles

"The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State."

See *Yearbook . . . 1980*, vol. II (Part Two), p. 141.

⁴ "Article 1. Scope of the present articles

"The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State."

See *Yearbook . . . 1982*, vol. II (Part Two), p. 99; for the commentary, *ibid.*, pp. 99-100.

⁵ For the original text of article 2, *ibid.*, pp. 95-96, footnote 224.

⁶ "Article 2. Use of terms

"1. For the purposes of the present articles:

"(a) 'court' means any organ of a State, however named, entitled to exercise judicial functions;

"..."

Ibid., p. 100; for the commentary, *ibid.*

⁷ See footnote 5 above.

⁸ "Article 2. Use of terms

"1. For the purposes of the present articles:

"..."

"(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,

5. Other terms defined in article 2, paragraph 1,⁹ have not been fully considered. The definitions of "immunity" and "jurisdictional immunities" in former subparagraphs (a) and (b) are perhaps self-evident and no longer needed. The definitions of "territorial State" and "foreign State" in subparagraphs (c) and (d) have been withdrawn and the technique adopted of referring instead to *one State* in relation to *another State*. The definition of "State property" in subparagraph (e), and paragraph 2 of the article, remain to be considered. New terms may yet be included as consideration of further draft articles progresses.

6. *Article 3* (Interpretative provisions) has been partially considered in connection with the exception of "commercial contracts" as contained in article 12 and defined in article 2, paragraph 1 (g), already provisionally adopted. The Commission also provisionally adopted paragraph 2 of article 3, recognizing the use of the "nature test" as well as the "purpose test" for determining the commercial or non-commercial character of a contract or transaction.¹⁰

7. Paragraph 1, giving an illustration of the various elements which constitute a State for the purpose of immunity and the types of power covered by the expression "jurisdiction" of another State, remains to be considered.¹¹

8. *Article 4* (Jurisdictional immunities not within the scope of the present articles) has been briefly discussed in connection with draft article 15 (Ownership, possession and use of property), especially its paragraph 3. This article, as well as *article 5* (Non-retroactivity of the present articles), is still to be considered more fully after the Commission has considered the rest of the draft articles.¹²

2. PART II. GENERAL PRINCIPLES

9. Part II (General principles) is all but complete except for the basic article, *article 6* (State immunity), which, despite its previous provisional adoption,¹³ remains to be re-examined with a view to possible reformulation so as to

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.

"..."

See *Yearbook . . . 1983*, vol. II (Part Two), p. 34; for the commentary, *ibid.*, pp. 34-35.

⁹ See footnote 5 above.

¹⁰ "Article 3. Interpretative provisions

"..."

"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."

See *Yearbook . . . 1983*, vol. II (Part Two), p. 35; for the commentary, *ibid.*, pp. 35-36.

¹¹ For the text of article 3, see *Yearbook . . . 1982*, vol. II (Part Two), p. 96, footnote 225.

¹² For the texts of articles 4 and 5, *ibid.*, footnotes 226 and 227.

¹³ "Article 6. State immunity

"1. A State is immune from the jurisdiction of [the courts of] another State in accordance with the provisions of the present articles.

give greater satisfaction to the various points of view expressed. The study and analysis leading to the formulation of draft article 6 have not been seriously challenged, but its wording requires further improvement and readjustment. There is sufficient general agreement that immunity is a fundamental principle of international law supported by the general practice of States. Only its fullest extent has yet to be more precisely defined. A State is immune from the jurisdiction of the courts of another State. The rest of the draft articles will further clarify, qualify or modify the scope and extent of the application of this principle. Final revision of article 6 will therefore have to await consideration of the remaining draft articles, so as to allow a more generally accepted restatement of the basic principle to materialize.¹⁴ In the mean time, it may be convenient to reaffirm the existence of a basic general principle of State immunity in article 6 as further elaborated and qualified by other general principles in part II of the draft articles, to the extent of and subject to the exceptions and limitations contained in part III. As is gradually becoming increasingly apparent, in each of the particular areas designated as exceptional, the extent of State immunity is being delineated. In each of these areas, immunity exists to varying degrees and extent, beyond which no immunity need be recognized or accorded.

10. Except for article 6 (State immunity), the remaining four articles of part II (General principles) have been provisionally adopted without too much opposition. *Article 7* (Modalities for giving effect to State immunity)¹⁵ was accepted by consensus subject to final approval of article 6, since it contains an express reference to State immunity under article 6. But article 7 covers wider ground than modalities for fulfilment of the obligation to give effect to State immunity. It also sets out the circumstances when a State is said to be impleaded, whether directly or indirectly, and the different situations or occasions in which a proceeding not instituted against a State as such is still regarded as being against a State. Inherent in the provisions of article 7 is the differentiation between the higher and lower echelons of bodies forming part of the State or under its administration or control, and the requirement for acts to be performed in the exercise of governmental or sovereign authority for State immunity to be extended to cover agencies and instrumentalities of more remote connection with the central organ or machinery of government. Similarly, representatives of a State are immune only in respect of acts performed in their representative capacities and not otherwise, except for diplomatic agents who are entitled to immunity *ratione personae* in addition to their immunity *ratione materiae*, both of which belong to the sending State in the ultimate analysis and which can be waived only by the sending State.

¹² Effect shall be given to State immunity in accordance with the provisions of the present articles."

See *Yearbook . . . 1980*, vol. II (Part Two), p. 142; for the commentary, *ibid.*, pp. 142 *et seq.*

¹⁴ See *Yearbook . . . 1982*, vol. II (Part Two), p. 100, footnote 239. Several alternative formulations have been proposed, such as:

"A State is immune from the jurisdiction of the courts of another State except as provided in the present articles"; or "... except as provided in articles 12 to 20"; or "... to the extent and subject to the limitations provided in the present articles".

¹⁵ *Ibid.*; for the commentary, *ibid.*, pp. 100 *et seq.*

11. *Article 8* (Express consent to the exercise of jurisdiction),¹⁶ *article 9* (Effect of participation in a proceeding before a court)¹⁷ and *article 10* (Counter-claims)¹⁸ deal with the various aspects of consent to the exercise of jurisdiction, expressly given as in article 8, or by conduct such as participation in a legal proceeding, as in article 9, or the effect of counter-claims by or against a State, as in article 10. Articles 8 and 9 were provisionally adopted in 1982 and article 10 in 1983, thus completing the provisions on general principles dealing with consent as an important element in the establishment or application of State immunity.

12. Articles 6 to 10 constitute the general principles of State immunity and are placed in part II, entitled "General principles". Should the title be changed to "General provisions", a corresponding change will be needed for part III, which could read "Extent of State immunity in specified areas" instead of "Exceptions to State immunity".

3. PART III. EXCEPTIONS TO STATE IMMUNITY

13. Part III (Exceptions to State immunity) begins with *article 11* (Scope of the present part)¹⁹ which, as revised by the Special Rapporteur²⁰ after a preliminary exchange of views in the Commission, is intended to serve as a link between parts II and III of the draft articles. It would also serve to introduce the necessary or implied condition of reciprocity permissible in the granting or refusal of State immunity in a given case in a specified area of activities or conduct of a State. It is also designed to confirm the exceptional nature of subsequent articles providing for a limited application of State immunity. Part III in its entirety and in each of its specific provisions from article 12 to article 20 deals with actual limitations of State immunity.

14. Four exceptions have so far been proposed by the Special Rapporteur in articles 12 to 15, of which two have been provisionally adopted by the Commission together with their respective commentaries, namely *article 12* (Commercial contracts)²¹ together with its ancillary pro-

¹⁶ *Ibid.*, p. 107; for the commentary, *ibid.*, pp. 107 *et seq.*

¹⁷ *Ibid.*, p. 109; for the commentary, *ibid.*, pp. 109 *et seq.*

¹⁸ See *Yearbook . . . 1983*, vol. II (Part Two), p. 22; for the commentary, *ibid.*, pp. 22 *et seq.*

¹⁹ The text originally submitted by the Special Rapporteur read as follows:

"*Article 11. Scope of the present part*

"Except as provided in the following articles of the present part, effect shall be given to the general principles of State immunity as contained in part II of the present articles."

See *Yearbook . . . 1982*, vol. II (Part Two), p. 95, footnote 220.

²⁰ "*Article 11. Scope of the present part*

"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."

Ibid., p. 99, footnote 237.

²¹ "*Article 12. Commercial contracts*

"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

visions²² and *article 15* (Ownership, possession and use of property).²³ The adoption of article 12, which had presented the greatest difficulties, constituted an important breakthrough in the efforts to secure a more generally acceptable solution to the main and central problem of State immunity. Article 15 had not given rise to much comment or opposition, although the reasons for accepting it could be based on diverse grounds, centring on the unique applicability and monopoly of the *lex situs* and therefore the supremacy of the *forum rei sitae*, at least in so far as immovables are concerned. Reasoning in private international law finds stout support in public international law doctrine of the supreme authority of the territorial sovereign. The principle of territoriality overrides all other considerations, including that of sovereign immunity, which is personal to the State claiming entitlement to immunity.

15. Two other exceptions were proposed by the Special Rapporteur in his fifth report, namely *article 13* (Contracts of employment)²⁴ and *article 14* (Personal injuries and

(Footnote 21 continued)

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."

See *Yearbook* . . . 1983, vol. II (Part Two), p. 25; for the commentary, *ibid.*, pp. 25 *et seq.*

²² Article 2, paragraph 1 (g), and article 3, paragraph 2 (see footnotes 8 and 10 above).

²³ "*Article 15. Ownership, possession and use of property*

"1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

"(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

"(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

"(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

"(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

"(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

"2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

"(a) which is in the possession or control of the State; or

"(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

"3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission."

See *Yearbook* . . . 1983, vol. II (Part Two), p. 36; for the commentary, *ibid.*, pp. 36 *et seq.*

²⁴ The text originally submitted by the Special Rapporteur read as follows:

damage to property).²⁵ There was a lack of enthusiasm for these two exceptions since they found no support in the general practice of States. Nevertheless, a trend seems to have emerged in recent legislation and treaty practice projecting such limitations for future progressive development. After the first round of discussion in the Commission, the Special Rapporteur submitted a revised draft of these two articles to the Drafting Committee.

16. The application of the exception concerning contracts of employment as provided in the revised article 13²⁶ seems narrowly confined to the small number of cases in which the employer State, of its own free will, decides to place locally recruited non-national employees under the

"*Article 13. Contracts of employment*

"1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a 'contract of employment' of a national or resident of that other State for work to be performed there.

"2. Paragraph 1 does not apply if:

"(a) the proceedings relate to failure to employ an individual or dismissal of an employee;

"(b) the employee is a national of the employing State at the time the proceedings are brought;

"(c) the employee was neither a national nor a resident of the State of the forum at the time of employment; or

"(d) the employee has otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter."

Ibid., p. 18, footnote 54.

²⁵ The text originally submitted by the Special Rapporteur read as follows:

"*Article 14. Personal injuries and damage to property*

"Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to injury to the person or death or damage to or loss of tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the author of the injury or damage was present therein at the time of its occurrence."

Ibid., p. 19, footnote 55.

²⁶ The revised text of article 13 submitted by the Special Rapporteur read as follows:

"*Article 13. Contracts of employment*

"1. Unless otherwise mutually agreed between the States concerned, a State which employs an individual for services to be performed, in whole or in part, in the territory of another State, and has effectively placed the employee under the social security system of that other State, is considered to have consented to the exercise of jurisdiction by a court of that other State in a proceeding relating to the contract of employment.

"2. Paragraph 1 does not apply if:

"(a) the individual has been appointed under the administrative law of the employer State, and is performing functions in the exercise of governmental authority;

"(b) the proceeding relates to non-appointment or dismissal of an individual seeking employment or re-employment;

"(c) the individual is a national of the employer State at the time the proceeding is instituted;

"(d) the individual was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded, unless otherwise agreed in writing between the parties to the contract of employment;

"(e) the individual has otherwise agreed in writing, and the court of the State of the forum does not retain exclusive jurisdiction by reason of the subject-matter of the proceeding or the subordinate rank of the employee performing services of a solely domestic or non-governmental nature."

Ibid., p. 20, footnote 58.

social security system of the host State in preference to its own. This may constitute a clear indication of intention to consent to the exercise of local jurisdiction and the applicability of local labour law in regard to that particular contract of employment. This exception does not concern either appointment or non-appointment of an employee, or dismissal, or non-renewal of the contract of employment. It may concern breaches of the terms of the contract of employment to which local labour law and regulations of local labour relations apply. Thus a large volume of State immunity is preserved in the field of contracts of employment.

17. The revised text of article 14 (Personal injuries and damage to property)²⁷ is very limited in the scope of its application so as to cover only recovery of pecuniary compensation for insurable risks of accidents resulting from inland transport of passengers and goods by rail, road, waterways or air, and the liability of the occupier of premises for risks which are also insurable. It is designed not to deprive individuals of otherwise available relief without in any way inconveniencing the foreign Government. It does not concern transboundary torts or letter-bomb cases. But the insurance companies involved would no longer be able to hide behind the cloak of sovereign immunity, and this may serve in a way to encourage government agencies operating in another State to take out insurance policies where such are not required or already compulsory. Both articles 13 and 14 remain with the Drafting Committee and will be considered at the thirty-sixth session.

18. Following the above account of the work so far accomplished and the draft articles still to be reconsidered and revised or readjusted before provisional adoption, it may now be convenient to proceed with a presentation of other possible exceptions or particular areas in which the extent of State immunity deserves the closest scrutiny and the most meticulous consideration.

B. Debate in the Sixth Committee at the thirty-eighth session of the General Assembly

19. At the thirty-eighth session of the General Assembly, about 80 representatives took part in the debate on the report of the Commission on the work of its thirty-fifth

²⁷ The revised text of article 14 submitted by the Special Rapporteur read as follows:

Article 14. Personal injuries and damage to property

"1. Unless otherwise mutually agreed between the States concerned, a State which, through one of its organs, or agencies or instrumentalities acting in the exercise of governmental authority, maintains an office, agency or establishment in another State or occupies premises therein, or engages therein in the transport of passengers and cargoes either by air or by rail or road, or by waterways, is considered to have consented to the exercise of jurisdiction by a court of that other State in a proceeding relating to compensation for death or injury to the person or loss of or damage to tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the person responsible for or contributing to the injury or damage was present therein at the time of its occurrence.

"2. Paragraph 1 is without prejudice to the rights and duties of individuals in one State *vis-à-vis* another State which are specifically regulated by treaties, or other bilateral agreements, or regional arrangements, or international conventions specifying or limiting the extent of liabilities or compensation."

Ibid., footnote 59.

session. No fewer than two thirds spoke on chapter III of the report, on jurisdictional immunities of States and their property, touching on one or several aspects of the topic.²⁸ The fact that consideration of the topic in progress enlivened the debate in the Sixth Committee is in itself an encouraging sign, confirming the general belief that the topic is of practical importance and the need and relative urgency for it to be completed in the near future. The Special Rapporteur believes it may be useful at this point to give his overall impressions of the debate on the topic and to provide further clarifications where lingering doubts and hesitations subsist.

I. IRRELEVANCE OF CONTINUING DIFFERENCES IN IDEOLOGY

20. Ideological differences with regard to the personality of the State or the capacity and functions of the State continue to exist. There is no likelihood that such a controversy could be resolved one way or the other. It became apparent from the debate that, according to one school of thought, a sovereign State cannot have two different personalities. A State cannot act otherwise than as a sovereign entity. All functions undertaken by the State are governmental and official. A State does not act nor can it perform an act in a like manner as an individual. This theory is not only prevalent among socialist States but also adhered to in some non-socialist countries.²⁹ On the other hand, this distinction has been recognized from the very beginning of State immunity in the judicial practice of several countries, notably Italy, Belgium and Egypt. The ideological differences in this connection cut across the distinctions between socialist law and non-socialist law, civil law and common law, Islamic law and non-Islamic law, or other similar classifications of legal systems. It would appear to serve no useful purpose for the Special Rapporteur or the Commission to endeavour to resolve these differences. On the contrary, in its study the Commission has so far tried to avoid taking any side in the confrontation between such unavoidable differences. Possible solutions proposed by the Special Rapporteur therefore do not rely on any such distinctions.

21. While the Commission has been able to reach the conclusion, tentatively as it may seem, that State immunity is a general principle, and that its limitations are exceptions to the general principle, which is of course composed of several elements and qualifications as elaborated in articles 6 to 10, the proposed exceptions have not been based on any such differences which could give rise to objections from one quarter or another. Thus all the criticisms and objections raised in the Sixth Committee against the application of any such distinctions, whether between *acta jure imperii* and *acta jure gestionis*, to which considerable lip-service continues to be paid in a growing quantity of judicial decisions, or between public acts and private

²⁸ See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 36th to 50th, 54th and 70th meetings. See also the statement introducing the report and the concluding observations by the Chairman of the Commission, *ibid.*, 34th meeting, paras. 12-20, and 54th meeting, para. 52.

²⁹ See, for example, the statement by Miss Frascini, the representative of Uruguay, *ibid.*, 45th meeting, para. 45.

acts, or between official and governmental capacity or personality and unofficial and non-governmental capacity or personality, or between the various functions undertaken by a Government or State organ, do not apply to the draft articles proposed and provisionally adopted by the Commission.

22. The criticism levelled against the lack of justification or practical difficulties in the application of the functional criterion or any such distinctions need not therefore retain the attention of the Commission, which proceeds on the assumption that such differences in ideology persist and endeavours to find solutions regardless of such differences. None of the solutions proposed will therefore be based on any of the distinctions or criteria which have been the subject of penetrating, and at times justified criticism.

2. EMERGENCE OF SUBTLE DIFFERENCES IN PRACTICE AND PROCEDURE

23. The expression "jurisdictional immunities" to many and in several legal systems tends to presuppose the existence of jurisdiction, i.e. invocable or exercisable jurisdiction, depending on the point of view from which the initiation of a legal proceeding is considered; the plaintiff may invoke jurisdiction while the court may exercise it. Generally speaking, it seems logical enough that the question of immunity from jurisdiction does not and cannot arise unless and until it is clear that such jurisdiction, from which the defendant could claim to be immune, does exist. Following this conceptual or theoretical approach, the scope or limit of jurisdiction is not at issue in any examination or investigation of the question of State immunity. In practice, however, the disconnection between jurisdiction and jurisdictional immunity is not so clear-cut. When jurisdiction of a court is challenged, it could be challenged on the ground of jurisdictional immunity, because it impleads the foreign sovereign directly or indirectly, or on any other ground, such as the "act of State" doctrine, or lack of jurisdiction under the laws of the organization of the court *ratione materiae* because the subject-matter of the dispute lies outside the scope of its jurisdiction or beyond its limits, or *ratione personae* because the person involved is exempt from the jurisdiction or for lack of capacity to sue and be sued of either one of the party-litigants. Nor is the court bound to decide upon the question of immunity before determining the extent of its jurisdiction in any case or vice versa.

24. Procedural discrepancies have compounded the difficulties of approaching the issue. In most systems, jurisdictional immunity need not be raised by the party. Although it can be raised at any stage of the trial, it can also be considered by the court *proprio motu* or *d'office*. In other systems, it is a question of *ordre public* and the court is bound to consider its own competence in any event. In general, other branches of the Government, such as the State Department, the *Procureur de la République* or the *Avvocato dello Stato* could raise the question with the court by making a suggestion of immunity or intervening as *amicus curiae*. In some systems, "jurisdictional immunity" is so inextricably linked and intimately confused with invocability or exercisability of jurisdiction that there is no tangible, subtle distinction left in effect between *immunité de juridiction* and *incompétence d'attribution*, especially in

civil-law countries where the court has little discretion, upon proof of its *compétence en la matière*, to decline or refuse to exercise jurisdiction. It has no choice but to sit and decide the case. When the court declares itself *incompétent*, the effect is the same as dismissal of a case for lack of jurisdiction or on the ground of jurisdictional immunity.

25. This subtle distinction has to be maintained in order to appreciate the necessity for the pre-existence of jurisdiction in many classes of case before proceeding to decide on the question of immunity. Without this distinction, it would make no difference whether the defendant was entitled to State immunity or not, or whether in fact as well as in law the court had no jurisdiction in the first place, regardless of the personality or the personal attributes of the defendant. Reference to the existing jurisdiction or the permissible scope of exercisable jurisdiction is determined by the internal law of the State of the forum. The law on this point may be found in some cases in the constitution of the State or in the judiciary act or in the law of the organization of the courts of justice. Whatever it may be called, it determines the scope and extent of jurisdiction in any given case, and whenever there is a foreign element in the proceeding, the law determining the invocability or exercisability or appropriateness of jurisdiction of a court is known as the applicable rules of private international law or conflict of laws, whether or not there is a question of conflict of laws or of concurrence of jurisdictions.

26. It is a fortunate coincidence that many representatives³⁰ have pointed out that, in the present study of jurisdictional immunities of States and their property, the Commission is neither required nor called upon to examine, co-ordinate or harmonize the question of extent or scope of jurisdiction of the courts of any State, nor to regulate internationally or by way of uniform rules the applicable rules of private international law or conflict of laws of every State. One has to start from the proposition that jurisdiction exists or that there is jurisdiction which is valid and recognized generally. Of course, disputes between States as to the propriety of the exercise of concurrent jurisdictions or priority of jurisdiction belong to other fields of private and public international law. They do exist and always continue to exist in relation to this topic as well as countless other topics involving the exercise of jurisdiction whenever there is a foreign element in the dispute. It is not the purpose of the present study to resolve all questions covered under a much larger heading of national jurisdiction or extent of judicial jurisdiction of a national court. One point should be made clear beyond dispute, however, whatever the views regarding the distinction between *immunité de juridiction* and *incompétence d'attribution*: whenever the court decides to exercise its jurisdiction and to consider the merits of the case, it has also decided that it is competent and has jurisdiction in accordance with its applicable rules of private international law governing the question of jurisdiction in such matters. In so doing, the court has also decided that the defence of jurisdictional immunity raised by one of the parties was not available to take the case out of its jurisdiction. Thus doubts could only

³⁰ See, for example, the statements by Sir Ian Sinclair, the representative of the United Kingdom, *ibid.*, 39th meeting, para. 93, and by Mr. De Stoop, the representative of Australia, *ibid.*, 50th meeting, para. 49.

exist when the court declines to exercise jurisdiction, since the issue of extent or scope of jurisdiction may have been confused or merged with the question of jurisdictional immunity. When jurisdiction is assumed and exercised, both questions have been clearly determined, namely the existence of jurisdiction and the non-applicability of State immunity.

3. DIMINISHING CRITICISM AND GROWING ACCEPTANCE OF THE NECESSITY FOR INTERNATIONAL CONTROL OF STATE IMMUNITY

27. One encouraging element resulting from increasing appreciation of the problems confronting the Commission is the decrease in opposition to and decline in criticism of its work, with regard both to the areas of investigation and to the seriousness of the objections. It must be insisted several times that the source materials before the Commission constitute the sum total or quasi-sum total of existing State practice and that the selection of cases presented under each rubric is not at random, nor discriminatory, before this fact is understood and accepted. It also took time and effort to point out that practically every legal system has followed a path that is not always uniform, regardless of the doctrine of precedent or *stare decisis*, and that the seeming distortions are not the Special Rapporteur's own doing but inherent in the practice of States itself. It has become at times impossible to untwist or unbend the course of legal developments so as to stretch it into a straight line. Like a river, whose natural course is dictated by geological conditions and the volume and frequency of rainfall, so the judicial practice of States on this topic is conditioned by several factors of common sense, logic and even expediency.

28. Clearly, some of the misgivings will remain, owing to the complexity of the subject-matter under investigation and existing differences in the various legal systems, differences not only in ideology, but also in approach, methodology and outcome. Such differences either appear reconcilable or could be put aside in order to allow a more orderly international regulation to operate; but lack of in-depth appreciation may continue. Care should be taken lest lack of practice in a given State be misconstrued as existence of practice favouring absolute immunity, when in actual fact there has been no decision upholding any State immunity anywhere. In the same way that it cannot be said that a particular legal system has adopted a restrictive practice, nor can the opposite be inferred simply from the absence of practice to the contrary. It has become increasingly more apparent that the question of jurisdictional immunities of States deserves international attention and cannot be left to the judicial decisions of municipal courts alone, nor exclusively to national legislation.³¹ The codification and progressive development of international law on the topic by an international institution will alone be likely to provide an adequate and satisfactory answer to most of the questions involved.

³¹ Several representatives in the Sixth Committee indicated that no legislation was contemplated in their countries. At the informal meeting of legal advisers of the Asian-African Legal Consultative Committee held in New York from 23 to 25 November 1983, it was agreed to await further developments in the work of the Commission before considering new initiatives.

29. This growing realization is imperative if chaos is ever to be replaced by order. State immunity as a principle is to be upheld, but several specified areas should be investigated to determine the precise extent of immunity, its applicability and the conditions or limitations qualifying its application. These specified areas may be viewed as exceptional spheres where State immunity may not operate or apply to its maximum capacity, but is otherwise limited by more impelling reasons of practical necessity or sheer common sense or good faith. Reciprocity is another consideration that has its valid application and mounting persuasive force. If States are at the same time, though not in the same case, giver and recipient of immunity, reciprocity is inevitable, though not necessarily controllable.

4. COMMENTS ON THE DRAFT ARTICLES

30. A large number of speakers in the Sixth Committee took time to comment in a highly constructive and very encouraging way on the draft articles provisionally adopted or recently submitted. The Special Rapporteur could not help being inspired by many of the commentators, who are without exception well-wishers.

31. *Article 10* (Counter-claims) received positive endorsement in principle. No one spoke against the substance or principles contained in its provisions. Some merely suggested possible drafting improvements, which will be re-examined during second reading. This is not insignificant in view of the vastly different rules of procedure that exist in various legal systems. The Drafting Committee is to be congratulated for its agility in meeting most of the points encountered in the formulation of the three paragraphs to cover different situations in the prevailing systems in various parts of the world.

32. *Article 11* (Scope of the present part) is designed to introduce the notion of "reciprocity" as an element which will ensure flexibility in the application of the exceptions proposed in part III of the draft articles. It has been observed quite correctly that reciprocity will serve to reduce the scope of application of State immunity rather than expand it. It will not reduce the exceptions, although in actual practice there appear to be diametrically opposite schools of thought. One is found in the practice of India³² and concerns more the executive than the judiciary, since the rule seems to favour general immunity except where, by virtue of reciprocity, the principle of State immunity has no application in the other country concerned. Another school followed by Italy would allow State immunity only if, by way of reciprocity, it can be clearly proven that the Italian State would likewise be accorded jurisdictional immunity. This doctrine of reciprocity applies especially with regard to immunity of State property from attachment and execution. Proof has to be furnished of existing legislation of the other State or else confirmed in writing by the Ministry of Foreign Affairs through normal diplomatic channels.³³ Thus property of a foreign State is not auto-

³² See, for example, the statement made at the thirty-fourth session of the Commission by Mr. Jagota (*Yearbook* . . . 1982, vol. I, pp. 189-190, 1729th meeting, paras. 6-12). Mr. Rao expressed a similar view at the informal meeting of legal advisers of the Asian-African Legal Consultative Committee in New York on 25 November 1983 (unpublished).

³³ See, for example, decree law No. 1621 of 30 August 1925 on the

matically accorded immunity from attachment or execution, unless, by virtue of reciprocity, it can be established that, under existing legislation of that country, property of the Italian State is accorded immunity from attachment and execution. Whichever way the doctrine of reciprocity is to be applied, it would only operate to limit rather than expand the scope of State immunity.

33. It has also dawned on the Special Rapporteur, listening to the various comments made in the course of the debate in the Sixth Committee during the thirty-eighth session of the General Assembly, that the nature of the exceptions in part III could also be clarified in the provision of article 11. For instance, it has been stated all along that the principle of State immunity is relative in the sense that consent is decisive. Thus, even if the cases under consideration were to fall squarely within one of the exceptions provided for in the draft articles, nothing could prevent the court of a State from granting immunity. In any event, the court may also follow the lead of the executive in any given case for any reason that it considers to be imperative. Even convenience could be operative as a reason for the court declining to exercise its otherwise competent jurisdiction on the ground that it is a *forum non conveniens*, or that other forums are more convenient and therefore more appropriate.

34. *Article 12* (Commercial contracts) has attracted the most comment, together with the related provisions of article 2, paragraph 1 (g), and article 3, paragraph 2. The majority of speakers seemed to think that it had struck a satisfactory balance. There were those who would like to see a more restrictive formulation, and also those who would consider these provisions superfluous. Admittedly, the problems did not arise in regard to socialist countries, but no strong objection was raised against allowing the world community, including the non-socialist countries, to endeavour to resolve this difficult and complex question among themselves. Yet others expressed the view that the Commission was on the right track, but hoped that further improvement could be introduced to maintain an even better equilibrium between the interests of various groups of States, the rich and the poor, developed and developing, socialist and non-socialist, and other opposite types of interest. To be more precise, criticism was levelled from some quarters regarding the use of the expression "applicable rules of private international law"—so much used in the context of conflict of laws—which refers to an internal legal system with a foreign element, concerning the scope and extent of existing competence or jurisdiction of a court of law rather than State immunity. The interests of developing countries would be better served if the exception of commercial contracts were further linked to a significant territorial or other substantial connection or contact with the forum State, especially if it were further reinforced or secured by the establishment of a local office or agency operating within the territory of the forum State, whence the dispute resulting from a commercial contract has emerged. The second reading of this draft could produce a still more satisfying improvement. As it is, the draft represents a breakthrough and offers a possible way out of the labyrinth in which the law finds itself.

(Footnote 33 continued.)

property of foreign States in Italy, *Rivista di diritto internazionale* (Rome), 18th year (1926), p. 159, "Atti esecutivi sopra beni di Stati esteri nel Regno".

35. *Article 13* (Contracts of employment) has also been the subject of favourable as well as less kindly expressed views. The revised version was definitely preferred but opinions still varied from one extreme to another. The Drafting Committee will have to meet another challenge here.

36. *Article 14* (Personal injuries and damage to property) has come up against some strong opposition, unless it is confined to pecuniary compensation and coverage for insurable risks. Opinions were also divided. The interests of foreign States and the safety and welfare of local inhabitants are at stake, though not necessarily in direct conflict, since the insurance company comes into the picture as the middleman who claims the best of both worlds. The Drafting Committee will also face considerable difficulties in this connection, though, it is hoped, by no means insurmountable ones.

37. *Article 15* (Ownership, possession and use of property) has attracted little comment. It was on the whole considered satisfactory, except for the saving clause concerning diplomatic and consular premises in paragraph 3, which could be made clearer. Ultimately, it might be necessary to spell out in part IV of the draft articles, in no uncertain terms, the immunity of State property from attachment and execution. Such immunity, as the representative of France pointed out,³⁴ could not be identified with the inviolability and protection provided in the two Vienna Conventions of 1961 and 1963.³⁵ Perhaps the gap will have to be filled, and part IV rather than article 15 appears to offer an appropriate place.

C. Continuing progress in legal developments

38. Since the previous report, submitted in 1983, legal developments have occurred in abundance and in rapid succession, so that any observation made on the practice of a State today may no longer be valid tomorrow. Before proceeding to confirm or make any necessary alterations to the projected structure of the rest of the present study, it may be necessary to glance quickly at the legal developments that have occurred since the preparation of the fifth report.

1. SHARP INCREASE IN RESTRICTIVE PRACTICE

39. Whatever the outcry or denial of emerging trends, there appears to be an unmistakable upsurge in legal developments which clearly indicates a strong tendency in favour of further restrictions of State immunity in every imaginable field, most important of all in the allowance of actual attachment and execution of State property where it really hurts—affecting not only the sovereign dignity of the State, but more practically the means by which meaningful diplomatic intercourse or interchange of good offices and international transactions are engaged.

³⁴ See the statement by Mr. Guillaume, the representative of France (*Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 41st meeting, para. 29*).

³⁵ 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95), and 1963 Vienna Convention on Consular Relations (*ibid.*, vol. 596, p. 261).

40. Recent practice in the United States of America has been noted for the liberal interpretation that its courts have been prepared to give to the wording of the *Foreign Sovereign Immunities Act of 1976*,³⁶ so as to disallow State immunity where the commercial transaction, wherever concluded and performed, could cause direct effect in the United States, or entail financial consequences therein, or bring tangible benefits or advantages such as repatriation of profits to the home base in the State of the forum. In actual practice, however, United States courts could be said to have imposed self-restraint in certain decisions holding the injury to have occurred outside the territory of the forum State³⁷ or that the commercial transaction in question had no bearing or adverse effect in the United States.³⁸ In any event, the Act in question was designed to establish a well-recognized exception to jurisdictional immunities customarily accorded to foreign Governments, and not in any way whatsoever to expand or enlarge existing territorial or national jurisdiction of United States courts, nor to create new special jurisdiction where none had existed before.³⁹

41. In that particular connection, it is not United States practice that has gone furthest in favour of the exercise of jurisdiction in regard to commercial activity, rather the most recent case-law of the United Kingdom, where the House of Lords admitted the assumption of sister-ship jurisdiction upon the physical presence of a sister ship.⁴⁰

42. Yet in terms of doctrinal confirmation of the nature test for a commercial transaction, notwithstanding the public or sovereign purpose of the contract from the point of view of the State, the Constitutional Court of the Federal

Republic of Germany must now be regarded as a champion in upholding jurisdiction by application of the nature test to the exclusion of all other tests and proceeding thereby to allow attachment and also the eventual possible execution of the assets of the property of a foreign sovereign State (in one case, the National Iranian Oil Company),⁴¹ German case-law was careful to disallow such a drastic measure against the bank account of a foreign State for the operation of an embassy (a case concerning the Philippine Embassy),⁴² although other bank accounts not connected with the operation of the embassy might not be so leniently treated.

43. In this connection, United States courts may be leading the field in holding that the burden lies on the foreign embassy concerned to furnish proof that the bank account to be attached was for the purpose of operating the embassy and in ruling that a mixed account is liable to attachment and therefore unprotected by State immunity.⁴³

44. This sharp twist in the recent practice of countries holding a restrictive view of immunity is far more alarming than the theoretical absence of jurisdictional immunity, followed by a judicial pronouncement or even condemnation without any prospect of satisfaction or execution of the judgment. What appears in the fifth report of the Special Rapporteur regarding Italian practice in the field of contracts of employment⁴⁴ must now be disavowed. In cases judged since the preparation of that report (1983), bank accounts of embassies were attached for payment of social security and other emoluments under contracts of employment.⁴⁵

2. ABSENCE OF JUDICIAL PRACTICE UPHOLDING ABSOLUTE IMMUNITY

45. As much as the Special Rapporteur is willing to recognize and accept as authoritative and persuasive any current judicial decisions supporting the doctrine of absolute immunity, none has been found in the period since the preparation of the fifth report. A memorandum submitted by a member of the Commission⁴⁶ has proved of the greatest value as evidence of existing adherence to an absolute view of State immunity. Clearly, the absolute doctrine as propounded in the memorandum and supported by some members of the Commission is entitled to the greatest weight as an authoritative statement of the law in a given

³⁶ *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 55 *et seq.*

For United States case-law, see, for example, *Texas Trading and Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria* (1981) (*Federal Reporter, 2nd Series*, vol. 647 (1981), p. 300; see also United Nations, *Materials on Jurisdictional Immunities* . . . , p. 527); *Harris Corporation v. National Iranian Radio and Television* (1982) (*Federal Reporter, 2nd Series*, vol. 691 (1983), p. 1344). Cf. a similar trend which has emerged in the case-law of France: see, for example, *Corporación del Cobre v. Braden Copper Corporation et Société Le Groupement d'importation des métaux* (1972) (*Revue générale de droit international public* (Paris), vol. 77 (1973), p. 1240).

³⁷ See, for example, *Sedco, Inc. (Petróleos Mexicanos)* (1982) (*Federal Supplement*, vol. 543 (1982), p. 561). Pemex, as an instrumentality of the Mexican Government, was held to be immune from jurisdiction, and the blow-out concerned was held to be non-commercial and also within the discretionary activity protected by the *Foreign Sovereign Immunities Act of 1976*.

³⁸ See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (1982) (*Federal Reporter, 2nd Series*, vol. 693 (1983), p. 1094). The court declined jurisdiction for lack of a substantial link between the commercial activity and the United States.

³⁹ See, for example, *Warner v. Territory of Hawaii* (1953) (*ibid.*, vol. 206 (1953), p. 851). See also American Law Institute, *Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 2* (27 March 1981) (Philadelphia, Pa.), pp. 171-221, Part IV: Jurisdiction and Judgments, chap. 2, especially p. 178: "The law . . . does not establish causes of action or create or destroy legal obligations . . .". The Act refers to any civil action against a foreign State as defined in the Act and which is not entitled to immunity under the provisions of the Act or under any applicable international agreement.

⁴⁰ See, in particular, *The "I Congreso del Partido"* (1981) (*The All England Law Reports, 1981*, vol. 2, p. 1064). Two sister ships of the *I Congreso del Partido*, namely the *Marble Islands* and the *Playa Larga*, were at the origin of the action.

⁴¹ See the decision of 12 April 1983 by the Federal Constitutional Court concerning the complaint of unconstitutionality submitted by the National Iranian Oil Company (*Entscheidungen des Bundesverfassungsgerichts* (Tübingen), vol. 64 (1984), p. 1).

⁴² See the decision of the Federal Constitutional Court of 13 December 1977 in *X v. Republic of the Philippines* (United Nations, *Materials on Jurisdictional Immunities* . . . , p. 297).

⁴³ See, for example, *Birch Shipping Corp. v. Embassy of Tanzania* (1980) (*Federal Supplement*, vol. 507 (1981), p. 311).

⁴⁴ Document A/CN.4/363 and Add.1 (see footnote 1 (e) above), para. 48.

⁴⁵ The Ceremoniale Diplomatico della Repubblica has intervened on two occasions in actions, one involving the Embassy of Algeria and the other the Embassy of the Islamic Republic of Iran, for payment of social security and other emoluments. See *Appunto* (Rome), 10 June 1983.

⁴⁶ *Yearbook* . . . 1983, vol. II (Part One), p. 53, document A/CN.4/371.

State, whether socialist or non-socialist. It has certainly afforded a sound foundation for the Commission in its continuing search for a better balanced approach to this difficult conceptual problem.

46. It is high time an absolute view was cited so as to present firm opposition to the restrictive trends that appear to be asserting themselves. The question is how to slow down, arrest or even reverse the trends so as to maintain what jurisdictional immunities there might still be for States and their property. The trends would not be suspended simply by enunciation of an opposing doctrine or by mere declaration of an absolute principle. Even if such a gesture were to be followed up by national legislation, it would only allow immunity one-sidedly to foreign States, and only by a process of reciprocal treatment would jurisdiction in turn be upheld and exercised. Just as it is correct to predicate that most of the developing countries have not adopted the practice of restrictive immunity, it is equally accurate to state that none of the socialist countries has adopted a restrictive view of State immunity. But to state any such proposition, however emphatically, is still far from providing concrete evidence of a judicial decision allowing immunity in cases where it would have been denied in countries practising restricted immunity. Regrettably, nothing short of an affirmative judicial decision could be viewed as establishing the acceptance of absolute immunity in the judicial practice of States. It would be difficult, if not impossible, for the Special Rapporteur to invent or concoct such a decision in a vacuum.

47. Judicial decisions that have gone a long way to approaching an absolute rule of State immunity are to be found in the practice of British and American courts, dating back to *The "Pesaro"* (1926)⁴⁷ and *The "Porto Alexandre"* (1920),⁴⁸ which must now be considered to have long been overruled and discarded. As has been seen, the judicial practice of the States that had upheld absolute immunity has now radically changed. As far as the research of the Codification Division reveals, there are no such judicial decisions in the practice of other States.

⁴⁷ See *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (*United States Reports*, vol. 271 (1927), p. 562).

⁴⁸ United Kingdom, *The Law Reports, Probate Division, 1920*, p. 30. See also *The "Parlement belge"* (1880) (*ibid.*, vol. V (1880), p. 197) and *The "Cristina"* (1938) (*The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938*, p. 485).

3. CONTINUING PURSUIT OF THE CURRENT PROGRAMME

48. In the circumstances, the more appealing alternative would appear to be to accelerate the pace of work in pursuit of the current programme. This would at least provide an assured way of containing the restrictive trends. By examining the particular areas where exceptions are believed to have been recognized, and by circumscribing and delimiting the scope of the application of such exceptions in the specified areas, taking into account all the theoretical differences identified and the various points of view noted, and bearing in mind the differences in legal, political and economic systems prevailing in various States, an approach may be found which could yield salutary results.

49. In the pages that follow, it is therefore proposed to examine draft articles in the following specified areas of part III.

Article 16. Patents, trade marks and other intellectual properties;

Article 17. Fiscal liabilities and customs duties;

Article 18. Shareholdings and membership of bodies corporate;

Article 19. Ships employed in commercial service;

Article 20. Arbitration.

50. It should be recalled at this point that the selection of the above specified areas has not been without precedent. Rather, precisely because such areas have been considered exceptional in a number of instruments, multilateral conventions,⁴⁹ regional or bilateral treaties, or legislative enactments,⁵⁰ the present study cannot afford to overlook whatever authoritative source materials or practice may exist in order to prepare the groundwork upon which to erect a solid edifice of legal propositions.

⁴⁹ See, for example, the 1972 European Convention on State Immunity and its Additional Protocol (Council of Europe, European Treaty Series (Strasbourg), No. 74 (1972)) and the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 173 *et seq.*).

⁵⁰ See, for example, the United States *Foreign Sovereign Immunities Act of 1976* (see footnote 36 above); the United Kingdom *State Immunity Act 1978* (see footnote 58 below); Pakistan's *State Immunity Ordinance, 1981* (see footnote 62 below); and Singapore's *State Immunity Act, 1979* (see footnote 61 below).

Draft articles on jurisdictional immunities of States and their property (*continued*)

PART III. EXCEPTIONS TO STATE IMMUNITY (*continued*)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

A. General considerations

1. SCOPE OF "PATENTS, TRADE MARKS AND OTHER INTELLECTUAL PROPERTIES"

51. The object of article 16 is to examine the extent of State immunity in another specified area, that involving

"patents, trade marks and other intellectual properties". Under the general heading of article 16 are grouped three categories of intellectual and industrial property. The first group is designated as "patents" and includes industrial designs and inventions for industrial or manufacturing purposes. The second group, entitled "trade marks", covers the use of trade names, service marks or other similar rights pertaining to merchandise on sale in the markets or for general or limited distribution for commercial pur-

poses. The third group comprises the remaining types of industrial or intellectual property, such as copyright, translation rights, reproduction rights, literary works, artistic objects, musical compositions, lyrics, video tapes, discs, and audio and audio-visual tapes.

52. Industrial or intellectual properties under the heading of article 16 are therefore rights protected by States, nationally as well as internationally. The protection provided by States within their respective territorial jurisdictions varies according to the organized system of registration of such rights, for which protection is guaranteed by internal law and enforced by appropriate machinery. The system for deposit, examination, investigation and eventual registration is administered in each State in accordance with its prevailing legislation and customs. It is not unusual that, in industrially or economically developed countries, the protection provided is more effective and infringement is discouraged or severely punished, while in less developed or developing countries, such a system may either be non-existent or be at a very embryonic stage, since expert knowledge is required before registration of any invention, patent or industrial design. Copyrights of literary works, artistic objects and musical compositions, reproduction, translation or performance of which must be authorized in advance, often against fees or royalties, are more widely known the world over, for they are also associated with cultural heritage and works of art protected by recognition of an author's rights, regardless of the commercial or non-commercial nature of the reproduction, performance, publication or distribution.

2. PROTECTION AS A BASIS FOR JURISDICTION

53. Legal protection offered by the State of the forum provides a strong foundation and a valid legal basis for the assumption and exercise of jurisdiction. Protection is generally consequential upon registration or even upon application for registration or upon deposit of such an application. It may also exist otherwise in certain systems where, even prior to actual acceptance for registration, some measure of protection is conceivable. Protection depends on the existence and sanctity of the national legislation and the effectiveness of the system in operation in a particular society. Thus not only is the appropriate legislation applicable, but also there has to be an effective system of registration in force to afford a sound legal basis for jurisdiction.

54. It follows that effectiveness is only practicable within the territorial confines of the State concerned. Thus the system in operation could be invoked for protection in cases of infringement of intellectual properties or violation of the rights protected only in so far as infringements or violations occurring within the territory of the State of the forum are concerned. In the case of infringements or violations outside such territorial limits, other remedies or a different kind of protection available in another State under the jurisdiction of another authority would have to be invoked.

55. It could also be stated that the basis for jurisdiction is the existence of a substantial territorial connection or important contact with the State of the forum. Without the occurrence of violations or infringements within its terri-

tory, there would be no justification for the exercise of jurisdiction. This is so because the legislative protection given is available only territorially, the State not being in a position to extend its protective arms beyond the limits of its own national territory.

3. CLOSENESS TO TRADE AND USE OF PROPERTY

56. It is clear that the area specified under article 16 bears the closest relationship to "commercial contracts" under article 12 and "ownership, possession and use of property" under article 15. In the latter two articles, the two exceptions appear to have been fairly widely accepted in the practice of States. Article 16 could be considered as an extension of the exception of trading transactions recognized under article 12, the difference being that, in article 16, the purpose of the protection is to prevent "unfair competition" in trade and to regulate the imposition of trade restrictions such as anti-trust legislation. The protection of patents, trade marks and other intellectual properties is designed to ensure greater fairness in commercial practices. The result of this protection could be felt internally as well as in international trade, as the origin of the goods may be in one State and their distribution might infringe rights in another State. While the measure of protection is territorially limited, its beneficial consequences could be transboundary, if not world-wide, regardless of the place of origin, production or manufacture of the goods; the place of infringement could be at the receiving end, in the country of either wholesalers or retail traders. Even under modern theories regarding rules of conflict of laws for unfair competition or restraint on trade, the law of the country where the infringement occurs is a decisive factor and this could be the proper forum to exercise jurisdiction.

57. By analogy with article 15, copyrights and other intellectual property rights constitute a collection of proprietary rights or rights to use or reproduce which could be designated as properties under the classification of "incorporeal hereditaments", i.e. intangible rights, or rights without a corpus. Recognition and protection of such industrial designs or other intellectual properties is a matter for the law of the place where the particular right is registered. In other words, the *lex situs* of such intangible properties is the law of the place of their registration. Thus the applicable law, as well as the invocable or exercisable jurisdiction, seem to cross at the same convenient point so as to make the court of the State where protection is offered for the registration of such rights as well as of the place of their infringement the only competent forum, and as such a *forum conveniens* under the applicable rules of private international law.

4. CONSENT AS AN ALTERNATIVE BASIS FOR THE EXERCISE OF JURISDICTION

58. If a State seeks the protection of another State for the registration of a patent, invention or industrial design, it has clearly consented to the exercise of jurisdiction by the territorial authority from which it is seeking protection within the territory of another State. This would seem equally true when a State seeks to claim or contest a claim

to such rights, or is otherwise involved in a dispute concerning infringements of such rights or properties. Of course, if the State does not contest the rights but admits the violations or infringements, it would be difficult in the same breath to invoke its sovereign immunity for an activity which is not only commercial and non-governmental, but also involves unfair competition and trade practices. It would seem logical for consent to be presumed or implicit in the event of infringements, just as in the event of contestation. In the latter event, the foreign State would be claiming the protection of the State of the forum and, as such, would be another claimant of the rights at issue or in dispute.

59. Such a line of reasoning is attractive, whether the search for protection by another State is evidence of consent if this is regarded as a right to use an incorporeal property, or if it is considered to be a waiver or abandonment of immunity when a State competes in trade in the territory of another State, especially in the field of unfair competition of trade practices, beyond entering an ordinary commercial contract. Whatever the rationale behind the suggestion of non-immunity in this specified area, whether on the grounds of implied consent by analogy with article 12 or article 15, or whether it is likened to commercial contracts under article 12 or to the use of property under article 15, common sense appears to dictate absence of objection to this restriction on State immunity. The practice of States may bear witness to this preliminary finding.

B. The practice of States

1. GENERAL OBSERVATIONS

60. It should be observed, before exploring the practice of States in this specified area, that legal developments in the field of patents, trade marks and other intellectual properties are matters of comparatively recent occurrence. Trade names and trade marks may have been the earliest of intellectual properties to have been given national and international protection. Patents of inventions and industrial designs were relatively unknown in the developing world, and it is not until very recently that attention has been drawn in developing countries to the need to provide incentives for initiatives of invention and ingenuity, even in more primitive societies. Thus State practice has not been too rich in this area where another State is a party to litigation before a national authority. Earlier case-law of developed countries has very few instances of such disputes. Judicial and governmental practice of States can only be found in the contemporary period.

61. Another explanation may be found in the fact that States did not normally engage in trade themselves until very recently, and now that they do, they have not indulged in unfair competition, save in very rare, exceptional instances. With the assistance of a theory of consent by conduct or by necessary implication, a State very often finds itself appearing as claimant or indeed plaintiff before the courts of another State, thus avoiding the invocation of State immunity. Again with the aid of such a doctrine, acceptance of this exception to State immunity does not need to be based on too much practice.

62. The present inquiry is limited to the protection of patents, trade marks and other intellectual properties at the national level; beyond that there exists another layer of protection, at the international level, which might be inter-State or intergovernmental relations or protection offered by an international system or organization, such as WIPO, or by a series of international conventions, such as the Paris Copyright Convention.⁵¹ The present study is conducted at the national, as opposed to the international level. Thus, when a State seeks the authority, judicial or administrative, of another State to protect its rights against infringements, it may be an initial step in the process of exhaustion of local remedies.

63. In actual practice, a State may succeed to the rights and obligations of private firms or trading or manufacturing companies, by way of nationalization or otherwise, and also become answerable for the infringements of patents by the corporations it has nationalized or acquired. This is not an uncommon phenomenon in this day and age, when developing countries and socialist as well as capitalist States have also deemed it expedient to nationalize an industry or enterprise or the production and management of natural resources such as oil, gas, electricity, water and other sources of energy. Banking and other financial institutions are no exceptions to the wave of nationalization to remedy or improve national economies.

2. JUDICIAL PRACTICE

64. Judicial decisions directly in point are not so plentiful for reasons that are apparent from the foregoing general observations. The case-law regarding patents, trade marks and other intellectual properties is regarded as a specialized field for practitioners. Only specialists in any one of the three groups are well versed in the jurisprudence in a particular branch of the industry or artistry protected. Thus cases involving foreign States or Governments or their agencies and instrumentalities are rare. Nevertheless, the few leading cases that are available are instructive and so noteworthy that they deserve the most attentive consideration.

65. The leading case in this particular area is indisputably the decision of the Supreme Court of Austria in *Dralle v. Republic of Czechoslovakia* (1950).⁵² This decision ranks as one of the *causes célèbres* in the historical development of the case-law of Austria and is well known throughout the world for the thoroughness with which the court examined not only Austrian case-law, but also the judicial practice and jurisprudence of as many important countries as are known in the annals of legal science. Not only European cases, but also Latin-American and Asian cases were cited and examined by the court. In this case, the respondent was the Czechoslovak State, engaging in business under the name of a firm. The dispute related to the use of trade

⁵¹ Universal Copyright Convention, revised at Paris on 24 July 1971 (United Nations, *Treaty Series*, vol. 943, p. 178).

⁵² *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. The text of the decision of the Austrian Supreme Court is reproduced (in English) in United Nations, *Materials on Jurisdictional Immunities*..., pp. 183 *et seq.*

marks which applied to goods made by the German parent company, sold in Austria and registered in the name of the Czechoslovak subsidiary nationalized by the Czechoslovak State. The German parent company sought an injunction to prevent the Czechoslovak Government from using the trade marks. The extraterritorial effect of the confiscation of trade mark rights was denied in relation to the Austrian marks. It was also held that, since Austria rejected the concept of a uniform trade mark in relation to foreign marks, this also applied to internationally registered foreign marks. Since the nationalized marks were subsequent to the rights of the plaintiff or his licensor, the injunction could be granted. It was held that:

1. *Under international law*, foreign States are exempt from the jurisdiction of the Austrian courts only in so far as relates to acts performed by them in the exercise of their sovereign powers;

2. Similarly, *under municipal law*, foreign States are subject to Austrian jurisdiction in all contentious matters arising out of legal relations within the sphere of private law.⁵³

Referring to the facts of the case, the court observed that:

... Today the position is entirely different; States engage in commercial activities and, as the present case shows, *enter into competition with their own nationals and with foreigners*.^{*} Accordingly, the classic doctrine of immunity has lost its meaning, and, *ratione cessante*, can no longer be recognized as a rule of international law.⁵⁴

66. Whatever may be the criteria used to distinguish between *acta jure gestionis* not covered by State immunity and *acta jure imperii* entitled to immunity, the Supreme Court of Austria was as convincing as it was convinced in its historical approach and judicial reasoning that the business activity conducted in Austria was not protected by State immunity and that the question relating to the use of trade marks by foreign firms registered in Austria was determined by Austrian domestic law under Austrian jurisdiction. No immunity was recognized in respect of questions relating to the foreign trade mark rights in dispute. The Czechoslovak Government could be said to be as much a claimant of the foreign mark rights as the party seeking relief from the court.

67. Another less well-known case is the decision of 30 June 1977 by the Land High Court (Oberlandesgericht) of Frankfurt in the Federal Republic of Germany concerning the Spanish Government Tourist Bureau.⁵⁵ The dispute related to the unauthorized performance of copyrighted film scores and compensation for the infringement of copyrights. The claim for damages was statute-barred but was made on the additional ground of unjust enrichment. The performances were held not to constitute a permissible public use under the Literary Copyright Act. It was also held that film scores retained their separate legal existence even if they were composed for a particular film, because as a rule they could also be utilized for their own sake.⁵⁶ Infringement of copyrighted film scores by showings of such films served, at least indirectly, the "gainful purposes" of the Spanish State.⁵⁷ The court had no diffi-

culty in holding that the Spanish State carrying on business under private law within the Federal Republic of Germany was subject to its jurisdiction. The activities of Spanish Government tourist bureaux were held to be of a private-law nature and thereby not entitled to immunity, nor were violations of copyrights exempt from local jurisdiction even if performances and showings were made by government bureaux of official agencies of a foreign State.

68. In the absence of more recent decisions to the contrary or recognizing State immunity in relation to infringements of rights to the use of patents, trade marks or other intellectual properties, the leading cases cited, especially the Austrian decision containing references to the practice of States, must be viewed as clear indications of an irreversible trend in support of restriction in this particular area, as is in fact being confirmed by other forms of State practice.

3. GOVERNMENTAL PRACTICE

69. It will be seen whether the trend in governmental practice is pointing in the same direction or in the opposite one.

(a) National legislation

70. It is not without interest to note that the United Kingdom, whose case-law has traditionally been associated with the most unqualified practice of sovereign immunity, included the following provision as section 7 of its *State Immunity Act 1978*:⁵⁸

Exceptions from immunity

...

7. A State is not immune as respects proceedings relating to:

(a) any patent, trade mark, design or plant breeders' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;

(b) an alleged infringement by the State in the United Kingdom of any patent, trade mark, design, plant breeders' rights or copyright; or

(c) the right to use a trade or business name in the United Kingdom.

71. This provision has no direct counterpart in the *Foreign Sovereign Immunities Act of 1976* of the United States,⁵⁹ in which the commercial activity covered in subsection (a) (2) of section 1605⁶⁰ may in fact be said to have overshadowed, if not substantially overlapped, the use of copyrights and other similar rights. There has been no clear decision to reject or support this proposition. On the other hand, the British Act is reproduced in substance in section 9 of Singapore's *State Immunity Act, 1979*,⁶¹ and

⁵⁸ United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715; text reproduced in United Nations, *Materials on Jurisdictional Immunities*..., pp. 41 *et seq.*

⁵⁹ See footnote 36 above.

⁶⁰ Cf. section 5 of Canada's 1982 "Act to provide for State immunity in Canadian courts" (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95).

⁶¹ Text reproduced in United Nations, *Materials on Jurisdictional Immunities*..., pp. 28 *et seq.*

⁵³ United Nations, *Materials*..., p. 202.

⁵⁴ *Ibid.*, p. 195.

⁵⁵ *X v. Spanish Government Tourist Bureau, ibid.*, pp. 294 *et seq.*

⁵⁶ *Ibid.*, p. 297.

⁵⁷ *Ibid.*, p. 294.

almost verbatim in section 8 of Pakistan's *State Immunity Ordinance, 1981*.⁶² Other Governments studying the possibility of adopting national legislation on this topic also contemplate inclusion of a similar provision covering this exception in this particular area.⁶³

72. The adoption of a restrictive provision in the national legislation of a few countries, however important, may not be indicative, let alone conclusive, of an emerging trend, but the application of such legislation may produce a widening restrictive effect in view of the practice of many Governments, notably those of India and Italy. The imposition of a commensurate countermeasure in such circumstances is expressly envisaged in the third paragraph of article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics.⁶⁴

(b) *International or regional conventions*

(i) *1972 European Convention on State Immunity*

73. The 1972 European Convention on State Immunity⁶⁵ came into force in 1976 between Austria, Belgium and Cyprus. It has since been ratified by the United Kingdom and Portugal. The Netherlands is also contemplating ratification, while the Federal Republic of Germany and Italy are probably already putting the provisions into practice, stretching them to their logical extremes. It is no longer true that the European Convention is accepted only by Western European countries or members of the European Economic Community. Austria is certainly following a distinctly different policy, while Cyprus has been regarded as Asian in the United Nations. The Convention provides:

Article 8

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate:

(a) to a patent, industrial design, trade mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner;

(b) to an alleged infringement by it, in the territory of the State of the

⁶² *The Gazette of Pakistan* (Islamabad), 11 March 1981 (text reproduced in United Nations, *Materials...*, pp. 20 *et seq.*). Cf. section 8 of South Africa's *Foreign States Immunities Act, 1981* (*ibid.*, pp. 34 *et seq.*).

⁶³ See, for example, the draft Australian legislation of 1984 on the immunities of foreign States, *Foreign States Immunities Bill 1984*, sections 10-20 (reproduced in *International Legal Materials* (Washington, D.C.), vol. XXIII, No. 6 (November 1984), pp. 1398 *et seq.*). Malaysia is also conducting a study.

⁶⁴ That provision reads:

"Article 61. *Suits against foreign States. Diplomatic immunity.*

"...

"Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or that property of that State."

Text reproduced (in English) in United Nations, *Materials on Jurisdictional Immunities...*, p. 40.

⁶⁵ See footnote 49 above.

forum, of such a right belonging to a third person and protected in that State;

(c) to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State;

(d) to the right to use a trade name in the State of the forum.

74. This international convention, although not universal in its application or participation, cannot be brushed aside as insignificant in view of the importance which industrially advanced countries attach to the protection of intellectual property; the principle of reciprocity seems to militate in favour of its widening acceptance in practice.

(ii) *Inter-American Draft Convention on Jurisdictional Immunity of States*

75. While the Inter-American Draft Convention on Jurisdictional Immunity of States as prepared by the Inter-American Juridical Committee⁶⁶ is still in its initial stages and far from being a final text, the problem relating to patents, trade marks and other intellectual properties may be considered overlapped by the wider exception of trade or commercial activities in the first paragraph of its article 5.⁶⁷ The second paragraph states that trade or commercial activities of a State are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.

4. INTERNATIONAL OPINION

76. In the absence of clear *communis opinio doctorum*, as noted by the Supreme Court of Austria in the celebrated *Dralle* case concerning foreign trade marks (see paragraph 65 above), the way is clear for progress to be made along the lines of the majority view or of an existing trend, if any. Since the question is of relatively recent origin, the opinions of publicists have not been so clear-cut or decisive, although it could not be denied that contemporary views are by and large inclined towards a more restrictive practice of jurisdictional immunity in this particular area as well.

77. Thus, for example, the Committee on State Immunity of the International Law Association, in September 1982, recommended a set of draft articles for a convention on State immunity,⁶⁸ article III of which contained the following provision:

Article III. Exceptions to immunity from adjudication

A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances *inter alia*:

⁶⁶ Draft approved on 21 January 1983 in Rio de Janeiro (OEA/Ser. G-CP/doc.1352/83, of 30 March 1983). See also *International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (March 1983), p. 292.

⁶⁷

"Article 5

"States shall not invoke immunity against claims relative to trade or commercial activities undertaken in the State of the forum.

"..."

⁶⁸ The draft convention was adopted by ILA at its Sixtieth Conference (Montreal, 29 August-4 September 1982). See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

...

E. Where the cause of action relates to:

1. Intellectual or industrial property rights (patent, industrial design, trade mark, copyright, or other similar rights) belonging to the foreign State in the forum State or for which the foreign State has applied in the forum State; or
2. A claim for infringement by the foreign State of any patent, industrial design, trade mark, copyright or other similar right; or
3. The right to use a trade or business name in the forum State.

5. A CLEAR TREND

78. If any question, dispute or difference relating to the rights or interests of a State in a patent, trade mark or other intellectual property registered, applied for or otherwise protected by another State is subject to the applicable law and jurisdiction of the court of that other State, it is not too far-fetched to assume that the State owning or applying for registration of such rights would have in fact accepted the protection of another State and hence consented to the exercise of jurisdiction by the forum State in all proceedings relating thereto. Half of the battle is over, since in most cases relating to such rights the foreign State is invariably in the position of a claimant. If the State is claiming the rights or is applying for such rights, its consent to the exercise of jurisdiction is presumed to have been given by its own conduct. If, however, the State is alleged to have infringed the rights of a third person and it disputes or contests the allegation, then it is also inevitably a claimant, for otherwise it will not have to be joined as a party to the litigation, except in the event of an injunction being sought against the State for the continuing use of such rights in the State of the forum. Then the State is obliged either to forgo the use of such rights or to contest the claim. In the latter event, the State will in fact be in the position of a joint claimant or co-claimant of the disputed rights.

79. A trend in the practice of States and legal opinion seems to have emerged clearly in support of absence of immunity, or the subjection of the foreign State claiming, contesting or applying for such rights to the jurisdiction of the forum State. There appears to be no other clear trend in a different or opposite direction.

C. Formulation of draft article 16

80. The draft article for this particular area of patents, trade marks and other intellectual properties might accordingly be formulated as follows:

Article 16. Patents, trade marks and other intellectual properties

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) the right to use a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright which has been registered, deposited or applied for or is otherwise protected in another State, and

in respect of which the State is the owner or applicant; or

(b) the right to use a trade name or business name in that other State.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it which relates to:

(a) an alleged infringement by or attributable to a State, in the territory of that other State, of a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright belonging to a third person and protected in that other State; or

(b) an alleged infringement by or attributable to a State, in the territory of that other State, of the right to use a trade name or business name belonging to a third person and protected in that other State.

ARTICLE 17 (Fiscal liabilities and customs duties)

A. General considerations

1. SCOPE OF "FISCAL LIABILITIES AND CUSTOMS DUTIES"

81. A State is not normally liable to taxation or customs duties levied by another State, except in cases where it establishes a business—official or commercial—or maintains an office or agency in the territory of another State. The maxim *par in parem imperium non habet* or *jurisdictionem non habet* must be read in the context where there is no overlapping of activities of a State in the territory or under the territorial sovereign authority of another State. It is generally undisputed that the principle of "territoriality" or "territorial sovereignty" is more absolute and is not subject to limitations or qualifications by the national or personal sovereignty, or sovereign authority or personality of another State.

82. It follows as a matter of course that, in most cases of contact, confrontation, clash or conflict, the territorial sovereign exercises supreme authority over and within its territory. An outside sovereign or extraterritorial power must be presumed to have submitted to the sovereign authority of the territorial State and could only exert or exercise such governmental or sovereign authority as had been previously agreed to by the territorial sovereign, which could either waive its sovereign authority or consent to the exercise of a limited governmental power by the visiting extraterritorial authority. Otherwise, it would be tantamount to the recognition of a colonial status or régime, directly against the concept of *jus cogens*.

83. Conceptually, liability in terms of jural relationship is the correlative of power, as opposed to immunity which is the correlative of non-power. Thus to admit the supremacy or superiority of the territorial sovereign is already one big step towards acceptance of liability, once the extraterritorial State projects its image or personality within the territorial sphere of a sovereign authority of another State.

84. The matter has to a large extent been regulated in so far as diplomatic, consular or *ad hoc* missions are concerned. The special régime allowing for special privileges

and exemptions from certain categories of taxation is based on functional necessity and justified by the principle of reciprocity. Beyond reciprocity and functional necessity, exemption from taxation is granted as a matter of generosity or courtesy; it stems from the comity of nations, based on considerations of reciprocal treatment rather than *opinio juris* or legal obligation. Besides, there is nothing to prevent two or more States or a group of States from agreeing to accord tax concessions *inter se* (or even unilaterally) as part of a generalized system of special preferences, whether for internal revenues or levies for import of goods or for other tariff or non-tariff barriers. The rationale behind the authority to tax or to collect levies lies in the supremacy of the territorial sovereign.

85. Article 17 may be entitled "Fiscal liabilities and customs duties" to denote absence of immunity from the jurisdiction to tax or collect revenues. Lack of exemption or of immunity from the territorial jurisdiction to adjudicate upon questions of taxes or tax assessment is the equivalent of liability for taxation and payment of duties. This heading also includes property taxes and rates for the utilities and facilities connected with immovable property.

2. JURISDICTION TO TAX OR COLLECT IMPORT DUTIES

86. The legal basis for the jurisdiction or power of a State to tax any person, including a foreigner or another State, is to be found in the territorial connection of the source of income or the importation or entry of goods into the territory of the territorial State. The power to tax can sometimes be excessive—if it extends beyond the territorial scope or confines it has to be justified on another ground, such as nationality or origin of the revenue, or indeed residence, even if partial or temporary.

87. Jurisdiction in fiscal matters and importation of goods or merchandise normally belongs to the revenue and customs department of the Ministry of Finance or the Treasury. Thus revenue collection and the power to impose levies and customs duties are sanctioned by law but enforced by the officers of the revenue department or customs officers, or indeed through other more decentralized authorities such as cities, counties and municipalities in respect of rates, property taxes or road taxes for vehicles and other means of transport such as motor launches, helicopters and aircraft. In the penultimate analysis, appeal may be made to the Minister of Finance or the Lord Mayor of a city or other high administrative officer, whose decision could be challenged in a court of law in legal proceedings. Thus a State could be implicated or involved in a proceeding before the court of another State for failure to pay taxes or import duties in respect of income earned on behalf of the State in the territory of that other State or for the importation of goods into that other State without an agreement to exempt or to waive the taxes or duties to be collected. On the other hand, a State could, of its own free will, participate in a proceeding in a court of another State relating to the amount or assessment of taxes, revenues or duties, or to the very question of its own liability for taxation by the revenue authority of the State of the forum. In the latter instance, the State may be said to have consented by clear conduct to the exercise of jurisdiction by the court of the forum State.

3. MARGINAL UTILITY OF AN EXPRESS PROVISION

88. A question may be validly asked as to the practical use of a provision excepting "fiscal liabilities and customs duties" from the principle of State immunity. Once the exception of commercial contracts is admitted, the importation of goods in connection with a commercial transaction is clearly not exempt from the jurisdiction of the territorial or forum State. Nor indeed is the State immune from the jurisdiction of a court of another State in respect of taxation for the revenue or income derived from the trading or commercial activities conducted within the territory of that other State. There may perhaps be no great need to include a specific provision expressly dealing with lack of immunity with regard to "fiscal liabilities and customs duties" payable by an extraterritorial State. But for the sake of clarity, and to put an end to lingering doubts, there appears to be some usefulness, or at least a marginal utility, in dissipating unnecessary hesitancy, thereby clearing the path for greater simplicity in the application of otherwise complex rules of State immunity.

89. Furthermore, there seems to be no doubt as to the correctness of the proposition that, where jurisdiction exists for one State to collect revenues or duties from an agency or instrumentality of another State, liabilities to pay such revenues and duties are established, unless the territorial State specifically waives its power to tax for any reason or considerations of its own free will. Proceedings before the court of another State relating to "fiscal liabilities and customs duties" accordingly lie outside the scope of application of State immunity, constituting as they do a substantive exception to the general principles of jurisdictional immunities of States and their property. Conversely, to formulate such an exception provides an opportunity to delimit the scope and extent of its application, and hence an opportunity to reassert and preserve immunity of State property from some kinds of taxation, as long as it is used as diplomatic or consular premises, and the immunity from income taxes accorded to members of diplomatic and consular missions under the Vienna Conventions of 1961 and 1963.⁶⁹

B. The practice of States

1. JUDICIAL PRACTICE

90. Judicial decisions against a foreign State or foreign government agency compelling payment of taxes, dues, charges or rates are rare. This is so not because they have successfully invoked jurisdictional immunity or been held to be exempt from liability to pay such taxes or revenues, but more frequently because there is no point in refusing to pay such taxes. The fact that another State is admitted and permitted to run a business or use a motor vehicle in the territory of the forum State indicates unmistakably its willingness to recognize and respect the local laws or ground rules, including the power of the local authority to tax and the extraterritorial State's liability to pay local taxes in accordance with local regulations. Adjudication is but an

⁶⁹ See footnote 35 above.

ultimate recourse that need not be taken, once a State acknowledges the supremacy of another State over its own territory. Failure to do that may result in a more serious conflict, entailing graver consequences.

91. There are no decided cases in the practice of most countries, including the United Kingdom, France and Australia. A line of cases could be found in the practice of the United States of America between May 1952, the date of the "Tate Letter",⁷⁰ and January 1977, the date of entry into force of the *Foreign Sovereign Immunities Act of 1976*, most of which concerned the possibility of levying property taxes on State property of a foreign Government. Thus, in three parallel actions, *City of New Rochelle v. Republic of Ghana*, *Republic of Indonesia*, and *Republic of Liberia* (1964),⁷¹ immunity of property from foreclosure proceedings to satisfy real estate tax liens was recognized in three parallel State Department notes dated 8 June 1964. The United States Attorney was instructed to appear and file a suggestion of immunity with the court on the ground that the property in question was "being used as the residence of the Permanent Representative of Ghana to the United Nations" and as such "not subject to the jurisdiction of the County Court of the County of Westchester, State of New York". With respect to the request for action to have the claim for taxes on the property in question withdrawn, however, the Ambassador was informed that "in the Department's view such property is not immune from real property taxation under customary international law".⁷²

92. Thus, unless otherwise agreed in a bilateral treaty, headquarters agreement or multilateral convention, property taxes in the United States are payable, although in the above three cases as well as in an earlier case concerning the Kingdom of Afghanistan,⁷³ immunity from suit was recognized in a claim against property levied upon for non-payment of real estate taxes as a measure of enforcement of tax collection. The State Department held a similar view in regard to non-assessment of taxes against foreign government-owned property used for public non-commercial purposes, namely the consulate of the Republic of Argentina in New York. In that case, Argentina was plaintiff in an action to recover taxes assessed against its consulate in New York.⁷⁴ The lower court held that, in the absence of a treaty to the contrary, a foreign State's property was not exempt from taxation and that Argentina was not entitled to recover real estate taxes on consular property. The

Department of Justice as *amicus curiae* on appeal brought to the attention of the Court of Appeals a letter dated 2 September 1965, to the effect that

The Department of State is of the opinion that under *recognized principles of international law and comity** the several States of the United States, as well as their political subdivisions, should not assess taxes against foreign government-owned property used for public non-commercial purposes.⁷⁵

The New York Court of Appeals held that foreign State property devoted to public governmental use is immune under customary international law from local real estate taxes, but that Argentina's claim for a refund was not timely.

93. In another case, in which the United States sought to enjoin a tax foreclosure sale by the City of Glen Cove against a residence of the Permanent Representative of the Soviet Union to the United Nations,⁷⁶ the State Department stated in a letter to the Attorney General that it "accepts as true the diplomatic representations" of the Soviet Government that the property "is used as a residence of its Permanent Representative to the United Nations and his deputies having the rank of Ambassador or Minister...".⁷⁷ It would appear that the liability for taxes depended on the discretion of the Department of State in the first place but the actual decision, beyond the action taken by the taxing authority, would have to come from the court of competence. The law does not appear to be clear. Relativity abounds around the possibility of existing treaty commitments in a particular case, and yet the residual rule, in the absence of a bilateral arrangement, seems to hover between the various authorities within the same Government. A distinction was drawn between liability for taxation and possible immunity from jurisdiction to foreclose a lien on the property used for governmental and non-commercial purposes, which is closer to immunity from execution but subjection to taxation. A later case relating to attempted taxation by local authorities of uranium stored for Japanese utility companies in Oak Ridge, Tennessee, and purchased pursuant to undertakings between the Governments of Japan and the United States did not throw any further light on this mystery. No decision was made by the State Department as the request from the Embassy of Japan was withdrawn on the basis of a settlement.⁷⁸

94. Judicial decisions and the opinions of the executive in the cases referred to above appear inconclusive if not outright inconsistent. On the one hand, there appears to be authority for the proposition that the power to tax and liability for taxation coexist even as regards a foreign State's property, and that the only possible exception is consent or waiver by the territorial State established in the form of treaty provisions. No clear precedent exists for the

⁷⁰ See the fourth report of the Special Rapporteur (see footnote 1 (d) above), para. 94.

⁷¹ *New York Supplement, 2d Series*, vol. 255 (1965), p. 178.

⁷² See *Digest of United States Practice in International Law, 1977* (Washington, D.C., 1979), appendix: "Sovereign immunity decisions of the Department of State, May 1972 to January 1977", p. 1050, No. 44. The Department of State construed section 15 of the Headquarters Agreement of 1947 between the United States of America and the United Nations "as not extending immunity from real estate taxes to missions to the United Nations". That position was first stated in a note to the Secretary-General of the United Nations on 23 November 1955 (*ibid.*).

⁷³ *Knocklong Corporation v. Kingdom of Afghanistan* (1957) (*New York Supplement, 2d Series*, vol. 167 (1958), p. 285); see *Digest of United States Practice...*, 1977, *op. cit.*, p. 1034, No. 14.

⁷⁴ *Republic of Argentina v. City of New York* (1967) (*New York Supplement, 2d Series*, vol. 283 (1968), p. 389); judgment affirmed (1968) (*ibid.*, vol. 290 (1968), p. 706); judgment modified (1969) (*ibid.*, vol. 303 (1970), p. 644).

⁷⁵ See the letter from the Department of State's Acting Legal Adviser, Mr. Richard D. Kearney, to the Comptroller of the City of New York, *Digest of United States Practice...*, 1977, *op. cit.*, p. 1053, No. 48.

⁷⁶ *United States v. City of Glen Cove* (1971) (*Federal Supplement*, vol. 322 (1971), p. 149); judgment affirmed (1971) (*Federal Reporter, 2d Series*, vol. 450 (1972), p. 884).

⁷⁷ See *Digest of United States Practice...*, 1977, *op. cit.*, p. 1069, No. 71.

⁷⁸ *Ibid.*, p. 1077, No. 100. See also C. Brower, "Litigation of sovereign immunity before a State administrative body and the Department of State: The Japanese uranium tax case", *American Journal of International Law* (Washington, D.C.), vol. 71 (1977), p. 438.

absolute immunity of diplomatic or consular premises from taxation beyond courtesy or comity, depending on the discretionary power of the territorial State to dispense with the tax assessment. It is relatively certain that foreign State property used for governmental and non-commercial purposes would be exempt from attachment, seizure, foreclosure proceedings and other measures of execution, especially as far as the executive is concerned. Payment of taxes already assessed would not appear to be recoverable.

95. Such practice, unsettled and unsettling as it may seem, is no more precise elsewhere. The only other relevant decision is probably a Canadian case decided in 1958⁷⁹ relating to an attempt by the local authority to collect rates on premises leased on behalf of the United States for the purpose of constructing a radar installation pursuant to a joint defence scheme with the Canadian Government. The Canadian Supreme Court held that the land was immune from rates, although the decision was probably not influenced by the fact that there was an express invitation by Canada to the United States to undertake the work and that the defence, rather than the commercial, character of the project was emphasized.

2. GOVERNMENTAL PRACTICE

96. In a way not uncharacteristic of the Canadian and United States decisions, which are inherently connected with the positions taken by the political branches of the Government, and not altogether separable from the discretionary power of the executive, governmental practice seems to be preponderantly in favour of settlement of this delicate point by bilateral agreements. Thus the Government of Thailand, for example, had concluded agreements, as it is entitled to do in law and as it often does in practice, with friendly Governments or international organizations dispensing with the liability to pay *ad valorem* duties on transfer of title deeds or reducing such fiscal liabilities by a half. Rates can similarly be adjusted and readjusted in accordance with the favourable treatment to be accorded to official premises or property of Governments or international organizations used for official, governmental and non-commercial purposes.

97. Practice therefore varies from complete exemption or absolute immunity, to complete subjection or liability to taxation in full, via intermediate stages of partial subjection to rates and taxes. This is also true of import duties in Thailand, exemption from which may be accorded under bilateral arrangements or headquarters agreements, as fully authorized by the general enabling clause or provision in an act in the Revenue Code, as well as by the royal decree for customs tariff exemptions.

98. This state of flux in international practice would appear to call for a re-examination of the entire question of fiscal liabilities and customs duties. An attempt should therefore be made to restate or reformulate residuary rules in this specified area, while leaving intact the inviolability,

and hence immunity, of State property from all forms of seizure, attachment, foreclosure or execution.

(a) National legislation

99. The United Kingdom *State Immunity Act 1978*⁸⁰ contains a provision on the point at issue. Section 11 of that Act reads:

Exceptions from immunity

...

11. A State is not immune as respects proceedings relating to its liability for:

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) rates in respect of premises occupied by it for commercial purposes.

100. A similar provision is contained in section 13 of Singapore's *State Immunity Act, 1979*⁸¹ and in section 12 of Pakistan's *State Immunity Ordinance, 1981*.⁸² The United States and Canadian counterparts do not contain parallel provisions. However, the liability of foreign Governments to pay United States 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 rule-making"⁸³ provides guidance for taxing foreign sovereigns on their income from commercial activities within the United States. 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 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*,⁸⁴ whereas amounts derived from commercial activities in the United States are taxable under section 881 or 882. 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.

(b) International or regional conventions

101. International or regional conventions appear to remain silent on this point. Perhaps silence was preferred, leaving the practice to grow out of the general confusion. Neither the 1972 European Convention on State Immun-

⁸⁰ See footnote 58 above.

⁸¹ See footnote 61 above.

⁸² See footnote 62 above; see also section 12 of South Africa's *Foreign States Immunities Act, 1981* (*ibid.*).

⁸³ *Federal Register*, vol. 43, No. 158 (15 August 1978), pp. 36111 *et seq.*; see also United Nations, *Materials on Jurisdictional Immunities...*, pp. 63 *et seq.*

⁸⁴ *United States Code, 1976 Edition*, vol. 7, title 26, p. 572.

⁷⁹ *Municipality of the City and County of Saint John, Logan and Clayton v. Fraser-Brace Overseas Corporation et al.*; see United Nations, *Materials on Jurisdictional Immunities...*, pp. 232 *et seq.*

ity⁸⁵ nor the 1983 Inter-American Draft Convention on Jurisdictional Immunity of States⁸⁶ contains a comprehensive provision on immunity from taxation either of the State itself, or of its property. The inter-American draft convention merely states:

Article 6

States shall not claim immunity from jurisdiction either:

...

(d) in tax matters regarding activities under paragraph one of article 5, for property located in the forum State;

...

The activities in question include "trade or commercial activities undertaken in the State of the forum".⁸⁷

3. INTERNATIONAL OPINION

102. Legal opinions are perhaps undecided or even indifferent on a number of relevant points, not knowing for certain whether a provision dealing with this specified area should be included in the part on exceptions. If so, the extent or scope of the content of the exception, its qualifications and limitations will also have to be ascertained and formulated with a reasonable measure of precision and confidence. The draft prepared by the Committee on State Immunity of the International Law Association and adopted at Montreal in 1982⁸⁸ makes no pronouncement on this significant but delicate issue. On the positive side, progressive development of international law should include an appropriate provision.

4. A TWILIGHT ZONE

103. This particular area of "fiscal liabilities and customs duties" may constitute a twilight zone in the opinion of writers, at least as to the desirability and necessity of including a specific provision. This somewhat nebulous area could be illuminated by articulating a draft provision to indicate the likelihood of positive rules being adopted on the application or non-application of State immunity in regard to fiscal liability, including income tax, purchase or sales tax, excise duties, *ad valorem* stamp duties, import levies and duties, rates and other taxes on property. The inclusion of such a provision would seem to be warranted.

C. Formulation of draft article 17

104. Article 17 could be formulated as follows:

Article 17. Fiscal liabilities and customs duties

1. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its liability for:

⁸⁵ See footnote 49 above.

⁸⁶ See footnote 66 above.

⁸⁷ See footnote 67 above.

⁸⁸ See footnote 68 above.

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) *ad valorem* stamp duty or a charge or registration fee for registration or transfer of property in the forum State; or

(c) income tax derived from commercial activities conducted in the forum State; or

(d) rates or taxes on premises occupied by it in the forum State for commercial purposes.

2. Nothing in paragraph 1 shall be interpreted as an exception to the immunity of a State for its diplomatic and consular premises from seizure, attachment or measures of execution, or to allow foreclosure, sequestration or freezing of such premises or of State property otherwise internationally protected.

ARTICLE 18 (Shareholdings and membership of bodies corporate)

A. General considerations

1. SCOPE OF "SHAREHOLDINGS AND MEMBERSHIP OF BODIES CORPORATE"

105. When a State buys share or holds shares in a company constituted under the law and registered by virtue of the company law of another State, or acquires equities or becomes a member in an association or partnership formed, organized or chartered under the legal system of another State, it may be said to have entered into a legal relationship in that other State. Physically, the State need not leave its territory nor cross the boundary of that other State to acquire shares, membership or partnership in any corporation, association or society established in the territory of another State by virtue of its internal law.

106. The fact that a State holds shares or becomes a member of a body corporate organized and operating in another State would seem to indicate its willingness to recognize the validity of the legal relationship it has created or entered into under the legal system of that other State. In so doing, the State is also bound to respect the local laws of the State of incorporation or registration, or of the *siège social* or headquarters, and to abide by the charter of the corporation or unincorporated partnership concerned. The purpose of article 18 is to examine and delimit the scope of "shareholdings and membership of bodies corporate" by a State as an exception to its immunity from the jurisdiction of the State of incorporation or association.

2. APPLICABILITY OF THE LAW OF INCORPORATION AS A SOUND BASIS FOR EXERCISE OF JURISDICTION

107. In all matters relating to the relationship between shareholders *inter se* or between the shareholders and the company or body corporate of any form, the law of the State of incorporation governs the formation, operation and also the dissolution of the entity in question. No other legal relationship could exist outside the purview of the law of the State of incorporation or registration, or of the controlling centre or *siège social* or *central* of the organization or entity. Because of the special nature of the law and the resulting legal relationship, no other systems of law seem to be applicable. Thus the exclusive application of the law of

the State of incorporation makes it difficult or impossible to imagine the applicability of another law or another separate and independent legal system.

108. It does not, however, necessarily follow that the exclusive applicability of a law implies the exclusive competence of the State of incorporation. The existence of rules of conflict of laws and private international law presupposes the possibility of a choice of laws to be made by any competent court or any tribunal with concurrent jurisdiction. But for a highly specialized branch of the law, such as that relating to patents and trade marks (article 16) or company law or law concerning bodies corporate (article 18), the jurisdiction of the State of incorporation and place of head office of the corporate bodies is practically exclusive. No other jurisdiction seems better entitled to exercise the specialized competence or to apply with accuracy and consistency the complex system of company law or association law of another State, which at best would be alien to it.

109. Thus any court foreign to the applicable law is invariably a *forum non conveniens*. Only the court of the State of incorporation or the place of head office could be a *forum conveniens* or an appropriate adjudicatory tribunal.

3. PRESUMPTION OF CONSENT TO THE EXERCISE OF SOLE JURISDICTION BY THE STATE OF INCORPORATION

110. If the only applicable law coincides with the sole jurisdiction of the State of incorporation and customary international law requires other States to respect the applicable local law of the place of incorporation or of the place of business operation, as the case may be, the presumption is almost irrebuttable that any extraterritorial State acquiring shares in a company or membership of a body corporate established under the law of another State must have understood and consented to be bound by the very same law which creates the legal obligations contracted and, failing other available jurisdictions, also agreed to the exercise of jurisdiction by the competent court of that legal system in all matters relating to or arising out of the legal relationship connected with the company or body corporate in question. No other explanation makes any sense.

4. AN ACQUIRED PLACE

111. It is thus becoming increasingly clear that, in this particular area of "shareholdings and membership of bodies corporate", the principle of State immunity does not and cannot truly apply without creating a legal vacuum which can never be filled. This area may be said to have acquired a rightful place in the current stage of legal developments as an inevitable and uncontested exception to the doctrine of State immunity.

B. The practice of States

1. JUDICIAL PRACTICE

112. The absence of judicial decisions directly concerning these matters does not seem to present a source of real

difficulty, not unlike the area of patents, trade marks and other intellectual properties, where very few decisions have been cited and discussed. In this area, as in others, including that of fiscal liabilities and customs duties, in which case-law is scanty if not non-existent (except for the few instances in the United States), the noticeable absence of judicial pronouncements does not alter the facts of legal developments and evolution. Other sources of State practice need to be examined to supplement what appears to be lacking in judicial reaffirmations.

2. GOVERNMENTAL PRACTICE

(a) National legislation

113. It is sufficiently clear, in the absence of judicial decisions to the contrary, that in the practice of the countries which have adopted national legislation limiting or restricting State immunity in this specified area, immunity is denied a foreign State in proceedings relating to its membership of a body corporate, an unincorporated body or a partnership, and in those arising between the State and that body or its members, or between partners. It is interesting to note the requirement that another member (or members) must not be a State (or States). One of the three links or substantial connections, namely the place of incorporation indicating the system of incorporation, charter or constitution; the place of control; or the principal place of business (*siège social*), must be in the State of the forum to substantiate the presumption of consent to the exercise of jurisdiction by such closely connected forum.

114. Thus section 8 of the United Kingdom *State Immunity Act 1978*⁸⁹ provides:

Exceptions from immunity

...

8. (1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which:

(a) has members other than States; and

(b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom,

being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

(2) This section 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 or partnership in question.

115. Similar provisions are contained in Singapore's *State Immunity Act, 1979*,⁹⁰ Pakistan's *State Immunity Ordinance, 1981*⁹¹ and other legislative texts.⁹² The Canadian Act and that of the United States of America appear to have included this area under the wider exception of commercial activities.⁹³

⁸⁹ See footnote 58 above.

⁹⁰ See footnote 61 above.

⁹¹ See footnote 62 above.

⁹² See, for example, section 9 of South Africa's *Foreign States Immunities Act, 1981* (*ibid.*).

(b) *International or regional conventions*

116. The 1972 European Convention on State Immunity⁹⁴ and the 1983 Inter-American Draft Convention on Jurisdictional Immunity of States⁹⁵ appear to have included this exception under a larger heading of trade or commercial activities conducted or undertaken in the State of the forum.

3. INTERNATIONAL OPINION

117. International opinion is not so prolific in this area of "shareholdings and membership of bodies corporate". The draft convention prepared by the International Law Association's Committee on State Immunity prefers to have this limited area of exception partially or fully covered by the wider notion of "commercial activity".⁹⁶ Even under that larger exception, questions relating to shareholdings and membership of bodies corporate are not always completely or wholly covered. In any event, article 12,⁹⁷ as provisionally adopted by the Commission, refers to "commercial contracts" rather than the entire field of trading or commercial activities. Accordingly, if originally the reason for including article 18 might have been fragile, there now appears to be stronger justification in practice. There are no compelling views of writers on this particular issue.⁹⁸ A flexible attitude is therefore recommended. Jurisdiction of the State of incorporation or of principal place of business or control may be presumed, for without it there may be no court competent to try the subject-matter of the litigation. In the interest of justice, and however narrow the special area designated under this exception may be, a provision would be useful in any effort to codify or progressively develop rules regarding State immunity and the extent of their practical application.

C. Formulation of draft article 18

118. An attempt has thus been made to formulate article 18 to cover the exception of "shareholdings and membership of bodies corporate", keeping intact the freedom of contract of the parties to opt out of the provision, and establishing a firm link between the exercise of jurisdiction and the preponderant, if not obviously exclusive, applicability of the law of the State of the forum, which is the law of the place of incorporation or association, or the law of the principal place of business or of the place of control. The draft article might be formulated as follows:

⁹³ See section 5 of Canada's 1982 Act (see footnote 60 above), and section 1605, subsection (a)(2), of the United States 1976 Act (see footnote 36 above).

⁹⁴ See footnote 49 above.

⁹⁵ See footnote 66 above.

⁹⁶ See article III, section B, of the draft convention (see footnote 68 above).

⁹⁷ See footnote 21 above.

⁹⁸ See, for example, J. Crawford, Rapporteur for the draft Australian legislation on the immunities of foreign States (see footnote 63 above), in Australian Law Reform Commission, "Foreign State Immunity Research Paper No. 4" (Canberra, 1983).

Article 18. Shareholdings and membership of bodies corporate

1. A State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to the determination of its rights and obligations arising from its shareholdings or membership of a body corporate, an unincorporated body or a partnership between the State and the body or its other members or, as the case may be, between the State and the partnership or the other partners, provided that the body or partnership:

(a) has members other than States; 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 or partnership in question.

ARTICLE 19 (Ships employed in commercial service)

A. General considerations

1. SPECIAL STATUS OF SHIPS

119. Ships or seagoing vessels have a special status distinct from other types of State property. In the first place, they are endowed with a nationality. There is always a State which exercises jurisdiction over a ship, wherever the ship may be, and that is the flag-State or the State whose flag the ship flies. Seagoing vessels may also have their places or port of registration separate or distinct from their flag-State. A land-locked State is entitled to have its flag. The place of registration may serve a different legal purpose, whereas the flag that a ship flies at least serves to indicate her nationality, and the nationality of a vessel in turn may serve to decide a number of questions, including allegiance to a sovereign State, involving its protection and the application of the laws of the flag-State, when on the high seas or otherwise, even outside the territorial waters or exclusive economic zones of the flag-State. A ship without a nationality is often regarded, not as a stateless ship, but as a pirate ship, while the flag-State may disown or denounce any of the ships flying its flag, once it is established that such a ship is engaged in acts of piracy on the high seas or is otherwise perpetrating an international crime known as piracy *jure gentium*.

120. Apart from the usual requisite of nationality which necessarily attaches to a seagoing vessels, the ship is also sometimes considered as a piece of floating territory of the flag-State. It is treated for several purposes as if it were an extension of the landed area of the territory of the State whose flag it flies. Although merely a fiction, the extraterritoriality of a seagoing vessel is a concept that carries far-reaching implications in actual practice. All kinds of legal or juristic acts may be performed or celebrated on board a seagoing vessel, including marriage, birth, burial or cremation, and treated as valid under the applicable laws of the flag-State. In short, several types of civil status of natural persons may be consummated on board this float-

ing territory, even on the high seas. The officer who may initiate the act is the captain or commander of the ship. This master or skipper of the ship may exercise extensive power of registration and administration concerning the civil status of persons. The territorial character of a ship even within foreign territorial waters or anchored in a foreign port may be illustrated by the possibility of asylum being given on board the ship and the surrender of a person by and from the ship, in the form of extradition for an extraditable offence in appropriate circumstances.

121. The combination of the two elements, namely nationality and territory, makes the status of a ship unique in more ways than one. In addition to its unique capacities and qualities, a seagoing vessel is often personified, in the sense that it may be likened to a natural or legal person as it is so recognized in several legal systems. Thus, more notably in the Anglo-American and other common-law countries, a ship could be proceeded against by an action *in rem* in admiralty, a distinct legal status incomparable to any other object or any personified subject of law. Such a process *in rem* is basically directed against the ship itself, which could be considered as coming under part IV of the draft, concerning immunities of State property from attachment and execution. No separate treatment would be necessary, if such were to be the case. However, it is now the practice in common-law systems that a process *in rem* against a ship, whether to repair physical damage caused by careless navigation of such a ship or to recover moneys in respect of salvage services, or in pursuit of a maritime lien, followed by seizure or arrest of the same, really has the purpose of compelling the owner to enter an appearance.⁹⁹

122. It has now become the practice even in a process *in rem* in admiralty for the writ to be addressed not only to the ship, but also to all persons interested in it, including the owner, charterer and operator, as well as the owners of the cargoes carried on board the vessel at the time of seizure. Referring to the peculiarities of the procedures of British admiralty, G. G. Phillimore remarked:

... it [the British admiralty] had peculiar procedures: it could proceed *in rem* against property situated within its jurisdiction by issuing a writ specifically against the ship and by seizure, or it could proceed *in personam* against the owner of the ship or the person actually in command.¹⁰⁰

123. This practice has operated to nullify what might otherwise have been a most effective means for a private litigant wishing to obtain redress against the trading ships of a foreign State. If that practice had not existed, he might have issued a writ *in rem* against the ship and secured his redress without disturbing or indeed impleading the foreign sovereign. But since the practice does exist, he can only issue such a writ *in rem* by addressing it not only to the ship, but inevitably also to all persons interested in it and its cargoes. If such persons are foreign sovereigns or States

⁹⁹ See the dictum of Sir Francis Jeune in *The "Dictator"* (1882) (*The Law Reports, Probate Division*, 1892, p. 304), followed by the Court of Appeal in *The "Gemma"* (1899) (*ibid.*, 1899, p. 285, especially p. 292); cf. Lord Justices Bankes and Scrutton in *The "Jupiter" No. 1* (1924) (*ibid.*, 1924, p. 236, at pp. 241-242).

¹⁰⁰ G. G. Phillimore, "Immunité des Etats au point de vue de la juridiction ou de l'exécution forcée", *Recueil des cours de l'Académie de droit international de La Haye, 1925-III* (Paris, Hachette), vol. 8 (1926), p. 461.

or Governments, they will necessarily be impleaded. Thus, because of its personal consequences, the admiralty rule as to a process *in rem* in the common-law countries, on the face of it impersonal, has become unworkable against vessels in which foreign States are interested. Consequently ships, though *prima facie* governed by rules different from those to which common law submits other movables, are in the final analysis subject to such rules, and the courts "will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control".¹⁰¹

2. OWNERSHIP, POSSESSION OR CONTROL

124. If ships, with their special status and peculiarities under the major legal systems, are also essentially property and subject equally to rules applicable to special kinds of movables, then the persons interested in a ship against which a process *in rem* is being directed must include all persons who are owners of the vessel or who have possession or control of it.

125. The concept of ownership is not irrelevant to the question of nationality. Apart from the possibility of a flag of convenience, which may be attributed to a ship for convenience sake and regardless of its true nationality, several legal systems impose certain minimum requirements for a ship to have the nationality of the flag-State or the State of its registration. Thus, in Thailand, to have Thai nationality a ship must be owned by Thai nationals; or, if the owner is a corporate body organized under Thai law, at least 70 per cent of the shares must be owned by Thai nationals.¹⁰² On the other hand, a company could be established in Thailand and registered with Thai nationality but with less than 70 per cent of its shares owned by Thai nationals. However, to own a Thai vessel with the right to fly the Thai flag, the company itself must be at least 70 per cent Thai-owned.¹⁰³ Otherwise, the vessel could not fly the Thai flag on the ground of insufficient ownership by Thai nationals.

126. Similar requirements exist regarding the classification of ships as being State-owned. Ownership of a vessel by a State will have to meet certain minimum requirements to justify the State's claim to own the vessel, substantially or principally if not wholly. Ownership by the foreign State clearly determines the fact that a proceeding impleads a foreign Government even if it is only incidentally against its owners. As has been seen in a different context, the flag implies the possibility of exercise by the flag-State of certain sovereign rights and powers or duties of protection, but not necessarily involving impleading the State whose flag the ship happens to fly, unless the ship actually belongs to the flag-State. The flag flown by a ship does not imply its ownership by the flag-State or by any State, it merely indicates the nationality of the vessel,

¹⁰¹ See the opinion of Lord Atkin in *The "Cristina"* (1938) (*The Law Reports, House of Lords...*, 1938, p. 490).

¹⁰² See section 7 of the Thai Ships Act as amended by section 3 of the Thai Ships Act (Third Act) (B.E. 2521).

¹⁰³ If it is owned by a registered partnership, all the partners must be Thais.

which entails legal consequences that, to some extent and for some purposes, could be less extensive or limited, as the case may be. The extent of ownership of a vessel by a foreign State may determine whether the State is being impleaded or not when a process *in rem* is directed against that ship. Because of the variety of requirements governing the nationality of a ship, the ship may fly a different flag from that of the State owning it, having been registered under a flag of convenience or otherwise.

127. The question of possession or control of a ship is basically relevant to the consideration of State immunities. Possession by the State could be constructive or actual, for instance through the captain, commanding officer, skipper or master of the ship obeying instructions from the State. Control could be more remote, and yet actual, through the same medium of the captain loyal to the owner State and following the instructions of the State or of one of its responsible agencies or instrumentalities. Persons interested in the ship cover a wider group than the owners or co-owners of the ship, including the corporation or its shareholders who are also classed as shipowners, and also owners or assignees of cargoes laden on board the vessel when seized, and charterers, operators or those responsible for the operation and navigation of the ship, be it the master and his crew or others. A State can thus remain in possession or control of a vessel through its captain, commanding officer or master and crew. A charter-party may contain provisions indicating the division of control according to whether it is a bare-boat charter or a charter-party for certain portions or containers or parts of the vessel, with or without the crew or master.

3. CLASSIFICATION OF VESSELS

128. It would seem pertinent to touch briefly upon the classification of vessels, especially for the purpose of immunities. Whatever the criterion—ownership, possession or control—a warship or man-of-war in active service belongs to a category of State-owned or State-operated ships or public vessels which enjoy extensive immunities from jurisdiction, arrest, detention and execution by the court of any other State, apart altogether from the wide-ranging sovereign power that a warship could display even on the high seas and through territorial waters. Vessels of war belong to the armed forces of the State, adding to its military strength and might, and as such lie outside the reach and jurisdiction of the courts of other States. This rule is applicable whether or not the ship is owned by the State. The fact of its service is determinative of its immunity. Its employment or commission as a man-of-war vests upon the vessel the character of a warship independently of its ownership at any particular moment. The ship could be commissioned under a requisition decree, chartered, bought on hire-purchase or made available on loan from another Government or a private party, so long as it is employed or used by the State as a man-of-war for purposes of national defence.

129. In international law, in time of peace or even in the event of an armed conflict, warships or men-of-war have a special status, special privileges, and admittedly cannot be proceeded against, unless they have been decommissioned or condemned as lawful prizes by a prize-court, an insti-

tution which has gone out of fashion.¹⁰⁴ Ordinarily, nowadays, since war is outlawed and the current instances of armed conflicts offer little or no illustration of such a possibility of adjudication of lawful prizes, it would not be unrealistic to regard such customs and traditions of prize as having fallen into desuetude.

130. The nature or character of service or employment of vessels appears therefore to afford a decisive criterion for classifying them. Warships or men-of-war of all types, including battleships, cruisers, destroyers, government yachts, submarines, auxiliary vessels, military transports, hospital ships, supply ships, etc., constitute a class apart, for which immunities from jurisdiction as well as from seizure and execution seem to have been well settled beyond controversy.¹⁰⁵ Other types of ships stand in need of a more precise designation or division for the different purposes for which ships are to be classified. Thus ships have been classified as public vessels or private ships according to the criterion of ownership, i.e. State-owned or privately-owned, or according to their service or use (*a*) as ships employed or used exclusively on governmental and non-commercial service, including the cargoes carried by such vessels not being subject to seizure, attachment or detention,¹⁰⁶ or (*b*) as ships owned or operated by a State for commercial and non-governmental purposes, which are assimilated to private vessels.¹⁰⁷

131. Ships have also been classified, for the purposes of the law of the sea, as (*a*) warships on the high seas, having complete immunity from the jurisdiction of any State other than the flag-State, (*b*) ships owned or operated by a State and used only on governmental non-commercial service, which are assimilated to warships, and (*c*) government vessels operated for commercial non-governmental service, which are assimilated as far as possible to private merchant vessels without immunity of any kind.¹⁰⁸ The classification adopted in the 1958 Geneva Conventions on the law of the sea¹⁰⁹ appears to have been confirmed, if not strengthened, by the classification adopted in the 1982 United Nations Convention on the Law of the Sea,¹¹⁰ of which article 236, entitled curiously enough "Sovereign

¹⁰⁴ See, for example, *The "Twee Gebroeders"* (1800) (C. Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. III (1802), p. 162); *The "Helen"* (1801) (*ibid.*, p. 224); *The "Porto Alexandre"* (1920) (*The Law Reports, Probate Division, 1920*, p. 30).

¹⁰⁵ See, for example, article 3 of the 1926 Brussels Convention (paragraph 203 below).

¹⁰⁶ See, for example, article I of the 1934 Additional Protocol to the 1926 Brussels Convention (paragraph 206 below).

¹⁰⁷ See, for example, article 1 of the 1926 Brussels Convention (paragraph 201 below).

¹⁰⁸ See, for example, the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) (United Nations, *Treaty Series*, vol. 516, p. 205), and the Convention on the High Seas (Geneva, 29 April 1958) (*ibid.*, vol. 450, p. 11).

¹⁰⁹ The General Assembly by its resolution 1105 (XI) of 21 February 1957, convened an international conference of plenipotentiaries to examine the law of the sea. The conference held at Geneva from 24 February to 27 April 1958, prepared and opened for signature four conventions, of which the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas have direct bearing on the immunities of public ships.

¹¹⁰ See *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.

immunity", assimilates the status of vessels or aircraft owned or operated by a State and used, at the time, only on governmental non-commercial service, to that of any warship or naval auxiliary.¹¹¹

4. THE EXTENT OF STATE IMMUNITY

132. The above general considerations serve in some small way to illustrate the relevance and extent of involvement of the question of State immunity in respect of State-owned and State-operated vessels. The basis for immunity from jurisdiction as well as from seizure, attachment and detention appears to lie in the actual operation or employment of the vessels by the State on governmental non-commercial service, thus leaving exposed to the normal exercise of local or territorial jurisdiction by the courts of competence all public vessels or vessels owned or operated by a State and used by it exclusively on non-governmental and commercial service. It is the purpose of the present study to examine the practice of States, both judicial and governmental, in order to ascertain the precise extent of immunity to be recommended or recognized in respect of ships employed by a State exclusively on commercial and non-governmental service. To what degree or extent can it be said that the position of such government-owned or government-operated vessels, used exclusively on commercial non-governmental service, is to be assimilated to that of privately owned or privately operated merchant marine or trading vessels?

133. It is also relevant to examine the possible use of public vessels in the carriage of goods and passengers for governmental and non-commercial services, such as the carriage of mail, the performance of a postal service,¹¹² or the carriage of food supplies by government ships or even warships to relieve a famine-stricken area, or medical supplies for a disease-ridden population. The nature of the service, namely the carriage of goods and passengers on ordinary commercial lines, seems fairly simple and straightforward, but the purpose of the supply or transport of foodstuffs, medicine and manpower may bear no relation to any commercial pursuit or gain, yet such carriage is designed more significantly to ensure the livelihood and welfare of a people, which is a legitimate government function and concern, as distinct from a commercial or trading transaction and as opposed to commercial service or operation. Legal developments traceable in the judicial and governmental practice of States will afford a serviceable guide in the planning and preparation of a draft article on this important aspect of the topic. It will also be seen to what extent the exercise of jurisdiction by a competent court of the local or territorial State will implead a foreign sovereign, and to what extent the foreign sovereign could be said to have consented to the exercise of such jurisdiction as against State-owned or State-operated ships used exclusively on commercial non-governmental service, and the relationship this question may have with the question of immunity of State property in general from attachment and execution.

¹¹¹ Article 236 is contained in section 10 of part XII, entitled "Protection and preservation of the marine environment."

¹¹² See, for example, *The "Parlement belge"* (1880) (*The Law Reports, Probate Division*, vol. V (1880), pp. 219-220).

5. THE BASIS FOR JURISDICTION

134. It is admittedly outside the scope of the present inquiry to examine the legitimacy of claims for the exercise of jurisdiction by the courts of a State in any given set of circumstances. The question of the appropriateness of or justification for the exercise of such jurisdiction is a matter essentially and primarily within the exclusive domain of a sovereign State. Of course, the jurisdiction of a State is not unlimited; there are some clear territorial limitations, and the exercise of extraterritorial jurisdiction is in principle subject to the rules not only of private international law, but also of the law of nations or public international law. However, this question will not be directly examined in the present study, as it is a question that must recur in any event, whenever there is an exercise of jurisdiction by a court of a State beyond the bounds of its national frontiers or territorial confines. It belongs, therefore, to the much larger subject of the scope and content of jurisdiction as an aspect of the sovereign authority of a State.

135. The points at issue, of which there are several in this particular connection, appear singularly inherent in the peculiarities of admiralty rules in the common-law countries, which permit a process *in rem* against a vessel, followed by its seizure, as a foundation for the commencement of an action or a legitimate ground upon which to found and exercise jurisdiction. Thus the physical presence of a ship within a harbour or port, or indeed lying anchored in territorial waters, could provide a firm ground for starting a process *in rem* or an action to seek relief for damages for collision at sea, or salvage services, or a salvor's or repairer's lien on the vessel. But British admiralty rules contain more points of obscurity than readily imaginable. For instance, the foundation of jurisdiction need be neither *real* nor indeed *personal*; it may often be a mere kinship or association. Through a thread of common ownership, for example, the law could fasten liabilities, both *in rem* and *in personam*, it would seem, on an entirely different ship not identified in any way with the ship in dispute which was at fault or the ship for which salvage services had been rendered, except by the relationship of mere sharing of common owners, or the association with the same fleet of ships—the sisterhood, as it is sometimes strangely called, of ships of the same fleet or company. This fiction of sister-ship jurisdiction, strange as it may seem, has afforded practical grounds and provided a convenient basis for the aggrieved party to commence an action or process *in rem* in admiralty against a sister ship in respect of the wrongs or harms done by another sister ship.¹¹³ Without commenting on the pros and cons of the rationale for such sister-ship jurisdiction, suffice it to recognize that, in the legal practice of States, the basis for jurisdiction seems incredibly wide, but nevertheless reasonably practical and flexible.

B. The practice of States

1. GENERAL OBSERVATIONS

136. It should be observed at this point that the practice of States with regard to State immunity in general started in

¹¹³ See, for example, *The "I Congreso del Partido"* (1981) (footnote 173 below).

many countries almost inevitably with the recognition of the immunities of public armed ships. Thus the immunities of States, as a whole and in all subsequent manifestations, were first recognized in connection with men-of-war. The immunities of public warships in foreign ports and territorial or national waters became established as early as 1812 in the celebrated case concerning a libel *in rem* against the schooner *Exchange*, which had been seized by persons acting under a decree issued by Napoleon I and subsequently converted into a public armed ship, then lying in the port of Philadelphia. In the classic case, *The Schooner "Exchange" v. McFaddon and others*,¹¹⁴ Chief Justice Marshall considered public armed ships as constituting a part of the military force of the nation, and accepted as "a principle of public law, that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction".¹¹⁵

137. This classic dictum of Chief Justice Marshall could scarcely be said to have derived from the desire on the part of a colonial Power or a developed country to perpetuate its subjugation of Asian or African peoples or its domination of foreign territories, or indeed to maintain its superiority over newly emerged States. If anything, the exact reverse seems much closer to the truth. Thus Jean Hostie, writing on the case-law of the American Supreme Court for that period¹¹⁶ when the United States was just a newly born State, had this to say about the sensitive awareness of its own national sovereignty and independence:

This same solicitous concern for its independence — quite natural for a young State, especially as it was the first colonial State to become sovereign, ... and quite justifiable, given the external circumstances and the novelty of the constitutional experience — this same concern is reflected in a doctrine that was to have a major role in the case-law of the Supreme Court.¹¹⁷

138. This decision of the United States Supreme Court is therefore remarkable in that it laid down for the first time, in no uncertain terms, the principle of State immunity in general and the immunities of men-of-war in particular.¹¹⁸ It represented a timely recognition of the equality of States at a time when the European Powers were not predisposed to accept such absolute equality for all States, although subsequent practice made it abundantly clear that an alternative, either in the form of legal inequality or super-

riority of the major Powers before the law, would be unacceptable. The principle enunciated by Chief Justice Marshall received judicial endorsement and governmental approbation in subsequent State practice. It was discussed at length in the United Kingdom after 1820,¹¹⁹ until finally confirmed in *The "Constitution"* (1879).¹²⁰ In France, the Foreign Minister made a declaration to the same effect less than a decade later in relation to a case concerning the *Ville de Victoria* and the *Sultan* (1887).¹²¹ In Germany, the same principles were applied in 1891 in a case concerning a Chilean ship, the *Presidente Pinto*, and in 1901 in a case relating to the *Assari Tewfik*, a Turkish vessel.¹²²

139. At that time, international law was still essentially and exclusively of European origin. But the innovation by the American Supreme Court had begun a series of encouraging breakthroughs to update and internationalize the process of international law-making. If States were to be regarded as equally sovereign and none could have nor exercise jurisdiction over the others, the very first case of likely contact, or indeed conflict or overlapping of sovereign authority or jurisdiction, between States could not have actually occurred unless one State moved into the territorial confines of another. Normally no territory of a State could overlap that of another State. But the mobility of seagoing vessels and the fiction of their territoriality provided precisely for this eventuality. It was therefore not surprising that the doctrine of State immunity first came to be recognized and accepted as a proposition of law in cases involving "floating territory" of one State which happened to sail into the territorial or national waters of another State, with the result that the principle of sovereign equality could not permit the exercise of jurisdiction by the territorial sovereign over the floating territory, which formed part of the armed forces of another, equally sovereign State. This was actually how the basic principle of State immunity or sovereign immunities of States in general came to be recognized and settled as a natural outcome of international intercourse and an inevitable principle of international law. The first concrete illustration of its application is to be found in cases of public armed vessels or warships. The likelihood of their movement into the territory of another State was self-apparent, owing to the inherent nature of their mobility across national maritime frontiers.

140. Gradually and progressively, the principle of State immunity which was first applicable to warships was actually applied to the State itself, its organs, agencies and others instrumentalities. Other public ships, not answering the definition of warships, nor used for defence purposes, were later accorded the same jurisdictional immunities, so long only as they were public vessels, or ships owned or operated by a State for public purposes or employed on governmental and official or non-commercial service.

¹¹⁴ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States* (New York), vol. VII (3rd ed.) (1911), p. 116.

¹¹⁵ *Ibid.*, pp. 143 and 145-146.

¹¹⁶ See also *Glass v. The Sloop "Betsey"* (1794) (A. J. Dallas, *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and of Pennsylvania* (New York), vol. III (2nd ed.) (1912), p. 6); *Church v. Hubbard* (1804) (Cranch, *op. cit.*, vol. II (3rd ed.) (1911), p. 187); *The "Antelope"* (1825) (H. Wheaton, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States* (New York), vol. X (4th ed.) (1911), pp. 66 and 122).

¹¹⁷ J. Hostie, "Contribution de la Cour suprême des Etats-Unis au développement du droit des gens", *Recueil des cours...*, 1939-III (Paris, Sirey), vol. 69 (1939), pp. 282-283.

¹¹⁸ The decision of Chief Justice Marshall in *The Schooner "Exchange"* was cited by the English Admiralty Court in *The "Prins Frederik"* (1820) (J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. II (1815-1822) (1828), p. 451).

¹¹⁹ *The "Prins Frederik"* (1820) (see footnote 118 above). It was admitted by the parties that the *Prins Frederik* was a public ship of war, *armé en flûte*, owned by the King of the Netherlands and employed in the carriage of spices and other goods.

¹²⁰ *The Law Reports, Probate Division*, vol. IV (1879), p. 39.

¹²¹ See G. Gidel, *Le droit international public de la mer* (Paris, Sirey), vol. II (1932), p. 303.

¹²² See C. Baldoni, "Les navires de guerre dans les eaux territoriales étrangères", *Recueil des cours...*, 1938-III (Paris, Sirey), vol. 65 (1938), pp. 247 *et seq.*

Thus it came about that the immunities originally granted to States in respect of their public armed vessels were subsequently extended, notably in Anglo-American case-law, to all kinds of public ships which, at the outset, were not employed on commercial service but were later used for the carriage of cargoes as freight earners or in the carrying trade. Since the First World War, it has become common practice among modern coastal States to keep a merchant fleet or create and maintain a merchant marine in order better to promote the national economy and external or overseas trade in the severely competitive international markets of the world. In view of these ever-increasing maritime commercial activities of States, it has become more and more questionable whether the tendency to extend immunities in a sweeping manner could be justified on any logical or juridical grounds, if such an extension finds no firm support in the overall practice of States in general.

141. It is in the light of this question that the closest attention should be paid to contemporary State practice regarding the matter under consideration. It is not without interest to note that the practice of States has been neither logically consistent nor progressively harmonious. In fact, the attitude of one and the same State is often different as a claimant of immunity for its own merchant fleet, when it demands complete and unquestioning concession of State immunity in any circumstances, from when it displays more judicious deliberation and restraint in the recognition and granting of like immunities for foreign public vessels operated and employed by a State or one of its agencies exclusively on commercial and non-governmental service. It will be seen whether there is room for consistency or harmony, if not uniformity, in the general practice of States, taking into account the different political and economic structures and ideologies prevailing in various legal and social systems and the intermittent interplay of the concept and practice of reciprocity.

2. JUDICIAL PRACTICE

(a) *A brief historical sketch of relevant practice*

142. As has been noted in the general observations above, the immunities of States in respect of their public armed vessels were the first to have received judicial recognition, as early as 1812,¹²³ followed by recognition and endorsement in the practice of States. At that time, States were still employing their ships mainly for the purposes of defence. Even the protection of overseas trade with their colonial territories had an imperial ring sufficient to conjure up the official function of national defence or protection of the ships flying their flags. Such protection was considered necessary in international or foreign waters infested by countless fleets of pirate ships hunting for prey and bounty. Ships owned and operated by States originally had this basic function of policing the sea-ways or patrolling the sea lanes to ensure the safety of maritime transport or the safe conduct and undisturbed freedom of navigation for national ships.

¹²³ See *The Schooner "Exchange" v. McFaddon and others* (1812) (footnote 114 above).

143. Later on, States found it necessary and convenient to employ public ships not only to suppress piracy on the high seas, or outwardly to protect vessels flying their flags in peacetime as well as to engage in time of war in the arrest and seizure of foreign neutral or enemy ships as lawful prizes, but more practically in the performance of other public duties not necessarily connected with national defence, such as postal services,¹²⁴ or to serve as government pleasure yachts,¹²⁵ or as patrol boats to suppress illegal traffic or trade.¹²⁶ Immunities of public armed ships were gradually extended to all such vessels employed on public or governmental service. However, the First World War had necessitated the new practice. In order to ensure the supply of vital goods for areas affected by enemy blockade, Governments had to engage directly in the carriage and transport of such supplies as food, medicines, oil and other necessities for the sustenance of human life. The end of the First World War left States with seagoing vessels, freighters and tankers on hand, either publicly owned or privately owned but requisitioned, or seized from enemy fleets, to fulfil the wartime needs of the nation. Once engaged in the maritime trade and keenly aware of the need for such services, it was difficult for maritime nations to disengage themselves at the close of hostilities and to return to normalcy as if the war had never happened. The question to be asked in connection with the judicial practice of States is whether, and to what extent, vessels owned or operated by States exclusively on commercial and non-governmental service would be accorded immunities from the jurisdiction of the courts of another State.

144. The practice of various legal systems in the past appears to reveal a substantial reluctance to give full recognition to the need for such unqualified immunities. The qualification of immunities appears to have been centred on the nature of the service or the exclusive use of the vessel by a State for trading purposes, that is to say on commercial and non-governmental service. It is both crucial and useful to examine the judicial practice of States having the most favourable inclination towards an unqualified doctrine of State immunity. It should be borne in mind that, in some countries, such as in socialist legal systems, where government practice clearly favours an absolute rule of sovereign immunity for ships owned by the State itself regardless of their employment or the nature of their service, there has nevertheless been no judicial practice supporting the converse situation, where foreign States could be given recognition or accorded appropriate immunities for their vessels, however employed or regardless of the nature of their service. As no other judicial system could be said to have gone as far as the British and United States systems, it is only appropriate that the present investigation of judicial practice should begin with the so-called Anglo-American practice.

(i) *United Kingdom*

145. The case-law of the United Kingdom is probably the richest in the field of State immunities in respect of public

¹²⁴ For example, in *The "Parlement belge"* (1880) (see footnote 112 above), immunity was recognized for a mail packet.

¹²⁵ See, for example, *The "Newbattle"* (1885) (*The Law Reports, Probate Division*, vol. X (1885), p. 33).

vessels. It has indisputably shown the greatest propensity towards absolute or unqualified immunity in regard to State-owned or State-operated vessels. But this propensity belongs now to a remote past which is not likely to recur. As has been noted (paragraph 121 above), a process *in rem* against a ship, followed by arrest or detention, is considered to implead the owner. However, a process *in rem*, not followed by arrest or detention, could proceed against a vessel not owned by a foreign State but requisitioned by it. An historical survey of English case-law regarding immunities of foreign public vessels reveals an interesting phenomenon of uncertainty and changing positions in the practice of the courts.

146. English case-law began with a period of uncertainty from 1800 to 1873. Early nineteenth-century cases were concerned with prize law.¹²⁷ The "*Prins Frederik*" (1820)¹²⁸ was probably the first case involving a public ship of war, *armé en flûte*, owned by the King of the Netherlands; but the dispute was finally settled out of court by arbitration. Reported cases before 1873 had little or no bearing on public vessels employed in trade, since States had not generally employed their ships in the carriage of merchandise for freight. Cases like *The "Marquis of Huntley"* (1835),¹²⁹ *The "Athol"* (1842)¹³⁰ and *The "Thomas A. Scott"* (1864)¹³¹ were either concerned with ships of war or related to questions of municipal rather than international law.

147. The second period was from 1873 to 1880, that is to say between *The "Charkieh"* (1873)¹³² and *The "Parlement belge"* (1880).¹³³ This could be considered as corresponding to the acceptance of a restrictive rule of immunity. Sir Robert Phillimore, an unsurpassed authority on British admiralty law in the nineteenth century since Lord Stowell, held that the commercial nature of the service or employment of the vessel disentitled it to State immunity. Since the *Charkieh* was, *inter alia*, engaged in trading ventures, it was not accorded immunity. Another lesser ground for rejecting immunity was the fact that it was owned by the Khedive of Egypt, probably in his private capacity. Furthermore, it was chartered to a British subject at the time

the proceeding had started. Sir Robert Phillimore, in his oft-cited dictum, stated *per curiam*:

... No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorise a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.¹³⁴

148. The reign of restricted immunity was confirmed in regard to the domestic sovereign in *The "Cybele"* (1877)¹³⁵ by Sir Robert Phillimore himself, who also, in the later case of *The "Constitution"* (1879),¹³⁶ distinguished between an American vessel of war entitled to immunity, although at the critical time it was carrying cargo for the Paris Exhibition, and a public ship employed for commercial purposes, which would not be accorded jurisdictional immunity. Sir Robert Phillimore went a step further in the more controversial case *The "Parlement belge"* (1879),¹³⁷ concerning a ship used only partly, not exclusively, for commercial purposes.

149. His decision rejecting immunity was reversed in 1880¹³⁸ by the Court of Appeal, which, per Lord Justice Brett, accorded immunity on the grounds, *inter alia*, that

... the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails.¹³⁹

Besides, the *Parlement belge* was intrinsically a mail packet, owned by the King of Belgium in his sovereign capacity, and at no time was it exclusively employed on commercial and non-governmental service. Nevertheless, the reversal of Sir Robert Phillimore's decision by the Court of Appeal in 1880 marked a decline in the attractiveness of the restrictive doctrine and, owing to a system of rigid adherence to *stare decisis*, the 40-year period following *The "Parlement belge"* (1880)¹⁴⁰ until 1920 has been characterized perhaps less accurately as a period of uncertainty, with a tendency in favour of a more unqualified rule of State immunity. The uncertainty was more of an erroneous appreciation of the true nature of the service or the preponderant employment of the *Parlement belge* in the carriage of mail. In addition, under the bilateral treaty then in force between Belgium and the United Kingdom,

¹²⁶ See, for example, *The "Dictator"* (1892) (footnote 99 above); *The "Gemma"* (1899) (*ibid.*); and *The "Jassy"* (1906) (*The Law Reports, Probate Division, 1906*, p. 270).

¹²⁷ See, for example, *The "Twee Gebroeders"* (1800) (footnote 104 above); *The "Helen"* (1801) (*ibid.*); *The "Anna"* (1805) (C. Robinson, *op. cit.*, vol. V (1806), p. 373); *The "Comus"* (1816), referred to in connection with *The "Prins Frederik"* (Dodson, *op. cit.*, vol. II (1815-1822), p. 464). Cf. *The "Charkieh"* (1873) (footnote 132 below) and *The "Thomas A. Scott"* (1864) (*The Law Times Reports* (London), vol. X (March-September 1864), p. 726).

¹²⁸ See footnote 118 above.

¹²⁹ J. Haggard, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. III (1833-1838) (1840), p. 246.

¹³⁰ W. Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. I (1838-1842) (1844), p. 374. See also *The "Swallow"* (1856) and *The "Inflexible"* (1856) (M. C. Swabey, *Reports of Cases Decided in the High Court of Admiralty, 1855-1859* (London, 1860), pp. 30 and 32); and *The "Ticonderoga"* (1857) (Swabey, *op. cit.*, p. 215).

¹³¹ See footnote 127 above, *in fine*; the term "ships of war" was held to include a transport owned by a State.

¹³² *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1985), p. 59; see also C. F. Gabba in *Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 41.

¹³³ See footnote 138 below.

¹³⁴ *The Law Reports, High Court of Admiralty . . .*, vol. IV (1875), pp. 99-100.

¹³⁵ *The Law Reports, Probate Division*, vol. II (1877), p. 224. See also *Young, Master of SS "Furnesia" v. SS "Scotia"* (1903) (*The Law Reports, House of Lords . . .*, 1903, p. 505).

¹³⁶ See footnote 120 above.

¹³⁷ *The Law Reports, Probate Division*, vol. IV (1879), p. 129. After reviewing English and American cases, Judge Phillimore concluded that the *Parlement belge* was neither a ship of war nor a pleasure-boat and was thus not entitled to immunity.

¹³⁸ *Ibid.*, vol. V (1880), p. 197.

¹³⁹ *Ibid.*, p. 220.

¹⁴⁰ See footnote 138 above. See also F. Wharton, "Le cas du vapeur postal: le *Parlement belge*", *Revue de droit international et de législation comparée* (Paris), vol. XII (1880), p. 235.

mail packets such as the *Parlement belge*, regardless of its subsidiary employment, which was partly commercial, were to be treated as men-of-war for the purposes of jurisdictional immunities.¹⁴¹ Lord Justice Brett, after an intensive review of earlier cases, recognized that

... as a consequence of the absolute independence of every sovereign authority, ... each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the *public property** of any State which is destined to public use...¹⁴²

150. The principle thus laid down does not appear to be incompatible with a restrictive view of immunity, for the public property of a foreign State is further required to be destined for public use (*publicis usibus destinata*) or in use for public purposes in order to be entitled to State immunity. The case *Vavasseur v. Krupp* (1878)¹⁴³ was therefore cited in support of the view that the public property of a foreign sovereign in use for public purposes was exempt from the jurisdiction of English courts. The requirement of public use or public purposes of the public property was weakened by a further dictum of Lord Justice Brett in *The "Parlement belge"*, which contained a suggestion that a declaration of a foreign sovereign as to the nature or character of the use of his public property was determinative and was binding on the courts.¹⁴⁴ This suggestion was subsequently overruled by English courts in a series of much more recent cases, the first of which was *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* (1954).¹⁴⁵ In the meantime, however, a more unqualified rule of State immunity continued to assert itself in British practice in all its various aspects, except directly on the point under investigation, namely the exclusive use of public vessels on commercial and non-governmental service.

151. In the 40 years that followed *The "Parlement belge"* (1880), which have been classified as a period of uncertainty with a favourable tendency towards absolute immunity, and also for a few years after, a series of cases were decided which clarified a number of salient points regarding procedures in admiralty and the circumstances in which it could be said whether or not a foreign sovereign would be impleaded in a process *in rem* against a ship not

owned by a foreign sovereign, but in his possession, without other interests such as the right to possess.¹⁴⁶ Thus it follows that actions *in rem* could be brought against privately owned vessels at any time regardless of the actual employment by the State, provided that the proceedings did not relate to the activities of the State operating them, while actions *in personam* were equally permissible against the private owners in respect of acts unconnected with the employment by the State.¹⁴⁷ A writ *in rem* could be issued against a privately owned vessel which did nothing to interfere with the use of the vessel by the sovereign State.¹⁴⁸ An action *in rem* could be instituted against a requisitioned ship, but no arrest could be made while it was in public service or use or in the possession of a foreign Government.¹⁴⁹ It appears that the real purpose of this "suspended action *in rem*" was to enable a writ to issue, to prevent the running of time against the plaintiff, who would thus be able eventually to call the owner to account with the possibility of attaching the property when it reverted to him.¹⁵⁰ It follows that, after the termination of public service of a privately owned vessel, actions *in rem* which had been suspended could now proceed against the vessel inasmuch as they did not touch the personal liability of the foreign Government. Thus actions for salvage services have been allowed, while actions for damage by collision during the employment of the ship by a foreign State have been set aside for impleading the foreign State, as the State was responsible for the safe navigation of the ships, while in the former case the private owners had benefited from the salvage services.¹⁵¹ Lastly, it should also be noted that no maritime lien could attach to privately owned ships while in the public service of a foreign Government.¹⁵² Pre-existing maritime liens, prior to requisition or charter of a ship by the State, would be suspended during the term of State employment, after which they would once again become operative.¹⁵³

¹⁴¹ Article VI of the postal Convention of 17 February 1876 between the United Kingdom and Belgium provides:

"VI. ...

"These vessels shall be considered, and treated . . . as vessels of war, and be there entitled to all the honours and privileges which the interests and importance of the service in which they are employed demand.

"..."

(*British and Foreign State Papers, 1875-1876* (London), vol. LXVII (1883), p. 21). See also, concerning foreign mail packets, Lord McNair, *International Law Opinions* (Cambridge, University Press), vol. I (1956), pp. 95 *et seq.*

¹⁴² *Loc. cit.* (footnote 138 above), pp. 214-215.

¹⁴³ *The Law Reports, Chancery Division*, vol. IX (1878), p. 351. The case concerned quantities of shells bought in Germany by the Emperor of Japan. The shells were destined for use in guns to be fitted to battleships forming part of the Japanese imperial fleet.

¹⁴⁴ *Loc. cit.* (footnote 138 above), pp. 212-213.

¹⁴⁵ *The Law Reports, House of Lords* . . . , 1955, p. 72. Cf. the *Hong Kong Aircraft case* (1953) (*ibid.*, 1953, p. 70).

¹⁴⁶ See, for example, *The "Broadmayne"* (1916) (*Annual Digest of The Times Law Reports* (London), vol. XXXII, p. 304); *The "Messicano"* (1916) (*ibid.*, p. 159); *The "Erissos"* (1917) (*Lloyd's List* (London), 23 October 1917); *The "Eolo"* (1918) (*The Irish Law Reports*, vol. 2, p. 78); *The "Crimdon"* (1918) (*Annual Digest of The Times Law Reports*, vol. XXXV, p. 81); *The "Koursk"* (1918) (*Lloyd's List*, 19 June 1918); *The "Espozende"* (1918) (*ibid.*, 18 and 25 February 1918); and *The "Jupiter"* No. 1 (1924) (see footnote 99 above, *in fine*, and *Annual Digest* . . . , 1925-1926 (London), vol. 3 (1929), p. 136, case No. 100).

¹⁴⁷ See, for example, *The "Messicano"* (1916), *The "Erissos"* (1917) and *The "Crimdon"* (1918) (cases referred to in footnote 146 above).

¹⁴⁸ See the opinion of Judge Hill in *The "Crimdon"* (1918), (footnote 146 above).

¹⁴⁹ See the opinion of Sir Samuel Evans in *The "Messicano"* (1916) (*ibid.*).

¹⁵⁰ See *The "Gagara"* (1919) (*The Law Reports, Probate Division, 1919*, p. 95, especially p. 101). In this case, immunity was accorded to a ship requisitioned by the Estonian Government and which remained in its possession. Cf. the opinion expressed by Lord Justice Bankes in *The "Jupiter"* No. 1 (1924) (footnote 99 above), and the refusal of immunity in *The "Jupiter"* No. 2 (1925) (*The Law Reports, Probate Division, 1925*, p. 69), where the Soviet Government was no longer in possession of the *Jupiter* and claimed no interest in it.

¹⁵¹ See *The "Meandros"* (1924) (*The Law Reports, Probate Division, 1925*, p. 61). The owners were held liable for the salvage services rendered.

¹⁵² See *The "Sylvan Arrow"* (1923) (*ibid.*, 1923, p. 220). The personal liability *in rem* of a ship for a delict depended on the amenability to the local jurisdiction of the persons operating it.

¹⁵³ See also *The "Tervaete"* (1922) (*ibid.*, 1922, pp. 197 and 259); *The*

152. It is interesting to note that, on the eve of 1920, Judge Hill made a suggestion in *The "Annette"; The "Dora"* (1919)¹⁵⁴ that a ship chartered or requisitioned by a Government and merely employed in ordinary trading voyages was to enjoy no immunity. This commendable suggestion was rejected by the Court of Appeal the following year in *The "Porto Alexandre"* (1920).¹⁵⁵ The *Porto Alexandre* was formerly a German privately-owned vessel named the *Ingbert*, adjudged lawful prize by the Portuguese Prize Court in 1917. She had earlier been requisitioned by the Portuguese Government and handed over to the Committee of Services of the Transportes Marítimos do Estado (TMDE)¹⁵⁶ and had since been employed exclusively in ordinary trading operations, earning freight for the Government. In the Admiralty Division of the High Court, Judge Hill declined jurisdiction, setting aside the writ *in rem* against the ship, her cargo and freight, and against her owners in so far as the ship and freight were concerned, pointing out the undesirability of such hard cases, but having to assert then what he "conceived to be the law".¹⁵⁷ Absolute immunity was applied with reluctance. The Court of Appeal showed no less hesitation in confirming this decision. Lord Justice Bankes felt the difficulty but deemed himself, rightly or wrongly, bound by the decision of the same court in *The "Parlement belge"*.¹⁵⁸ Lord Justice Warrington was of a similar opinion.¹⁵⁹ Lord Justice Scrutton appreciated the difficulty and shared the doubts felt by Judge Hill in the court below, but refused the judicial remedy sought and went out of his way to suggest some practical remedies which were extra-legal. He observed: "no one can shut his eyes, now that the fashion of nationalization is in the air . . . and if these national ships wander about without liabilities, many trading affairs will become difficult".¹⁶⁰ The phrase *publicis usibus destinata* was much discussed, while on the whole Judge Hill and the Court of Appeal appear to have gratuitously declared themselves bound by the authority of *The "Parlement belge"*. The principles favouring an absolute view of State immunity as laid down in *The "Porto Alexandre"* were admitted by counsel in *The "Jupiter"* No. 1 (1924)¹⁶¹ without any argument and were applied in subsequent cases,

"*Utopia*" (1893) (*The Law Reports, House of Lords . . . , 1893*, p. 492), especially the opinion of Sir Francis Jeune (pp. 497 and 499); and *The "Castlegate"* (1892) (*ibid.*, p. 38), especially the opinion of Lord Watson (p. 52).

¹⁵⁴ *The Law Reports, Probate Division, 1919*, p. 105 especially pp. 112-113.

¹⁵⁵ *Ibid.*, 1920, p. 30.

¹⁵⁶ An organization similar to the United States Shipping Board (USSB).

¹⁵⁷ *The Law Reports, Probate Division, 1920*, p. 31.

¹⁵⁸ Lord Justice Bankes stated:

"But in modern times sovereigns have taken to owning ships, which may . . . be employed as ordinary trading vessels engaged in ordinary trading. The fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest." (*Ibid.*, p. 34.)

¹⁵⁹ *Ibid.*, pp. 35-36.

¹⁶⁰ *Ibid.*, pp. 38-39. An accurate résumé of the position in English case-law before 1921 is given in A. D. McNair, "Judicial recognition of States and Governments and the immunity of public ships", *British Year Book of International Law, 1921-22* (London), vol. 2, p. 74 (d) and (e); cf. W. R. Bisschop, "Immunity of States in maritime law", *ibid.*, 1922-23, vol. 3, p. 159.

¹⁶¹ See footnote 99 above.

such as *Compañía Mercantil Argentina v. United States Shipping Board* (1924).¹⁶² This rule was applied in a long line of recognition cases during the Spanish civil war.¹⁶³

153. The next period in the history of English case-law on the point under review started with *The "Cristina"* (1938).¹⁶⁴ It was another period of uncertainty, with tendencies towards more and more restrictions, culminating in the final confirmation of absence of State immunity in respect of ships employed by a foreign State exclusively on commercial and non-governmental service. *The "Cristina"* was a turning-point in 1938; the vessel was in use for public purposes and not employed in trading voyages. The five Law Lords in the House of Lords took occasion to express their views on the question. State immunity was allowed for privately owned ships chartered or requisitioned by foreign States. It was held, per Lord Atkin, that the courts would not, by their process, seize or detain "property which is . . . [the sovereign's] or of which he is in possession or control".¹⁶⁵ In his view, immunity would have applied also to public property used for purely commercial purposes. That view was shared also by Lord Wright, approving the correctness of the judgment of the Court of Appeal in *The "Porto Alexandre"* (1920)¹⁶⁶ and the decision of the United States Supreme Court in *The "Pesaro"* (1926),¹⁶⁷ but observing: "This modern development of the immunity of public ships has not escaped severe, and, in my opinion, justifiable criticism on practical grounds of policy, at least as applied in times of peace."¹⁶⁸ Lord Macmillan reserved his opinion, and expressed his doubts:

I confess that I should hesitate to lay down that it is part of the Law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect.¹⁶⁹

154. This marked absence of consensus of international opinion or practice seems to go a long way towards denying any pre-existing principle of State immunity for vessels employed by foreign Governments exclusively in trading

¹⁶² *Law Journal Reports, 1924, King's Bench Division* (London), vol. 93, p. 816; *Annual Digest . . . , 1923-24* (London), vol. 2 (1933), p. 138, case No. 73.

¹⁶³ See, for example, *The "El Condato"* (1937) (*Lloyd's List Law Reports* (London), vol. 59 (1937), p. 119); *The "Rita García"* (1937) (*ibid.*, p. 140); *The "Arraiz"* (1938) (*ibid.*, vol. 61 (1938), p. 39); *The "El Neptuno"* (1938) (*ibid.*, vol. 62 (1938), p. 7); *The "Arantzazu Mendi"* (1939) (*The Law Reports, House of Lords . . . , 1939*, p. 256); *The "Abodi Mendi"* (1939) (*The Law Reports, Probate Division, 1939*, p. 178); *The "Kabalo"* (1940) (*Lloyd's List Law Reports*, vol. 67 (1940), p. 572). See also *Annual Digest . . . , 1938-1940* (London), vol. 9 (1942), cases Nos. 25 and 88-92.

¹⁶⁴ *The Law Reports, House of Lords . . . , 1938*, p. 485. See also H. Lauterpacht, "The Cristina", *The Law Quarterly Review* (London), vol. LIV (1938), p. 339; F. A. Mann, "Immunity of foreign States", *The Modern Law Review* (London), vol. II (1938-1939), p. 57; R. Y. Jennings, "Recognition and sovereign immunities", *ibid.*, p. 287; note in *The British Year Book of International Law, 1938* (London), vol. 19, pp. 243-249.

¹⁶⁵ *The Law Reports, House of Lords . . . , 1938*, p. 490.

¹⁶⁶ See footnote 155 above.

¹⁶⁷ See footnote 179 below.

¹⁶⁸ *The Law Reports, House of Lords . . . , 1938*, p. 512.

¹⁶⁹ *Ibid.*, p. 498.

voyages. Thus Lord Thankerton and Lord Maugham shared the view that *The "Parlement belge"* did not actually lay down the principle of immunity of State-trading vessels, and that the decision in that case was misinterpreted by Judge Hill and the Court of Appeal in *The "Porto Alexandre"*. Lord Thankerton said: "... I express no opinion on the matter, but I desire to make clear that I hold myself free to reconsider the decision in *The "Porto Alexandre"*."¹⁷⁰ Lord Maugham entertained no doubt that, had the *Parlement belge* been used solely for trading purposes, the decision would have gone the other way, and considered that it was "high time steps were taken to put an end to a state of things which in addition to being anomalous is most unjust to our own nationals".¹⁷¹

155. What it was high time to do in 1938 according to Lord Maugham, whose opinion was "shared by many judges and by nearly all persons engaged in maritime pursuits",¹⁷² took more than four decades to accomplish, before a final judicial confirmation was delivered by the House of Lords in the much awaited decision in *The "I Congreso del Partido"* (1981).¹⁷³ This judicious *coup de grâce* was in fact preceded or superseded, if not conceded, by the United Kingdom's ratification of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels in 1926, and of its 1934 Protocol, with effect on 3 January 1980, more than half a century after signature.¹⁷⁴ The decision in *The "I Congreso del Partido"* was final and the judgment decisive on the question at issue, although the basis for the assumption and exercise of sister-ship jurisdiction is not completely free from controversy. The House of Lords, reversing the decision of the Court of Appeal (1979)¹⁷⁵ and allowing the appeals, held:

(a) That, at the time of the transactions (before the common law was superseded by the *State Immunity Act 1978*), restrictions were applied to the scope of sovereignty to permit individuals with whom sovereign States had entered into commercial transactions to bring such transactions before the court; but where the act complained of was sovereign, and not a private commercial act, it could not be challenged, and in deciding into which category the act fell municipal courts, conforming to accepted international standards, had to consider the whole context.

(b) That, in accordance with those principles, the restrictive doctrine of sovereign immunity applied (i) to the case of the *Playa Larga*, since, in taking her out of Chilean waters for her own safety, no governmental authority was invoked, even though the instruction might not have been given had the owner not been the Republic of Cuba, and also (ii) (Lord Wilberforce and Lord Edmund-Davies dissenting) to the case of the *Marble Islands*, since the right asserted by the master to sell the perishable cargo in Vietnam was based by him on the contractual terms of the bills of lading and the law of Cuba.¹⁷⁶

156. The House of Lords thus applied common-law principles as they existed before the entry into force of the *State*

Immunity Act 1978 and before ratification by the United Kingdom of the 1926 Brussels Convention and its 1934 Protocol. The decisions in *The "Philippine Admiral"* (1975)¹⁷⁷ and *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (1977)¹⁷⁸ were applied, thereby putting an end once and for all to whatever doubts and hesitations might have lingered in the past regarding the judicial practice of the United Kingdom. It can no longer be said that the case-law of the United Kingdom supports an absolute theory of immunity to the extent that a vessel, employed wholly on commercial and non-governmental service, whether Government-owned or State-operated, would be entitled to immunity from actions *in rem* or from arrest and detention by English courts.

(ii) *United States of America*

157. The practice of United States courts has also been marked by a quaint doctrine of unqualified State immunity. The strongest trace of an "absolute" view of sovereign immunity in the present connection could be found in the decision of the Supreme Court in *Berizzi Brothers Co. v. SS "Pesaro"* (*The "Pesaro"*) (1926),¹⁷⁹ refusing to adopt the suggestion of the State Department that immunity should not be accorded to vessels employed by a foreign Government in commercial operations.¹⁸⁰ The practice of American courts also allows actions *in rem* against a ship having a personalized responsibility. For all acts connected with the ship, the ship and its owners are jointly and severally answerable. In addition to this somewhat "noxal" liability of shipowners, the ship as such may be liable for the tortious acts of anyone who is lawfully in possession of the ship and directs its navigation, be that person charterer, agent or crew.¹⁸¹ As for foreign State-owned vessels, the rules of the English Admiralty Court seem to have been adopted to the extent that the legal personality of a publicly owned ship merged into that of the State.¹⁸² Although, as

¹⁷⁷ *The Law Reports, House of Lords*... 1977, p. 373. Lord Wilberforce regarded *The "Philippine Admiral"* as one of the two landmark cases in the history of English case-law. The Judicial Committee of the Privy Council, in an appeal from Hong Kong, declined to follow *The "Porto Alexandre"* (1920) (see footnote 155 above) and decided to apply the "restrictive doctrine to an action *in rem* against a State-owned trading vessel". In a comprehensive judgment delivered on behalf of the Board, it was said that to do so was more consonant with justice. Lord Wilberforce did not limit the application of the restrictive doctrine to actions commenced *in rem* but regarded it as applicable to nations generally (*The All England Law Reports*, 1981, vol. 2, pp. 1069-1070).

¹⁷⁸ *The All England Law Reports*, 1977, vol. 1, p. 881. The decision of the Court of Appeal upheld general application of the "restrictive" theory.

¹⁷⁹ *United States Reports*, vol. 271 (1927), p. 562.

¹⁸⁰ A suggestion made by Secretary of State Lansing in his letter of 8 November 1918 to Attorney-General Gregory. In his reply of 25 November 1918, the Attorney-General refused to adopt that suggestion, stating: "The Department of Justice is convinced that, as the law now stands, these ships [foreign State-trading vessels] are immune." (See G. H. Hackworth, *Digest of International Law* (Washington, D.C.), vol. II (1941), pp. 429-430.)

¹⁸¹ See, for example, *The "Attualità"* (1961) (*The Federal Reporter*, vol. 238 (1917), p. 909); *The "Siren"* (1868) (J. W. Wallace, *Cases Argued and Adjudged in the Supreme Court of the United States* (New York), vol. VII (1903), p. 152).

¹⁸² See *The "Western Maid"* (1922) (*United States Reports*, vol. 257 (1922), p. 419), where, according to Judge Holmes (p. 433): "It may be said

¹⁷⁰ *Ibid.*, p. 496.

¹⁷¹ *Ibid.*, p. 521.

¹⁷² *Ibid.*

¹⁷³ *The All England Law Reports*, 1981, vol. 2, p. 1064.

¹⁷⁴ See footnotes 294 and 299 below.

¹⁷⁵ *The All England Law Reports*, 1981, vol. 1, p. 1092.

¹⁷⁶ *Ibid.*, vol. 2, pp. 1066-1083, opinions of Lord Wilberforce, Lord Diplock, Lord Edmund-Davies, Lord Keith of Kinkel and Lord Bridge of Harwich.

Judge Julian Mack of the United States Southern District Court of New York pointed out in *The "Pesaro"* (1921),¹⁸³ the English criterion of "public property" has not been accepted by American courts as the basis of immunity for property of foreign Governments. The actual possession or control by foreign Governments seems to offer a solid ground for immunity of public vessels. Thus, in *The "Carlo Poma"* (1919), the court said, with reference to English law: "The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or foreign sovereign, depends, not merely upon ownership, but also upon the actual possession by the sovereign of the property at the time process is served."¹⁸⁴

158. The ground upon which the Supreme Court disclaimed jurisdiction in the leading case concerning the *Pesaro* is to be found in the ownership and actual possession of the vessel by the Italian Government and its operation by the foreign sovereign in its service and interest, although the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Supreme Court was particularly timid in its treatment of this delicate subject of the immunities of State-trading vessels. Mr. Justice Van Devanter made the following observation:

We think the principles are applicable alike to all ships held and used by a Government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a Government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.¹⁸⁵

159. For a brief spell following *The "Pesaro"* the suggestion of the double character of States was rejected by the Supreme Court, for unlike sovereigns and ambassadors, States could act only in their public and sovereign capacities.¹⁸⁶ Nevertheless, ownership and actual possession or operation of a ship might have more than one continuing capacity in the life span of a ship, which may remain within or outside the possession of, or use by, the State owning it.

that . . . the ship for this purpose is regarded as a person. . . . The personality of a public vessel is merged in that of the sovereign." See also *The "Fidelity"* (1879) (S. Blatchford, *Reports of Cases Argued and Determined in the Circuit Court of the United States, Second Circuit* (New York), vol. XVI (1880), p. 569); *Ex parte State of New York* (1921) (*United States Reports*, vol. 256 (1922), p. 503).

¹⁸³ *The Federal Reporter*, vol. 277 (1922), p. 473.

¹⁸⁴ *Ibid.*, vol. 259 (1920), p. 369, at p. 370.

¹⁸⁵ *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (*United States Reports*, vol. 271 (1927), p. 574); see the opinion of the court as stated by Mr. Justice Van Devanter (*ibid.*, pp. 569 *et seq.*). Cf. *Ex parte in the Matter of Muir, Master of the "Gleneden"* (1921) (*ibid.*, vol. 254 (1921), p. 531); and *Ex parte in the Matter of Hussein Lutfi Bey, Master of the "Gul Djemal"* (1921) (*ibid.*, vol. 256 (1922), p. 619). *The "Parlement belge"* (1880), *The "Porto Alexandre"* (1920) and a number of other English decisions in support of immunity for public merchant vessels were cited with approval.

¹⁸⁶ Cf. *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (see footnote 179 above). In *Briggs v. Light-Boats* (1865) (C. Allen, *Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts* (Boston), vol. XI (1878), p. 163), Justice Gray stated: "These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal rather than in a public or political character. They were . . . held and owned by the United States for public uses."

The decision in *The "Pesaro"* may be regarded as having been decisive for a very brief period during which it was not altogether free from reservation and controversy. Indeed, the Supreme Court¹⁸⁷ and the Department of Justice¹⁸⁸ appeared to hold similar views, whereas Judge Julian Mack in the District Court¹⁸⁹ and the Department of State seemed to have a different theory.¹⁹⁰ The attitude of the State Department is reflected in the letter of 2 August 1921 from Mr. Nielsen, Solicitor for the Department of State, to Judge Mack, stating:

It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this Government in such litigation.¹⁹¹

160. The triumph of the Supreme Court over the State Department in matters affecting foreign relations appeared to be short-lived. The temporary victory of the judiciary was attributable partly to the prevailing view of American judges of that period that "it is for the foreign government and not for the court to decide whether a merchant ship is public or private, or whether an act of the foreign government is governmental or non-governmental".¹⁹² Judge Mack's dichotomy as a basis of restricted immunity was thus rejected on mechanical or formal as opposed to substantive grounds. The role of the American executive in this connection became clearly recognized in the lucid dictum of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945), where he said: "It is therefore not for the

¹⁸⁷ *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (see footnote 179 above).

¹⁸⁸ See, for example, Attorney-General Gregory's letter of 25 November 1918 (footnote 180 above).

¹⁸⁹ *The "Pesaro"* (1921) (see footnote 183 above).

¹⁹⁰ See the suggestion made by Secretary of State Lansing in his letter of 8 November 1918, and the Attorney-General's refusal to adopt that suggestion (footnote 180 above). See also *Sloan Shipyards Corporation et al. v. United States Shipping Board* (1922) (*United States Reports*, vol. 258 (1923), p. 549); the State Department's reply to the Italian Ambassador regarding the arrest of the *Pesaro* (see Hackworth, *op. cit.*, p. 437); Secretary of State Hughes's instructions to United States diplomatic and consular officers, "General Instructions, consular, No. 871", of 11 January 1923 (*ibid.*, p. 440); and the State Department's decisions regarding the merchant vessels *Chaco* (1918), owned by the Argentine State, and *Dio* (1919), owned by the United States (*ibid.*, pp. 460-461).

¹⁹¹ See Hackworth, *op. cit.*, pp. 438-439. See also the United States *Shipping Act, 1916* (*The Statutes at Large of the United States of America from December 1915 to March 1917*, vol. XXXIX, part 1, chap. 451, pp. 728 and 730-731), section 9 of which provides: "Every vessel purchased, chartered or leased from the board . . . while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels . . ." This provision must be read subject to section 7 of the *Suits in Admiralty Act, 1920* (*The Statutes at Large . . . from May 1919 to March 1921*, vol. XLI, part 1, chap. 95, pp. 525 and 527); see also "Special instruction, consular, No. 722", of 21 May 1920 (Hackworth, *op. cit.*, p. 434), as well as the inquiry made by the British Ambassador as to the interpretation of section 7, and the reply by the State Department (*ibid.*, pp. 440-441).

¹⁹² For example, in *The "Roseric"* (1918) (*The Federal Reporter*, vol. 254 (1919), p. 154), the court declared (p. 158): "Such idea [the privilege] is as cogently applicable to an unarmed vessel . . . as it is to one of his [the sovereign's] battleships."

courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."¹⁹³ American judges were predisposed to regard the interpretation of a foreign State's use of its vessels as a matter of diplomatic rather than judicial determination.¹⁹⁴ The judicial primacy in this field has therefore been relegated. The trend in the Supreme Court in favour of following the lead of the political branch of the Government in this connection is significant in view of the restatement of the policy of the United States Government limiting immunity in certain classes of case, as enunciated in the famous Tate Letter of 19 May 1952.¹⁹⁵

161. The Tate Letter put an end to any lingering doubts regarding the policy to be followed by the executive, as well as by the courts. Restricted immunity based on a distinction between public acts (*jure imperii*) and private acts (*jure gestionis*) was adopted and the practice of the State Department of making suggestions of immunity gradually developed. The role of the judiciary became that of a "second chamber", and the practice of pre-trial by the political branch of the Government grew, until it became too onerous to maintain.¹⁹⁶ Thus the legislative branch of the Government intervened to restore a new balance in the form of the *Foreign Sovereign Immunities Act of 1976*.¹⁹⁷ The determination of questions of jurisdictional immunities and their extent was once again restored to the original authority, namely the judiciary, with far less likelihood of interventions by the executive branch of the Government.¹⁹⁸ What is clear, however, is that, since the Tate

Letter (1952), it has become settled law in the practice of the United States that State ships operated exclusively on commercial and non-governmental service are not granted immunities from seizure, attachment or detention.

162. It should also be observed that, even prior to and during the period between *Berizzi Brothers Co. v. SS "Pesaro"* (1926)¹⁹⁹ and the dictum of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945),²⁰⁰ when ships employed by foreign Governments exclusively on commercial and governmental service were accorded immunity from the jurisdiction of United States courts, immunity was subject to further restrictions and qualifications. Unlike English practice, which gave prominence to ownership by a foreign sovereign, United States practice based immunity on actual possession. Thus immunity was recognized if the ship was either owned and possessed, or merely possessed and controlled or managed by a foreign Government, as in *The "Roseric"* (1918)²⁰¹ and *The "Carlo Poma"* (1919).²⁰² Conversely, immunity was denied in cases like *The "Attualità"* (1916)²⁰³ and *The "Beaverton"; the "Daisai Maru"* (1919),²⁰⁴ where the ship in question was neither owned, nor possessed, nor operated by the State, though it was chartered or requisitioned by it. The requirement of actual possession as evidence of dedication to public service was regarded as determinative. In United States law, property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public use and must be employed in carrying on the operations of the Government.²⁰⁵

163. There are also strict requirements as to the methods of claiming immunity in United States practice. Not only must immunity be positively claimed, but also it must be properly claimed according to the *lex fori*.²⁰⁶ Immunity would not be considered *d'office* or *proprio motu* but must be claimed through a proper channel, otherwise it could not be considered by reason of inadmissibility of evidence.²⁰⁷ Immunity of a public ship may be effectively

¹⁹³ *United States Reports*, vol. 324 (1946), p. 30, at p. 35. Cf. the opinion of Chief Justice Stone in *Ex parte Republic of Peru* (1943) (*ibid.*, vol. 318 (1943), p. 578, at pp. 588-589). See also *F. W. Stone Engineering Co. v. Petróleos Mexicanos* (1945) (*Pennsylvania State Reports*, vol. 352 (1946), p. 12; *Annual Digest* . . ., 1946 (London), vol. 13 (1951), p. 76, case No. 31); *United States of Mexico et al. v. Peter Schmuck et al.* (1944) (*Reports of Cases Decided in the Court of Appeals of the State of New York*, vol. 293 (1945), p. 264; *Annual Digest* . . ., 1943-1945 (London), vol. 12 (1949), p. 75, case No. 21); A. B. Lyons, "The conclusiveness of the 'suggestion' and certificate of the American State Department", *The British Year Book of International Law*, 1947 (London), vol. 24, p. 116.

¹⁹⁴ For example, in *The "Maipo"* (1919) (*The Federal Reporter*, vol. 259 (1920), p. 367), Judge Hough considered that, if a Government engaged in trade, it should be subject to the same liabilities as private individuals, but this would invoke the Chilean Government's interpretation of what was a public function. It was, as such, a matter of diplomatic rather than judicial determination. Cf. *The "Roseric"* (1918) (footnote 192 above).

¹⁹⁵ *The Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), pp. 984-985. See also W. W. Bishop, Jr., "New United States policy limiting sovereign immunity", *The American Journal of International Law* (Washington, D.C.), vol. 47 (1953), p. 93.

¹⁹⁶ Pre-1976 judicial practice was to a greater or lesser extent influenced by the "views" or "suggestions" of the executive branch of the Government, especially when they were favourable to the granting of immunity. See *Chemical Natural Resources v. Republic of Venezuela* (1966) (*International Law Reports* (London), vol. 42 (1971), p. 119); *Isbrandtsen Tankers v. President of India* (1970) (*International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), p. 1046); *Amkor Corporation v. Bank of Korea* (1969) (*International Law Reports* (Cambridge), vol. 53 (1979), p. 291).

¹⁹⁷ See footnote 282 below.

¹⁹⁸ The procedure still exists for foreign Governments to ask the State Department to intervene through the Department of Justice as *amicus curiae*. See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (1982) (footnote 38 above), in which the United States of America was an intervener; the conclusions of the United States are reproduced in *International Legal Materials* (Washington, D.C.), vol. XX, No. 6 (November 1981), pp. 1436 *et seq.*

¹⁹⁹ See footnote 179 above.

²⁰⁰ See footnote 193 above.

²⁰¹ See footnote 192 above.

²⁰² See footnote 184 above.

²⁰³ See footnote 181 above. See also *The "Mina"; the "Attualità"* (1917) (*The Federal Reporter*, vol. 241 (1917), p. 530). Cf. *Maru Navigation Co. v. Società Commerciale Italiana di Navigazione* (1921) (*ibid.*, vol. 271 (1921), p. 97).

²⁰⁴ *The Federal Reporter*, vol. 273 (1921), p. 539; this decision followed *United States v. Wilder* (1838) (*The Federal Cases*, vol. 28 (1896), p. 601, case No. 16,694) and *The Johnson Lighterage Co. No. 24* (1916) (*The Federal Reporter*, vol. 231 (1916), p. 365).

²⁰⁵ Opinion of Chief Justice Waite in *The "Fidelity"* (1879) (see footnote 182 above); see the opinion of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945) (*loc. cit.* (footnote 193 above), p. 37). See also *The "Davis"* (1869) (Wallace, *op. cit.*, vol. X (1909), p. 15); *Long v. the "Tampico"* (1883) (*The Federal Reporter*, vol. 16 (1883), p. 491, especially pp. 493-494); *The "Uxmal"* (1941) (*Federal Supplement*, vol. 40 (1942), p. 258); *The "Katingo Hadjipatera"* (1941) (*ibid.*, p. 546; on appeal, *Federal Reporter*, 2d Series, vol. 119 (1941), p. 1022; and *United States Reports*, vol. 313 (1941), p. 593); *The "Ljubica Matkovic"* (1943) (*Federal Supplement*, vol. 49 (1943), p. 936).

²⁰⁶ Unlike United States practice, British courts, instead of qualifying the methods of claiming immunity, have laid down stricter requirements for a valid waiver of immunity.

²⁰⁷ *Società Commerciale Italiana di Navigazione v. Maru Navigation Co. (The "St. Charles"; The "Tea"; The "Armando")* (1922) (*The Federal*

claimed through the diplomatic channel,²⁰⁸ or by direct intervention of the foreign Government concerned,²⁰⁹ alternatively, the public status of the ship may be brought to the notice of the courts by the State Department.²¹⁰ Immunity has been withheld where the claim was represented by the master of the ship or by private counsel,²¹¹ or by a consul²¹² or by an ambassador of a third country.²¹³

(iii) France

164. The position of public vessels in France is different from that in the Anglo-American world. France does not recognize admiralty actions *in rem*. Damage resulting from the use of government vessels generally entails actions *in personam* against the State owning the ships or the captain commanding the vessels.²¹⁴ Immunity of public ships *per se* is considered only in connection with their liability to seizure, either in a *saisie conservatoire* or *préliminaire* or *préventive*, or in a *saisie exécutoire* or *exécution* or *définitive*.²¹⁵ Owing to certain technicalities of a *saisie conservatoire*, attachments of public vessels have been frequent, while cases arising from a *saisie exécutoire* have been comparatively rare,²¹⁶ and would have closer relations to part IV of the draft articles than to the present study.

Reporter, vol. 280 (1922), p. 334); *The "Uxmal"* (1941) (see footnote 205 above).

²⁰⁸ See, for example, *The "Maipo"* (1918) (*The Federal Reporter*, vol. 252 (1919), p. 627); *The "Maipo"* (1919) (*ibid.*, vol. 259 (1920), p. 367); *The "Rogdai"* (1920) (*ibid.*, vol. 278 (1922), p. 294); *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (footnote 179 above). *The "Secundus"* (1926) (*The Federal Reporter*, 2d Series, vol. 13 (1926), p. 469; *ibid.*, vol. 15 (1927), p. 711).

²⁰⁹ *Fields v. Predionica i Tkanica* (1941) (*New York Supplement*, 2d Series, vol. 31 (1942), p. 739).

²¹⁰ *The "Florence H."* (1918) (*The Federal Reporter*, vol. 248 (1918), p. 1012); *The "Lake Monroe"* (1919) (*United States Reports*, vol. 250 (1923), p. 246); *The "Western Maid"* (1922) (see footnote 182 above).

²¹¹ See, for example, *Ex parte in the Matter of Muir, Master of the "Gleneden"* (1921) (footnote 185 above); *The "Roseric"* (1918) (footnote 192 above).

²¹² See, for example, *The "São Vicente"*, *The "Murmugão"*—*Rose v. Transportes Marítimos do Estado* (1922) (*The Federal Reporter*, vol. 281 (1922), p. 111); *The "São Vicente"*—*Transportes Marítimos do Estado v. T. A. Scott Co.* (1924) (*ibid.*, vol. 295 (1924), p. 829).

²¹³ See, for example, *The "Gul Djemal"* (1920) (1922) (*The Federal Reporter*, vol. 296 (1924), pp. 563 and 567); *The "Gul Djemal"* (1924) (*United States Reports*, vol. 264 (1924), p. 90). During suspension or severance of diplomatic relations between the United States and Turkey, the Spanish Ambassador could not claim immunity for a merchant ship operated by the Turkish Government. Such a claim should be made through the United States Department of State.

²¹⁴ See, for example, *The "Hungerford"* (1918) (1919) (footnote 222 below); cf. E. W. Allen, *The Position of Foreign States before French Courts* (New York, Macmillan, 1929); and C. J. Hamson, "Immunity of foreign States: the practice of the French courts", *The British Year Book of International Law*, 1950 (London), vol. 27, p. 293.

²¹⁵ A *saisie conservatoire* is by way of *cautio iudicatum solvi*, i.e. security for judgment. In commercial cases, any creditor who has a reasonable fear of the debtor's insolvency may apply for such a *saisie* without the appearance of the defendant. A *saisie exécutoire* is an attachment in execution of a judgment rendered against the owner or possessor of the property seized.

²¹⁶ A *saisie préliminaire* is a *fait accompli* before the owner has a chance to assert his public status, while a *saisie conservatoire* against State-owned property is generally not allowed. See *Veuve Caratier-Terrasson v. Direction générale des chemins de fer d'Alsace-Lorraine* (1885) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1885 (Paris), part I, p. 341); *Battarel v. Ephrussi* (1889) (*Journal du droit international privé* (Clunet)

165. Before the First World War, French courts appear to have applied a principle of unqualified immunity. Since then, the contradiction between the principle of inviolability of State-owned property²¹⁷ and the application of the distinction between *actes de puissance publique* and *actes de gestion privée* or *actes de commerce*²¹⁸ has given rise to considerable inconsistency in the judicial practice of France with regard to the immunity from arrest and attachment of foreign public vessels employed exclusively in commerce—*dans un but commercial et non gouvernemental*. In *The "Campos"* (1919),²¹⁹ *The SS "Balosaro"* (1919)²²⁰ and *The "Englewood"* (1920),²²¹ there were traces of a more absolute principle being applied, as it was held that ships employed by foreign States for trading purposes could not be seized or attached.

166. Such traces were overshadowed by the distinction formulated in *The "Hungerford"* (1918) by the Tribunal de commerce of Nantes between State ships employed for public purposes and vessels employed in ordinary trading voyages. Although the judgment of the commercial court was reversed by the Court of Appeal of Rennes (1919), the distinction formulated was restated and adopted. At the time the proceedings started, the *Hungerford*, a merchant ship requisitioned by the British Admiralty, was carrying a cargo of wheat and wool for the British and French Governments. It was therefore conceivable, as was found by the Court of Appeal of Rennes, that the *Hungerford* was employed in public law activities.²²² The distinction was upheld in a number of subsequent cases.²²³

167. It is of interest to note that, although France had signed the 1926 Brussels Convention, but was not to ratify it until 1955, the Tribunal de commerce of La Rochelle, in *Etienne v. Gouvernement des Pays-Bas* (1947),²²⁴

(Paris), vol. 16 (1889), p. 461); but see J. G. Castel, "Immunity of a foreign State from execution: French practice", *The American Journal of International Law* (Washington, D.C.), vol. 46 (1952), p. 520.

²¹⁷ See, for example, *The "Campos"* (1919) (*Journal du droit international* (Clunet) (Paris), vol. 46 (1919), p. 747; *Revue internationale du droit maritime* (Paris), vol. XXXII (1920-1921), p. 600).

²¹⁸ See the cases cited in *Annual Digest . . . 1938-1940* (London), vol. 9 (1942), pp. 241-242.

²¹⁹ See footnote 217 above; G. Ripert was of the opinion in this case that a vessel employed by the Brazilian Government for commercial purposes could not be attached (*Revue internationale du droit maritime* (Paris), vol. XXXIV (1922), p. 19).

²²⁰ *La Gazette des Tribunaux*, 1920 (Paris), part. 2, p. 93.

²²¹ *Journal du droit international* (Clunet) (Paris), vol. 47 (1920), p. 621; *Revue internationale du droit maritime* (Paris), vol. XXXII (1920-1921), p. 602; the Tribunal civil of Bordeaux lifted the attachment of the vessel *Englewood*, which was owned by the United States Government. See also *The "Glenridge"* (1920) (*Revue internationale du droit maritime*, vol. XXXII (1920-1921), p. 599); *The "Avensdaw"* (1922) (*ibid.*, vol. XXIV (1922), p. 1074).

²²² *Société maritime auxiliaire de transports v. Capitaine du vapeur anglais "Hungerford"* (1918) and *Capitaine Seabrook v. Société maritime auxiliaire de transports* (1919) (*Revue internationale du droit maritime* (Paris), vol. XXXII (1920-1921), p. 345). With regard to the immunities of requisitioned ships, contrast the judgments concerning the *Axpe Mendi* (*Rousse et Maber v. Banque d'Espagne et autres* (1937)) and the *Itxas Zuri* (*Société Cements Resola v. Larrasquitu et Etat espagnol* (1937)) (*Journal du droit international* (Clunet) (Paris), vol. 65 (1938), pp. 53 and 287).

²²³ See, for example, *Hertzfeld v. Dobroflotte* (1930) (*Journal du droit international* (Clunet) (Paris), vol. 57 (1930), p. 692); *Hertzfeld v. Union des Républiques socialistes soviétiques* (1938) (*ibid.*, vol. 65 (1938), p. 1034).

²²⁴ Case concerning the vessel *Ittersum* (*Recueil Dalloz*, 1948 (Paris), p. 84).

expressed its approval of the principles of the Convention limiting immunity in regard to public ships engaged in commercial activities, although jurisdiction was declined in that case on the ground that the *Ittersum* was employed by the Netherlands for political purposes, namely the carriage of wheat for revictualing the country.

(iv) *Germany*

168. Before the First World War, German courts appear to have applied the principle of unqualified immunity with little hesitation.²²⁵ War vessels were accorded complete immunity.²²⁶ By the close of that war, the legal status of Government-owned vessels employed in trade was judicially determined. In the few years following the end of the war, immunity was recognized for foreign State ships even when engaged in commercial activities. In *The "Schenectady"* (1920),²²⁷ the Supreme Court (Reichsgericht) dismissed an appeal against immunity from seizure and attachment of a vessel owned by the United States of America for failure to deliver some 100 bales of cotton as contracted. The same court affirmed the decision of the higher regional court (Oberlandesgericht) in *The "Ice King"* (1921)²²⁸ and upheld immunity, although the vessel was operated by the United States Shipping Board (USSB) for commercial purposes. On the same day, the court reversed the judgments of the lower courts in *The "West Chatala"* (1921),²²⁹ granting immunity to another ship employed by USSB on the ground that the American line was acting merely as agent for the United States Government.

169. In *The "Coimbra"* (1923),²³⁰ the regional court (Landgericht) affirmed an order of attachment against a vessel apportioned to Portugal after the First World War, but equipped and maintained by a private company. Assuming that the practice of German courts during the decade that followed the war tended to favour an absolute view of immunity, that tendency was reversed by Germany's ratification of the 1926 Brussels Convention, at least in so far as public ships and cargoes were concerned. *The "Oituz"* (1930)²³¹ was probably the last case in which *The "Ice King"* was followed. There, immunity was ac-

corded to a government ship employed for commercial purposes. The reversal of the absolute rule of immunity was pronounced in *The "Visurgis"; the "Siena"* (1938),²³² in which the extent and limits of the immunities of public vessels both before and after the Brussels Convention and its Additional Protocol were fully discussed.²³³

(v) *Netherlands*

170. Before the First World War, State immunities were not recognized by Netherlands courts.²³⁴ In 1917, the executive filled the gap by introducing a general enactment recognizing the immunities of foreign States in accordance with international law.²³⁵ In 1921, immunity was admitted by the courts in regard to acts *jure imperii*.²³⁶ In regard to public ships, it appears from two leading cases²³⁷—one of which was, however, decided before the entry into force of the 1926 Brussels Convention—that State-operated vessels employed in trade would be accorded immunity from arrest and that the distinction between the private and public character of the service of the ship was irrelevant. On the other hand, since the entry into force of the Brussels Convention and the Netherlands' deposit of its instrument of ratification, there has been no question that such immunity would no longer be recognized except to the extent and subject to the limitations provided in the Brussels Convention.²³⁸

(vi) *Italy*

171. Italy has been regarded as being foremost among States which have adopted a restrictive view of immunity from the very beginning. The distinctions between *atti d'impero* and *atti di gestione* and between the State as *ente politico* and *ente civile* were recognized by Italian courts as early as 1886.²³⁹ Apart altogether from this restrictive practice, the problem of State immunities in respect of public vessels employed in trade does not arise in Italian law, owing to certain peculiarities of the internal law. The personification of seagoing vessels has been pushed to its log-

²²⁵ See, for example, E. W. Allen, *The Position of Foreign States before German Courts* (New York, Macmillan, 1928). See also *Heizer v. Kaiser-Franz-Joseph-Bahn A.G.* (1885) (*Gesetz- und Verordnungsblatt für das Königreich Bayern* (Munich), vol. I (1885), pp. 15-16). Cf. article 7 of the Harvard Law School draft convention on competence of courts in regard to foreign States (*Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 533-534).

²²⁶ See, for example, *The "Ismir"; the "Assari Tewfik"* (1901) (*Zeitschrift für Internationales Privat- und Öffentliches Recht* (Leipzig), vol. XIII (1903), p. 397).

²²⁷ *Hanseatische Gerichtszeitung* (Hamburg), vol. XLII (1921), p. 76, No. 38.

²²⁸ *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 103 (1922), p. 274, No. 82; *Revue internationale du droit maritime* (Paris), vol. XXXIII (1922), p. 868.

²²⁹ *Entscheidungen des Reichsgerichts . . .*, vol. 103 (1922), p. 280, No. 83; *Revue internationale du droit maritime*, vol. XXXIV (1922), p. 668.

²³⁰ *Hanseatische Gerichtszeitung* (Hamburg), vol. XLIV (1923), p. 178, No. 101; *Revue de droit maritime comparé* (Paris), vol. 4 (1923), p. 89.

²³¹ *Juristische Wochenschrift* (Leipzig), vol. 60 (1931), p. 150, No. 6; *Annual Digest . . . 1929-1930* (London), vol. 5 (1935), p. 129.

²³² *Entscheidungen des Reichsgerichts . . .*, vol. 157 (1938), p. 389, No. 62; *Revue de droit maritime comparé* (Paris), vol. 39 (1939), p. 50; *Annual Digest . . . 1938-1940 (op. cit.)*, p. 284, case No. 94. An action *in rem* was permissible, although the arrest of the ship while it was in the service of a foreign State was not allowed.

²³³ For further discussion of the application of the Brussels Convention, see paragraph 207 below.

²³⁴ See Phillimore, *loc. cit.* (footnote 100 above), pp. 466-467.

²³⁵ See, for example, article 13 (a) of the Act of Parliament of 26 April 1917 (*Staatsblad van het Koninkrijk der Nederlanden* (The Hague, 1917), No. 303).

²³⁶ *Union of South Africa v. Herman Grote* (1921) (*Nederlandse Jurisprudentie* (Zwollen, 1921), p. 849; *Annual Digest . . . 1919-1922* (London), vol. 1 (1932), p. 22, case No. 8).

²³⁷ *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (*Weekblad van het Recht* (The Hague), No. 11088; *Annual Digest . . . 1923-1924* (London), vol. 2 (1933), p. 133, case No. 69); and *The "Garbi"* (1938) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1939), No. 96; *Annual Digest . . . 1919-1942* (London), vol. 11 (1947), p. 155, case No. 83).

²³⁸ See paragraphs 199 *et seq.* below.

²³⁹ See, for example, *Guttieres v. Elmilik* (1886) (*Il Foro Italiano* (Rome), vol. XI, part 1 (1886), p. 913, especially pp. 920-922).

ical extreme, so that, with the exception of ships of war, seafaring vessels within Italian waters are amenable to the jurisdiction of Italian courts and are governed by the same law as private persons.²⁴⁰ It should be further noted that Italy has also ratified the 1926 Brussels Convention and consistently followed the principle enunciated therein.

(vii) *Belgium*

172. In Belgium, as in France, the problem of immunity of public ships arises only in connection with the inviolability or exemption from seizure, arrest and attachment of property of foreign Governments. In this connection, it appears, quite contrary to the established practice of Belgian courts in favour of a restrictive view of immunity from jurisdiction,²⁴¹ that, since the First World War and until recently,²⁴² the immunity of public property from attachment and execution has been regarded as absolute. In the cases concerning the *Joulan* (1920)²⁴³ and the *Lima* and the *Pangim* (1921),²⁴⁴ it was held that a public vessel in use for commercial purposes did not lose its immunity from arrest by way of attachment or execution. It was also held in a number of cases that the act of requisition by a foreign State was an *actum imperii* over which Belgian courts had no jurisdiction.²⁴⁵ The position of State-trading vessels was brought into line with the principle of restricted immunity by Belgium's ratification, both international and constitutional,²⁴⁶ of the Brussels Convention. A direct application of this Convention is to be found in *Sáez*

Murua v. Pinillos et García (1938),²⁴⁷ in which the Court of Appeal of Brussels permitted the arrest of a vessel employed by Spain in trading.

(viii) *Egypt*

173. The mixed courts of Egypt have been consistent in denying immunity to foreign States with regard to their *actes de gestion privée, jure gestionis*.²⁴⁸ The same is true regarding government ships. It was held in *Capitaine Hall v. Capitaine Bengoa* (1920)²⁴⁹ that the immunity of a public ship applied only where the act complained of was performed in the exercise of the powers of the State in its public capacity, and not where a civil wrong had been done by an employee of the State in the management of its private interests. As regards the nature of the service of public ships, the courts have been somewhat arbitrary in giving immunity in one case to merchant ships chartered for the transport of troops²⁵⁰ and denying it in another case concerning a public ship employed in the carriage of pilgrims, although the ship was designed for coastal defence.²⁵¹ On the other hand, the seizure of two Egyptian vessels by the Soviet Government was held to be outside Egyptian jurisdiction, for the act of seizure was a clear manifestation of the sovereign authority of the Soviet Union.

(ix) *Portugal*

174. In *The "Cathelamet"* (1926),²⁵² the Court of Appeal of Lisbon exercised jurisdiction in respect of a vessel of commerce owned and employed by the United States Shipping Board for trading purposes. On the other hand, in 1920, immunity was claimed by the Portuguese Government in connection with an attempted seizure of the *Porto Alexandre*, a ship employed by the Transportes Marítimos do Estado wholly in commercial activities (see paragraph

²⁴⁰ See, for example, the case concerning the collision between the Soviet vessel *Plekhanoff* and the Italian vessel *Generale Pettiti: Società di Navigazione Generale "Gerolimich" v. Rappresentanza commerciale dell'URSS in Italia* (court of first instance, 1934, and Court of Appeal of Genoa, 1936) (*Rivista di diritto internazionale* (Rome), 27th year (1935), p. 419; *ibid.*, 30th year (1938), p. 226), and *Rappresentanza commerciale dell'URSS v. Società di Navigazione Generale "Gerolimich"* (Court of Cassation, 1938) (*Il Foro Italiano* (Rome), vol. LXIII (1938), p. 1216; *Rivista del diritto della navigazione* (Rome), vol. IV-I (1938), p. 460, with a note by R. Quadri; *Il Diritto marittimo* (Rome), 40th year (1938), p. 465, with a note by B. Bissaldi; *Journal du droit international* (Clunet) (Paris), vol. 66 (1939), p. 180; *Revue de droit maritime comparé* (Paris), vol. 39 (1939), p. 190; *Annual Digest . . . , 1938-1940 (op. cit.)*, p. 247, case No. 84). See also Phillimore, *loc. cit.* (footnote 100 above).

²⁴¹ See, for example, *Etat du Pérou v. Kreglinger* (1857) (*La Belgique judiciaire* (Brussels), vol. XVII (1959), p. 331).

²⁴² See, for example, *Socobelge et Etat belge v. Etat hellénique, Banque de Grèce et Banque de Bruxelles* (1951) (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), p. 244).

²⁴³ *West Russian Steamship Company Ltd. v. Capitaine Sucksdorff (Pasicrisie belge, 1922* (Brussels), part 3, p. 3; *Annual Digest . . . , 1919-1922 (op. cit.)*, p. 152, case No. 103).

²⁴⁴ *Etat portugais v. Sauvage* (*Journal du droit international* (Clunet) (Paris), vol. 49 (1922), p. 739; *Annual Digest . . . , 1919-1922 (op. cit.)*, p. 154, case No. 104).

²⁴⁵ See, for example, *Brasseur et consorts v. République hellénique et Société Socobel* (Tribunal civil of Anvers, 1932) (*Journal du droit international* (Clunet) (Paris), vol. 59 (1932), p. 1088), (Court of Appeal of Brussels, 1933) (*Pasicrisie belge, 1933* (Brussels), part. 2, p. 197; *Annual Digest . . . , 1931-1932* (London), vol. 6 (1938), p. 164, case No. 85); *Capitaine Urrutia et capitaine Amollobieta v. Martiarena et consorts* (1937) (*Revue de droit maritime comparé* (Paris), vol. 38 (1938), p. 69; *Annual Digest . . . , 1935-1937* (London), vol. 8 (1941), p. 237, case No. 94).

²⁴⁶ See the Act of 28 November 1928 for the introduction into Belgian law of provisions corresponding to those of the 1926 Brussels Convention (*Recueil des lois et arrêtés royaux de Belgique, 1929*, p. 74); cf. the note by M. R. Hennebicq concerning the *Socobelge* case (*loc. cit.*, footnote 242 above).

²⁴⁷ *Revue critique de droit international* (Paris), vol. XXXIV (1939), p. 317; for the judgment of the Court of Cassation (1939), see *Pasicrisie belge, 1939* (Brussels), part 2, p. 116; *Annual Digest . . . , 1938-1940 (op. cit.)*, p. 289, case No. 95.

²⁴⁸ See *Gouvernement égyptien v. Chemins de fer de l'Etat palestinien* (1942) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 54 (1941-1942), part 2, p. 242; *Annual Digest . . . , 1919-1942 (op. cit.)*, p. 146, case No. 78).

²⁴⁹ *The "Sumatra" case* (*Bulletin de législation et de jurisprudence égyptiennes*, vol. 33 (1920-1921), p. 25; *Journal du droit international* (Clunet) (Paris), vol. 48 (1921), p. 270; *Annual Digest . . . , 1919-1922 (op. cit.)*, p. 157, case No. 107).

²⁵⁰ *Stapledon & Sons v. S. E. le Premier lord de l'Amirauté britannique* (1924) (*Gazette des tribunaux mixtes d'Egypte* (Alexandria), vol. XIV (1923-1924), p. 253; *Annual Digest . . . , 1923-1924 (op. cit.)*, p. 140, case No. 74).

²⁵¹ *Saglietto v. Tawill* (1923) (*Gazette des tribunaux mixtes d'Egypte*, vol. XIV . . . , p. 252; *Annual Digest . . . , 1923-1924 (op. cit.)*, p. 144, case No. 77). See also *The National Navigation Company of Egypt v. Tavoularidis et Cie* (1927) (*Gazette des tribunaux mixtes d'Egypte*, vol. XIX (1928-1929), p. 251).

²⁵² *Gazeta Judicial* (Ponta Delgada, Azores), vol. 11, No. 170, 2nd series, p. 68; *Annual Digest . . . , 1925-1926* (London), vol. 3 (1929), p. 184, case No. 133. See, however, *The "Curvello"* (1922) (*Gazeta da Relação de Lisboa*, vol. 18, p. 36), in which a Brazilian State-owned ship carrying passengers and goods, as well as government mail, was entitled to immunity from jurisdiction and seizure.

152 above). There appears to be an inconsistency between the judicial practice and the practice of the executive branch of the Government in the recognition or granting of immunity, on the one hand, and in making a like claim on behalf of the State, on the other.

(x) *Scandinavian States*

175. From the few reported cases available,²⁵³ it can be gathered that the distinction between acts *jure imperii* and acts *jure gestionis* has been recognized and accepted in the practice of the Scandinavian States.²⁵⁴ In *Norway*, the immunities from attachment and execution of merchant ships employed in commerce have been upheld so long only as the vessels remained in the possession of the foreign Governments.²⁵⁵ In *Sweden*, in the well-known case of *The "Rigmor"* (1942),²⁵⁶ the Supreme Court, applying the 1926 Brussels Convention, upheld the immunity from arrest of a vessel requisitioned by the Norwegian Government and appropriated to the public service of the British Ministry of War Transport. When the proceedings started, the *Rigmor* was in the possession of the British Government and employed by it in the carriage of non-commercial cargo for public purposes. It may be added that Denmark, Sweden and Norway were among the 13 countries that ratified the 1926 Brussels Convention before the Second World War, and that Norway has actually applied the principles of the Convention in two interesting cases concerning Norwegian ships requisitioned by German occupying authorities.

176. Thus, in a case decided in 1949 concerning the *Fredrikstad*, a Norwegian ship requisitioned by German occupation authorities in Norway, the Supreme Court held that no maritime lien could attach to ships employed by an occupying power for State purposes in respect of collision, on the ground that no execution could be levied against the ships so used. The distinction was maintained between *public ships being used exclusively for State purposes* and other ships.²⁵⁷ On the other hand, in *A/S Irania under Public Administration v. A/S Franmaes mek. Verksted*

²⁵³ Cf. H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law*, 1951, vol. 28, pp. 264-265.

²⁵⁴ See, for example, A. Ross, *A Textbook of International Law* (London, Longmans, 1947), p. 190; F. Castberg, *Folkerett* (Oslo, Lindkvist, 1948), p. 100. See also Comité maritime international, *Bulletin No. 57. Conférence de Londres (octobre 1922)* (Anvers, 1923), pp. 122 *et seq.* and p. 194, concerning, in particular, trading vessels; and the more recent work of L. Pelin, *Statsimmunitetens omfattning* (Juridiska Föreningen i Lund No. 29), Acta Societatis Juridicae Lundensis (1979).

²⁵⁵ *The "Guernica"* (1938) (*Norsk Retstidende*, 1938 (Oslo), p. 584; *Annual Digest . . . , 1919-1942 (op. cit.)*, p. 139, case No. 73); and *The "Hanna I"* (1948) (*Norsk Retstidende*, 1948, p. 706; *Annual Digest . . . , 1948* (London), vol. 15 (1953), p. 146, case No. 46).

²⁵⁶ See *The American Journal of International Law* (Washington, D.C.), vol. 37 (1943), p. 141; *Annual Digest . . . , 1941-1942* (London), vol. 10 (1945), p. 240, case No. 63. See also *Russian Trade Delegation v. Carlbon* No. 2 (1944) (*Nytt Juridiskt Arkiv*, 1944 (Lund), p. 269; *Annual Digest . . . , 1943-1945 (op. cit.)*, p. 112, case No. 31). The court declined jurisdiction against the *Toomas* on the ground that the vessel was in actual possession of the Soviet Union and that the seizure was in execution of a judgment against the master of the *Toomas* and not against the Soviet Union, so that the law implementing the 1926 Brussels Convention was inapplicable.

²⁵⁷ *Fredrikstad Havnevesen v. A/S Bertelsens mek. Verksted* (1949) (*Norsk Retstidende*, 1949, p. 881; *International Law Reports*, 1950 (London), vol. 17 (1956), p. 167, case No. 42).

(1950),²⁵⁸ it was held by the Court of Appeal that a Norwegian ship requisitioned by German authorities could be detained by a Norwegian shipyard in respect of repairs carried out on the ship by order of the German authorities, the latter having failed to pay for the repairs. The ship in question was found not to have been used *exclusively on governmental and non-commercial service*, as provided in the 1926 Brussels Convention, having been employed for the transport of edible fats to merchants in Norway.²⁵⁹

(xi) *Latin-American States*

177. It would be presumptuous to refer to the practice of Latin-American States in a generalized way. There seems to be a clear indication in the practice of some of the Latin American systems limiting State immunity with respect to State ships engaged in trade. In *Argentina*, two decisions clearly illustrate this. In *The "Cokato"* (1924),²⁶⁰ the Federal Court of Appeal assumed jurisdiction over a Government-operated vessel engaged in trade despite its ownership by the United States Shipping Board. On the other hand, in *The "Ibai"* (1937),²⁶¹ the same court declined jurisdiction against a Spanish requisitioned ship on the grounds, *inter alia*, that its voyage was not of a commercial nature and that it was employed for national defence, which had nothing to do with speculation or gain, but was prompted by the necessity of providing efficiently for the defence of the State.²⁶² It may be added that, by 1938, *Chile*²⁶³ and *Brazil*²⁶⁴ had deposited their ratifications of the 1926 Brussels Convention.

(b) *A tentative indication*

178. The preceding survey of legal developments in the judicial practice of States does not in itself furnish conclusive evidence of an established set of rules of interna-

²⁵⁸ *Nordiske Dommer i Sjøfartssaker*, 1950 (Oslo), p. 181; *International Law Reports*, 1950 (*op. cit.*), p. 168, footnote 1.

²⁵⁹ By comparison with English admiralty practice, the two cases could be distinguished on the further ground that the former was a collision case, in which allowing a maritime lien would have implicated the foreign sovereign, while the latter concerned repairs effected on a privately owned ship, and upholding immunity would have allowed unjust enrichment in favour of the private shipowner for the repairs.

²⁶⁰ *Jurisprudencia Argentina* (Buenos Aires), vol. 14, p. 705; *Annual Digest . . . , 1923-1924 (op. cit.)*, p. 136, case No. 71.

²⁶¹ *Ibarra y Cia v. Captain of the "Ibai"* (*Fallos de la Corta Suprema de Justicia de la Nación* (Buenos Aires), vol. 178, p. 173; *Revue de droit maritime comparé* (Paris), vol. 38 (1938), p. 50; *Annual Digest . . . , 1935-1937* (London), vol. 8 (1941), p. 247, case No. 100; *Annual Digest . . . , 1938-1940 (op. cit.)*, p. 293, case No. 96).

²⁶² See also *Gobierno de Italia v. Consejo Nacional de Educación* (1940) (*Jurisprudencia Argentina*, vol. 71, p. 400; *Annual Digest . . . , 1941-1942 (op. cit.)*, p. 196, case No. 52).

²⁶³ See, for example, *Pacey v. Barroso* (1926) (*Revista de derecho, jurisprudencia y ciencias sociales y Gaceta de los Tribunales* (Santiago, Chile), vol. 25, parte II, p. 49; *Annual Digest . . . , 1927-1928* (London), vol. 4 (1931), p. 369, case No. 250); and the *Chayet* case (1932) (*Revista de derecho . . . y Gaceta de los Tribunales*, vol. 30, p. 70; *Annual Digest . . . , 1931-1932 (op. cit.)*, p. 329, case No. 181).

²⁶⁴ See, for example, *The "Lone Star"* (1944) (*Diário da Justiça* (Rio de Janeiro), No. 45 (24 February 1945), annex; *Annual Digest . . . , 1947* (London), vol. 14 (1951), p. 84, case No. 31); and the *Gilbert* case (1944) (*Diário da Justiça* (Rio de Janeiro), No. 190 (21 August 1945), annex; *Annual Digest . . . , 1946* (London), vol. 13 (1951), p. 86, case No. 37).

tional law governing jurisdictional immunities in respect of ships owned, possessed or employed by States. Yet it may serve as a strongly persuasive indication of the direction in which the case-law or judicial practice of States has been developing in the recent past. One outstanding fact is clearly beyond controversy: that is the marked absence of a consistent practice of States in support of immunities in respect of State-owned or State-operated vessels, regardless of the nature of their service or employment. Whenever a court has exercised or disclaimed jurisdiction in a given case on the point under examination, it has done so on grounds which invariably related to the nature of the service or employment of the ship in question.

179. Owing to the existence of certain technicalities peculiar to the law and practice of the various legal systems on the points examined, the survey of reported decisions does not and cannot lend itself to a general conclusion applicable to all systems, but it appears to indicate certain developments favouring a number of legal propositions. In the first place, it has helped to delineate or delimit the areas where the question of State immunities could arise in respect of State-owned or State-operated vessels. Vessels owned by or in the possession of States are generally immune if employed in the governmental or public service of the State, whereas privately owned vessels chartered, hired or requisitioned by a foreign Government, as long as they continue to be possessed and operated by it, are to some extent immune from measures of arrest, seizure, detention, attachment and execution, but not necessarily from actions *in rem* not followed by arrest or attachment. Nor subsequently could a maritime lien attach to such ships by reason of collision caused during operation or possession by the foreign Government. In other words, actions against vessels owned, possessed or operated by States may be allowed to proceed if they in fact do not implead the foreign Governments, whether the actions are *in rem* against the vessels, or *in personam* against their private owners or private operators. There is no State immunity because the question simply does not arise. In *The "Visurgis"; the "Siena"*, decided in Germany in 1938 (see paragraph 169 above), the court declared:

Allowing for minor differences of view in the matter of the definition of State ships and of the extent of the immunities accorded to them, it is possible to summarize Continental, British and American practice as follows: "A vessel chartered by a State but not commanded by a captain in the service the State does not enjoy immunity if proceedings *in rem* are brought against it; still less can the owner of the vessel claim such immunity in an action for damages."²⁶⁵

180. The second proposition rests on the unmistakable and cogent evidence indicating almost conclusively that the practice of States has undergone some changes since the First World War. Shipping came under direct State control and indeed the control of a group of States.²⁶⁶ An English judge once described this state of affairs: "In 1917-18 any shipowner who had a tanker free from government control could have become rich beyond the dreams of avarice."²⁶⁷

²⁶⁵ English translation in *Annual Digest . . . 1938-1940 (op. cit.)*, p. 287, case No. 94.

²⁶⁶ See J. A. Salter, *Allied Shipping Control. An Experiment in International Administration* (Oxford, Clarendon Press, 1921).

²⁶⁷ Opinion of Judge Hill in *The "Sylvan Arrow"* (1923) (*The Law Reports, Probate Division*, 1923, p. 230).

This rather sudden change of circumstances was vividly pictured by G. van Slooten as follows:

Before the war, there had been very few opportunities for States which owned vessels other than those used for national defence or public service to invoke jurisdictional immunity for themselves or immunity from seizure for their vessels. Once the war was over and peace treaties entered into force, the situation changed abruptly. Several States were in possession of sizeable merchant fleets; . . . [they] became shipowners in earnest, engaged in the carriage of passengers and cargo. . . .²⁶⁸

181. If, in some jurisdictions, there were decisions during the last century and even in the mid-1920s upholding the immunities of privately owned but State-operated vessels from arrest and attachment and the immunities of State-owned or State-possessed²⁶⁹ vessels from all judicial proceedings irrespective of the trading or commercial nature of their service or employment, such decisions have now been overruled or reversed, if not rejected or disavowed, by the courts themselves, or with the assistance of the legislature, or upon application of the relevant provisions of an international convention. There is today no outstanding judicial decision which has not been overruled or which has been reconfirmed as still valid that upholds an absolute rule of immunity for vessels owned or operated by States regardless of the nature of their service or employment. It follows accordingly that, whatever may have been the belief in the nineteenth century which may have lingered into the first quarter of the present century, contemporary State practice does not require States to grant jurisdictional immunities in respect of public vessels employed by other States exclusively on commercial and non-governmental service. This does not mean that States are in any way prevented by law from displaying courtesy or forbidden by custom to extend especially courteous treatment to trading vessels of friendly neighbours or allies, should States so wish or should their courts feel so inclined. Such in any truly reflects the essentially flexible nature of the rule of international law regarding State immunity.

182. A third proposition appears to emerge as a necessary consequence, namely that the practice of States as examined in the brief general survey of judicial developments is indicative of a clear and irreversible trend in favour of non-recognition of jurisdictional immunities in respect of a category of public vessels, or vessels requisitioned, employed or operated by States, based on the criterion of their exclusive commercial use or service and absence of connection with any governmental service. Immunity need not be accorded to ships employed by States exclusively on commercial and non-governmental service, while such public ships employed on governmental and non-commercial service continue to enjoy the privilege or protection of

²⁶⁸ G. van Slooten, "La Convention de Bruxelles sur le statut juridique des navires d'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VII (1926), p. 457. Cf. L. van Praag, "La question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent", *ibid.*, 3rd series, vol. XVI (1935), pp. 116 et seq.

²⁶⁹ Possession of a ship by a State is generally considered to be sufficient evidence of its State ownership; cf. R. E. Megarry in *The Law Quarterly Review* (London), vol. 71 (1955), p. 1. See also *The "Manuel Arnus"* (1944) (*Federal Reporter, 2d Series*, vol. 141 (1944), p. 585), in which the United States Supreme Court disclaimed jurisdiction over a vessel in the possession of the United States under a claim of ownership (*United States Reports*, vol. 323 (1945), p. 728).

State immunities from measures of attachment, seizure, detention and execution to the extent indicated in the first proposition, depending on the type of proceedings or causes of actions brought, on whether the vessel in question is privately owned, State-owned, requisitioned, chartered or government-operated, and on the fact of actual possession by the foreign Government claiming its immunity.

183. The rules of State immunity as applied to vessels owned or operated by States were restated with accuracy by Lord Wilberforce in *The "I Congreso del Partido"* (1981), as follows:

... I would unhesitatingly affirm as part of English law the advance made by *The "Philippine Admiral"* with the reservation that the decision was perhaps unnecessarily restrictive in, apparently, confining the departure made to actions *in rem*. In truth an action *in rem* as regards a ship, if it proceeds beyond the initial stages, is itself in addition an action *in personam*, viz. the owner of the ship (see *The "Cristina"*...), the description *in rem* denoting the procedural advantages available as regards service, arrest and enforcement. It should be borne in mind that no distinction between actions *in rem* and actions *in personam* is generally recognized elsewhere so that it would in any event be desirable to liberate English law from an anomaly if that existed. In fact there is no anomaly and no distinction. The effect of *The "Philippine Admiral"* if accepted, as I would accept it, is that, as regards State-owned trading vessels, actions, whether commenced *in rem* or not, are to be decided according to the "restrictive" theory.²⁷⁰

184. As shown in the above examination of legal developments, it has taken the House of Lords more than a century and a half to rejoin the starting-point made by Lord Stowell in *The "Swift"* (1813), where he said:

The utmost that I can venture to admit is that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes (Navigation Acts). Some sovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated.²⁷¹

185. As also examined earlier, judicial pronouncements by United States judges have been more consistent, with the exception of the decision of the Supreme Court in *Berizzi Brothers Co. v. SS "Pesaro"* (1926).²⁷² Thus, in *Ohio v. Helvering* (1934),²⁷³ the court said: "When a State enters the market-place seeking customers, it divests itself of its quasi sovereignty *pro tanto*, and takes on the character of a trader." This dictum merely reaffirmed the view expressed a century earlier by Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia* (1824),²⁷⁴ where he observed: "It is, we think, a sound principle that, when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." That was but a rep-

etition of an earlier observation made by the same Chief Justice in *The Schooner "Exchange" v. McFaddon and others* (1812), where he said:

... there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; ...²⁷⁵

3. GOVERNMENTAL PRACTICE

(a) *Relative relevance of views and attitudes of Governments*

186. It is difficult to assess the relevance of views and attitudes of Governments expressed or reflected in certain actions or statements as evidence or indications of governmental practice on questions relating to the immunities to be accorded to vessels owned or operated by Governments. The first practical problem is one of determining to whom to attribute a particular view expressed by a certain official of a State organ, or an attitude adopted or reflected in a statement or declaration by a representative of a Government. Views or considered opinions given by legal advisers to a Government on matters of general concern or on a particular issue may be regarded as views of that Government at a particular time. To what extent the expression of such views in an official capacity by an authority of the State could constitute evidence of State practice is another matter, for practice refers to concrete acts performed by the State rather than mere expression of considered reflections. Statements or declarations made by representatives of a Government before the judicial authorities of other States as regards the status of certain government agencies, government ownership of State property and claims of jurisdictional immunities for such agencies or property may afford evidence of the positions taken by Governments, which, if sufficiently clear or consistently maintained, could furnish proof of usage or practice of a State on a particular question.

187. Another difficulty relates, therefore, to the ascertainment of views or attitudes of Governments on a particular issue at the material time, for Governments change as often as do their views and attitudes on a particular question. It is not surprising, therefore, that the views expressed officially by internationally recognized experts who may also hold positions or bear certain responsibility within a Government do not necessarily reflect the views or attitude of that Government; and even when they do formally represent the views of the Government, such views are subject to changes and modifications without notice. Such is the prerogative of the sovereign authority with which the State, like its executive branch, is vested. If the views and attitude attributable to one Government or to one State may change at will, as they are susceptible to sudden alteration, modification, clarification or indeed reversal without prior notice, the views of various

²⁷⁰ *The All England Law Reports, 1981*, vol. 2, p. 1070.

²⁷¹ Dodson, *op. cit.*, vol. I (1815), p. 339; see also the opinion of Sir Robert Phillimore in *The "Charkieh"* (1873) (see paragraph 147 and footnote 134 above) and *The "Parlement belge"* (1879) (see footnote 137 above), a judgment overruled by the Court of Appeal (1880) (see footnote 138 above).

²⁷² See footnote 179 above.

²⁷³ *United States Reports*, vol. 292 (1934), p. 360, at p. 369.

²⁷⁴ Wheaton, *op. cit.*, vol. IX (4th ed.) (1911), p. 907.

²⁷⁵ Cranch, *op. cit.* (footnote 114 above), p. 145; cf. J. G. Hervey, "The immunity of foreign States when engaged in commercial enterprises: a proposed solution", *Michigan Law Review* (Ann Arbor, Mich.), vol. XXVII (1929), p. 751.

Governments on the same questions can and do vary according to their vital interests, political ideologies, economic theories and social backgrounds.

188. This is on the assumption that the views sought relate to the same aspect of the issue. In reality, however, there are often several questions involved in a particular situation and even one and the same issue may have more than one aspect. There is always the other side of the coin, as demonstrated by the views and attitudes of Governments regarding State immunity, which may vary with the side of the coin, whether it is heads when it is the duty of the Government to recognize and accord State immunity to another Government, or tails when the Government expects to be the recipient or beneficiary of State immunity to be recognized and accorded by the courts of another State. Thus it is not surprising that Governments which are obliged to submit their publicly owned or State-operated vessels to their own national or territorial jurisdiction would think twice before agreeing to submit such vessels employed exclusively on commercial service to the jurisdiction of the courts of another State. Examples in the judicial practice examined earlier amply demonstrate this phenomenon.²⁷⁶ As also frequently occurs, a Government is likely to support its own claim of State immunity from the jurisdiction of the courts of another State in respect of the vessels owned or operated by one of its agencies, without necessarily raising a similar objection when actions are brought against the vessel before one of its own courts, and regardless of whether its own courts adhere to a restrictive or unqualified view of State immunity in regard to foreign vessels or vessels owned or employed by a foreign Government. A Government can maintain a consistent attitude and adhere strictly to the view that its own public vessels should be accorded absolute immunity by the courts of other States, subject always to the important reservation of reciprocity. When it comes to the granting of like immunity to the vessels of other States, reciprocity may in fact operate to prevent such recognition, either because of the restrictive practice prevailing in the State requesting immunity, or on the ground of lack of positive evidence that the same extent of jurisdictional immunity would, by law and practice, be assured, if not guaranteed, for the benefit of the vessels owned or operated by the State before whose courts immunity is being sought.²⁷⁷ It is not difficult, as in reality often happens, for one State to advocate the theory or principle of absolute immunity for foreign public vessels, regardless of the nature of their employment or service, while in actual performance there is no concrete evidence to substantiate the adoption of the practice of such an unqualified principle, which in any event is invariably qualified by the principle of reciprocity.²⁷⁸

²⁷⁶ See, for example, *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (see footnote 162 above); the United States *Shipping Act, 1916 and Suits in Admiralty Act, 1920* (see footnote 191 above); and *The "Cathelamet"* (1926) (see footnote 252 above).

²⁷⁷ See, for example, *The "Jupiter" No. 1* (1924) (*The Law Reports, Probate Division, 1924*, p. 236), and compare with *The "Jupiter" No. 2* (1925) (*ibid.*, 1925, p. 69); but in the latter case the Soviet Government was no longer in possession of the *Jupiter* and claimed no interest in her. The Italian Government's requirement of reciprocity is more exacting in practice than it might be in the case of a possible claim of immunity before a Soviet court.

²⁷⁸ See article 61 of the Fundamentals of Civil Procedure of the USSR

189. It is subject to these cautions and bearing in mind the relative relevance of views and attitudes of Governments that governmental practice will be examined in the light of national legislation and international agreements or conventions bearing on the questions under review.

(b) National legislation

190. There appears to be a growing volume of national legislation dealing directly with, or closely relating to, the point at issue. In an effort to examine relevant provisions of national legislation, regard should be had to the commentaries or views expressed in the replies to question 12 of the questionnaire addressed to the Governments of Member States in 1979.²⁷⁹ National legislation directly in point includes laws regulating the extent of immunities accorded to vessels owned or operated by foreign States, which invariably depends on the governmental and non-commercial nature of their service or the public, as opposed to private or commercial, purposes of their employment.

191. In this particular connection, it will be noted in relation to States which have ratified the 1926 Brussels Convention and its 1934 Protocol that legislative enactments have invariably been adopted giving effect to their ratification of the international agreement. Thus Norway's national legislation of 17 March 1939²⁸⁰ may be cited as a typical example. The relevant sections provide:

§ 1. The fact that a vessel is owned or used by a foreign government, or that a vessel's cargo belongs to a foreign government, shall not—with the exemption of the cases mentioned in §§ 2 and 3—prevent proceedings being taken in this realm for claims arising out of the use of the vessel or the transport of the cargo—or the enforcement of such a claim in this realm or interim orders against the vessel or the cargo.

§ 2. Proceedings to collect claims as mentioned in § 1 may not be instituted in this realm when they relate to:

(1) Men of war and other vessels which a foreign government owns or uses when at the time the claim arose they were used exclusively for government purposes of a public nature.

(2) Cargo which belongs to a foreign government and is carried by a vessel as mentioned under 1.

(3) Cargo which belongs to a foreign government, and is carried in a merchantman for government purposes of a public nature, unless the claim relates to salvage general average or agreements regarding the cargo.

§ 3. Enforcements and interim orders relating to claims as mentioned in § 1 may not be executed within this realm when relating to:

(1) Men of war and other vessels which are owned by or used by a foreign government or chartered by them exclusively on time or for a voyage, when the vessel is used exclusively for government purposes of a public nature.

(2) Cargo which belongs to a foreign government and is carried in vessels as mentioned under 1 or by merchantmen for government purposes of a public nature.

...

and the Union Republics of 1961 (United Nations, *Materials on Jurisdictional Immunities* . . . , p. 40).

²⁷⁹ The replies to the questionnaire are published in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 555 *et seq.*

²⁸⁰ *Norges Lov, 1682-1961* (Oslo, Grondahl & Sons, 1962); English translation in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 19-20.

§ 4. By agreement with a foreign government it may be decided that a certificate from the diplomatic representative of the foreign government shall be considered proof for treating vessels and cargo under the stipulations of § 3, 1st paragraph, 1 and 2, when a requisition is made for the annulment of enforcements or interim orders.

§ 5. This law will come into force on the day determined by the King.

192. By 1980, some 20 countries, which included a wide variety of States, maritime as well as land-locked, European, Latin-American, African and socialist countries, had ratified the 1926 Brussels Convention and its 1934 Protocol and seven others had acceded to the Convention. Furthermore, it is not insignificant to note that Estonia and Hungary also ratified the Convention in 1937. Although Poland and Romania subsequently denounced it in 1952 and 1959, respectively, Poland reratified the Convention once again in 1976, effective 16 January 1977. Zaire, Greece, Turkey, Syria and Egypt were also bound by the Convention. There are therefore various legislative enactments giving effect to the rules contained in the Convention.

193. Among countries which have not ratified the Convention, the United States of America stands out among the States which have adopted national legislation along the same lines. The United States explained its absence from the Brussels Conference in 1926 by stating that it had already given, effect to the wish for uniformity in the law relating to State-owned ships by adopting the *Public Vessels Act* on 3 March 1925.²⁸¹ But a more specific provision is to be found in a more recent act, the *Foreign Sovereign Immunities Act of 1976*,²⁸² of which the relevant section reads:

Section 1605. General exceptions to the jurisdictional immunity of a foreign State

...

(b) A foreign State shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign State, which maritime lien is based upon a commercial activity of the foreign State: *Provided*, That:

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign State was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign State of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign State was involved, of the date such party determined the existence of the foreign State's interest.

²⁸¹ *The Statutes at Large of the United States of America from December 1923 to March 1925*, vol. XLIII, part 1, chap. 428, pp. 1112-1113, sects. 1, 3 and 5 (reciprocity); *United States Code Annotated, Title 46, Shipping, Sections 721 to 1100*, sects. 781-799.

²⁸² *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 55 *et seq.*

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an *in personam* claim against the foreign State which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign State in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b) (1) of this section.

194. Section 10 of the United Kingdom *State Immunity Act 1978*²⁸³ deals rather exhaustively with the question of absence or non-recognition of State immunity in respect of ships used for commercial purposes. It provides:²⁸⁴

Exceptions from immunity

...

10. (1) This section applies to:

(a) Admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects:

(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) Where 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, subsection (2) (a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respects:

(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 references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship.

(6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

195. The United Kingdom *State Immunity Act*, which was adopted on 20 July 1978, was procedurally and substantively qualified by the *State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978*,²⁸⁵ which came into operation on 22 November 1978, the same date as the Act itself. The Order provides:

...

3. Notwithstanding section 13 (4) of the State Immunity Act 1978, no application shall be made for the issue of a warrant of arrest in an action *in*

²⁸³ United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715; reproduced in United Nations, *Materials . . .*, pp. 41 *et seq.*

²⁸⁴ See also the United Kingdom's reply to question 12 of the questionnaire (United Nations, *Materials . . .*, p. 627).

rem against a ship owned by the Union of Soviet Socialist Republics or cargo aboard it until notice has been served on a consular officer of that State in London or in the port at which it is intended to cause the ship to be arrested.

4. Notwithstanding section 13 (4) of the State Immunity Act 1978, no ship or cargo owned by the Union of Soviet Socialist Republics shall be subject to any process for the enforcement of a judgment or for the enforcement of terms of settlement filed with and taking effect as a court order.

196. This Order has the effect of preserving the immunity from execution of ships and cargoes of the Soviet Union which would otherwise have been lost by virtue of section 13 (4) of the *State Immunity Act 1978*, and requires notice to be given to a Soviet Consul before a warrant of arrest is issued in an action *in rem* against a ship of that State or a cargo on it. It gives effect to articles 2 and 3 of the Protocol to the Treaty on Merchant Navigation of 3 April 1968 between the two countries.²⁸⁶ The special treatment accorded to ships and cargoes belonging to the Soviet Union therefore constitutes an important exception to the general rule adopted by the United Kingdom in this connection.

197. Section 10 of the United Kingdom *State Immunity Act 1978* has served as a model for several other acts adopted by other countries, mostly within or related to the British Commonwealth. Thus section 11 (Ships used for commercial purposes) of Pakistan's *State Immunity Ordinance, 1981*²⁸⁷ literally reproduces the British provision, as do section 12 of Singapore's *State Immunity Act, 1979*²⁸⁸ and section 7 of Canada's 1982 "Act to provide for State immunity in Canadian courts".²⁸⁹ Section 18 of the draft Australian legislation of 1984 on the immunities of foreign States, *Foreign States Immunities Bill 1984*, contains essentially the same provision.²⁹⁰

(c) International or regional conventions

198. On the point under examination, several conventions have been concluded having a more or less direct bearing on State practice, and having special relevance or a more general application; some have been ratified and come into operation, while others are yet to be processed and finalized for signature and ratification. It is useful to highlight the main features of some of the conventions, international or regional, which have a close relevance to the issue under consideration.

(i) *The Brussels Convention of 10 April 1926 and its Additional Protocol of 24 May 1934*

199. Pre-1926 efforts by jurists to assimilate the position of public trading vessels to that of private merchantmen

²⁸⁵ United Kingdom, *Statutory Instruments, 1978*, Part III, Section I, p. 4553; reproduced in United Nations, *Materials . . .*, pp. 51-52.

²⁸⁶ United Nations, *Treaty Series*, vol. 857, p. 217.

²⁸⁷ *The Gazette of Pakistan* (Islamabad), 11 March 1981; reproduced in United Nations, *Materials . . .*, pp. 20 *et seq.*

²⁸⁸ Reproduced in United Nations, *Materials . . .*, pp. 28 *et seq.*

²⁸⁹ *The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982). Cf. also section 11 of South Africa's *Foreign States Immunities Act, 1981* (reproduced in United Nations, *Materials . . .*, pp. 34 *et seq.*).

²⁹⁰ See *International Legal Materials* (Washington, D.C.), vol. XXIII, No. 6 (November 1984), pp. 1398 *et seq.*

were reflected in a number of draft conventions;²⁹¹ but it was not until 1926 that the first international convention was adopted dealing directly with the question of the immunities of public ships engaged in trade.

200. In 1922, Sir Maurice Hill, the celebrated English admiralty judge, proposed the abolition of jurisdictional immunities of public vessels, in particular regarding their commercial activities. That proposal was adopted in the resolutions of the International Maritime Committee at its 1922 London Conference.²⁹² The draft treaty prepared at Gothenburg in 1923 and slightly modified at Genoa in 1925²⁹³ was finally submitted to the Conférence diplomatique de droit maritime at Brussels. On 10 April 1926, the Conference adopted the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, commonly referred to as the Brussels Convention.²⁹⁴ That Convention, as Gilbert Gidel, the Rapporteur, put it, "avait pour raison d'être essentielle les navires publics engagés dans des opérations commerciales".²⁹⁵

201. The main object of the Convention was to assimilate the position of State-exploited merchant ships to that of private vessels of commerce in regard to the question of immunities. Article 1 provides:²⁹⁶

Article 1

Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.

202. Article 1 merely reaffirms the rule that public vessels and cargoes carried on State ships are subject to local laws with respect to their substantive liabilities. Article 2 contains provisions relating more specifically to jurisdiction, as follows:

²⁹¹ The forerunners of the Brussels Convention include article 4, paragraph 3, of the "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State", adopted by the Institute of International Law on 11 September 1891 and revised in September 1892 (Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, 1957), pp. 14-15); article 11 of the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 23 September 1910), and article 14 of the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea (Brussels, 23 September 1910) (cf. G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. I, p. 99); article XVII of the "Barcelona Statute" of 1921 (*ibid.*); article XIII, paragraph 1, of the "Geneva Statute" of 1923 (*ibid.*). See also N. Matsunami, *The Publication of "Immunity of State Ships" and its Sequences* (Japanese edition, 1925), pp. 110 *et seq.*

²⁹² International Maritime Committee, *Bulletin No. 57. London Conference (October 1922)* (Antwerp, 1923), p. v.

²⁹³ International Maritime Committee, *Bulletin No. 65. Gothenburg Conference (August 1923)* (Antwerp, 1924), p. vi; and International Maritime Committee, *Bulletin No. 74. Genoa Conference (September 1925)* (Antwerp, 1926), p. v.

²⁹⁴ League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

²⁹⁵ Gidel, *op. cit.*, vol. II, p. 362.

²⁹⁶ In interpreting article 1 of the Convention, municipal courts have preferred the official English version. Thus the term *exploités*, which can mean "used" or "operated", has been interpreted according to the term "operated" which appears in the English text (see *The "Visurgis"; the "Siena"* (1938), footnote 232 above).

Article 2

For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately owned merchant vessels and cargoes and of their owners.

Article 2 thus assimilates the position of State-owned and State-operated ships engaged in trade and their cargoes to that of ordinary private commercial vessels and cargoes by subjecting the former to the jurisdiction of local courts. In addition, it also assimilates the position of States as shipowners and shippers to that of private persons engaged in the shipping business by making States accountable before the local courts in respect of maritime commerce.

203. For the purposes of jurisdictional immunities, article 3 draws a distinction between the exploitation of vessels by States and other governmental maritime activities. Paragraph 1 of article 3 is thus worded:

Article 3

§ 1. The provisions of the two preceding articles shall not be applicable to ships of war, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*.²⁹⁷

204. Even for public vessels for which immunities from local jurisdictions are provided, article 3 further authorizes, in paragraph 1, certain remedies before the courts of the countries that own or operate the vessels in question, recognizing the right of claimants to take

... proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity:

- (1) In case of actions in respect of collision or other accidents of navigation;
- (2) In case of actions in respect of assistance, salvage and general average;
- (3) In case of actions in respect of repairs, supplies, or other contracts relating to the vessel.

205. Article 3 includes similar provisions in paragraphs 2 and 3 concerning State-owned cargoes carried on board public vessels of a governmental and non-commercial nature and State-owned cargoes carried on board merchant vessels for governmental and non-commercial purposes.

206. By 1931, none of the signatories of the Brussels Convention had deposited its ratification at Brussels.²⁹⁸ Meanwhile, doubts arose as to the correct interpretation of the phrase "operated by a State" in article 3. The United Kingdom objected to the extension of exemption from

actions *in rem* to private vessels employed or operated, but not owned, by a State, which in English case-law was not entitled to immunity. That objection was sustained and the Brussels Convention was accordingly modified by the Additional Protocol signed at Brussels on 24 May 1934.²⁹⁹ Article I³⁰⁰ reads, in part, as follows:

Vessels chartered by States either for a given time or by the voyage, provided they are exclusively used on governmental and non-commercial service, and the cargoes carried by such vessels, shall not be subject to seizure, attachment or detention of any kind, *but this immunity shall not prejudicially affect any other rights or remedies open to the parties concerned*. * . .

207. It is true that the Brussels Convention and its Additional Protocol cannot claim to have had universal application. It is also true that the Convention has left out many important matters. Nevertheless, the Convention has provided most encouraging guidance for municipal courts to assume jurisdiction against foreign States in this particular connection of maritime transport or the carrying trade. The list of ratifications and accessions to the Convention and Protocol is not meagre, with 20 or so States ratifying and seven acceding to the Convention. The application is not confined to one region, nor to Europe alone, although it includes important European maritime nations such as Belgium, Denmark, France, the Federal Republic of Germany, Greece, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. Switzerland and some Eastern European countries such as Hungary, Poland, Romania and Yugoslavia have also adopted the Convention. Adherents from other continents include Argentina, Brazil, Chile, Egypt, Mexico, Turkey, Uruguay and Zaire. Its coverage is sufficiently scattered and fairly distributed. Its significance cannot be underestimated, especially in view of its ratification by the United Kingdom on 3 January 1980 after more than half a century of silence since it signed the Convention.

(ii) *Codification conventions prepared by the United Nations Conference on the Law of the Sea, Geneva, 1958*

208. The United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, prepared and opened for signature four conventions, two of which have some bearing on the immunities of public ships. The first is the Convention on the Territorial Sea and the Contiguous Zone, done on 29 April 1958,³⁰¹ part I, section III, of which deals, *inter alia*, with the position of ships exercising the right of innocent passage through foreign territorial waters. This section is divided into four subsections: A. Rules applicable to all ships; B. Rules applicable to merchant ships; C. Rules applicable to government ships other than warships; D. Rule applicable to warships. The distinction between merchant ships and warships has its counterpart in the subdivision of government ships other than warships into (a) government ships

²⁹⁷ This provision operates to extend immunity from proceedings *in rem* to privately owned ships chartered or requisitioned by a foreign State and operated by it in governmental service.

²⁹⁸ See J. W. Garner, "Legal status of government ships employed in commerce", *The American Journal of International Law* (Washington, D.C.), vol. 20 (1926), p. 759.

²⁹⁹ League of Nations, *Treaty Series*, vol. CLXXVI, p. 215.

³⁰⁰ See also article II of the Additional Protocol.

³⁰¹ United Nations, *Treaty Series*, vol. 516, p. 205.

operated for commercial purposes, and (b) government ships operated for non-commercial purposes. A number of interesting points may be noted in connection with this classification of ships:

(a) For the purposes of the Convention, ships are classified according to the nature of their service or activities. The old distinction between public and private ships based exclusively on ownership appears to have been abandoned.

(b) Government ships other than warships are further subdivided according to the nature of their operation. Government ships operated for commercial purposes are treated in the same manner as merchant vessels, while those operated for non-commercial purposes may be compared with warships. In terms almost identical with the provisions of the 1926 Brussels Convention, upholding the immunities of vessels employed exclusively on governmental and non-commercial service,³⁰² article 22 of the Convention on the Territorial Sea and the Contiguous Zone reserves the immunities of government ships operated for non-commercial purposes; paragraph 2 provides that "nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law".

(c) No reference is made in article 21 of the latter Convention to the immunities of government ships operated for commercial purposes, either under these articles or other rules of international law. Indeed, paragraphs 2 and 3 of article 20 give the coastal State jurisdiction to levy execution against or arrest foreign ships (including government ships operated for commercial purposes by application of article 21)³⁰³ in certain cases in respect of ships exercising the right of innocent passage,³⁰⁴ and in all cases in respect of foreign ships lying in its territorial waters.³⁰⁵

209. The other convention is the Convention of the High Seas, done on 29 April 1958,³⁰⁶ which contains provisions concerning the status of ships on the high seas. Paragraph 1 of article 8 provides: "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." Article 9 assimilates the position of "ships owned or operated by a State and used only on government non-commercial service" to that of warships inasmuch as these ships, like warships, "shall, on the high

³⁰² See article 3, paragraph 2, of the 1926 Brussels Convention (paragraphs 203-204 above).

³⁰³

"Article 21

"The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes."

³⁰⁴ Paragraph 2 of article 20 provides:

"2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State."

³⁰⁵ Paragraph 2 of article 20 provides:

"3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters."

³⁰⁶ United Nations, *Treaty Series*, vol. 450, p. 11.

seas, have complete immunity from the jurisdiction of any State other than the flag State". While this Convention expressly reaffirms State immunities as applied to ships, it limits the application of immunities to certain classes of public vessels only, viz. (a) warships, and (b) ships owned or operated by a State and used exclusively on governmental and non-commercial service, thus precluding from participation in the enjoyment of State immunities ships owned or operated by a Government on commercial and non-governmental service and ships not exclusively employed for government and non-commercial service.

210. In effect, these two codification conventions serve to reconfirm the principles of the 1926 Brussels Convention. In a sense, these provisions may be said to consolidate the existing rules of customary international law. While the absolute immunity of warships and government vessels operated for non-commercial purposes is kept intact, the position of government vessels operated for commercial purposes is assimilated as far as possible to that of private merchant vessels. Apart from reaffirming governmental policies regarding non-recognition of immunity of public vessels employed in commerce, the 1958 Geneva Convention may be said to be declaratory of the existing practice of States in this particular connection.

(iii) *The 1982 United Nations Convention on the Law of the Sea*

211. This continuing trend seems to have been given added vigour by the incorporation of section 10, entitled "Sovereign immunity", into part XII, entitled "Protection and preservation of the marine environment", of the 1982 United Nations Convention on the Law of the Sea.³⁰⁷ Article 236, with the same strange title as the section, provides:

Article 236. Sovereign immunity

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

212. The scope of this Convention is intended to be universal. The provisions of this article are not without significance in confirming again the distinction between ships operated by a State exclusively on governmental non-commercial service and those operated on commercial non-governmental service. The criterion of the nature of the service or operation of the ship appears to be decisive in determining its status and the extent of State immunities to be accorded.

(iv) *Other miscellaneous conventions*

213. In addition to the three main conventions examined, there are other miscellaneous conventions relating to

³⁰⁷ *Official Records of the Third United Nations Conference on the Law*

navigation at sea which tend to distinguish between the position of vessels on the criterion of the nature of their service or operation, rather than on that of public ownership or possession or control by the State. By way of example, the Treaty on International Commercial Navigation Law, signed at Montevideo on 19 March 1940,³⁰⁸ contains the following interesting provisions:

Art. 34. Vessels which are the property of the contracting States or operated by them, the freight and passengers carried by such vessels, and the cargoes which belong to the States, in so far as concerns claims relative to the operation of the vessels or the transport of passengers and freight, are subject to the laws and rules of responsibility and competency applicable to private vessels, cargo and equipment.

Art. 35. The rule laid down in the preceding article does not apply to men-of-war, yachts, airplanes, or hospital-, coast guard-, police-, sanitation-, supply-, and public-works vessels; nor to other vessels which are the property of the State, or operated by it, and which are employed, at the time when the claim arises, in some public service outside the field of commerce.

214. A further example of an international convention confirming this line of distinction is provided by the International Convention on Civil Liability for Oil Pollution Damage, signed at Brussels on 29 November 1969,³⁰⁹ of which article XI provides:

Article XI

1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State.

(d) *Treaty practice*

215. A similar "waiver clause" is to be found in a growing number of bilateral treaties, reaffirming a clear trend in the treaty practice of States supporting the exercise of jurisdiction by competent courts in admiralty proceedings *in rem* or *in personam* against vessels, cargoes and owners, regardless of the status of the sovereign States, provided the cause of action arose out of commercial shipping forming part of the business activities of the State, whether or not conducted by a national enterprise, agency or instrumentality of government. A typical example of this trend in treaty practice is provided by article XVIII of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, signed at Washington on 29 October 1954:³¹⁰

³⁰⁷ (Footnote continued)

of the Sea, vol. XVII (United Nations publication, Sale No. E.84.V.3), p. 151, document A/CONF.62/122.

³⁰⁸ See *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 37 (1943), p. 109; United Nations, *Materials on Jurisdictional Immunities* . . . pp. 177-178. See also articles 36 to 42 of the Convention.

³⁰⁹ United Nations, *Treaty Series*, vol. 973, p. 3.

³¹⁰ *Ibid.*, vol. 273, p. 3; see also the relevant provisions of other bilateral treaties cited in United Nations, *Materials on Jurisdictional Immunities* . . . pp. 131-150.

Article XVIII

. . .

2. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, *shipping or other business activities** within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

4. INTERNATIONAL OPINION

216. In contrast to the three preceding draft articles, international opinion on the question at issue in draft article 19 is prolific. Views and attitudes of Governments, apart from being far from uniform, are also changing,³¹¹ and they do have a bearing and a certain influence on the development of international opinion. Just as there are two mainstreams of theories and views regarding the immunities of States in general, including those of sovereigns and ambassadors, the opinions of writers and publicists are divided in regard to the immunities of public vessels employed exclusively for trade into two groups: (a) those favouring unqualified or more absolute immunity; (b) those supporting one or more criteria for restricting immunity.

(a) *Absolute immunity*

217. Writers who hold an absolute view of immunity generally think that State vessels are exempt from the jurisdiction of foreign courts regardless of the nature of their service or employment, even if they are in fact operated solely for commercial purposes. Among these must be mentioned Sir Gerald Fitzmaurice,³¹² Hackworth,³¹³ Hall,³¹⁴ van Praag,³¹⁵ Lawrence,³¹⁶ Ross,³¹⁷ Ushakov,³¹⁸ Wheaton³¹⁹ and Westlake.³²⁰

³¹¹ See especially the replies of Governments to question 12 of the questionnaire, in United Nations, *Materials* . . . pp. 557-644.

³¹² G. Fitzmaurice, "State immunity from proceedings in foreign courts", *The British Year Book of International Law*, 1933 (London), vol. 14, p. 101.

³¹³ G. H. Hackworth, *Digest of International Law* (Washington (D.C.), U.S. Government Printing Office, 1941), pp. 423 *et seq.*

³¹⁴ W. E. Hall, *Treaties on International Law* (8th ed.,) (Oxford, Clarendon Press, 1924), pp. 307 *et seq.*

³¹⁵ L. van Praag, "La question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent", *Revue de droit international et de législation comparée* (Brussels), vol. XV (1934), p. 652; and *ibid.*, vol. XVI (1935), p. 100.

³¹⁶ T. J. Lawrence, *The Principles of International Law* (7th ed., revised by P. H. Winfield) (London, Macmillan, 1923), p. 225, sect. 107.

³¹⁷ A. Ross, *A Textbook of International Law* (London, Longmans, 1947), pp. 144-145, 179 and 189.

³¹⁸ Memorandum presented by N. A. Ushakov to the thirty-fifth session of the Commission, see *Yearbook* . . . 1983, vol. II (Part One), p. 53, document A/CN.4/371.

³¹⁹ H. Wheaton, *Elements of International Law* (Philadelphia (Pa.), 1836); 6th ed., revised by A. B. Keith (London, Stevens, 1929), vol. I, pp. 241-242.

³²⁰ J. Westlake, *International Law* (2nd ed.) (Cambridge, The University Press, 1910), part I, p. 265.

218. The main argument in support of immunity of State trading vessels has been that the mere fact that government vessels are engaged in trading should not take away the immunities enjoyed by public vessels.³²¹ This argument presupposes the existence of a rule that immunity is accorded to all classes of State vessels, which is simply untrue historically. It should be noted, however, that in some jurisdictions in which immunities have been recognized even for State ships employed in trade, two theories have been advanced in explanation of such practice. First, the position of ships is determined by that of their owners. The criterion of State ownership is determinative of immunity. Public merchant ships are also included in the category of "public property" (*res publica, publicis usibus destinata*). This theory of "public property" had received judicial countenance in the practice of British courts, which have now denounced it.³²² According to this theory, since States were exempt from foreign jurisdiction, their public property was also immune, for a judicial process against such property would directly implead the State owning it.³²³ The logic of that proposition reflected the peculiarity of the rules of British admiralty courts. It had been held that, if the owner of a ship could not be sued, the ship could not be attached or arrested or proceeded against *in rem*, nor could a maritime lien exist or come into being during the continuing *dominium* or operation of that ship by the foreign Government. This theory was first propounded by the Crown Advocate in *The "Prins Frederik"* (1820).³²⁴ It went back to the Roman law division of things. *Res publicae* are things which lie outside commerce, *extra commercium quorum non est commercium, extra patrimonium*. The advocates of this theory appear to have borrowed the Roman term without fully appreciating that "public property" in the Roman sense means things which are publicly owned. Moreover, they cannot be the subjects of private rights and their use is open to the public at large. It would also seem odd to regard ships actively engaged in commerce as *res extra commercium*. The phrase *publicis usibus destinata* (destined for public use) means in Roman law that the property can be used by any member of the public, and that no one can prevent another from using it. A public merchant ship could not be open to the public like *ager publicus*, highways or sea-shores.³²⁵ In English law, the term "public property" merely means that a State has an interest in the property concerned, and the phrase *publicis usibus destinata* means "employed by a State for public purposes", or "in the public service of a State".³²⁶

³²¹ See, for example, the opinion of Lord Justice Brett in *The "Parlement belge"* (1880) (see paragraph 149 above); W. Friedmann, "The growth of State control over the individual and its effects upon the rules of international State responsibility", *The British Year Book of International Law* (London), vol. 19 (1938), p. 118.

³²² See, for example, *The "I Congreso del Partido"* (1981) (see paragraphs 155-156 above).

³²³ See, for example, the opinion of Lord Atkin in *The "Cristina"* (1938) (see paragraph 123, *in fine*, and paragraph 153 above).

³²⁴ See footnote 118 above.

³²⁵ See, for example, the *Institutes* of Justinian, book II.1: De rerum divisione; book II.4: De usu fructu; book III.19: De inutilibus stipulationibus; and the *Digest*, book XLIII.87: Ne quid in loco publico vel itinere fiat.

³²⁶ See, for example, *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* (1954) (see footnote 145 above), and the *Hong Kong Aircraft case* (1953) (*ibid.*).

219. The second theory is that of "State possession", which found early acceptance in the courts of the United States of America. Under this theory, the public property of a State was exempt from the jurisdiction of foreign courts provided that, and so long as, it was in the actual possession of the foreign Government,³²⁷ regardless of the fact that a ship had been employed in ordinary trading voyages. Actual possession was believed to constitute sufficient evidence of public use or government service. This theory is no longer followed in view of recent developments in the policy of the United States Government as confirmed by legislation.

220. Both theories appear to have based immunity on the public character of the functions, employment, service, operation or purposes of ships. In England, for a long time, the test of that "public character" had been that of the foreign State and not of English judges. The varying nature of the English test had led to the granting of immunity in a number of commercial shipping cases. In the United States, the test of "governmental function" had been the "actual possession" of the property in question by a foreign Government.³²⁸

221. A third theory is the one recently propounded by Mr. Ushakov;³²⁹ although without the support of concrete evidence of judicial practice, it could be regarded as similar to views held by certain Governments. This theory of complete immunity is based on the principle of complete sovereignty and equality of States and on the fact that the origin of State immunity is also based initially on waiver of jurisdiction, express or implied, or on the consent of the State having territorial jurisdiction. It is conditional also on the principle of reciprocity, and immunity itself, like jurisdiction of a sovereign State, being an attribute of sovereignty, can in the same manner be waived by an expression or implication of consent, or communication of consent, express or implied. It will be seen how the various theories, including this one, could be reconciled in a meaningful and objective approach to this difficult and delicate question.

(b) Restricted immunity

222. It is generally agreed among writers holding a restrictive view of State immunity that State-owned and State-operated ships are not entitled to jurisdictional immunities if employed by the State in commercial ventures. Recently, publicists have increasingly adopted such a view. Prominent among proponents of this thesis may be mentioned Bisschop,³³⁰ McNair,³³¹ Sir Robert Phillimore,³³²

³²⁷ See, for example, *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (see paragraphs 157-158 above).

³²⁸ See, for example, the opinion of Justice Frankfurter in *Republic of Mexico et al. v. Hoffman* (1945) (*United States Reports*, vol. 324 (1946), pp. 39-40).

³²⁹ See footnote 318 above.

³³⁰ W. R. Bisschop, "Immunity of States in maritime law", *The British Year Book of International Law, 1922-23* (London), vol. 3, pp. 159 *et seq.*

³³¹ A. D. McNair, "Judicial recognition of States and Governments and the immunity of public ships", *ibid.*, 1921-22, vol. 2, pp. 67-74.

³³² R. Phillimore, *Commentaries upon International Law* (3rd ed.) (London, Butterworths, 1882), vol. II, pp. 140-141.

G. G. Phillimore,³³³ Allen,³³⁴ Hayes,³³⁵ Hervey,³³⁶ Borchard,³³⁷ Garner,³³⁸ Gidel,³³⁹ Bonfils and Fauchille,³⁴⁰ Ripert,³⁴¹ Fox,³⁴² Nielsen,³⁴³ Matsunami³⁴⁴ and Watkins.³⁴⁵

223. No fewer than six arguments have been put forward in support of the proposition that State merchant vessels should be subject to the jurisdiction of competent foreign courts. It has been argued, in the first place, that even assuming that a rule of customary international law existed in the nineteenth century in favour of immunity for all types of State ships, it is now no longer tenable that such a rule could still have a general application. When the immunities of State ships became crystalized, it could not be predicted that coastal States would soon become engaged in maritime trade and employ their newly acquired merchant fleets side by side with private shipowners in commercial ventures.³⁴⁶ There would appear to be a fallacy in the assumption that a rule of law concocted to suit the economic and social conditions of the nineteenth century should still apply today, when not only circumstances, but also theories and ideas are fundamentally different.

224. Secondly, a closer inspection of government merchant ships discloses some cardinal resemblances between this class of public vessels and ordinary trading vessels. Public merchantmen, in spite of State ownership and State operation, possess the same intrinsic characteristics as private traders and are employed for the same commercial purposes. The reasons for assimilating their legal position to that of private ships of commerce seem stronger than the

³³³ G. G. Phillimore, "Immunité des Etats au point de vue de la juridiction ou de l'exécution forcée", *Recueil des cours* . . . , 1925-III (Paris, Hachette), vol. 8 (1926), p. 461.

³³⁴ E. W. Allen, *The Position of Foreign States before National Courts* (New York, Macmillan, 1933).

³³⁵ A. Hayes, "Private claims against foreign sovereigns", *Harvard Law Review* (Cambridge, Mass.), vol. 38 (1924-1925), p. 599.

³³⁶ J. G. Hervey, "The immunity of foreign States when engaged in commercial enterprises: a proposed solution", *Michigan Law Review* (Ann Arbor, Mich.), vol. 27 (1927), p. 751.

³³⁷ E. M. Borchard, in a series of articles referred to by G. G. Phillimore, *loc. cit.* (footnote 333 above), pp. 469-471.

³³⁸ J. W. Garner, "Immunities of State-owned ships employed in commerce", *The British Year Book of International Law, 1925* (London), vol. 6, p. 128.

³³⁹ G. Gidel, *Le droit international de la mer* (Paris, Sirey), vol. II (1932), pp. 337 *et seq.*

³⁴⁰ P. Fauchille, *Traité de droit international public*, 8th ed. (revised) of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1925), vol. I, 2nd part, p. 1116, para. 625 (*Navires marchands d'Etat*).

³⁴¹ G. Ripert, in *Revue internationale du droit maritime* (Paris), vol. XXXIV (1922), p. 1; cf. G. G. Phillimore, *loc. cit.* (footnote 333 above), pp. 468-469.

³⁴² W. T. R. Fox, "Competence of courts in regard to 'non sovereign' acts of foreign States", *The American Journal of International Law* (Washington, D.C.), vol. 35 (1941), pp. 632-636 and 640.

³⁴³ F. K. Nielsen, "The lack of uniformity in the law and practice of States with regard to merchant vessels", *ibid.*, vol. 13 (1919), pp. 12-21.

³⁴⁴ N. Matsunami, *Immunity of State Ships* (London, Richard Flint, 1924); cf. *The British Year Book of International Law, 1925* (London), vol. 6, p. 239.

³⁴⁵ R. D. Watkins, *The State as a Party Litigant* (Baltimore (Md.), The Johns Hopkins Press, 1927), pp. 189-191. See also S. A. Riesenfeld, "Sovereign immunity for foreign vessels in Anglo-American law", *Minnesota Law Review* (Minneapolis, Minn.), vol. 25 (1940), pp. 7 *et seq.*

³⁴⁶ See, for example, van Praag, *loc. cit.*, 1935 (footnote 315 above, *in fine*), p. 116.

argument that they should benefit from the immunities of States originally accorded to men-of-war. There appears to be no cogent reason for an ordinary vessel of commerce to be accorded immunity by the mere circumstance that it is owned or operated by a State. As Sibert suggested, public vessels should be further subdivided, for the purposes of immunity, into trading and non-trading vessels, public trading vessels being subject to the local jurisdiction like private ships.³⁴⁷

225. Thirdly, it seems harsh and inequitable to draw a line of distinction, for the purposes of immunity, between public and private merchant vessels, while States are in fact competing with private shippers and shipowners. If it is open to States to enter the market of maritime trade, they should be placed on the same footing as other traders. The mere fact of ownership or operation by a State should provide no ground for distinguishing such public vessels from trading ships. The trading character or the commercial nature of the operation of the vessels should be sufficient to assimilate their position to that of private merchant vessels.³⁴⁸

226. Fourthly, to allow proceedings *in rem* against government ships employed in commerce is in no way inconsistent with the dignity, equality, sovereignty and independence of the States owning or operating the vessels,³⁴⁹ nor does it appear that permitting such proceedings will interfere with the political arms of the Government in the conduct of foreign relations.³⁵⁰

227. Fifthly, the ever-growing number of ships employed by States in ordinary trading voyages is all the more reason for restricting their exemptions from local jurisdiction. In the interest of safe navigation, it would seem undesirable to allow to navigate the seas so many vessels whose owners are aware that these ships can never be arrested while in the service of States, however negligently they may have navigated.³⁵¹ Furthermore, there is a danger that immunity may operate to the detriment of States owning or operating such merchantmen, for shippers will hesitate to trade with them, and salvors will run few risks to save the property of States, if these ships are to be exempt from the jurisdiction of coastal States.³⁵²

³⁴⁷ M. Sibert, "Les voies de communication en droit international public", *Cours de droit*, Paris (1953-1954) (mimeographed), pp. 181-185 and 203-204. According to Gidel, *op. cit.*, vol. I, pp. 98-99:

"Le critère essentiel dont on s'inspire à l'heure actuelle pour classer les navires et déterminer leur statut juridique au point de vue du droit international public est le *genre de navigation** effectué par ces navires. *Ce qui importe, c'est leur affectation à telle ou telle activité et non pas la qualité de leurs propriétaires, particuliers ou personnes publiques.* . . ."

³⁴⁸ See, for example, E. D. Dickinson, "The immunity of public ships employed in trade", *The American Journal of International Law* (Washington, D.C.), vol. 21 (1927), p. 108. See also *The "Attualità"* (1916) (footnote 181 above).

³⁴⁹ In *The "Cristina"* (1938) (*loc. cit.* (footnote 164 above), p. 521), Lord Maugham posed the question: "Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and shipowners in the markets of the world?"

³⁵⁰ According to Judge Mack, in *The "Pesaro"* (1921) (*loc. cit.* (footnote 183 above), p. 485), "it seems improbable that in these days the judicial seizure of a publicly owned merchantman like the *Pesaro* would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the *Aquitania*."

³⁵¹ See the opinion of Judge Hill in *The "Espozende"* (1918) (footnote 146 above) and in *The "Crimdon"* (1918) (*ibid.*).

228. Last, but not least, there is the argument that world trade, which depends largely on carriage by sea, may suffer, for few shippers will ship their goods on public merchantmen for fear of accidents at sea and resulting loss of merchandise with relatively little hope of salvage and without any remedies against the States or their merchant ships. In this respect, free international trade will be difficult if States and individuals continue to carry on their maritime commerce on different levels. Lord Justice Scrutton advanced the same argument in *The "Porto Alexandre"* (1920).³⁵³

5. AN UNDEVIATING TREND

229. While there is no general agreement either in the practice of States or in international opinion as to the basis for vessels operated by States for commercial non-governmental purposes, there appears to have emerged a clear and unmistakable trend in support of the absence of immunity for vessels employed by States exclusively on commercial non-governmental service. This trend appears to be undeviating and reasserts itself in all its manifestations: in judicial practice, in the traditionally "absolute immunity" jurisdictions, in legislation even in countries where the most unqualified theory of immunity had prevailed, such as the United Kingdom and the United States of America, in the adoption of international conventions, such as the 1926 Brussels Convention, and in other more general conventions, such as the law of the sea conventions of 1958 and 1982. There seems to be emerging an inevitable trend in national legislation recognizing the possibility of assimilating the position of State-operated merchant vessels to that of private merchantmen. Romania's decree-law No. 443, of 20 November 1972,³⁵⁴ concerning civil navigation, may also be cited as re-enforcing this undeviating trend. It provides:

Article 103. The provisions of articles 97, 100 and 101 do not apply to military vessels or to vessels in government service flying a foreign flag.

230. Writers whose opinions differed widely in the past appear to have narrowed their differences. Contemporary writers are more inclined to favour less unqualified immunity and sympathizers of the more absolute view of immunity have begun to recognize important qualifications and limitations, such as the principle of reciprocity and the theory of implied consent or presumption of waiver by conduct, in addition to the significant restriction of express consent or explicit agreement.³⁵⁵ A compromise solution could be found along these lines which, while not completely satisfactory for all, might produce generally tolerable results.

³⁵² See the opinion of Judge Mack in *The "Pesaro"* (1921) (footnote 183 above).

³⁵³ "... no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many States are trading... with ships...; and if these national ships wander about without liabilities, many trading affairs will become difficult;..." (*The Law Reports, Probate Division, 1920*, pp. 38-39).

³⁵⁴ See United Nations, *Materials on Jurisdictional Immunities...*, p. 27.

³⁵⁵ See, for example, Ushakov (footnote 318 above).

C. Formulation of draft article 19

231. It is against this background of an undeviating trend in favour of restricting State immunity with regard to trading vessels operated by States on commercial non-governmental service that draft article 19 should be formulated. Several elements of fundamental importance should be noted and be taken carefully into consideration:

(a) The question of State immunity in respect of attachment and execution of its property as such is outside the scope of article 19, for it belongs properly to part IV of the draft articles—Immunities of State property from attachment and execution. Thus ships owned or operated by States for commercial purposes, which form the subject-matter of draft article 19, are not considered as public property or property of the State for the purpose of execution of judgment against the State or attachment of State property in a proceeding against the State.

(b) The question at issue concerns primarily the immunities of States from admiralty proceedings for public vessels employed by them exclusively on non-governmental and commercial service.

(c) Such public vessels should not be accorded immunities from jurisdiction in proceedings *in rem* against the vessels of their owners, the foreign States.

(d) Privately owned vessels operated by a State for commercial non-governmental purposes should not be accorded any immunity, although while under requisition or charter to a foreign Government, they may be entitled to some special treatment in respect of suspension of measures such as seizure, arrest, detention or attachment while in the public or governmental and non-commercial service of a foreign State. Proceedings *in rem* may certainly be permitted against privately owned ships at all times, although actual arrest, seizure, detention or attachment would have to be suspended pending operation or employment by the State on governmental non-commercial service.

(e) *A fortiori*, proceedings *in rem* followed by arrest, seizure, detention or attachment of privately owned vessels are generally permissible while they are in the service of a State, provided the nature of the service is exclusively commercial and non-governmental.

(f) What has been said of vessels is also applicable to cargo belonging to the State.

1. ALTERNATIVE A

232. Accordingly, draft article 19 might be couched in the following terms:

Article 19. Ships employed in commercial service

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.

2. ALTERNATIVE B

233. Draft article 19 could take a more simplified form, on the model of article 12, and might read as follows:

Article 19. Ships employed in commercial service

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.

ARTICLE 20 (Arbitration)

A. General considerations

1. SCOPE OF ARBITRATION

234. When a State agrees to submit a dispute or difference to arbitration, either in advance in a written agreement or on an *ad hoc* basis, it is interesting to examine the extent to which that consent or agreement to submit to arbitration may constitute an exception to the application of State immunity. Clearly, arbitration is a well-known method of pacific settlement of legal disputes. As such, it is distinguishable from judicial settlement as a separate and different method of dispute settlement. However, a closer examination of procedures available in internal laws will reveal the closest connection between arbitration and judicial settlement, even to the extent that there are areas where the two methods of dispute settlement may and, in fact, do overlap, if not completely coincide with each other. In certain areas, the operation of one is inextricably linked to the other. Arbitration may exist as a legal process in court or out of court. As an out-of-court settlement, an arbitral proceeding is still not entirely free from judicial control, by way of judicial review, appeal or enforcement order. Thus it could be misleading to suppose that arbitration is always to be viewed in contradistinction to judicial settlement, or that the judiciary applies rules of law while arbitration applies equitable rules. In reality, apart from historical developments in English courts, law and equity are applicable alike by the courts just as much as they are by arbitral tribunals or by arbitration.

235. In view of the twilight zone which blurs the distinction between arbitration and judicial settlement, it is difficult to state precisely in what manner an agreement to submit to arbitration constitutes submission to jurisdiction or an inevitable eventual waiver of immunity from that jurisdiction. This, in turn, would appear to depend on the link between the arbitration to which a State has agreed to submit the dispute in question and the disposition of the court to exercise its otherwise competent and available jurisdiction. There are many types of arbitration, some of which may be to a greater or lesser degree subject to the control or under the jurisdiction of a court, or under judicial supervision, others being essentially part and parcel of the judicial process of adjudication.

236. Having thus clarified the conceptual ambiguity inherent in this connection, it is still not easy to envisage the interplay of the two analogous concepts. Just as a court of law may appoint a commission of inquiry, a jury, or a panel of experts or assessors, a panel of arbitrators could be so appointed to consider certain questions assigned to it by the court. The court might also be called upon to approve, revise or enforce an arbitral award or judgment, as if arbitration merely formed part of the pre-trial phase of a judicial process. It is perhaps because of their closeness that the two notions cannot be sharply focused upon as distinct, but rather as overlapping concepts, the court rising above arbitration, which is inevitably eclipsed by the finality of judicial prerogative. This overlapping of concepts, resulting in a certain confusion, gives rise to a tendency to equate an agreement to submit to arbitration with consent to submit to jurisdiction. Arbitration could be viewed, at first

sight, as an exception to the exercise of jurisdiction, almost tantamount to exemption or immunity from the jurisdiction of a competent court; but on reflection it could at best operate only to postpone or temporarily suspend the exercise of jurisdiction and only eventually to confirm the ultimate submission to the jurisdiction or the expression of choice of jurisdiction. In the final analysis, therefore, arbitration is more like an exception to jurisdictional immunity than a substitute for jurisdiction or an alternative method of dispute settlement, as it may well be in the regulation of differences between States or settlement of disputes between Governments. Thus arbitration as a notion has more than one meaning, depending on the type of dispute and the status of the parties thereto. Arbitration between States or Governments as a method of dispute settlement is subject to public international law, while international arbitration in which parties are of different nationalities or in which there is a foreign element involved, whether or not one of the parties is a State, belongs to the realm of internal law or private international law.

2. TYPES OF ARBITRATION

237. It is therefore not irrelevant to mention the different types of arbitration in order to illustrate conceptual difficulties in an initial approach to the question of "arbitration" in relation to jurisdictional immunities of States.

(a) *Arbitration under internal law*

238. The most common of all types of arbitration, having the greatest relevance to the present study, is arbitration under internal, domestic or municipal law, or indeed national law, as opposed to public international law. In this sense, the expressions "internal law" or "internal legal system" necessarily include the notions of private international law or of conflict of laws. Arbitration under internal law may take many forms. To take a simple example, section 210 of Thailand's Code of Civil Procedure (B.E. 2477)³⁵⁶ provides:

In any case pending before a court of first instance, the parties may agree to submit the dispute, in reference to all or any of the issues, to one or more arbitrators for settlement, by filing with the court a joint application stating the terms of such agreement.

If the court is of the opinion that the agreement is not contrary to law, it shall grant the application.

239. Under the Thai internal legal system, there are two types of arbitration, *viz.* arbitration appointed by the court or within the court, and arbitration out of court. For arbitration in the court under section 210 of the Code of Civil Procedure, section 218 requires the arbitrators "to file their award with the court" and provides that the court "shall give judgment in accordance therewith". However, if the court is of the opinion that the award is contrary to law in any respect, it shall have the power to issue an order refusing to confirm the award, or it may amend the award

³⁵⁶ The 1934 Code was enacted on 15 June 1935; unofficial translation, edited by Mr. Suchart Chivachart.

within a reasonable time so as to confirm it by a judgment.

240. Section 221 provides that "where a dispute is submitted to arbitration out of court, if any party refuses to abide by the award, such award may not be enforced unless the court of territorial competence upon the request of the opposing party gives judgment in accordance with the award". It is further provided that "in such case, the court of territorial competence shall be the court designated by the parties in the agreement or, in the absence of such designation, the court which would have territorial jurisdiction and competence to try and adjudge the dispute".

241. Thus both types of arbitration under the prevailing legal system of Thailand, arbitration in court and arbitration out of court, are intimately linked to the existing machinery of justice, the administration of which is in the hands of the court in the name of the King under the country's Constitution. The closeness of the linkage or association with the court renders an agreement to arbitration equivalent to consent to the exercise of jurisdiction by the competent court.

242. In other internal systems, it is also conceivable that there could be other types of arbitration more or less connected with the framework of the judiciary or the system of administration of justice, depending for implementation and enforcement upon the existing machinery of justice. Even in the most independent type of arbitration, whether under internal law or in transboundary arbitration or international arbitration, the ultimate resort for enforcement is open to the judiciary for satisfaction or implementation of the award.

(b) *International commercial arbitration*

243. International commercial arbitration is but another type of arbitration under national law or an internal legal system, but in which the dispute involves a foreign element or two parties of different nationalities. In the field of commerce and trade, attempts have been made to provide for uniform rules or procedures for the settlement of differences or disputes by commercial arbitration.³⁵⁷ Thus the International Chamber of Commerce³⁵⁸ and the United Nations Commission on International Trade Law (UNCITRAL)³⁵⁹ have also prepared model rules to be adopted by parties seeking to settle their differences by arbitration, generally covering, but not necessarily confined to, commercial activities.

(c) *Arbitration for investment disputes*

244. Another specific area in which international arbitration between private enterprises and government agen-

³⁵⁷ See P. I. Benjamin, "The European Convention on International Commercial Arbitration", *The British Year Book of International Law, 1961* (London), vol. 37, pp. 478-487; International Union of Lawyers, *International Commercial Arbitration*, rapporteur général P. Sanders, vol. I (Paris, Dalloz et Sirey, 1956), vol. II (The Hague, Martinus Nijhoff, 1960), vol. III (The Hague, Martinus Nijhoff, 1965).

³⁵⁸ P. Sanders, "ECAFE rules for international commercial arbitration", *International Arbitration: Liber Amicorum for Martin Domke*, P. Sanders, ed. (The Hague, Martinus Nijhoff, 1967), p. 252.

³⁵⁹ See the report of UNCITRAL on the work of its twelfth session

cies has grown in practice is the settlement of investment disputes.³⁶⁰ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965,³⁶¹ may be cited as an example of efforts to resolve investment disputes between States and foreign nationals by arbitration, which may be said to assume an international character, and whose award may depend for judicial enforcement upon several jurisdictions, where assets happen to be located or where enforcement measures are available.

(d) *International arbitration*

245. International arbitration in the sense of inter-State or intergovernmental arbitration is a method of pacific settlement of disputes between nations or States under the Charter of the United Nations. It can take many different forms, with one or more arbitrators applying various rules and different procedures. The Permanent Court of Arbitration at The Hague is a striking example of an arbitral institution with a permanent panel of arbitrators, from which parties could propose or select international arbitrators. While international arbitration, being as such a means of pacific settlement of disputes between States, appears to lie outside the scope of the present study,³⁶² an award of such international arbitration may well derive its force from municipal judicial authority for an eventual enforcement measure, which incidentally forms the subject of the next part of the study and need not be further discussed in relation to the present draft article.

3. ARBITRATION CLAUSE

246. An arbitration clause or *compromis* is a clause in a contract—in the present context a State contract, which could be a contract of loan,³⁶³ a commercial contract, or another type of transaction—whereby the parties, including the State or government agency, agree to submit a dispute which has arisen or which may arise to arbitration of one type or another, with or without an effective means of enforcing the award. An arbitration clause depends on the volition of the parties at the outset, but may become obligatory or compulsory once the clause is adopted or incorporated in a contract or loan or other commercial transaction.

B. The practice of States

1. JUDICIAL PRACTICE

247. Judicial practice on the point under examination is bound to be scanty, owing to the conceptual difficulty

(Footnote 359 continued)
 (1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, paras. 57-70.

³⁶⁰ See, for example, American Society of International Law, *Proceedings of the International Investment Law Conference* (Washington (D.C.), 1956), part 1, pp. 22-32; revised in *The Business Lawyer* (Chicago, Ill.), vol. 12 (1957), pp. 264-271.

³⁶¹ United Nations, *Treaty Series*, vol. 575, p. 159.

³⁶² See, for example, *Société commerciale de Belgique*, judgment of

which tends to becloud the issue. A State agreeing to submit to arbitration is entitled to insist on settlement by or through arbitration before judicial settlement. Should the case be brought before a court, it is not always clear whether the State could or should claim immunity from the jurisdiction of the court. The answer to this question is likely to depend on the stage of the proceedings, judicial or arbitral, since in more ways than one an arbitral award is essentially linked, in its initiation or enforcement, to judicial process. Of course, an agreement to submit to arbitration may operate to suspend or postpone the initial exercise of jurisdiction by the court pending the appointment, examination and award of the arbitrators, especially if the court in question is that of a State which recognizes the type of arbitration to which parties have agreed to submit their difference or dispute.

248. Thus, in 1982, in the arbitration case *Maritime International Nominees Establishment v. Republic of Guinea* (the latter being the appellant, and the United States of America the intervenor),³⁶⁴ the United States Court of Appeal concluded that the defendant was immune under the *Foreign Sovereign Immunities Act of 1976*³⁶⁵ and that the court lacked subject-matter jurisdiction to confirm the award, as the suits were between foreign plaintiffs and foreign States. Had the court found itself with sufficient original jurisdiction without conferment by the arbitration clause in the contract, the question of immunity might have been only temporarily postponed and the award judicially confirmed. The type of arbitration selected by the parties was in conformity with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Such an agreement was not considered as a valid waiver of immunity under the *Foreign Sovereign Immunities Act*. The connection between the enforcement or confirmation of the arbitral award and the agreement by Guinea to submit to arbitration was severed by non-immunity as a condition to subject-matter jurisdiction. To look at the decision in a different legal context, the agreement to submit to arbitration did not create new jurisdiction where none existed. If the decision appears to complicate still further the confusion between consent to arbitration and consent to the exercise of jurisdiction, it does clarify the distinction between agreement to submit to arbitration and absence of judicial jurisdiction.

2. GOVERNMENTAL PRACTICE

(a) *National legislation*

249. National legislation in the field of jurisdictional immunities contains some reference to arbitration as an exception to State immunity from the existing jurisdiction of an otherwise competent court. An interesting provision

15 June 1939, *P.C.I.J., Series A/B, No. 78*, p. 160; and the *Socobelge case* (see footnote 242 above).

³⁶³ See, for example, M. Domke, "Arbitration clauses and international loans", *The Arbitration Journal* (New York), vol. 3 (1939), p. 161.

³⁶⁴ See footnote 38 above.

³⁶⁵ See footnote 282 above.

is to be found in section 9 of the United Kingdom State Immunity Act 1978,³⁶⁶ which reads:

Exceptions from immunity

...

9. (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

250. Similar provisions are found in section 10 of Pakistan's *State Immunity Ordinance, 1981*,³⁶⁷ section 11 of Singapore's *State Immunity Act, 1979*³⁶⁸ and section 10 of South Africa's *Foreign States Immunities Act, 1981*,³⁶⁹ and in the draft Australian legislation, *Foreign States Immunities Bill 1984*.³⁷⁰ Since consent of the State is all that matters with regard to arbitral competence and may imply, in some measure, submission to the jurisdiction of a court, neither the United States of America nor Canada has considered it necessary to include such a provision in its legislation.

(b) *International or regional conventions*

(i) *1972 European Convention on State Immunity*

251. The 1972 European Convention on State Immunity³⁷¹ contains an interesting article 12,³⁷² which reads as follows:

Article 12

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

- (a) the validity or interpretation of the arbitration agreement;
- (b) the arbitration procedure;
- (c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

2. Paragraph 1 shall not apply to an arbitration agreement between States.

³⁶⁶ See footnote 283 above.

³⁶⁷ See footnote 287 above.

³⁶⁸ See footnote 288 above.

³⁶⁹ See United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 37-38.

³⁷⁰ See section 17 (footnote 290 above), which resembles more closely the provisions of the 1972 European Convention.

³⁷¹ See Council of Europe, *European Convention on State Immunity and Additional Protocol* (1972), European Treaty Series (Strasbourg), No. 74 (1972).

³⁷² See the commentary to article 12, Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972), p. 21.

(ii) *1923 Protocol on Arbitration Clauses*

252. The Protocol on Arbitration Clauses, signed at Geneva on 24 September 1923,³⁷³ provides, in article 1, for recognition of:

... the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

...

(iii) *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

253. In a different context, but not entirely irrelevant to the relationship between consent to submit to arbitration and waiver or renunciation of jurisdictional immunity in regard to judicial proceedings connected with the arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958,³⁷⁴ contains provisions regarding, *inter alia*, recognition of an agreement in writing to submit to arbitration (art. II) and recognition of arbitral awards as binding and enforceable in accordance with the rules of procedure of the State where the award is relied upon (art. III).

3. INTERNATIONAL OPINION

254. Leaving aside for the moment the question of enforcement of arbitral awards or of foreign arbitral awards by national courts, which will be taken up in part IV of the draft articles on immunities from attachment and execution, it is convenient at this juncture to note an emerging consensus of legal opinion favouring arbitration as a means of settling international trade, loan or investment disputes. However, the extent of consent to submit to arbitration, being regarded also as consent to the exercise of jurisdiction in appropriate circumstances, is a matter for States to decide and agree upon. After all, it is an implication to be drawn from the expression of consent to submit current and future differences and disputes to arbitral settlement in regard to possible exercise of existing jurisdiction in relation to the arbitration, from the appointment of arbitrators and interpretation of arbitration clauses to recognition and enforcement of arbitral awards.³⁷⁵

4. AN IRRESISTIBLE IMPLICATION OF CONSENT

255. Once a State agrees in a written instrument to submit to arbitration disputes which have arisen or may arise

³⁷³ League of Nations, *Treaty Series*, vol. XXVII, p. 157.

³⁷⁴ United Nations, *Treaty Series*, vol. 330, p. 38.

³⁷⁵ See, for example, *International Arbitration: Liber Amicorum for Martin Domke* (op. cit.) (footnote 358 above).

between it and other private parties to a transaction, there is an irresistible implication, if not an almost irrebuttable presumption, that it has waived its jurisdictional immunity in relation to all pertinent questions arising out of the arbitral process, from its initiation to judicial confirmation and enforcement of the arbitral awards. A crucial point is the existence of available jurisdiction which is competent to consider the subject-matter, whether it be the appointment or challenging of arbitrators, arbitral procedures, the setting aside or confirmation of an award, or judicial supervision of the arbitral process.

C. Formulation of draft article 20

256. In the light of the foregoing, draft article 20 might be formulated as follows:

Article 20. Arbitration

1. If a State agrees in writing with a foreign natural or juridical person to submit to arbitration a dispute which has arisen, or may arise, out of a civil or commercial matter, that State is considered to have consented to the exercise of jurisdiction by a court of another State on the territory or according to the law of which the arbitration has taken or will take place, and accordingly it cannot invoke immunity from jurisdiction in any proceedings before that court in relation to:

- (a) the validity or interpretation of the arbitration agreement;**
- (b) the arbitration procedure;**
- (c) the setting aside of the awards.**

2. Paragraph 1 has effect subject to any contrary provision in the arbitration agreement, and shall not apply to an arbitration agreement between States.

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

[Agenda item 4]

DOCUMENT A/CN.4/379 and Add.1

Information received from Governments

[Original: English, Spanish]
[23 February and 1 June 1984]

CONTENTS

	<i>Page</i>
INTRODUCTION	60
Austria	60
Belize	60
Bulgaria	61
Chile	61
Colombia	61
Cyprus	62
Fiji	62
Holy See	63
Hungary	63
Iran (Islamic Republic of)	64
Japan	64
Mexico	64
Pakistan	69
Syrian Arab Republic	69
Thailand	69
United Arab Emirates	70
Uruguay	70
Viet Nam	70

NOTE

Multilateral conventions mentioned in the present document:

Source

Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter called 1961 Vienna Convention	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter called 1963 Vienna Convention	<i>Ibid.</i> , vol. 596, p. 261.

Introduction

1. The International Law Commission at its thirty-fifth session, in 1983, upon the suggestion of the Special Rapporteur, requested the Secretariat to renew the request addressed to States by the Secretary-General to provide further information on national laws and regulations and other administrative acts, as well as on procedures and recommended practices, judicial decisions, arbitral awards and diplomatic correspondence in the fields of diplomatic law with respect to the treatment of couriers and bags.¹ Pursuant to the Commission's request, the Legal Counsel of the United Nations addressed a circular letter dated 10 August 1983 to Governments, inviting them to submit relevant information or bring up to date information submitted earlier, not later than 16 January 1984.
2. The replies received by 18 April 1984 from the Governments of 18 Member States are reproduced below, in alphabetical order.

¹ *Yearbook . . . 1983*, vol. II (Part Two), p. 53, para. 187.

Austria

[Original: English]
[6 January 1984]

The information pertaining to the treatment of the diplomatic courier and the diplomatic bag transmitted with Note 843-A/82 of 19 February 1982¹ is still valid. However, the procedure regarding the X-ray screening of the diplomatic bag has been abolished in the light of the changed security situation. Only if the diplomatic bag is not transported by the national airline may an X-ray screening take place upon the request of the airline undertaking the shipment.

¹ *Yearbook . . . 1982*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/356 and Add.1-3.

Belize

[Original: English]
[20 September 1983]

1. Before Belize achieved independence, in 1981, States had been represented there only at consular level. Thus the Consular Relations Ordinance No. 9 of 1972 addresses itself to the status of the consular courier and consular bag only in section 35, entitled "Freedom of communications", in the second schedule of the ordinance.
2. The Consular Relations Ordinance came into force to give effect, *inter alia*, to the 1963 Vienna Convention and other agreements concerning consular relations, and to make further provision with respect to such relations.
3. Section 35 of the second schedule of the Consular

Relations Ordinance No. 9 of 1972, entitled "Freedom of communications", reads in part as follows:

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land 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 consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

4. Some States are now represented at the ambassadorial or high commissioner level. Legislation is being drafted to correspond more adequately to Belize's new position in respect of international diplomatic relations. In the mean time Belize follows the recognized practices of international law.

Bulgaria

[Original: English]
[21 February 1984]

1. The Government of the People's Republic of Bulgaria regards the possibility of maintaining free communications between States and their missions and representatives abroad as a condition *sine qua non* for the normal functioning of those missions. Unfortunately international practice knows cases of violation of the privileges and immunities of the diplomatic courier and of non-observance of the inviolability of the diplomatic bag, as well as of the abuse of such privileges and immunities. In view of this, the elaboration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, aimed at working out and adopting an international legal instrument reflecting the progressive development and codification of legal rules in this field, is of great practical importance. The Bulgarian Government believes that the Commission should give priority to the consideration of this topic at its thirty-sixth session. In this connection, the full set of draft articles already presented should facilitate and expedite the work of the Commission.

2. The Bulgarian Government supports the comprehensive approach applied to the draft articles by the establishment of a uniform régime for all kinds of couriers and diplomatic bags. The scope of the draft articles should also include provisions regulating the status of couriers and bags of international organizations, as well as those of national liberation movements recognized by the United Nations and regional international organizations. Thus the future document will become a really universal set of rules concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. With the aforementioned exception, the first eight draft articles represent an appropriate basis for the further work on the draft, since they reflect the basic principles of international law directly related to the status of the diplomatic courier and the diplomatic bag, namely the principle of freedom of communications, the duty to respect the norms of international law and the law of the receiving and transit State, and the principle of reciprocity and non-discrimination.

3. The Bulgarian Government considers that draft articles 15 to 19 in their present version are an acceptable basis for further work on the draft as a whole. The provision contained in draft article 18 is necessary, for it is of concrete practical significance and does not duplicate the provisions of draft article 4.

4. Concerning draft articles 20 to 23, the Bulgarian Government supports the provision set out in article 20, paragraph 2, which requires the receiving or the transit State to prosecute and punish persons responsible for any infringement of the person, freedom or dignity of the courier. Such an obligation would be in conformity with the general obligation of States to ensure the normal functioning of diplomatic communications.

5. Moreover, such an obligation would provide effective protection of the personal inviolability of the diplomatic courier. The provisions contained in draft articles 21 and 22 are also justified, although cases of their practical application might prove relatively limited.

6. The Bulgarian Government considers that the provisions contained in article 21, paragraph 3, and article 22, paragraph 2, represent a considerable deviation from the principle of inviolability of the temporary accommodation and individual means of transport of the diplomatic courier, which is a fundamental prerequisite for the unrestricted performance of the functions of the courier. The draft should provide for the strict application of this principle and allow no digressions from it. If it were nevertheless considered appropriate to introduce some limitations to the principle of inviolability with a view to avoiding possible abuses, such limitations should be minimal. They should be applied under strictly specified conditions not going beyond those contained in the draft articles, and above all in no case should an infringement of the personal inviolability of the diplomatic courier and the inviolability of the diplomatic bag be allowed.

7. It is the opinion of the Bulgarian Government that the Commission should try to complete its work on this topic at an earlier date by submitting an appropriate draft to be adopted in the form of an international convention. This would permit the comprehensive and uniform regulation of the status of the diplomatic courier and the diplomatic bag, which would contribute to the promotion of good relations between States. The Bulgarian Government believes that the Commission will be able to conclude the first reading of the whole set of draft articles at its thirty-sixth session.

Chile

[Original: Spanish]
[2 November 1983]

1. As a State party to the 1961 Vienna Convention, Chile strictly implements the provisions of the Convention in the area under consideration, namely matters relating to the immunities and privileges of the diplomatic courier and the official correspondence of the mission.

2. In this respect, administrative procedures and the judicial practice of the Chilean courts have been both uniform and consistent, and no difficulties have been encountered in implementing the relevant rules laid down in the above-mentioned Convention.

3. Without prejudice to the foregoing, the Government of Chile notes with growing interest the work carried out in this field by the Commission and considers it absolutely essential to prepare an organic set of rules to ensure full implementation of the principles concerning this aspect of activities relating to diplomatic representation.

Colombia

[Original: Spanish]
[23 November 1983]

The provisions of article 27 of the 1961 Vienna Convention and article 35 of the 1963 Vienna Convention were

incorporated in Colombian legislation by Act No. 6 of 1972¹ and Act No. 17 of 1972² respectively.

With regard to the recommended practices, the two most recent circulars issued by the Office of the Under-Secretary for Administrative Affairs of the Ministry of Foreign Affairs on the treatment to be accorded to the diplomatic bag are reproduced below.

Circular No. A/A-85:

With a view to facilitating the diplomatic bag service, [the Under-Secretary for Administrative Affairs] wishes to stress the need:

1. To return the bags promptly, inasmuch as holding them causes correspondence to accumulate and results in irregularity in the dispatch of correspondence.
2. To consign the bag to an official of diplomatic or consular rank and, if none is available, to an administrative official expressly delegated by the head of mission.
3. To check the schedules of outgoing and incoming bags in order to ensure that they are correctly prepared and that everything listed on them is included.
4. To protect the correspondence adequately in order to prevent damage to it, bearing in mind that the annexes must be stapled to the routing slip.
5. The bag service is intended solely for the carriage of official correspondence.

Notes sent by the mission to government agencies must be dispatched in unsealed envelopes unless they are confidential, in which case they must be endorsed by the head of mission.

As an exceptional measure and in very special circumstances, the head of mission may give prior express authorization for the dispatch of officials' personal correspondence, in which event the envelopes must be unsealed, must not weigh more than 25 grams and must clearly indicate the address and telephone number of the addressee, who shall collect them in person from the offices of the Ministry.

The Ministry shall return all correspondence not satisfying the above requirements.

6. The inclusion of valuables, drugs or articles of any kind is strictly prohibited. An official who contravenes this provision shall be subject to disciplinary penalties in accordance with the provisions in force.

7. The mission shall ascertain the time of arrival of the bag and arrange for its immediate collection from the relevant offices of the carrier.

8. It should be noted in the manual that the final segment of the carriage to Bogotá shall be effected solely by Avianca, inasmuch as the Ministry desires, to the extent possible, to make payments through that company.

Circular No. 149 of 18 November 1981, addressed to heads of mission by the Under-Secretary for Administrative Affairs:

With a view to ensuring better control of the dispatch of the diplomatic bag, you are requested to issue the following instructions:

1. At the time of dispatch of the diplomatic bag, the person to whom it is consigned (who must be a diplomatic officer, if available) shall bear in mind:
 - (a) Correspondence for government agencies must be unsealed, except for confidential notes;
 - (b) Non-official correspondence may be included in the diplomatic bag if it is appropriately endorsed by the head of mission or consul, and it must in all cases be unsealed.
2. The inclusion of valuables, drugs or any other type of article is strictly prohibited. It should be noted that any official who contravenes this provision will be punished in accordance with the disciplinary provisions in force.

¹ Republic of Colombia, *Diario Oficial* (Bogotá), No. 33750 (29 November 1972).

² *Ibid.*, No. 33462 (18 November 1971).

3. It must be borne in mind that the diplomatic bag is strictly for official use, save as provided in paragraph 1(b) of this circular.

4. The officials responsible for the diplomatic bag in Bogotá will report any irregularities to this office.

Cyprus

[Original: English]
[26 July 1983]

... The present note from the Ministry of Foreign Affairs, stating the position of the Government of the Republic of Cyprus concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, supersedes its previous note of 3 February 1983.¹

[The above-mentioned topic] is of practical everyday importance for foreign ministries and diplomatic missions, and indeed is broad enough to include communications of international organizations and of recognized liberation movements. Many points and issues under this general heading are not sufficiently covered under existing conventions and require further elaboration. Considerable progress has been made in harmonizing and supplementing the existing international legal instruments on this subject in the light of State practice. The Government of Cyprus looks forward to continued fruitful work on this topic and to its early successful conclusion.

¹ New reply of the Cypriot Government to the circular dated 21 September 1982 addressed to Member States by the Legal Counsel; the previous reply is reproduced in *Yearbook... 1983*, vol. II (Part One), p. 58, document A/CN.4/372 and Add.1 and 2.

Fiji

[Original: English]
[21 September 1983]

1. Section 3, subsection 1, of Fiji's Diplomatic Privileges and Immunities Act of 13 May 1971,¹ states:

1. Subject to the provisions of subsection 6, the provisions of articles 1, 22, 24 and 27 to 40 inclusive of the Convention shall have the force of law in Fiji.

The "Convention", defined in section 2 of the Act, means the Vienna Convention on Diplomatic Relations signed in 1961.

Subsection 6 of section 3, to which articles 1, 22 and 24 and 27 to 40 inclusive of the Convention are made subject, states:

For the purposes of the provisions of the articles referred to in subsection 1

- (a) A reference in those provisions to the receiving State shall be construed as a reference to Fiji;
- (b) A reference in those provisions to a national of the receiving State shall be construed as a reference to a Fiji citizen;
- (c) The reference in paragraph 1 of article 22 to agents of the receiving State shall be construed as including a reference to any police officer and any person exercising a power of entry to premises;

¹ *The Acts of Fiji Enacted During the Year 1971*, p. 407, Act No. 26.

(d) The reference in article 32 to waiver by the sending State shall be construed as including a waiver by the head of the mission of the sending State or by a person for the time being performing the functions of the head of mission;

(e) Articles 35, 36 and 40 shall be construed as granting the privileges or immunities that those articles require to be granted;

(f) The reference in paragraph 1 of article 36 to such laws and regulations as the receiving State may adopt shall be construed as including a reference to any law in force in Fiji relating to the quarantine, or the prohibition or restriction of the importation into or the exportation from Fiji of animals, plants, or goods;

Provided that any immunity from jurisdiction that a person may possess or enjoy by virtue of subsection 1 shall not be prejudiced;

(g) The reference in paragraph 4 of article 37 to the extent to which privileges and immunities are admitted by the receiving State, . . . shall, so far as they relate to privileges, be construed as references to such determinations as may be made by the Minister pursuant to subsection 2, and, so far as they relate to immunities, be construed as references to such immunities as may be conferred by an order under subsection 3;

(h) The reference in paragraph 2 of article 38 to the extent to which privileges and immunities are admitted by the receiving State shall, so far as it relates to privileges, be construed as reference to such determinations as may be made by the Minister pursuant to subsection 2, and so far as it relates to immunities, be construed, in relation to persons to whom section 4 applied, as a reference to immunities conferred by that section, and, in relation to other persons to whom that paragraph applies, as a reference to such immunities as may be conferred by an order under subsection 3.

In so far as article 27 of the 1961 Vienna Convention imposes on the receiving State the obligation to permit and protect free communication on the part of the diplomatic mission of any State, it could be said that Fiji does conform with its obligation under the Convention.

2. Section 3, subsection 1, of Fiji's Consular Privileges and Immunities Act of 22 December 1972² states:

1. Subject to the provisions of this [section] and section 4, the provisions referred to in the second schedule (being articles or parts of articles of the Convention) shall have the force of law in Fiji and shall for that purpose be construed in accordance with the succeeding subsections of this section.

The "Convention" defined under section 2 of the Act, means the Vienna Convention of Consular Relations signed in 1963.

The succeeding subsections 2 to 8 of section 3 of the Act, to which the relevant provisions of the Convention are made subject, state:

2. The references in article 44 to matters connected with the exercise of the functions of members of a consular post shall be construed as references to matters connected with the exercise of consular functions by consular officers or consular employees.

3. For the purposes of article 45 and that article as applied by article 58, a waiver shall be deemed to have been expressed by a State if it has been expressed by the head, or any person for the time being performing the functions of head, of the diplomatic mission of that State or, if there is no such mission, of the consular post concerned.

4. Article 48 shall not affect any agreement made between or on behalf of Fiji and any other State before the commencement of this Act and shall not be taken to prevent the making of any such agreement after the commencement of this Act.

5. Articles 50, 51, 52, 54, 62 and 67 shall be construed as granting any privilege or immunity which they require to be granted.

6. The reference in article 57 to the privileges and immunities provided in chapter II shall be construed as referring to those provided in section II of that chapter of the Convention.

7. The reference in article 70 to the rules of international law concerning diplomatic relations shall be construed as a reference to the provisions of the Diplomatic Privileges and Immunities Act, 1971.

8. The references in article 71 to additional privileges and immunities that may be granted by the receiving State or to privileges and immunities so far as these are granted by the receiving State shall be construed as referring to such privileges and immunities as may be specified by the Minister by order.

Section 4 of the Act, to which, in addition to subsections 2 to 8 of section 3, the Convention is made subject, states:

4. If it appears to the Minister that the privileges and immunities accorded to a consular post of Fiji in the territory of any State, or to persons connected with such a consular post, are less than those conferred by this Act on a consular post of that State or on persons connected with such a consular post, the Minister may by order withdraw such of the privileges and immunities so conferred from all or any of the consular posts of that State or from such persons connected therewith as appears to him to be proper.

In so far as article 35 of the 1963 Vienna Convention imposes an obligation on the receiving State to permit and protect freedom of communication on the part of the consular posts of any State, it could be said that Fiji does conform with its obligation under the said Convention.

Holy See

[Original: English]
[4 October 1983]

The Holy See does not have any specific laws or statutes regarding this topic. The Italian Government gives the diplomatic couriers and diplomatic bags of the Holy See the same treatment as it gives to those of the Italian State.

Hungary

[Original: English]
[18 January 1984]

1. The Hungarian People's Republic is a party to the 1961 Vienna Convention. Article 27 of the Convention contains provisions concerning the legal status and immunity of the diplomatic courier and the diplomatic bag.

2. In this field, as in every other instance too, the Hungarian People's Republic has strictly observed its international legal obligations. In conformity with the said international Convention and other sources of international law, it accords immunities to foreign States and grants privileges and immunities to their diplomatic representatives and other agents so that they can perform their functions successfully.

3. Thus Law-Decree No. 7 of 1973 of the Presidential Council of the Hungarian People's Republic, on proceedings to be instituted regarding diplomatic or other immunities¹ provides that, if in a civil, administrative or

¹ Hungary, Ministry of Justice, *Törvények és Rendeletek Hivatalos Gyűjteménye 1973* [Official compendium of laws and decrees, 1973] (Budapest), 1974, p. 207.

² *The Acts of Fiji Enacted During the Year 1972*, p. 215, Act No. 31.

criminal proceeding before a court or other authority the facts of the case show that the person involved is entitled to immunity based on diplomatic or international law, the court or other authority shall suspend the proceeding *ex officio* and, once the existence of immunity has been confirmed, shall establish the lack of jurisdiction.

4. On customs clearance of diplomatic consignments, the Hungarian customs and revenue organs similarly act in accordance with article 27 of the 1961 Vienna Convention, which was promulgated in Hungary by Law-Decree No. 21 of 1965.²

5. Accordingly, the packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

6. The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag.

7. The diplomatic bag must not be opened or detained. The person of the diplomatic courier shall be inviolable and he shall not be liable to any form of arrest or detention.

8. The same provisions apply to an *ad hoc* diplomatic courier designated by the sending State or mission, except that the courier's personal immunities shall cease upon delivery of the diplomatic bag to the consignee.

9. The exemption of diplomatic agents and persons with diplomatic status from customs duties is covered by article 7 of Law-Decree No. 2 of 1966,³ while exemption from customs declaration and inspection is governed by articles 20 and 29 of Decree No. 39/1976(XI.10) of the Ministry of Finance and the Ministry for Foreign Trade,⁴ in conformity with the Convention.

10. This special treatment is automatically extended to diplomatic agents and persons with diplomatic status of countries not parties to the 1961 Vienna Convention.

11. The competent Hungarian authorities pay special attention to ensuring exemption of the diplomatic bag from inspection as well as to according polite treatment to the persons concerned.

12. The regulations on this subject have proved to be satisfactory in practice.

² *Ibid.*, 1965, 1966, p. 124.

³ *Ibid.*, 1966, 1967, p. 35.

⁴ *Ibid.*, 1976, 1977, p. 778.

Iran (Islamic Republic of)

[Original: English]
[14 December 1983]

1. No laws or regulations have so far been enacted in the Islamic Republic of Iran concerning diplomatic couriers and bags and no judicial decisions or arbitral awards have been rendered relating thereto.

2. In accordance with practice, the Ministry of Foreign Affairs of the Islamic Republic of Iran makes use of bags

measuring 130 × 70 centimetres 100 × 50 centimetres, 90 × 50 centimetres, or 65 × 45 centimetres. The range of capacity of these bags is from 3 to 70 kilograms, but the conventional weight is about 30 kilograms. Cotton and twine are used to knot the tops of the bags in the form of bundles, and the tips of the twine are passed through holes at the top of the bags, as well as a stamped and sealed identification ticket. The identification ticket, which has a specific shape and specific dimensions, bears the required information concerning the sender and the receiver.

Japan

[Original: English]
[10 January 1984]

1. There is no domestic law in Japan relating to the diplomatic courier and the diplomatic bag. The provisions of the 1961 Vienna Convention apply directly.

2. No judicial decision is found to have been rendered regarding the treatment of the diplomatic courier and the diplomatic bag.

Mexico

[Original: Spanish]
[21 November 1983]

1. Agreement between Mexico and Peru for the exchange of diplomatic bags. Lima, 26 March 1919:

Art. 1. The legation of the United Mexican States may use, for the exchange of communications with its Government, special bags which shall enjoy the same privileges and guarantees as those which the Peruvian Government accords to official mail.

Art. 2. The Peruvian legation in Mexico shall enjoy the same right as that set out in the preceding article.

Art. 3. The said bags shall be conveyed by the means of transport available to both countries for the conveyance of correspondence.

Art. 4. The Ministries of Foreign Affairs of both countries and their respective legations shall retain the keys to the special bags in question.

Art. 5. The postal administrations of the United Mexican States and the Peruvian Republic shall adopt the necessary measures for the immediate implementation of this Agreement.

2. Agreement between Mexico and Nicaragua for the exchange of diplomatic communications. Managua, 9 August 1919:

Art. I. The legation of Mexico in Nicaragua and the legation of Nicaragua in Mexico may use, for communications with their Governments, special bags which shall enjoy the same privileges and guarantees as those enjoyed by official mail.

Art. II. The said bags shall be conveyed by the means of transport available to the contracting Governments for the conveyance of correspondence, the keys to the said bags being kept only at the Ministries of Foreign Affairs and legations of the two countries.

Art. III. The respective postal administrations shall adopt the necessary measures for the appropriate implementation of this Agreement.

Art. IV. This Agreement shall remain in force for a period of five years from the date of the exchange of the instruments of ratification. If neither of the High Parties to the Agreement notifies the other of its desire to terminate it twelve months before its expiry, it shall continue to be binding for one year after notification of denunciation by either of the two Governments.

3. Exchange of notes between Mexico and Venezuela constituting an agreement on the exchange of diplomatic bags. Caracas, 10 September and 15 and 18 October 1919:

First: the bags may be deposited up to the last minute for the dispatch of correspondence at the post office of the locality in which the legation is situated by an employee duly authorized by the head or the secretary of the diplomatic mission, and the address shall be visibly and indelibly stamped on them. The post office employee who receives the bag shall give to the legation employee who deposits it a receipt indicating its weight and size of the bag and the date, place and time of its deposit at the post office.

Secondly: the bags shall be inviolable and shall be conveyed freely by the means of transport available to both countries for the conveyance of correspondence.

The ministries and legations shall retain the keys to their respective bags.

Since diplomatic bags should not exceed a specific limit on weight and size in order to be conveyed in the bags used for the transport of ordinary correspondence between the two countries, the two Governments agree: that the maximum weight of the bags shall be 15 kilograms and that they shall be 50 centimetres long by 30 centimetres wide, or any other proportions which provide a volume not exceeding 75 cubic decimetres.

4. Exchange of notes between Mexico and Japan constituting an agreement for the establishment of a special bag service for diplomatic correspondence. Mexico City, 15 October 1921:

I. Such bags shall be inviolable and shall be transported by the means available to both countries; however, where possible, use shall be made of the Japanese ships sailing between Yokohama and Manzanillo or Salina Cruz, and vice versa.

II. Such bags shall enjoy exemption from all postal fees; however, when they are sent from Japan to Mexico through the intermediary of another country or countries, the Japanese postal administration shall be authorized to collect, at a reduced rate, the costs incurred for the transport of such bags on behalf of the intermediary countries.

III. Each bag shall be made of strong leather or solid cloth and must be fitted with a lock which closes properly. The address shall be written legibly on a strong label or on the bag itself.

IV. The respective ministries and legations shall retain the keys to their bags.

V. In no case shall the weight of a bag exceed 30 kilograms.

VI. The postal administrations of the United Mexican States and the Empire of Japan shall adopt the necessary measures for the immediate implementation of this administrative agreement.

5. Exchange of notes between Mexico and Spain constituting an agreement for the establishment of a diplomatic bag service. Madrid, 23 October and 2 November 1921:

Art. I. The legation of the United Mexican States in Madrid may use, for the exchange of communications with its Government, special bags, measuring 40 centimetres long by 36 centimetres wide, which shall enjoy all the privileges and guarantees which the Spanish Government accords to official mail.

Art. II. The legation of Spain in Mexico shall enjoy the same right as that set out in the preceding article.

Art. III. The said bags shall be conveyed by the means of transport available to both countries for the conveyance of correspondence.

Art. IV. The Ministers for Foreign Affairs of both countries and their respective legations shall retain the keys to the special bags in question.

Art. V. The postal administrations of the Kingdom of Spain and the Republic of Mexico shall take the necessary measures for the implementation of this Agreement.

6. Agreement between Mexico and Paraguay for the trans-

port of diplomatic correspondence. Asunción, 19 April 1922:

Art. I. The legation of the United Mexican States in Asunción may use, for the exchange of communications with its Government, special bags which shall enjoy the same privileges and guarantees as those which the Paraguayan Government accords to official mail.

Art. II. The Paraguayan legation in Mexico shall enjoy the same right as that set out in the preceding article.

Art. III. The said bags shall be conveyed by the means of transport available to both countries for the conveyance of correspondence.

Art. IV. The Ministers for Foreign Affairs of both countries and their respective legations shall retain the keys to the special bags in question.

Art. V. The postal administrations of the United Mexican States and the Republic of Paraguay shall take the necessary measures for the immediate implementation of this Agreement.

7. Exchange of notes between Mexico and France constituting an agreement for the exchange of diplomatic bags. Paris, 15 August 1922:

Art. I. The legation of Mexico in Paris, in exchanging correspondence with its Government, may use special bags which shall be transported under appropriate security conditions.

Art. 2. Reciprocally, the legation of the French Republic in Mexico City shall enjoy the same privilege.

Art. 3. The said bags shall be sent by the means of transport used for the postal correspondence of the two countries under the terms laid down for such transport.

Art. 4. The Ministries of Foreign Affairs of the two countries and their respective legations shall retain the keys to the bags in question.

Art. 5. The postal administrations of Mexico and France shall take the necessary measures to establish as soon as possible the new service provided for by this Agreement.

Art. 6. The weight of the bags shall be limited to 30 kilograms, in accordance with the Madrid Postal Convention. Such bags may be accompanied by sacks or boxes bearing the official seals. The accompanying packages shall pay transport costs at the rates charged by the railway and shipping companies.

Art. 7. The bags may be made of either leather or cloth. They shall be fitted with locks and may also be sealed with wax stamped with an official seal.

Art. 8. The bags and accompanying packages shall not be liable to any form of inspection and shall be exempt from customs duties.

8. Agreement between Mexico and Bolivia for the transport of diplomatic correspondence. Mexico City, 19 December 1929:

Art. I. The legation of the United Mexican States in La Paz may use, for the exchange of communications with its Government, special bags which shall enjoy the same privileges and guarantees as those which the Government of Bolivia accords to official mail.

Art. II. The legation of Bolivia in Mexico City shall enjoy the same right as that set out in the preceding article.

Art. III. The said bags shall be conveyed by the means of transport available to both countries for the conveyance of correspondence.

Art. IV. The Ministries of Foreign Affairs of both countries and their respective legations shall retain the keys to the special bags in question.

Art. V. The postal administrations of the United Mexican States and the Republic of Bolivia shall take the necessary measures for the immediate implementation of this Agreement.

9. Exchange of notes between Mexico and Poland constituting an agreement for the exchange of correspondence in special diplomatic bags. Mexico City, 18 February 1936:

1. The Polish Government shall convey the bags containing its diplomatic correspondence between Warsaw and Mexico City and vice versa through the postal service, which shall see that they are placed in the mail-bags exchanged between the two countries. The Polish Ministry of

Foreign Affairs and the Polish Legation in Mexico City shall hold the keys to the respective diplomatic bags. The said bags shall be inviolable; their consignment to the persons appointed to receive them shall be effected in the post office of destination after verification of the mail-bags.

2. The Mexican diplomatic bags shall enjoy the same privileges and guarantees as those which the postal administrations of Poland and Mexico accord to official mail. They shall be inviolable and shall be placed in the mail-bags used for the conveyance of ordinary correspondence between the post offices of Mexico City and Warsaw. The keys to the diplomatic bags shall be held by the Ministry of Foreign Affairs in Mexico City and the Legation of the United Mexican States in Warsaw.

3. The postal administrations of the two countries shall, by mutual agreement and on the basis of experience, establish limits on the weight and dimensions of the diplomatic bags in order that these may fit into the mail-bags used for the conveyance of ordinary correspondence between the two countries.

4. Pending agreement on other limitations for the diplomatic bags, the bag shall not exceed 20 kilograms in weight and shall measure 50 centimetres in length by 30 centimetres in height or shall have dimensions equivalent to the maximum.

5. Notice of the termination of the present agreement may be given through the diplomatic channel, such notice to take effect one month after the date of its receipt by the Ministry of Foreign Affairs of Mexico or by the Ministry of Foreign Affairs in Warsaw, respectively.

The Agreement shall enter into force thirty days from the date of the exchange of notes establishing it.

10. Exchange of notes between the United Kingdom of Great Britain and Northern Ireland and Mexico constituting an agreement for the transmission of diplomatic correspondence between London and Mexico City. London, 27 September 1946:

1. The Mexican Government agrees to accept from His Majesty's Embassy in Mexico City diplomatic bags and to convey them through postal channels to the Foreign Office in London. Similarly, His Majesty's Government agrees to accept from the Mexican Embassy in London diplomatic bags and to convey them through postal channels to the Secretaría de Relaciones Exteriores in Mexico City.

2. The bags shall be addressed to His Majesty's Principal Secretary of State for Foreign Affairs or the Secretario de Relaciones Exteriores, or to the respective ambassadors or *chargés d'affaires*, as the case may be. The bags shall bear the appropriate seals, and may be locked if desired, the keys resting in the custody of the respective Foreign Offices and embassies.

3. There shall be no charge in the acceptance and conveyance of these diplomatic bags, which shall enjoy all the immunities customarily granted by the Mexican and British authorities respectively to official mails, and shall be inviolable.

4. In accordance with the requirements of the international postal regulations, the weight of each bag covered by this agreement shall not exceed 30 kilograms (66 pounds), and the dimensions of each bag shall not exceed 124 centimetres (49 inches) by 66 centimetres (26 inches).

11. Exchange of notes between Mexico and Guatemala constituting an agreement for the exchange of diplomatic bags by air. Guatemala City, 27 December 1946:

1. Diplomatic correspondence, information and printed matter exchanged between the Ministry of Foreign Affairs of Guatemala and its Embassy in Mexico and between the Ministry of Foreign Affairs of the United Mexican States and its Embassy in Guatemala may be sent by air in diplomatic bags weighing no more than 3 kilograms, including the wrapping materials.

2. The bags shall bear locks, padlocks or seals, the keys resting in the custody of the respective ministries and embassies.

3. Each Government shall designate an air transport enterprise to convey its own bags in both directions and shall make arrangements with the enterprise for the payment or waiver of charges.

4. The bags delivered to the post office by each ministry or embassy shall bear specific mention of the air transport enterprise responsible for their

conveyance, and the post offices themselves shall be responsible for transferring the bags to the respective enterprises.

5. The diplomatic bags of both countries shall be inviolable, shall be exempt from customs inspection and shall be transported as frequently as is deemed necessary, up to a maximum of six times per week.

6. The diplomatic bags of both countries shall be transported with total exemption from taxes, duties or charges of any kind. The authorities of the two countries shall take the necessary additional measures for the operation of the service and shall take, each on its own account, the necessary administrative measures in respect of the national or foreign enterprises responsible for the transport.

7. This Agreement shall not disrupt existing arrangements for the exchange of diplomatic bags by land or sea and shall enter into force on today's date. Notice of termination may be given. Such notice shall take effect one month after the date of its receipt by the Ministry of Foreign Affairs of the other Government.

12. Exchange of notes between Mexico and Brazil constituting an agreement for the exchange by air of official correspondence in special diplomatic bags. Mexico City, 24 February 1951 and 21 May 1952:

I. Official correspondence of an urgent nature exchanged between the Ministry of Foreign Affairs of Mexico and the Embassy of Mexico in Rio de Janeiro or between the Ministry of Foreign Affairs of Brazil and the Embassy of Brazil in Mexico City shall be transported by air in special diplomatic bags.

II. The diplomatic bags of both countries shall be inviolable and exempt from inspection, shall enjoy the privileges accorded to official mail and shall be conveyed by the means of transport available to the two countries for the conveyance of airmail correspondence.

III. The postal authorities of both countries shall take the additional measures necessary for the service and shall establish by mutual agreement and in accordance with existing practice, at Mexico City and Rio de Janeiro respectively, the date, time and place for the delivery of the bags, which shall be dispatched urgently by the local post office in the mail-bags used for the transport by air of correspondence between the two countries.

IV. The diplomatic bags of both countries used in air transport shall be made of canvas or such other material as experience has proved to be appropriate, and shall be a maximum of 60 centimetres long, 40 centimetres wide and, when full, 20 centimetres thick.

V. The air transport costs for the diplomatic bags shall be paid, on the basis of current rates, by the respective Governments to the appropriate post office at the time the bags are delivered.

VI. The bags shall bear locks, padlocks or security mechanisms, the keys or security mechanisms for Mexican bags resting in the custody of the Ministry of Foreign Affairs of Mexico and the Embassy of Mexico in Rio de Janeiro and those for Brazilian bags resting in the custody of the Ministry of Foreign Affairs of Brazil and the Embassy of Brazil in Mexico City.

13. Exchange of notes between Mexico and Uruguay constituting an agreement for the exchange by air of official correspondence in special diplomatic bags. Mexico City, 18 August and 20 September 1955:

I. Official correspondence of an urgent nature exchanged between the Ministry of Foreign Affairs of Uruguay and the Embassy of Uruguay in Mexico City and between the Ministry of Foreign Affairs of Mexico and the Embassy of Mexico in Montevideo shall be transported by air in special diplomatic bags.

II. The diplomatic bags of both countries shall be inviolable and exempt from inspection, shall enjoy the privileges accorded to official mail and shall be conveyed by the means of transport available to the two countries for the conveyance of airmail correspondence.

III. The postal authorities of both countries shall take the additional measures required for the service and shall establish by mutual agreement and in accordance with existing practice, at Montevideo and Mexico City respectively, the date, time and place for the delivery of the bags, which shall be dispatched urgently by the local post office in the mail-bags used

for the transport by air of correspondence between the two countries.

IV. The diplomatic bags of both countries used in air transport shall be made of canvas or such other material as experience has proved to be appropriate, and shall be a maximum of 60 centimetres long, 40 centimetres wide and, when full, 20 centimetres thick.

V. The air transport costs for diplomatic bags shall be paid, on the basis of current rates, by the respective Governments to the appropriate post office at the time the bags are delivered.

VI. The bags shall bear locks, padlocks or security mechanisms, and the keys or security mechanisms for Uruguayan bags shall rest in the custody of the Ministry of Foreign Affairs of Uruguay and the Embassy of Uruguay in Mexico, while those of Mexican bags shall rest in the custody of the Ministry of Foreign Affairs of Mexico and the Embassy of Mexico in Montevideo.

14. Organic law of 8 January 1982 concerning the Mexican Foreign Service (*extracts*):

CHAPTER VII. OBLIGATIONS OF MEMBERS OF THE SERVICE

Art. 46. It shall be incumbent upon heads of mission to:

...

(f) Comply with the laws and regulations of the State to whose Government they are accredited, without prejudice to their immunities and privileges, and to make the relevant representations in cases where the application of such laws and regulations to Mexico and Mexicans gives rise to any violation of international law and the contractual obligations assumed by the Government of the State in question *vis-à-vis* the Mexican Government;

Art. 48. Without prejudice to other applicable provisions, the members of the Foreign Service shall be prohibited from:

...

(c) Using for illicit purposes the post they occupy, official papers to which they have access and the bags, official stamps and means of communication that are the property of the missions and offices to which they are assigned;

CHAPTER IX. SEPARATION FROM THE MEXICAN FOREIGN SERVICE

Art. 58. The following are grounds for separation from the Mexican Foreign Service:

...

(d) Committing for a second time any acts constituting the grounds for suspension referred to in the following article.

Art. 59. The following are grounds for suspension for up to thirty days without pay:

...

(b) Illicit use, or use for personal gain, by an official of diplomatic exemptions, bags and couriers or the immunities and privileges of his post;

15. Regulations for the implementation of the organic law of the Mexican Foreign Service (*extracts*):

Art. 20. The use of diplomatic and consular bags solely for transporting papers and articles for official use shall be the responsibility of the head of the diplomatic mission or consular post.

Art. 21. Negligence in the handling of official papers and the use of code systems and bags shall be regarded as manifest laxity and carelessness in the execution of official duties.

16. Customs Act (*extracts*):

Art. 22. Goods that are the property of the central federal public administration and the federal legislative and judicial authorities shall not be subject to abandonment.

In the case of goods belonging to foreign embassies and consulates and to international organizations of which Mexico is a member and luggage and household articles belonging to the officials and employees of the embassies, consulates and organizations in question, the period of abandonment shall begin three months following the date on which the goods in question are deposited with the customs authorities.

SHIPMENT OF GOODS

Art. 25. Persons importing or exporting goods shall be required to submit to the customs authorities a declaration on the official form approved by the Ministry of Finance and Public Credit containing information relevant to the customs régime to which the goods in question are to be subject and such data as may be required for determining the level and effecting payment of the corresponding foreign trade duties. The customs declaration shall be accompanied by:

I. In the case of imports:

(a) The corresponding invoice in cases where the value of the goods exceeds 10,000 pesos, which shall be signed and made out in Spanish or accompanied by a translation and shall contain sufficient information to permit identification of the goods;

(b) The bill of lading or air way-bill, revalidated in each case by the carrier;

(c) Papers providing proof of compliance with any obligations arising from restrictions and special requirements;

(d) Proof of the origin and port of departure of the goods, where appropriate.

II. In the case of exports:

(a) The invoice, showing the commercial value of the goods;

(b) Papers providing proof of compliance with any obligations arising from restrictions and special requirements.

The submission of invoices shall not be required in the case of goods imported or exported by foreign embassies and consulates or by their officials and employees, or in the case of electric power and crude oil and natural gas and their derivatives transmitted by pipeline, or in the case of household articles.

APPROPRIATION OF GOODS AND EXEMPTIONS

Art. 46. No duties shall be payable when the following goods enter or leave Mexican territory:

I. Goods that are exempt in accordance with the relevant legislation on general import and export duties and the relevant international agreements;

17. Regulations for the implementation of the Customs Act (*extracts*):

POSTAL SERVICE

Art. 61. Customs officers who supervise the opening of mail-bags coming from abroad shall inspect the packages and shall sign, together with the post office employees concerned, the corresponding postal forms.

A copy of the document of inspection referred to in the paragraph above shall be sent to the customs-house through which the packages are redispached, for control purposes, unless the customs-house is the one through which the packages entered the country.

Diplomatic bags shall be dealt with in accordance with the provisions of the relevant international agreements and conventions.

EXEMPTIONS

PART ONE

Diplomatic, consular and special missions

Art. 104. Diplomatic, consular and special missions and the members of such missions shall apply to the customs authorities, through the competent authorities, in connection with the importation and exportation of such goods as may be exempt in accordance with the relevant international agreements and conventions.

Imported goods must be transmitted to the beneficiaries of the exemption.

18. Circular No. 1-22-60 of the Mexican Foreign Service, of 2 June 1937:

The circular contains classified instructions to ensure the inviolability of diplomatic bags sent abroad by the Ministry of Foreign Affairs and those sent from abroad to the

Ministry. In connection with the "classified" or "confidential" correspondence of the Foreign Service, it recommends that such communications should be marked accordingly and that they should always be sent in two envelopes, with the actual designation appearing only on the inner envelope, which must be closed securely and sealed with wax even when the correspondence in question is being sent by diplomatic bag.

It is also recommended that envelopes containing official correspondence should not bear the names of the officials to whom they are being sent but should merely refer to the officials' titles, in order to facilitate the registration and distribution of the documents, and that, in cases where there are attachments to the communications that are not joined to them but are being sent separately, care should be taken to identify each attachment by means of the number of the communication to which it corresponds, since failure to do so leads to confusion and delays the performance of the business in question.

19. Circular No. C-15-140 of the Mexican Foreign Service, of 2 December 1938:

Although diplomatic bags should, strictly speaking, be used only for transporting official correspondence whose nature warrants such measures, they are often used for sending correspondence and even articles to individuals. The Ministry of Foreign Affairs does not wish to take drastic measures prohibiting such use of the bag and reserving it for legitimate purposes. However, pending preparation of the relevant rules, which are currently under consideration, it is recommended that when consignments are sent they should be accompanied by a consignment sheet containing an accurate description of the contents of the consignment and that the sheet should be included in the shipment in such a way that it may be inspected easily by the Ministry's Dispatch Office.

20. Circular No. 111-1-22 of 4 July 1961 addressed by the Mexican Foreign Service to the heads of Mexican diplomatic missions abroad:

In order to ensure that all our missions apply uniform rules regarding use of the diplomatic bag, the Ministry wishes to draw to your attention the fact that the applicable provisions are as follows:

1. The diplomatic bag may be used only to transport diplomatic papers and articles for official use.
2. Not all articles intended for official use, in one way or another, by the diplomatic mission are to be regarded as articles for official use but, rather, only those whose nature warrants the granting of the special protection provided by the bag, as in the case of diplomatic papers.
3. Accordingly, articles that are obtainable commercially (such as liquor and office equipment) are not suitable articles for transport by diplomatic bag, even though they are intended for official use by a diplomatic mission.

21. Memorandum of 10 September 1981 addressed by the Legal Counsel of the Ministry of Foreign Affairs of Mexico to the Director-General of Protocol:

...
In reply to memorandum No. 1407099 of 10 August 1981, in which the Deputy Director-General of Protocol requested the views of the office of which I am in charge on a query from the General Customs Office dated 1 October 1980 concerning the approach to be taken in cases where a diplomatic mission does not comply with the rules laid down by the Government of Mexico for the use of diplomatic bags, I wish to inform you of the following:

It would appear appropriate, in the case of a consignment to an embassy that does not comply with circular No. 301-I-72212 of the General Customs Office, of 31 August 1961, concerning the use of diplomatic bags, that the General Protocol Office and the diplomatic mission in question should be notified immediately that they may avail themselves of the exemption system for bringing into the country packages or parcels that cannot be accepted as diplomatic bags.

However, a recommendation should be made to the Customs Office that it should be as flexible as possible in implementing the above-mentioned circular in cases where the consignment is accompanied by an official accredited as a diplomatic courier, since the presence of the official is an indication of the importance that the sending Government attaches to the consignment.

What must be reaffirmed is that in no circumstances may or should a bag or package bearing an adequate diplomatic identification be opened.

As you know, the International Law Commission is preparing rules governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and it is hoped that in two or three years there will be a set of rules to cover the situations in question. The above-mentioned circular of 1961 will have to be revised at that point.

22. Observations dated 19 January 1982 addressed by the Ministry of Foreign Affairs of Mexico to the General Customs Office on the rules for the implementation of the new Customs Act as regards diplomatic bags:

...
With regard to the drafting of rules for the implementation of the new Customs Act, you will find below the views held by this Ministry on the diplomatic bag service, which should, if appropriate, be reflected in the rules in preparation.

1. The Government of Mexico is a party to the Vienna Convention on Diplomatic Relations, signed at Vienna on 18 April 1961;
2. Articles 24 and 27 and article 40, paragraphs 3 and 4, govern the dispatch and receipt of the bag at the international level (see annex);
3. Mexico, as a party to the Convention, has a legal obligation to implement it;
4. In accordance with current practice, the diplomatic bag is normally transported as air freight and dealt with as such. It is also brought into the country by diplomatic couriers, bearing diplomatic passports, or by the captains of aircraft. However, there are no restrictions whatsoever on the way in which the bag is transported, which may be by a delivery service, by the postal service or by a carrier (employing ships, buses or aircraft), etc.;
5. The port of entry into Mexico most frequently used is the Mexico City airport, but there are no restrictions whatsoever regarding ports of entry;
6. Only States and international organizations may send and receive diplomatic bags. In Mexico, apart from the Ministry of Foreign Affairs, only missions accredited to the Government of Mexico may send and receive diplomatic bags;
7. The diplomatic bag must bear external marks so that it can be readily identified. The container, in other words the bag itself, may be made of a variety of materials, such as leather, canvas or cardboard.
If there are serious doubts as to the diplomatic nature of a consignment, the customs authorities may request, as further proof, presentation of a certificate made out by a competent authority, such as the head of a diplomatic mission, the representative of an international organization or the Ministry for Foreign Affairs of the sending country (even though the Vienna Convention does not make provision for such cases, this course of action is the normal practice in a number of countries in addition to Mexico).
8. In the case of the Ministry of Foreign Affairs, the department responsible for the diplomatic bag shall make out the certificate, which shall indicate the number of packets or packages constituting the bag and any other information that is helpful in identifying the bag (air way-bill, registration, etc.);
9. The diplomatic bag must not be opened, detained or subjected to any type of inspection;
10. No special permit or licence is required in order to import the diplomatic bag. The latter is exempt from all customs duties, taxes and

related charges other than charges for storage, cartage and similar services;

10. The Vienna Convention provides that the bag may contain only diplomatic correspondence or articles intended for official use. There is no internationally accepted definition of what is to be understood by an "article intended for official use". The Vienna Convention guarantees the inviolability of the bag even if there are serious grounds for presuming that the articles in the bag are not for official use;

11. There is another type of bag, namely, the consular bag. This type of bag has fewer privileges than the diplomatic bag and its status is governed by the Vienna Convention on Consular Relations (art. 35 (annex)), to which Mexico is a party and which is binding on Mexico;

12. Because it is subject to a number of restrictions, the consular bag is rarely used, and consulates are authorized to dispatch and receive the diplomatic bag, which they prefer;

13. The chief restriction to which the consular bag is subject is that, in cases where it is thought to contain articles other than correspondence, it may be opened in the presence of an authorized representative of the sending State, who may refuse to permit the bag to be opened, in which case it is returned to its place of origin. Should a situation arise in which it is considered necessary to request that a consular bag be opened, it is desirable to inform the Ministry of Foreign Affairs and the General Protocol Office, in addition to the foreign mission concerned, in order to settle any possible dispute.

If it is deemed necessary, the text of the relevant articles of the Vienna Conventions on Diplomatic Relations and on Consular Relations, to which reference is made in the above paragraphs, could be reproduced in the draft rules.

Pakistan

[Original: English]
[28 December 1983]

In 1948, Pakistan gave legal force to the Convention on the Privileges and Immunities of the United Nations¹ by enacting the United Nations (Privileges and Immunities) Act 1948.² In 1972, the 1961 Vienna Convention and the 1963 Vienna Convention were also given legal force through the Diplomatic and Consular Privileges Act, 1973.³ In the above-mentioned legislation, the Government of Pakistan incorporated the provisions relating to diplomatic couriers and the diplomatic bag not accompanied by diplomatic courier in the two Conventions without any alterations. The texts of the relevant provisions are reproduced below.

United Nations (Privileges and Immunities) Act 1948:

Article III

Sect. 10. The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Diplomatic and Consular Privileges Act, 1972:

FIRST SCHEDULE

Article 5 [paras. 3-7]

3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible exter-

nal marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land 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. The mission may send one of its members to take possession of the diplomatic bag directly.

Syrian Arab Republic

[Original: English]
[7 November 1983]

The Syrian laws and regulations relevant to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier are consistent with the 1961 Vienna Convention. That is to say, the Syrian airport authorities permit the diplomatic courier to hand over the diplomatic bags directly to the representative of the diplomatic mission, who has direct access to the tarmac. Moreover, the unaccompanied diplomatic bag is delivered to the representative of the diplomatic mission at the customs desk.

Thailand

[Original: English]
[7 February 1984]

Immigration Act of 24 February 1979 (extracts):

CHAPTER II. ENTRY INTO AND DEPARTURE FROM THE KINGDOM

Sect. 11. Persons entering or leaving the Kingdom shall pass through the authorized routes, immigration stations, ports, stations, or localities and during such time as to be prescribed by the Minister in the Government Gazette.

Sect. 12. No alien under any of the following descriptions shall be admitted into the Kingdom:

1. A person not having a genuine and valid passport or travelling document or, if he has, no visa has been issued by the Thai embassy or consulate abroad or the Ministry of Foreign Affairs, except in special cases where certain categories of aliens are exempted from requirement of visa.

The issue of visas and exemptions from requirement of visa shall be in accordance with the rules, procedure and conditions as prescribed in the Ministerial Regulation;¹

2. A person not having means of support appropriate for his admission into the Kingdom;

3. A person entering in order to become a labourer or to take up an employment for manual work requiring no academic or technical training,

¹ United Nations, *Treaty Series*, vol. 1, p. 15.

² *The Pakistan Code* (Karachi), vol. XI (1967), p. 16.

³ *The Gazette of Pakistan* (Islamabad), 19 August 1972, p. 361.

¹ As amended by Immigration Act (No. 2), B.E. 2523 (1980).

or to take up any other employment in violation of the law on the working of aliens;

4. A person of unsound mind or afflicted with any one of the diseases as prescribed in the Ministerial Regulation;

5. A person not having been inoculated against smallpox, or vaccinated or complied with any medical treatment for the prevention of contagious diseases prescribed by law, and refusing to allow an immigration medical officer to carry out the treatment;

6. A person having been imprisoned by the judgement of a Thai Court or a lawful order or the judgement of a foreign court except for a petty offence or an offence committed through negligence or an offence which has been exempted by the Ministerial Regulations;

Sect. 14. The Minister shall have the power to require any alien who is admitted into the Kingdom to possess cash or furnish security, or to grant exemption therefrom under any condition; provided that such requirement shall be published in the Government Gazette.

The requirement under paragraph 1 shall not apply to children under the age of 12.

Sect. 15. Aliens who have been admitted into the Kingdom and remain in the following capacity shall be granted exemption from complying with the duties of aliens as prescribed in this Act except for the duties or prohibitions under section 11, section 12, paras. 1, 4 and 5, and section 18, para. 2:

1. Members of diplomatic corps sent by a foreign Government to perform duties in the Kingdom, or those who travel through the Kingdom in order to perform duties in another country;

2. Consular officers or employees sent by a foreign Government to perform duties in the Kingdom, or those who travel through the Kingdom in order to perform duties in another country;

3. A person sent by a foreign Government with the consent of the Thai Government to perform duties or a mission in the Kingdom;

4. A person who performs duties or a mission for the Thai Government in the Kingdom under an agreement concluded between the Thai Government and a foreign Government;

5. Heads of offices of international organizations or agencies whose operations in Thailand are protected by law or approved by the Thai Government, and officials or experts or other persons who have been appointed or entrusted by such organizations or agencies to perform duties or missions in the Kingdom on their behalf or on behalf of the Thai Government under the agreements concluded between the Thai Government and such international organizations or agencies;

6. Spouses or children who are dependants and part of the family of a person specified in 1, 2, 3, 4 or 5 above;

7. Personal servants who come from abroad to carry on their normal occupation at the residence of persons referred to in 1 above or persons who have been accorded privileges and immunities equivalent to those of members of the diplomatic corps under an agreement concluded between the Thai Government and a foreign Government or an international organization or agency.

Cases under 1, 2, 6 or 7 above shall be in accordance with international obligations and the principle of reciprocity.

The competent official shall have the power to interrogate and ask for evidence in the investigation of a person being admitted into the Kingdom as to whether such person is entitled to the exemption under this section.

Sect. 16. In a case where the Minister finds the circumstances to be such that, in the national interest or for reasons of public order, good morals and public well-being, an alien or certain categories of aliens should not be admitted into the Kingdom, the Minister shall have the power to refuse admission of such alien or categories of aliens.

Sect. 17. In a special case, the Minister, with the approval of the Council of Ministers, may admit any alien or categories of aliens into the Kingdom under any condition or may waive any provision of this Act in any case.

Sect. 18. The competent official shall have the power to search any person entering or departing from the Kingdom.

For this purpose, the person entering or departing from the Kingdom shall submit particulars in the form prescribed in the Ministerial Regulation and shall have passed inspection of the competent official at the immigration station on such route.

Sect. 19. In examining whether an alien is under any prohibition to enter the Kingdom, the competent official may require the alien to reside at an appropriate place upon assurance that such alien shall present himself to the competent official to acknowledge the order on the date and at the time and place specified by the competent official and, if considered expedient, the competent official may require such alien to provide surety or surety with security, or may detain him at an appropriate place for the purpose of carrying out the provisions of this Act.

United Arab Emirates

[Original: English]
[14 December 1983]

No legislation on this matter has so far been enacted by the United Arab Emirates. Nor have any judicial decisions been rendered by the national courts. In practice, and in accordance with articles 27 and 41 of the 1961 Vienna Convention, if there is suspicion as to the contents of a diplomatic bag, the Ministry of Foreign Affairs offers the diplomatic mission concerned one of two options: to have the diplomatic bag opened by the proper authorities and in the presence of a member of the mission and a member of the Ministry of Foreign Affairs of the United Arab Emirates, or to have the diplomatic bag returned to the place from which it was originally sent.

Uruguay

[Original: Spanish]
[8 November 1983]

1. The general rules laid down in the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 2 October 1929¹ are applied in Uruguay. The Warsaw Convention was duly ratified and is implemented in respect of all matters in any way relevant to the transport of the diplomatic bag not accompanied by diplomatic courier.

2. Moreover, in Uruguay there are no specific regulations on the diplomatic courier and the diplomatic bag, except for the relevant provisions of the 1961 Vienna Convention.

¹ League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

Viet Nam

[Original: English]
[18 April 1984]

1. As a State Party to the 1961 Vienna Convention, by which it has strictly abided, the Socialist Republic of Viet Nam follows with interest the elaboration by the Commission of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

2. It is in the interest of international co-operation that the maintenance of communication between States and

their missions abroad be free of abuse and violation. This is regarded by the Government of Viet Nam as a condition *sine qua non* for the normal functioning of those missions. Notwithstanding article 27 of the 1961 Vienna Convention, which establishes the legal status and the immunity of the diplomatic courier and the official correspondence of the mission, State intercourse in this respect has shown considerable gaps in and breaches in the observance of the existing international instruments. Many of the points and issues relating to the topic in question still require further elaboration. The Work undertaken by the Commission should in fact contribute greatly toward strengthening the effectiveness of the rules governing inter-State relations and co-operation.

3. The Socialist Republic of Viet Nam, while desiring to make further comments at a later stage of elaboration of the draft articles, fully supports the comprehensive approach applied to the draft, namely that of establishing a uniform régime for all kinds of couriers and diplomatic bags. In its view, an appropriate draft, adopted in the form of an international convention, would be beneficial. The scope of the draft should also be extended to encompass communications of recognized liberation movements, as well as the status of couriers and bags of international organizations. The Government of the Socialist Republic of Viet Nam looks forward to the Commission's fruitful work in completing the whole set of articles at its coming session.

DOCUMENT 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**

[Original: English]
[14 May 1984]

CONTENTS

		<i>Page</i>
<i>Note</i>		73
	<i>Paragraphs</i>	
INTRODUCTION	1-2	73
<i>Sections</i>		
I. PRESENT STATUS OF THE DRAFT ARTICLES	3-7	73
II. DISCUSSION OF THE TOPIC IN THE SIXTH COMMITTEE AT THE THIRTY-EIGHTH SESSION OF THE GENERAL ASSEMBLY	8-39	76
A. Consideration of the topic as a whole	8-16	76
B. Comments on the draft articles provisionally adopted by the Commission or submitted by the Special Rapporteur	17-39	77
1. Comments on draft articles 1 to 8 provisionally adopted by the Commission	17-27	77
2. Comments on draft articles 9 to 23 submitted by the Special Rapporteur	28-39	78
III. BRIEF ANALYTICAL SURVEY OF STATE PRACTICE RELEVANT TO THE DRAFT ARTICLES SUBMITTED TO THE COMMISSION	40-81	80
A. State practice relating to the general provisions of the draft (arts. 1-6)	42-45	80
1. Scope of the draft articles	42-44	80
2. The principle of reciprocity (art. 6)	45	80
B. State practice relating to the status of the diplomatic courier	46-53	80
1. Documentation and nationality of the diplomatic courier	46-47	80
2. Facilities, privileges and immunities accorded to the diplomatic courier	48-52	81
3. Diplomatic courier <i>ad hoc</i>	53	81
C. State practice relating to the status of the diplomatic bag	54-81	82
1. Indication of status of the diplomatic bag (art. 31)	54-63	82
2. Content of the diplomatic bag (art. 32)	64-69	83
3. 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) and Status of the diplomatic bag dispatched by postal services or other means (art. 34)	70-72	84
4. Inviolability of the diplomatic bag (art. 36)	73-79	85
5. Exemption from customs duties and all dues and taxes (art. 38)	80-81	86
IV. CONSIDERATION OF THE DRAFT ARTICLES AT THE THIRTY-SIXTH SESSION OF THE COMMISSION ..	82-84	87

NOTE

Multilateral conventions cited in the present document:

	<i>Source</i>
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter referred to as the 1961 Vienna Convention	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter referred to as the 1963 Vienna Convention	<i>Ibid.</i> , vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) Hereinafter referred to as the 1975 Vienna Convention	<i>Ibid.</i> 1975 (Sales No. E.77.V.3), p. 87.

Introduction

1. The present report is the fifth submitted by the Special Rapporteur on the topic: "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". Its main objective is, first of all, to update the status of the draft articles and, secondly, to indicate the main trends in the attitude of Governments in respect of those draft articles emerging from the debates in the Sixth Committee of the General Assembly or as evidenced by recent State practice.

2. The essentially informative character of the present report is due to the fact that, in the fourth report,¹ a set of draft articles was already completed, together with the corresponding substantive commentaries. The present report is therefore designed to ascertain to what extent the views arising from the debates in the Sixth Committee, at the thirty-eighth session of the General Assembly, and from the latest information provided by Governments² or obtained from research by the Codification Division, coincide or are at variance with the solutions proposed by the Special Rapporteur in the draft articles submitted by him or provisionally adopted by the Commission, or are not covered thereby.³

¹ See footnote 3 (b) (iii) below.

² See p. 59 above, document A/CN.4/379 and Add.1.

³ For a detailed historical background of the consideration of the topic by the Commission up to 1983, see (a) the reports of the Commission: *Yearbook . . . 1979*, vol. II (Part Two), pp. 170 *et seq.*, chap. VI; *Yearbook . . . 1980*, vol. II (Part Two), pp. 162 *et seq.*, chap. VIII; *Yearbook . . . 1981*, vol. II (Part Two), pp. 159 *et seq.*, chap. VII; *Yearbook . . . 1982*, vol. II (Part Two), pp. 112 *et seq.* chap. VI; *Yearbook . . . 1983*, vol. II (Part Two), pp. 44 *et seq.*, chap. V; (b) the previous reports of the Special Rapporteur: (i) preliminary report, *Yearbook . . . 1980*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/335; (ii) second report, *Yearbook . . . 1981*, vol. II (Part One), pp. 151 *et seq.*, document A/CN.4/347 and Add.1 and 2; (iii) third report, *Yearbook . . . 1982*, vol. II (Part One), pp. 247 *et seq.*, document A/CN.4/359 and Add.1; (iv) fourth report, *Yearbook . . . 1983*, vol. II (Part One), pp. 62 *et seq.*, document A/CN.4/374 and Add.1-4.

I. Present status of the draft articles

3. The draft articles contained in the set proposed by the Special Rapporteur in his various reports⁴ could be classified, according to their present status, in the following categories:

(a) Draft articles provisionally adopted by the Commission at its thirty-fifth session, in 1983;

(b) Draft articles considered by the Commission and referred to the Drafting Committee;

(c) Draft articles completing the set contained in the fourth report and which should be examined by the Com-

⁴ See footnote 3 (b) above.

mission before they are referred to the Drafting Committee.

4. In the first category are eight draft articles adopted on first reading by the Commission at its thirty-fifth session.⁵ Articles 1 to 6 constitute part I, entitled "General Provisions" namely: "Scope of the present articles" (art. 1);⁶ "Couriers and bags not within the scope of the present articles" (art. 2);⁷ "Use of terms" (art. 3);⁸ "Freedom of

⁵ The texts of articles 1 to 8, and the commentaries thereto, are contained in *Yearbook . . . 1983*, vol. II (Part Two), pp. 53 *et seq.* para. 190.

⁶ Article 1 provisionally adopted by the Commission reads:

"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."

⁷ Article 2 provisionally adopted by the the Commission reads:

"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."

⁸ Article 3 provisionally adopted by the Commission reads:

"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 on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

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

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

official communications" (art. 4);⁹ "Duty to respect the laws and regulations of the receiving State and the transit State" (art. 5);¹⁰ and "Non-discrimination and reciprocity" (art. 6).¹¹ The other two draft articles are in part II, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag", namely: "Documentation of the diplomatic courier" (art. 7)¹² and "Appointment of the diplomatic courier" (art. 8).¹³

"(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."

⁹ Article 4 provisionally adopted by the Commission reads:

"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."

¹⁰ Article 5 provisionally adopted by the Commission reads:

"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."

¹¹ Article 6 provisionally adopted by the Commission reads:

"Article 6. Non-discrimination and reciprocity"

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

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

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

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

5. The second category comprises draft articles submitted by the Special Rapporteur in his third report (arts. 1-14) and referred to the Drafting Committee by a decision of the Commission at its thirty-fourth session, in 1982,¹⁴ as well as draft articles contained in his fourth report (arts. 15-19), which were also referred to the Drafting Committee by the Commission at its thirty-fifth session, in 1983.¹⁵ These draft articles, which are in part II, relating to the status of the diplomatic courier, are: "Appointment of the same person by two or more States as a diplomatic courier" (art. 9);¹⁶ "Nationality of the diplomatic courier" (art. 10);¹⁷ "Functions of the diplomatic courier" (art. 11);¹⁸ "Commencement of the functions of the diplomatic courier" (art. 12);¹⁹ "End of the function of the diplomatic courier" (art. 13);²⁰ "Persons declared *non grata* or not acceptable"

(art. 14);²¹ "General facilities" (art. 15);²² "Entry into the territory of the receiving State and the transit State" (art. 16);²³ "Freedom of movement" (art. 17);²⁴ "Freedom of communication" (art. 18)²⁵ and "Temporary accommodation" (art. 19).²⁶

6. At the thirty-fifth session of the Commission, the Special Rapporteur introduced four more draft articles (arts. 20-23), contained in his fourth report. These were partially examined by the Commission, it being understood that the debate on them should resume at the thirty-sixth session before they were referred to the Drafting Committee.²⁷ The draft articles are: "Personal inviolabil-

and does not affect the enjoyment of the rights or the performance of the obligations of third States."

¹² Article 7 provisionally adopted by the Commission reads:

"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."

¹³ Article 8 provisionally adopted by the Commission reads:

"Article 8. Appointment of the diplomatic courier"

"Subject to the provisions of articles [9], 10 and 14, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations."

¹⁴ *Yearbook . . . 1982*, vol. II (Part Two), p. 120, para. 249.

¹⁵ *Yearbook . . . 1983*, vol. II (Part Two), p. 50, para. 171.

¹⁶ Draft article 9 read as follows:

"Article 9. Appointment of the same person by two or more States as a diplomatic courier"

"Two or more States may appoint the same person as a diplomatic courier or diplomatic courier *ad hoc*".

¹⁷ Draft article 10 read as follows:

"Article 10. Nationality of the diplomatic courier"

"1. The diplomatic courier should, in principle, have the nationality of the sending State.

"2. Diplomatic couriers may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State, which may be withdrawn at any time.

"3. The receiving State may reserve the same right under paragraph 2 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.

"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."

¹⁸ Draft article 11 read as follows:

"Article 11. Functions of the diplomatic courier"

"The functions of the diplomatic courier shall consist in taking care of and delivering to its destination the diplomatic bag of the sending State or its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated."

¹⁹ Draft article 12 read as follows:

"Article 12. Commencement of the functions of the diplomatic courier"

"The functions of the diplomatic courier shall commence from the moment he is crossing the territory of the transit or receiving State, depending upon which of these events occurs first."

²⁰ Draft article 13 read as follows:

"Article 13. End of the function of the diplomatic courier"

"The function of a diplomatic courier comes to an end, *inter alia*, upon:

"(a) the completion of his task to deliver the diplomatic bag to its final destination;

"(b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;

"(c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;

"(d) the event of the death of the diplomatic courier."

²¹ Draft article 14 read as follows:

"Article 14. Persons declared 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 of the latter State is declared *persona non grata* or not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his function.

"2. In cases when a diplomatic courier is declared *persona non grata* or not acceptable in accordance with paragraph 1 prior to the commencement of his function, the sending State shall send another diplomatic courier to the receiving State."

²² Draft article 15 read as follows:

"Article 15. General facilities"

"The receiving State and the transit State shall accord to the diplomatic courier the facilities required for the performance of his official functions."

²³ Draft article 16 read as follows:

"Article 16. Entry into the territory of the receiving State and the transit State"

"1. The receiving State and the transit State shall allow the diplomatic courier to enter their territory in the performance of his official functions.

"2. Entry or transit visas, if required, shall be granted by the receiving or the transit State to the diplomatic courier as quickly as possible."

²⁴ Draft article 17 read as follows:

"Article 17. Freedom of movement"

"Subject to the laws and regulations concerning zones where access is prohibited or regulated for reasons of national security, the receiving State and the transit State shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions or when returning to the sending State."

²⁵ Draft article 18 read as follows:

"Article 18. Freedom of communication"

"The receiving and the transit State shall facilitate, when necessary, the communications of the diplomatic courier by all appropriate means with the sending State and its missions, as referred to in article 1, situated in the territory of the receiving State or in that of the transit State, as applicable."

²⁶ Draft article 19 read as follows:

"Article 19. Temporary accommodation"

"The receiving and the transit State shall, when requested, assist the diplomatic courier in obtaining temporary accommodation in connection with the performance of his official functions."

²⁷ *Yearbook . . . 1983*, vol. II (Part Two), p. 53, para. 189.

ity" (art. 20);²⁸ "Inviolability of temporary accommodation" (art. 21);²⁹ "Inviolability of the means of transport" (art. 22)³⁰ and "Immunity from jurisdiction" (art. 23).³¹

7. As indicated in the Commission's report on its thirty-fifth session, the remaining draft articles (arts. 24-42), which complete the set of draft articles submitted by the

²⁸ Draft article 20 read as follows:

"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."

²⁹ Draft article 21 read as follows:

"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."

³⁰ Draft article 22 read as follows:

"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

Special Rapporteur in his fourth report, were not formally introduced during that session; the Special Rapporteur briefly explained their content and suggested that the Commission, which now had before it the complete set of draft articles, should consider them at its thirty-sixth session.³²

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."

³¹ Draft article 23 read as follows:

"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."

³² *Yearbook . . . 1983*, vol. II (Part Two), p. 53, para. 186.

II. Discussion of the topic in the Sixth Committee at the thirty-eighth session of the General Assembly

A. Consideration of the topic as a whole

8. The progress achieved on the topic by the Commission at its thirty-fifth session, in 1983, received favourable consideration by many representatives. The presentation of the complete set of 42 draft articles was also appreciated as a basis for the work of the Commission. Some representatives expressed the hope that, given the satisfactory results produced so far, the Commission might be able to round off the first reading of the draft articles at its thirty-sixth session and finalize the second reading of the draft before the expiry of its current term of office, in 1986.³³

9. The importance of the topic and the need for its codi-

fication was again pointed out during the debate in the Sixth Committee. It was emphasized by some representatives that the codification of the status of the diplomatic courier and the diplomatic bag, particularly the enhancing of the system of protection of the means of official communication, would contribute to the effective functioning of diplomatic relations and to the strengthening of international co-operation.³⁴

10. Several representatives expressed support for the empirical, functional and pragmatic method applied in the elaboration of the draft articles, based on close examination of State practice in respect of diplomatic communications. It was also pointed out that the uniform approach and the comprehensive manner of dealing with all kinds of couriers and bags constituted a sound legal basis for a

³³ 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), paras. 302-304. See also *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 38th meeting, paras. 46-48 (Brazil), 41st meeting, para. 12 (Israel), 47th meeting, para. 56 (Poland), 48th meeting, para. 60 (Mongolia).

³⁴ See "Topical summary . . ." (A/CN.4/L.369), paras. 303-304; and *Officials Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 42nd meeting, para. 13 (Ethiopia), 44th meeting, para. 71 (Czechoslovakia), 46th meeting, para. 14 (Hungary) and para. 22 (Afghanistan), 48th meeting, para. 77 (Zaire).

uniform régime governing the status of the courier and the bag.

11. The view was expressed that the central point of the codification of the topic was the granting of privileges, immunities and facilities to diplomatic couriers and bags. In that connection, special emphasis was placed on the need for achieving a proper balance in the draft articles between the sending State's requirements for confidentiality and the receiving or transit State's legitimate security and other interests, as well as between the principle of the inviolability of the diplomatic bag and the need to prevent abuses of the diplomatic bag.

12. While not denying the progress made by the Commission on the topic, some representatives expressed certain doubts and reservations as to the urgency of proceeding to a detailed codification of the rules regulating the legal status of the diplomatic courier and the diplomatic bag. In their view, what was required was the filling of small gaps and the implementation of existing rules.³⁵

13. The view was expressed that, in elaborating rules for the adequate protection of the courier in the exercise of his functions, it would not be proper to go too far in assimilating the status of the diplomatic courier to that of diplomatic staff. The temporary nature of the diplomatic courier's assignment made him comparable to the members of a special mission. It was said that the personal inviolability of the diplomatic courier should be based on the principle of functional necessity.³⁶

14. The form of the future instrument to be adopted on the topic under consideration was again the subject of discussion. A number of representatives supported the view that the draft should take the form of a binding instrument, preferably an international convention. Some representatives expressed the view that the final product of the Commission should take the form of a protocol that did not depart from the relevant conventions adopted under the auspices of the United Nations. One representative suggested that the draft articles could provide a useful basis for a General Assembly recommendation to States with a view to supplementing and clarifying the provisions of the 1961 Vienna Convention on Diplomatic Relations. According to another representative, the final form of the draft articles was not a question of particular urgency.³⁷

15. Several representatives made general observations on the draft articles submitted so far by the Special Rapporteur, particularly draft articles 15 to 23. While expressing the view that those draft articles were generally acceptable and presented no substantive difficulties, they suggested some changes relating mainly to their form and

³⁵ See "Topical summary . . ." (A/CN.4/L.369), para. 305; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 39th meeting, para. 20 (Federal Republic of Germany), 45th meeting, para. 37 (Spain), 50th meeting, para. 37 (Japan).

³⁶ See "Topical summary . . ." (A/CN.4/L.369), para. 308; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 42nd meeting, para. 16 (Ethiopia).

³⁷ See "Topical summary . . ." (A/CN.4/L.369), para. 311; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 36th meeting, para. 77 (German Democratic Republic), 39th meeting, para. 79 (Jamaica), 41st meeting, para. 35 (France), 43rd meeting, para. 8 (Italy), 44th meeting, para. 39 (United States of America), 47th meeting, para. 41 (Bulgaria).

drafting. One representative stated that the draft articles should be condensed and amalgamated.³⁸

16. The relationship between the draft articles and the relevant conventions on diplomatic and consular relations was also mentioned in the debate. It was suggested that at some stage the Commission should take a decision on the matter.³⁹ The Special Rapporteur has contemplated the consideration of this issue in conjunction with draft article 42 submitted in the fourth report.⁴⁰

B. Comments on the draft articles provisionally adopted by the Commission or submitted by the Special Rapporteur

1. COMMENTS ON DRAFT ARTICLES 1 TO 8 PROVISIONALLY ADOPTED BY THE COMMISSION

17. The general view emerging from the debate on draft articles 1 to 8 provisionally adopted by the Commission was that they were satisfactory. At the same time, comments were made relating to the substance and form of individual articles.

18. *Article 1 (Scope of the present articles)* was the subject of a thorough discussion. Two main trends transpired from that discussion: one supporting the comprehensive and uniform approach covering all kinds of couriers and bags as adopted in the draft; the other favouring a restrictive approach confined only to the diplomatic courier and the unaccompanied diplomatic bag *stricto sensu*.

19. It was argued by several representatives that the comprehensive approach applied in the elaboration of draft article 1 constituted a sound legal basis for a uniform régime governing the status of the courier and the bag. The rules applicable to all types of couriers and bags, according to that view, ensured the normal functioning of official communications, since any differentiation in the facilities, privileges and immunities established in existing conventions on diplomatic law was based primarily on the difference in nature or degree of the functions performed by the various categories of official representatives.

20. The comprehensive and uniform approach was questioned by one representative, who expressed serious reservations about the applicability of the same basic rules to diplomatic couriers and bags, consular couriers and bags, and the couriers and bags of special and permanent missions to international organizations. In his view, that approach seemed dangerous and could jeopardize the success of the draft. Such an approach would raise difficult problems for States which were not parties to the 1969 Convention on Special Missions or to the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The comprehensive and uniform approach

³⁸ See "Topical summary . . ." (A/CN.4/L.369), para. 333; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 37th meeting, para. 32 (Tunisia), 45th meeting, para. 22 (Morocco).

³⁹ See "Topical summary . . ." (A/CN.4/L.369), para. 310; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 48th meeting, para. 38 (Indonesia).

⁴⁰ See document A/CN.4/374 and Add.1-4 (see footnote 3 (b) (iv) above), paras. 396-403.

disregarded the difference between the status of the diplomatic bag deriving from article 27 of the 1961 Vienna Convention on Diplomatic Relations and that deriving from article 35 of the 1963 Vienna Convention on Consular Relations, as a result of which the consular bag was currently subject to certain restrictions that did not apply to the diplomatic bag. Thus treating the two in exactly the same way, as envisaged in the draft articles, would constitute a radical change in the law and might not be acceptable to all States. A provision in the text permitting States to designate those types of couriers and bags to which they wished the new rules to apply might introduce useful flexibility in the draft but would not obviate the real complications, since the status of each type of bag would depend on the position taken by the sending State, the transit State and the receiving State. In that representative's view, such a system might impair the rules that were now universally accepted for the diplomatic bag and the consular bag, respectively.⁴¹ Another representative stated that the inclusion of a provision permitting States to designate those types of couriers and bags to which they wished the article to apply, as suggested in paragraph (2) of the commentary to article 1,⁴² would not promote uniformity in the treatment of diplomatic couriers. He therefore suggested that an attempt be made to draw up a compromise text that could eliminate the need for such an optional procedure.⁴³

21. The consideration of *article 2 (Couriers and bags not within the scope of the present articles)* raised the question, as on previous occasions, of the couriers and bags of international organizations and of national liberation movements.

22. Several representatives were in favour of extending the scope of the draft articles to international organizations and national liberation movements, taking into consideration the reality of international relations.⁴⁴

23. Some representatives, while basically in favour of extending the scope of the draft articles, advised great caution and realism, so as not to create difficulties that would obstruct progress and prevent the completion of the draft.⁴⁵

24. However, some representatives expressed opposition to or grave reservations about expanding the scope of the draft articles to include international organizations or other non-State entities. They stated that to do so would significantly complicate and delay the drafting work. It was suggested that the Commission should complete its first reading of the draft as a whole on the basis of the scope as indicated in draft article 1, and then review the position so that a final decision could be reached.⁴⁶

⁴¹ See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 41st meeting, para. 32 (France)*.

⁴² See footnote 5 above.

⁴³ See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 39th meeting, para. 85 (Jamaica)*.

⁴⁴ See "Topical summary . . ." (A/CN.4/L.369), para. 318; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 36th meeting, para. 76 (German Democratic Republic), 44th meeting, para. 12 (Algeria)*.

⁴⁵ *Ibid.*, 45th meeting, para. 21 (Morocco), 47th meeting, para. 55 (Poland).

⁴⁶ See "Topical summary . . ." (A/CN.4/L.369), para. 312; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee,*

25. The consideration of *article 3 (Use of terms)* concentrated more on the definition of the diplomatic bag and some drafting issues. One representative thought that it would be desirable to include articles on the right of a receiving State to prescribe and apply in a non-discriminatory manner the maximum allowable size of a diplomatic bag, and on the duty of a sending State to prevent misuse or abuse of the diplomatic bag. Another representative pointed out that the provisions concerning the diplomatic bag should cover only the diplomatic bag in the strict sense and should conform with article 27 of the 1961 Vienna Convention.⁴⁷ There were no specific comments on the other terms contained in article 3.

26. There were few comments on *article 5 (Duty to respect the laws and regulations of the receiving State and the transit State)*. The practical importance of the provision was stressed by one representative. Another representative noted some differences between the wording of article 5 and that of article 41, paragraph 1, of the 1961 Vienna Convention, differences for which he failed to see the justification.⁴⁸

27. *Article 6 (Non-discrimination and reciprocity)* did not raise any specific discussion, with the exception of one general comment to the effect that the article would be justified in principle only if a new convention were prepared. It was also pointed out that, as now drafted, it did not settle the question of the scope of the rule of reciprocity for the transit State.

2. COMMENTS ON DRAFT ARTICLES 9 TO 23 SUBMITTED BY THE SPECIAL RAPPORTEUR

28. Since more specific comments on draft articles 9 to 14 had been made in the Sixth Committee at the thirty-seventh session of the General Assembly, in 1982, this time they were confined to a few remarks on articles 9, 10, 12 and 13.

29. On draft *article 9 (Appointment of the same person by two or more States as a diplomatic courier)*, one representative stated that the principle underlying that article was acceptable to his delegation, but suggested that the provision could be included in an additional paragraph of article 8, instead of forming a separate article.⁴⁹

30. In connection with draft *article 10 (Nationality of the diplomatic courier)*, it was suggested by one representative that a specific reference to the diplomatic courier *ad hoc* be introduced.⁵⁰

41st meeting, para. 12 (Israel), 43rd meeting, para. 71 (United Kingdom), 44th meeting, para. 37 (United States of America).

⁴⁷ See "Topical summary . . ." (A/CN.4/L.369), paras. 323-325; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 39th meeting, para. 85 (Jamaica), 41st meeting, para. 34 (France), 42nd meeting, para. 17 (Ethiopia), 48th meeting, para. 28 (India)*.

⁴⁸ See "Topical summary . . ." (A/CN.4/L.369), paras. 327-328; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 41st meeting, para. 34 (France), 42nd meeting, para. 18 (Ethiopia)*.

⁴⁹ *Ibid.*, 39th meeting, para. 41 (Nigeria).

⁵⁰ *Ibid.*

31. On draft *article 13 (End of the function of the diplomatic courier)*, one representative expressed the view that the functions of the diplomatic courier were terminated only when the courier had delivered the bag to its final destination and returned to his country.⁵¹

32. Draft articles 15 to 19, which had been referred to the Drafting Committee, and draft articles 20 to 23, which had been partially considered by the Commission in 1983, were the subject of general as well as specific comments. As was pointed out, those draft articles were considered generally acceptable, subject to certain drafting changes and shortening of the texts (see paragraph 15 above).

33. The comments on draft articles 15 to 19, relating to the facilities accorded to the diplomatic courier, were confined to certain drafting amendments and suggestions for combining them into fewer provisions. One representative suggested adding the phrase "having regard to the nature and task of the diplomatic courier" at the end of draft *article 15 (General facilities)*.⁵²

34. On draft *article 16 (Entry into the territory of the receiving State and the transit State)* and draft *article 17 (Freedom of movement)*, only a few drafting amendments were proposed. One representative suggested replacing the work "quickly" by "expeditiously" in paragraph 2 of article 16. It was also suggested that the words "speedy and efficient performance" be inserted at the appropriate place in draft *article 17*.⁵³

35. Some representatives expressed general support for draft articles 20 to 23, on inviolability and immunity from jurisdiction, without prejudice to some drafting changes.⁵⁴

36. Several comments were made on draft *article 20 (Personal inviolability)*. The discussion was mainly concentrated on paragraph 2, with some critical observations concerning the obligation contained therein for the receiving State to prosecute and punish infringements of the personal inviolability of the diplomatic courier. It was pointed out that no such provision existed in the 1961 Vienna Convention or in the 1963 Vienna Convention. The issue thus exceeded the scope of diplomatic and consular law and touched on the problem of State responsibility.⁵⁵ One delegation proposed that paragraph 2 of draft *article 20* should be redrafted as follows:

"2. The receiving State or, as applicable, the transit State shall treat the diplomatic courier with courtesy and shall take all reasonable steps to prevent any infringement of his person, freedom or dignity."⁵⁶

37. Draft *article 21 (Inviolability of temporary accommodation)* was the subject of several comments and critical remarks, which varied from general acceptance to outright deletion. Several representatives criticized either a part of the draft *article*, mainly paragraph 3, or the draft *article* as a whole. In the view of one representative, the second sentence of paragraph 3, referring to the conditions and procedure of inspection or search of the temporary accommodation, should be deleted. Some representatives pointed out that there was a significant difference between the position of a member of the administrative and technical staff of a permanent mission, who resided on premises on a long-term basis, and that of a diplomatic courier, whose accommodation was temporary and short-term. It was further maintained that the provisions on the inviolability of temporary accommodation were hardly enforceable, in view of the established practice of freely choosing the hotel where the courier would stay.⁵⁷

38. Different views were also expressed on draft *article 22 (Inviolability of the means of transport)*. Several representatives expressed their general agreement with the text. One representative, while accepting paragraph 2 in principle, suggested the deletion of the reference to inspection and search, as in paragraph 3 of draft *article 21*. Some representatives suggested the deletion of draft *article 22*.⁵⁸

39. Draft *article 23 (Immunity from jurisdiction)* was also the subject of specific comments. Some representatives regarded it as an acceptable basis for the draft, while others questioned the need for it altogether. There were also comments relating to various paragraphs. One representative, while accepting the principle of absolute immunity from the criminal jurisdiction of the receiving or the transit State, could not see how the giving of evidence would ordinarily disturb the discharge of the courier's main function. If the exemption from the obligation to give evidence was to be retained in paragraph 4 of the draft *article*, it should be qualified by the addition of the phrase "concerning matters involving the exercise of his official function." Another representative questioned the usefulness of paragraph 5 of the draft *article* and suggested that measures of execution should not infringe the inviolability of the means of transport.⁵⁹

⁵¹ *Ibid.*, 45th meeting, para 7 (Kenya).

⁵² See "Topical summary . . ." (A/CN.4/L.369), paras. 333-334, 338 and 341-342; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 37th meeting*, para. 32 (Tunisia), 39th meeting, para. 81 (Jamaica), 45th meeting, para. 22 (Morocco), 47th meeting, para. 56 (Poland), 48th meeting, para. 27 (India).

⁵³ See "Topical summary . . ." (A/CN.4/L.369), paras. 336-337; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 48th meeting*, para. 27 (India).

⁵⁴ See "Topical summary . . ." (A/CN.4/L.369) para. 342; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 45th meeting*, para. 22 (Morocco).

⁵⁵ See "Topical summary . . ." (A/CN.4/L.369), para. 343; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 47th meeting*, para. 40 (Bulgaria).

⁵⁶ *Ibid.*, 39th meeting, para. 43 (Nigeria).

⁵⁷ See "Topical summary . . ." (A/CN.4/L.369), paras. 345-346; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 39th meeting*, para. 44 (Nigeria) and para. 82 (Jamaica), 41st meeting, para. 34 (France), 47th meeting, para. 40 (Bulgaria).

⁵⁸ See "Topical summary . . ." (A/CN.4/L.369), paras. 347-348; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 39th meeting*, para. 44 (Nigeria), and para. 83 (Jamaica), 43rd meeting, para. 70 (United Kingdom), 47th meeting, para. 40 (Bulgaria).

⁵⁹ See "Topical summary . . ." (A/CN.4/L.369), paras. 349-350; and *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 39th meeting*, para. 84 (Jamaica), 43rd meeting, para. 70 (United Kingdom), 47th meeting, para. 40 (Bulgaria) and para. 56 (Poland).

III. Brief analytical survey of State practice relevant to the draft articles submitted to the Commission

40. On the suggestion of the Special Rapporteur, the Commission requested the Secretariat *inter alia* to continue updating the collection of treaties relating to the topic and other relevant materials in the field of diplomatic and consular relations in general, and of official communications exercised through couriers and bags in particular. The Secretariat was also requested to update the study on State practice in the light of information and materials that might be provided by Governments or obtained through research.⁶⁰ The present survey is based on the study undertaken by the Codification Division. It is confined to the draft articles provisionally adopted by the Commission and those that have been submitted by the Special Rapporteur.

41. The main objective of this analytical survey is to ascertain to what extent the solutions suggested by the Special Rapporteur in his reports or draft articles and the commentaries thereto are supported by State practice or are at variance with or not covered by that practice. This method has been applied by the Special Rapporteur in his preceding reports. It has provided guidance in the study of the topic and the preparation of draft articles. This brief analytical survey, therefore, should be considered together with the one already used in the four previous reports submitted by the Special Rapporteur.

A. State practice relating to the general provisions of the draft (arts. 1-6)

1. SCOPE OF THE DRAFT ARTICLES

42. Some Governments, in their communications to the United Nations Secretariat, have alluded to the use of the diplomatic bag by entities other than States. Some among them have also referred to the possibility of extending the scope of the draft articles to those entities. The Mexican Ministry of Foreign Affairs has stated in a memorandum (para. 6)⁶¹ that:

Only States and international organizations may send and receive diplomatic bags. In Mexico, apart from the Ministry of Foreign Affairs, only missions accredited to the Government of Mexico may send and receive diplomatic bags.

Article III, section 10, of the *United Nations (Privileges and Immunities) Act 1948* of Pakistan⁶² provides:

The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

43. For its part, in its communication to the United Nations Secretariat,⁶³ the Government of Cyprus expresses

⁶⁰ *Yearbook* . . . 1983, vol. II (Part Two), p. 53, para. 187.

⁶¹ See the communication of the Government of Mexico, sect. 22 (p. 68 above, document A/CN.4/379 and Add.1).

⁶² See the communication of the Government of Pakistan (*ibid.*, p. 69).

⁶³ *Ibid.*, p. 69.

the view that the topic on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier is "broad enough to include communications of international organizations and of recognized liberation movements." Likewise, the Government of Bulgaria is of the view that:

. . . The scope of the draft articles should also include provisions regulating the status of couriers and bags of international organizations, as well as those of national liberation movements recognized by the United Nations and regional international organizations. Thus the future document will become a really universal set of rules concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. . . .⁶⁴

44. These comments regarding the broadening of the scope of the draft articles to cover international organizations and national liberation movements are in conformity with the possibilities contemplated in article 2 and the commentary thereto as provisionally adopted by the Commission.

2. THE PRINCIPLE OF RECIPROCITY (ART. 6)

45. Among the materials here surveyed, the only one relevant to the application of the principle of reciprocity in the treatment given to the diplomatic courier or the diplomatic bag is a comment from the Government of Indonesia transmitted to the United Nations Secretariat.⁶⁵ The Indonesian Government points out that Indonesia treats the diplomatic courier and the diplomatic bag in accordance with the provisions of the 1961 Vienna Convention and the 1963 Vienna Convention, and in conformity with customary international law, taking into account the principle of reciprocity. The comment is not explicit enough to determine whether the extent of the application of the principle of reciprocity makes it compatible with the solutions proposed in article 6 provisionally adopted by the Commission.

B. State practice relating to the status of the diplomatic courier

1. DOCUMENTATION AND NATIONALITY OF THE DIPLOMATIC COURIER

46. The materials here surveyed tend generally to reflect the relevant provisions of the 1961 and 1963 Vienna Conventions and they consequently coincide with the solutions proposed by the Special Rapporteur in his reports and draft articles, some of which have been provisionally adopted by the Commission, concerning questions such as the documentation and nationality of the diplomatic courier, his

⁶⁴ See the communication of the Government of Bulgaria, para. 2 (*ibid.*, p. 61).

⁶⁵ See the communication of the Government of Indonesia of 28 February 1983, para. 1 (*Yearbook* . . . 1983, vol. II (Part One), p. 59, document A/CN.4/372 and Add.1 and 2).

inviolability and immunity from jurisdiction as well as the facilities granted to him.

47. Some legislative sources and bilateral treaties provide information on the required documentation and on the nationality of the diplomatic courier. In this connection, the legislation of Belize⁶⁶ and the treaty practice of Sweden and Romania⁶⁷ contain provisions to the effect that the courier shall be provided with an official document indicating his status and the number of packages constituting the bag, and that, except with the consent of the receiving State, he shall be neither a national of the receiving State nor, unless he is a national of the sending State, a permanent resident of the receiving State.

2. FACILITIES, PRIVILEGES AND IMMUNITIES ACCORDED TO THE DIPLOMATIC COURIER

48. The most recent information received from the Government of Pakistan confirms that, in the performance of his functions, the diplomatic courier is protected by the receiving State, enjoys personal inviolability and cannot be liable to any form of detention.⁶⁸

49. The treaty practice of Bulgaria, Czechoslovakia, Mongolia and the German Democratic Republic equates the status of a diplomatic courier with that of persons carrying consular bags.⁶⁹

50. With regard to *entry into the territory* of the receiving State, contemplated in draft article 16, the Government of Indonesia points out that it "grants a 'multiple entry visa', which is valid for six months, to the appointed diplomatic courier."⁷⁰ For its part, the Government of the Soviet Union, in a communication of 28 February 1983 to the United Nations Secretariat,⁷¹ points out that, under article 12 of the USSR State Frontier Act of 24 November 1982:

Permission to cross the USSR State frontier shall be granted by border guards to persons holding valid documents authorizing them to enter or leave the USSR.

Means of transport, goods and other property shall be permitted to cross the Soviet frontier in accordance with the legislation of the Soviet Union and international treaties to which it is a party.

In accordance with international treaties to which the Soviet Union is a party, simplified procedures may be established for authorizing persons,

means of transport, goods and other property to cross the Soviet frontier.

51. The practice of Indonesia and the USSR cited above appears to be compatible with draft article 16 proposed by the Special Rapporteur.

52. With reference to *the inviolability of the temporary accommodation* of the diplomatic courier as well as of his *means of transport*, a communication from the Government of Bulgaria expresses some reservations regarding paragraph 3 of article 21 and paragraph 2 of article 22 proposed by the Special Rapporteur. Those paragraphs authorize inspection or search of the temporary accommodation or individual means of transport in very special circumstances related to the import of prohibited articles or items under quarantine. The Government of Bulgaria is of the view that those provisions:

... represent a considerable deviation from the principle of inviolability of the temporary accommodation and individual means of transport of the diplomatic courier, which is a fundamental prerequisite for the unrestricted performance of the functions of the courier. The draft should provide for the strict application of this principle and allow no digressions from it. If it were nevertheless considered appropriate to introduce some limitations to the principle of inviolability with a view to avoiding possible abuses, such limitations should be minimal. They should be applied under strictly specified conditions not going beyond those contained in the draft articles, and above all in no case should an infringement of the personal inviolability of the diplomatic courier and the inviolability of the diplomatic bag be allowed.⁷²

3. DIPLOMATIC COURIER *AD HOC*

53. Some States have included in their communications references to couriers *ad hoc*. In all cases, the diplomatic courier *ad hoc* has been equated with an ordinary diplomatic courier, with the exception that the immunities and privileges of the courier *ad hoc* cease to apply when the bag has been delivered to the consignee. Thus paragraph 6 of section 35, entitled "Freedom of communications" of the second schedule of the 1972 Consular Relations Ordinance No. 9 of Belize⁷³ reproduces paragraph 6 of the article 35 of the 1963 Vienna Convention; and paragraph 6 of article 5 of the first schedule of the 1972 Act on diplomatic and consular privileges of Pakistan⁷⁴ reproduces paragraph 6 of article 27 of the 1961 Vienna Convention. Furthermore, a communication of the Government of Hungary transmitted to the United Nations Secretariat states that the provisions applicable to a diplomatic courier apply likewise to a diplomatic courier *ad hoc* "except that the courier's personal immunities shall cease upon delivery of the diplomatic bag to the consignee."⁷⁵ The equation between a diplomatic courier *ad hoc* and an ordinary diplomatic courier appears to be in line with article 3, paragraph 1 (1), and the commentary thereto, as provisionally adopted by the Commission, to the effect that a courier *ad hoc* is a courier "for a special occasion".

⁷² Communication of the Government of Bulgaria, para. 6 (see p. 61 above, document A/CN.4/379 and Add.1).

⁷³ Communication of the Government of Belize (*ibid.*, p. 60).

⁷⁴ Communication of the Government of Pakistan (*ibid.*, p. 69).

⁷⁵ Communication of the Government of Hungary, para. 8 (*ibid.*, p. 64).

⁶⁶ Sect. 35 (Freedom of communications), para 5, of the second schedule of Ordinance No. 9 of 1972 (see p. 60 above, document A/CN.4/379 and Add.1).

⁶⁷ Art. 30, para. 5, of the Consular Convention between Sweden and Romania of 12 February 1974 (to appear in United Nations, *Treaty Series*, No. 20537).

⁶⁸ Art. 5, sect. 5, of the first schedule of the 1972 Act on diplomatic and consular privileges (see p. 69 above, document A/CN.4/379 and Add.1).

⁶⁹ Art. 14, para. 3, of the Consular Convention between Czechoslovakia and Bulgaria of 16 March 1972 (United Nations, *Treaty Series*, vol. 957, p. 3); art. 14, para. 3, of the Consular Convention between Mongolia and the German Democratic Republic of 12 October 1973 (*ibid.*, vol. 949, p. 3).

⁷⁰ Communication from the Government of Indonesia, para. 2 (see footnote 65 above).

⁷¹ See *Yearbook ... 1983*, vol. II (Part One), p. 61, document A/CN.4/372 and Add.1 and 2.

C. State practice relating to the status of the diplomatic bag

1. INDICATION OF STATUS OF THE DIPLOMATIC BAG (ART. 31)

54. The State practice here surveyed upholds the proposals of the Special Rapporteur in draft article 31 regarding the various elements constituting an indication of the status of the diplomatic bag.

55. In a memorandum of 9 May 1932 on diplomatic and consular privileges and immunities,⁷⁶ the Ministry for Foreign Affairs of Finland pointed out:

...

(3) Packages, bags, bales, valises, trunks and other similar consignments, addressed to the chief of a legation or to a legation, which the foreign diplomatic couriers bring with them, shall be admitted free of duty and without inspection, provided they are provided with proper official seals and included in the courier's list.

(4) Parcels which diplomatic couriers bring with them to a consulate of a foreign power in Finland shall be free of inspection and duty, provided they are provided with proper official seals and the courier's list states that they contain documents and letters.

56. More recent practice, whether conventional or otherwise, also makes constant mention of seals and locks as visible external marks of the diplomatic or consular bag. Thus article 2 of the agreement of 27 September 1946 between the United Kingdom and Mexico⁷⁷ provides:

... The bags shall bear the appropriate seals, and may be locked if desired, the keys resting in the custody of the respective Foreign Offices and Embassies.

The Convention between the United States of America and the United Kingdom relating to consular officers of 6 June 1951⁷⁸ provides in article 10, paragraph 3:

... Sealed consular pouches, bags and other containers shall be inviolable when they contain nothing but official communications and documents and are so certified by a responsible officer of the sending State.

57. The recent practice of Indonesia⁷⁹ and the treaty practice of Mexico⁸⁰ also insist on the need for visible

⁷⁶ Text reproduced in A. H. Feller and M. O. Hudson, ed., *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington (D.C.), Carnegie Endowment for International Peace, 1933), vol. I, p. 510.

⁷⁷ Exchange of notes constituting an agreement for the transmission of diplomatic correspondence between London and Mexico City. See United Nations, *Treaty Series*, vol. 91, p. 161, and p. 66 above, document A/CN.4/379 and Add.1.

⁷⁸ United Nations, *Treaty Series*, vol. 165, p. 121.

⁷⁹ The circular notes of 11 April 1978 and 2 October 1980 of the Department of Foreign Affairs of the Republic of Indonesia provide that "the diplomatic bag which has been sealed is exempted from inspection". See the communication from the Indonesian Government, paragraph 3 (see footnote 65 above).

⁸⁰ See e.g. art. III of the agreement of 15 October 1921 between Mexico and Japan: "Each bag . . . must be fitted with a lock which closes properly."; art. 7 of the agreement of 15 August 1922 between Mexico and France: "The bags may be made of either leather or cloth. They shall be fitted with locks and may also be sealed with wax stamped with an official seal."; art. VI of the agreement between Mexico and Uruguay (exchange of

external marks on the bag: seals and, frequently, locks and keys. The legislation of Pakistan⁸¹ and Belize⁸² also refers specifically to the "visible external marks" of the diplomatic bag. The Islamic Republic of Iran, in a communication to the United Nations Secretariat indicating its practice with regard to the diplomatic bag, describes in detail the "visible external marks" it adopts for the easy identification of its diplomatic bags:

... Cotton and twine are used to knot the tops of the bags in the form of bundles, and the tips of the twine are passed through holes at the top of the bags, as well as a stamped and sealed identification ticket. The identification ticket, which has a specific shape and specific dimensions, bears the required information concerning the sender and the receiver.⁸³

58. A distinction should be drawn between the sealing of the bag itself and the sealing of its contents. The internal regulations of some countries provide in this connection that the correspondence within the bag be unsealed.⁸⁴ On the other hand, in connection with "classified" or "confidential" correspondence, a circular of the Mexican Foreign Service recommends that such communications:

should be marked accordingly and that they should always be sent in two envelopes, with the actual designation appearing only on the inner envelope, which must be closed securely and sealed with wax even when the correspondence in question is being sent by diplomatic bag.⁸⁵

59. The materials here surveyed confirm the need for an official document as an indication of the status of the diplomatic bag. This document may be the same as the one indicating the status of the courier, or a special one in the case of an unaccompanied bag. In both cases, however, it should contain an indication of the number of packages constituting the bag.

60. A memorandum of 7 April 1931 on exemptions from taxation and customs duties addressed by the Ministry of Foreign Affairs of the Grand Duchy of Luxembourg to the United States Embassy at Brussels⁸⁶ also refers to an official document mentioning the packages constituting the diplomatic bag. The relevant part of the memorandum reads:

Persons who make themselves known as diplomatic agents, carriers or bearers of dispatches, obtain the same exemption for the packages and other parcels bearing the seal of a legation abroad and the address of the Minister of Foreign Affairs, of a legation accredited in the Grand Duchy or of another Government, provided that these packages are mentioned in the passport of the person who presents them.

notes of 18 August and 20 September 1955): "the bags shall bear locks, padlocks or security mechanisms . . ." See the communication from the Government of Mexico, sections 4, 7 and 13 respectively (pp. 65 and 66 above, document A/CN.4/379 and Add.1).

⁸¹ See art. 5, para. 4, of the first schedule of the 1972 Act on diplomatic and consular privileges (*ibid.*, p. 69).

⁸² See section 35 (Freedom of communications), para. 4, of the second schedule of Ordinance No. 9 of 1972 (*ibid.*, p. 60).

⁸³ Communication of the Islamic Republic of Iran, paragraph 2 (*ibid.*, p. 64).

⁸⁴ See circulars Nos. A/A-85 (para. 5) and 149 (para 1(a) and (b) of the Colombian Ministry of Foreign Affairs (*ibid.*, p. 62).

⁸⁵ See the communication of the Government of Mexico, section 18 (*ibid.*, p. 67).

⁸⁶ Reproduced in Feller and Hudson, ed., *op. cit.*, vol. II, p. 791.

61. Paragraphs 5 and 7 of article 5 of the first schedule of the Pakistan Diplomatic Consular Privileges Act, 1972,⁸⁷ reproduce paragraphs 5 and 7 of article 27 of the 1961 Vienna Convention, both paragraphs referring to the official documents indicating the status of the diplomatic bag. Paragraphs 5 and 7 of Section 35 (Freedom of communications) of the second schedule of the Belize Consular Relations Ordinance No. 9 of the 1972⁸⁸ reproduce paragraphs 5 and 7 of article 35 of the 1963 Vienna Convention.

62. The Government of Indonesia, in a communication to the United Nations Secretariat,⁸⁹ points out that:

An official diplomatic courier of the Republic of Indonesia is an official bearing a diplomatic passport who is also in possession of identification indicating that the said official is a diplomatic courier and of a document describing the content of the materials being carried.

A diplomatic bag which is sent by the Indonesian Government is marked with the signs stipulated in the 1961 Vienna Convention.

63. It should be pointed out that many countries regulate in a precise manner the material, dimensions and maximum weight of the diplomatic bag, although this aspect appears to be left to the internal regulations of the sending State or to bilateral treaty regulations between sending and receiving States. For instance, the Mexican Ministry of Foreign Affairs states in a memorandum (para. 7):⁹⁰

The container, in other words the bag itself, may be made of a variety of materials, such as leather, canvas or cardboard.

In its treaty practice with different countries, Mexico has adopted different solutions regarding the material, dimensions and weight of the bag.⁹¹ The same may be said of Brazil.⁹² The Islamic Republic of Iran, in a communication to the United Nations Secretariat,⁹³ states:

⁸⁷ See p. 69 above, document A/CN.4/379 and Add.1.

⁸⁸ *Ibid.*, p. 60.

⁸⁹ Communication of the Government of Indonesia, paragraphs 8-9 (see footnote 65 above).

⁹⁰ Communication of the Government of Mexico, section 22 (see p. 68 above, document A/CN.4/379 and Add.1).

⁹¹ See e.g. art. 4 of the agreement of 18 February 1936 between Mexico and Poland (*idem*, sect. 9, p. 65 above):

"4. Pending agreement on other limitations for the diplomatic bags, the bag shall not exceed 20 kilograms in weight and shall measure 50 centimetres in length by 30 centimetres in height or shall have dimensions equivalent to the maximum."

Art. 4 of the agreement of 27 September 1946 between the United Kingdom and Mexico (*idem*, sect. 10, p. 66 above):

"4. In accordance with the requirements of the international postal regulations, the weight of each bag covered by this agreement shall not exceed 30 kilograms (66 lbs) and the dimensions of each bag shall not exceed 124 centimetres (49 inches) by 66 centimetres (26 inches)."

Art. IV of the agreement between Mexico and Brazil (exchange of notes of 24 February 1951 and 21 May 1952) (*idem*, sect. 12, p. 66 above):

"IV. The diplomatic bags of both countries used in air transport shall be made of canvas or such other material as experience has proved to be appropriate, and shall be a maximum of 60 centimetres long, 40 centimetres wide and, when full, 20 centimetres thick."

See also arts. III and V of the agreement of 15 October 1921 between Mexico and Japan (*idem*, sect. 4, p. 62 above); art. 6 of the agreement of 15 August 1922 between Mexico and France (*idem*, sect. 7, p. 65 above); art. IV of the agreement between Mexico and Uruguay (exchange of notes of 18 August and 20 September 1955) (*idem*, sect. 13, p. 66 above).

⁹² The agreement of 30 January 1946 between Brazil and Venezuela

In accordance with practice, the Ministry of Foreign Affairs of the Islamic Republic of Iran makes use of bags measuring 130 × 70 centimetres or 100 × 50 centimetres or 90 × 50 centimetres or 65 × 45 centimetres. The range of capacity of these bags is from 3 to 70 kilograms, but the conventional weight is about 30 kilograms.

2. CONTENT OF THE DIPLOMATIC BAG (ART. 32)

64. With reference to the contents of the diplomatic or consular bag, the practice of States surveyed tends generally to confirm, the principles laid down in article 27 of the 1961 Vienna Convention and article 35 of the 1963 Vienna Convention as well as in article 32, paragraph 1, proposed by the Special Rapporteur, to the effect that the diplomatic bag may contain only official correspondence and documents or articles intended exclusively for official use. Along these lines, for instance, are Hungary's communication to the Secretariat,⁹⁴ circular notes Nos. A/A-85 and 149 of the Ministry of Foreign Affairs of Colombia,⁹⁵ and circular No. 111-1-22 of 4 July 1961 of the Mexican Foreign Service.⁹⁶

65. Worth noting are one or two aspects regarding the contents of the diplomatic bag arising from the materials surveyed. For instance, according to Mexican administrative practice, there is no international definition of what should be considered as an object or article for official use.⁹⁷ In this connection, circular No. 111-1-22 of 4 July 1961 of the Mexican Foreign Service⁹⁸ states:

2. Not all articles intended for official use, in one way or another, by the diplomatic mission are to be regarded as articles for official use but, rather, only those whose nature warrants the granting of the special protection provided by the bag, as in the case of diplomatic papers.

3. Accordingly, articles that are obtainable commercially (such as liquor and office equipment) are not suitable articles for transport by diplomatic bag, even though they are intended for official use by a diplomatic mission.

66. Another aspect regarding the contents of the bag concerns the question whether, in special circumstances, the bag may contain correspondence other than official. The French Minister of Foreign Affairs, in answer to an inquiry made by a Member of Parliament whether it was not

provides in para. 2 (b) that the exchange of official correspondence shall be effected "in pouches of canvas or other lighter material, with a maximum weight, including the postal receptacle and the safety lock, of 5 (five) kilograms, dimensions not exceeding 0.60 by 0.40 (sixty centimetres by 40 centimetres) with a maximum thickness of twenty centimetres." (United Nations, *Treaty Series*, vol. 65, p. 112.)

⁹³ Communication of the Islamic Republic of Iran, paragraph 2 (see p. 64 above, document A/CN.4/379 and Add.1).

⁹⁴ Paragraph 5 of the communication of the Government of Hungary provides that "the packages constituting the diplomatic bag . . . may contain only diplomatic documents or articles intended for official use." (*Ibid.*, p. 64.)

⁹⁵ Circular No. A/A-85 (para. 5) provides: "The bag service is intended solely for the carriage of official correspondence." Circular No. 149 (paras. 2-3) provides: "The inclusion of valuables, drugs or any other type of article is strictly prohibited. . . . It must be borne in mind that the diplomatic bag is strictly for official use." (*Ibid.*, p. 62.)

⁹⁶ Paragraph 1 of the circular provides: "The diplomatic bag may be used only to transport diplomatic papers and articles for official use." See communication of the Government of Mexico section 20 (*ibid.*, p. 68).

⁹⁷ *Idem*, sect. 22, para. 10 (*ibid.*, p. 69).

⁹⁸ *Idem.*, sect. 20 (p. 68 above).

possible for the diplomatic bag, in exceptional circumstances, to carry the correspondence of French nationals abroad, gave the following legal opinion:⁹⁹

Article 27 of the Vienna Convention of 18 April 1961, which governs diplomatic relations between States, determines the precise limits to the use of the diplomatic bag. Thus it provides that "the packages constituting the diplomatic bag . . . may contain only diplomatic documents or articles intended for official use". It is extremely important for our country, which expects from its partners strict compliance with this rule, not to depart from it under any circumstances. Furthermore, speaking now from a practical point of view, receiving, forwarding and delivering mail for our nationals in countries with postal difficulties would pose very difficult problems for this ministerial department.

In spite of the foregoing, this legal opinion seems to give an affirmative answer to the question, if very special and specific circumstances obtain. Thus it goes on to say:

*Nevertheless it is incumbent upon the heads of diplomatic or consular missions to determine on an ad hoc basis, and respecting the above-mentioned Vienna Convention, whether the transport of such and such non-administrative mail may be envisaged simultaneously with the transport of the bag itself: this is often the case with documents whose loss would cause the sender considerable harm (notarial certificates), or again with products whose dispatch is urgently needed (medicines).**

67. Circular C-15-140 of the Mexican Foreign Service dating from 1938, which has been communicated by the Government of Mexico as material still to be considered relevant, also refers to the inclusion of private correspondence in the bag.¹⁰⁰ It states:

Although diplomatic bags should, strictly speaking, be used only for transporting official correspondence whose nature warrants such measures, they are often used for sending correspondence and even articles to individuals. The Ministry of Foreign Affairs does not wish to take drastic measures prohibiting such use of the bag and reserving it for legitimate purposes. However, pending preparation of the relevant rules, which are currently under consideration, it is recommended that when consignments are sent they should be accompanied by a consignment sheet containing an accurate description of the contents of the consignment and that the sheet should be included in the shipment in such a way that it may be inspected easily by the Ministry's Dispatch Office.

68. In connection with the dispatch of private correspondence in a diplomatic bag, circular No. A/A-85 of the Colombian Ministry of Foreign Affairs¹⁰¹ provides:

As an exceptional measure and in very special circumstances, the head of mission may give prior express authorization for the dispatch of officials' personal correspondence, in which event the envelopes must be unsealed, must not weigh more than 25 grams and must clearly indicate the address and telephone number of the addressee, who shall collect them in person from the offices of the Ministry.

The Ministry shall return all correspondence not satisfying the above requirements.

69. The materials concerning State practice here surveyed also confirm the principle that the sending State

must take appropriate measures to prevent the dispatch through its diplomatic bag of unauthorized articles and prosecute and punish any person under its jurisdiction responsible for the misuse of the diplomatic bag, as contemplated in paragraph 2 of article 32 proposed by the Special Rapporteur. Thus, for instance, the organic law of the Mexican Foreign Service forbids the illicit use of diplomatic bags by diplomatic officials, considering such behaviour as grounds for suspension from service for up to 30 days.¹⁰² Similarly, administrative circular No. 149 of the Colombian Ministry of Foreign Affairs provides that the inclusion in the diplomatic bag of valuables, drugs or any other type of articles is strictly prohibited and that any official contravening that provision will be punished in accordance with the disciplinary provisions in force. Furthermore, any irregularity in the use of the bag—use for other than official purposes—must be reported to the competent authorities.¹⁰³

3. 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) AND STATUS OF THE DIPLOMATIC BAG DISPATCHED BY POSTAL SERVICES OR OTHER MEANS (ART. 34)

70. The considerations contained in the Special Rapporteur's reports as well as in draft articles 33 and 34 regarding the requirements to be met in respect of the diplomatic bag and the uniform protection it must enjoy, whether delivered by a professional or *ad hoc* courier, the captain of a commercial aircraft, the master of a merchant ship or a member of the crew, or dispatched by postal services or other means, are confirmed by some of the materials recently submitted by Governments to the United Nations Secretariat.

71. In this connection, paragraph 7 of section 35 (Freedom of communications) of the second schedule of Consular Relations Ordinance No. 9 of Belize of 1972¹⁰⁴ reproduces paragraph 7 of article 35 of the 1963 Vienna Convention, and paragraph 7 of article 5 of the first schedule of the 1972 Diplomatic and Consular Privileges Act of Pakistan¹⁰⁵ reproduces paragraph 6 of article 27 of the 1961 Vienna Convention. In accordance with those provisions, a diplomatic or consular bag may be entrusted to the master of a ship or the captain of a commercial aircraft scheduled to land 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 or consular courier. As to the status of the bag, by arrangement with the appropriate local authorities, the diplomatic mission or consular post may send one of its members to take possession of the bag

⁹⁹ *Annuaire français de droit international*, 1980 (Paris), vol. XXVI, p. 961.

¹⁰⁰ See the communication of the Government of Mexico, section 19 (p. 68 above, document A/CN.4/379 and Add.1).

¹⁰¹ See the communication of the Government of Colombia (*ibid.*, p. 62).

¹⁰² Article 48 (c) and article 59 (b) of the organic law; see the communication of the Government of Mexico, section 14 (*ibid.*, p. 67).

¹⁰³ Paragraphs 2 and 4 of the circular; see the communication of the Government of Colombia (*ibid.*, p. 62).

¹⁰⁴ See the communication of the Government of Belize (*ibid.*, p. 60).

¹⁰⁵ See the communication of the Government of Pakistan (*ibid.*, p. 69).

directly and freely from the master of the ship or the captain of the aircraft.

72. With regard to the various ways in which a diplomatic or consular bag may be delivered and the uniformity of the status of the bag whatever the means of delivery, a provision contained in a memorandum of the Mexican Ministry of Foreign Affairs is worth noting. It is therein stated (para. 4)¹⁰⁶ that at present the diplomatic bag is normally transported as air freight and dealt with as such. It is also brought into the country by diplomatic couriers, bearing diplomatic passports, or by the captains of aircraft. However, there are no restrictions whatsoever on the way in which the bag is transported, which may be a delivery service, by the postal service or by a carrier (employing ships, buses or aircraft), etc. With reference to the transportation of the diplomatic bag by air, the Government of Colombia has pointed out¹⁰⁷ that "a contract between the Ministry of Foreign Affairs and the airline *Avianca* provides for the transport of couriers and bags on the routes served by that airline".

4. INVIOABILITY OF THE DIPLOMATIC BAG (ART. 36)

73. The present survey of State practice tends generally to confirm the principle that the diplomatic bag may not be opened or detained and that it shall be exempt from customs and other inspection, as proposed in articles 36 (para. 1) and 37 submitted by the Special Rapporteur. In this connection, mention could be made of, for instance, Pakistani legislation,¹⁰⁸ Mexican administrative instructions,¹⁰⁹ Colombian circulars,¹¹⁰ Malawian practice,¹¹¹ Hungarian practice,¹¹² Indonesian practice,¹¹³ and Syrian practice.¹¹⁴

¹⁰⁶ See the communication of the Government of Mexico, section 22 (*ibid.*, p. 68).

¹⁰⁷ See the communication of the Government of Colombia of 18 February 1983, paragraph 2 (*Yearbook* . . . 1983, vol. II (Part One), p. 58, document A/CN.4/372 and Add.1 and 2).

¹⁰⁸ Article 5, paragraph 3, of the first schedule of the Diplomatic and Consular Privileges Act, 1972, provides: "The diplomatic bag shall not be opened or detained." (See the communication of the Government of Pakistan, p. 69 above, document A/CN.4/379 and Add.1.)

¹⁰⁹ The memorandum of 10 September 1981 of the Legal Counsel of the Mexican Ministry of Foreign Affairs states that "in no circumstances may or should a bag or package bearing an adequate diplomatic identification be opened." (See the communication of the Government of Mexico, section 21, p. 68 above.) A memorandum of 19 January 1982 of the Ministry of Foreign Affairs (para. 8) states: "The diplomatic bag must not be opened, detained or subjected to any type of inspection." (*Idem*, sect. 22, p. 68 above.)

¹¹⁰ The provisions of article 27 of the 1961 Vienna Convention and those of article 35 of the 1963 Vienna Convention were incorporated in Colombian legislation by Act No. 6 of 1972 and Act No. 17 of 1971 respectively. (See the communication of the Government of Colombia, p. 61 above.)

¹¹¹ In its communication of 18 January 1983, the Government of Malawi states that it "accords the full treatment provided for in article 27, paragraphs 3, 5 and 7, of the 1961 Vienna Convention to all missions accredited to Malawi. Thus diplomatic bags, whether accompanied or unaccompanied by diplomatic courier, are not opened or detained upon their entry into Malawi." (*Yearbook* . . . 1983, vol. II (Part One), p. 60, document A/CN.4/372 and Add.1 and 2.)

¹¹² The Government of Hungary indicates in its communication (paras. 4 and 7) that "the Hungarian customs and revenue organs similarly act in accordance with article 27 of the 1961 Vienna Convention, which was promulgated in Hungary by Law-Decree No. 21 of 1965", and that, con-

74. It is to be noted, however, that the Government of the United Arab Emirates states in its communication¹¹⁵ that no legislation has as yet been enacted in the matter and that no judicial decisions have been rendered by the national courts. In practice, the Ministry of Foreign Affairs of the United Arab Emirates, in accordance with articles 27 and 41 of the 1961 Vienna Convention, in a case where there is suspicion as to the contents of the diplomatic bag, offers the diplomatic mission concerned one of two options: to have the diplomatic bag opened by the proper authorities and in the presence of a member of the mission and a member of the Ministry of Foreign Affairs of the United Arab Emirates, or to have the diplomatic bag returned to the place from which it was originally sent.

75. Faced with a case in which the receiving State, invoking reasons of strong suspicion of violation of currency control measures, ordered a diplomatic bag to be opened, the Government of Sweden strongly protested in the following terms:

While understanding the problems facing the . . . authorities in the present situation, the Embassy must express its deep concern at the measures stipulated in the Ministry's communication, which might be taken to impugn the integrity not only of this Embassy but also of the Government which it has the honour to represent.

In particular, the Embassy invites the attention of the Ministry to the gravity of the measures relating to official correspondence and diplomatic bags, which conflicts with the customary law as well as with article 27 of the Vienna Convention on Diplomatic Relations to which the Republic of . . . is also a party. International law governing diplomatic relations prohibits any interference with official correspondence and diplomatic bags, whether sent to or from a Foreign Ministry or between its missions. Consequently the Embassy, on the instructions of its Government, has the honour to inform the Ministry that it is unable to acquiesce in the opening and inspecting of official correspondence and diplomatic bags.¹¹⁶

76. The administrative regulations of some countries, while fully endorsing the concept that a diplomatic bag may not be opened or detained, provide for a special régime for the consular bag, in accordance with article 35 of the 1963 Vienna Convention. Thus the Mexican Ministry of Foreign Affairs expressly states in a note on the subject (paras. 11 and 13)¹¹⁷ that, in contrast to the diplomatic bag, the consular bag "has fewer privileges", and that:

sequently, "the diplomatic bag must not be opened or detained". (See p. 64 above, document A/CN.4/379 and Add.1.)

¹¹³ The circular notes of 11 April 1978 and 2 October 1980 of the Department of Foreign Affairs of the Republic of Indonesia stipulate that "the diplomatic bag which has been sealed is exempted from inspection and can be picked up from the airport platform on arrival". (See the communication of the Government of Indonesia, paragraph 3 (see footnote 65 above).)

¹¹⁴ The communication of the Government of the Syrian Arab Republic states:

"The Syrian laws and regulations relevant to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier are consistent with the 1961 Vienna Convention. That is to say, the Syrian airport authorities permit the diplomatic courier to hand over the diplomatic bags directly to the representative of the diplomatic mission, who has direct access to the tarmac. Moreover, the unaccompanied diplomatic bag is delivered to the representative of the diplomatic mission at the customs desk."

(See p. 69 above, document A/CN.4/379 and Add.1.)

¹¹⁵ *Ibid.*, p. 70.

¹¹⁶ See the communication of the Government of Sweden of 24 January 1983 (*Yearbook* . . . 1983, vol. II (Part One), p. 61, document A/CN.4/372 and Add.1 and 2).

The chief restriction to which the consular bag is subject is that, in cases where it is thought to contain articles other than correspondence, it may be opened in the presence of an authorized representative of the sending State, who may refuse to permit the bag to be opened, in which case it is returned to its place of origin. Should a situation arise in which it is considered necessary to request that a consular bag be opened, it is desirable to inform the Ministry of Foreign Affairs and the General Protocol Office, in addition to the foreign mission concerned, in order to settle any possible dispute.

Similarly, article 3 of the 1974 Consular Convention between Sweden and Romania,¹¹⁸ reproduces paragraph 3 of article 35 of the 1963 Vienna Convention regarding the possibility, in case of serious reasons, of requesting the opening of the bag or its return to its place of origin.

77. On the other hand, the treaty practice of some countries appears to equate the treatment given to the diplomatic bag *stricto sensu* and that given to the consular bag. Thus, for instance, article 14, paragraph 2, of the 1973 Consular Convention between Mongolia and the German Democratic Republic¹¹⁹ provides that:

2. Official correspondence of the consular post, and the consular bag, bearing visible marks of their official character shall be inviolable and shall be neither inspected nor detained by the authorities of the receiving State, irrespective of the means of communication employed.

Likewise, article 14, paragraph 2, of the 1972 Consular Convention between Czechoslovakia and Bulgaria¹²⁰ provides that:

2. The official correspondence of a consular post, regardless of the means of communication used, and sealed bags bearing visible external marks of their official character shall be inviolable, shall not be subject to inspection and shall not be detained by the authorities of the receiving State.

78. Special mention must be made of the question of the electronic screening of the diplomatic bag, without opening it. In the view of some writers and even according to the practice of some States, this procedure would not infringe the inviolability of the diplomatic bag laid down by the 1961 Vienna Convention. For example, the Austrian Ministry of Foreign Affairs, in a circular letter addressed to the diplomatic missions accredited to Austria, expressed the view that, since the inspection might not consist in manual search, electronic screening would be admissible under the 1961 Vienna Convention.¹²¹ In its communication of 6

January 1984,¹²² the Government of Austria states:

The inspection pertaining to the treatment of the diplomatic courier and the diplomatic bag transmitted with Notes 843-A/82 of 19 February 1982 is still valid. However, the procedure regarding the X-ray screening of the diplomatic bag has been abolished in the light of the changed security situation. Only if the diplomatic bag is not transported by the national airline may an X-ray screening take place upon the request of the airline undertaking the shipment.

79. The State practice surveyed above is somewhat at variance with the principle contained in paragraph 1 of article 36 proposed by the Special Rapporteur regarding electronic screening of the bag:

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.

5. EXEMPTION FROM CUSTOMS DUTIES AND ALL DUES AND TAXES (ART. 38)

80. The State practice here surveyed confirms the general trend pointed out by the Special Rapporteur on exemption of the diplomatic bag from customs duties, dues and taxes, as reflected in draft article 38.

81. Article 8 of the agreement of 15 August 1922 between Mexico and France¹²³ provides:

The bags and accompanying packages shall not be liable to any form of inspection and shall be exempt from customs duties.

Likewise, article 6 of the agreement of 27 December 1946 between Mexico and Guatemala¹²⁴ provides:

The diplomatic bags of both countries shall be transported with total exemption from taxes, duties or charges of any kind. . . .

In a memorandum on 19 January 1982 of the Mexican Ministry of Foreign Affairs concerning the implementation of the new Customs Act in regard to diplomatic bags, it is stated (para. 9):¹²⁵

No special permit or licence is required in order to import the diplomatic bag. The latter is exempt from all customs duties, taxes and related charges other than charges for storage, cartage and similar services.

¹¹⁷ See the communication of the Government of Mexico, section 22 (p. 68 above, document A/CN.4/379 and Add.1).

¹¹⁸ To appear in United Nations, *Treaty Series*, No. 20537.

¹¹⁹ United Nations, *Treaty Series*, vol. 949, p. 3.

¹²⁰ *Ibid.*, vol. 957, p. 3.

¹²¹ See the communication of the Government of Austria of 19 February 1982, section B (*Yearbook . . . 1982*, vol. II (Part One), p. 233, document A/CN.4/356 and Add.1-3).

¹²² See p. 60 above, document A/CN.4/379 and Add.1.

¹²³ See the communication of the Government of Mexico, section 7 (p. 65 above).

¹²⁴ *Idem*, sect. 11 (p. 66 above).

¹²⁵ *Idem*, sect. 22 (p. 68 above).

IV. Consideration of the draft articles at the thirty-sixth session of the Commission

82. The work of the Commission at its thirty-sixth session will be greatly facilitated by the fact that it has at its disposal the complete set of draft articles on the topic. This set was already contained in the fourth report,¹²⁶ submitted by the Special Rapporteur at the thirty-fifth session of the Commission, in 1983.

83. Pursuant to a decision taken at its thirty-fifth session,¹²⁷ the Commission should first resume its debate on draft article 20 to 23 before referring them to the Drafting

Committee. The Commission should then proceed to the consideration of the other draft articles submitted in the fourth report: those relating to the status of the diplomatic courier (arts. 24 to 29), to the status of the captain of a commercial aircraft or the master of a merchant ship entrusted with the transport and delivery of a diplomatic bag (art. 30), to the status of the diplomatic bag (arts. 31 to 39), and to miscellaneous provisions (arts. 40 to 42).

84. It is to be hoped that, as suggested by several representatives during the discussion in the Sixth Committee of the General Assembly (see para. 8 above), the Commission may be able to finalize the first reading of the complete set of draft articles at its thirty-sixth session.

¹²⁶ See footnote 3 (b) (iv) above.

¹²⁷ *Yearbook . . . 1983*, vol. II (Part Two), p. 53, para. 189.

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 5]

DOCUMENT A/CN.4/377*

Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

[Original: French]
[1 February 1984]

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTION	1-14	89
<i>Chapters</i>		
I. OFFENCES COVERED BY THE 1954 DRAFT CODE	15-42	91
A. Offences against the sovereignty and territorial integrity of States	16-19	91
B. Offences violating the prohibitions and limitations on armaments or the laws and customs of war	20-27	92
C. Crimes against humanity	28-42	92
II. OFFENCES CLASSIFIED SINCE THE 1954 DRAFT CODE	43-78	94
A. Relevant instruments	44-46	94
B. Minimum content	47-67	96
C. Maximum content	68-78	98
III. CONCLUSION	79-83	100

Introduction

1. This report will be extremely brief. Its sole aim is to have the International Law Commission determine, before drafting any articles, the list of acts classified as offences against the peace and security of mankind.

2. At its thirty-fifth session, the Commission discussed general problems arising out of the codification of offences against the peace and security of mankind. It appeared that a number of questions were controversial, and the Commission deemed it advisable to submit them to the General Assembly, at its thirty-eighth session, in order to obtain answers, or at least guidance.

3. The questions involved were:

(a) With regard I to the content *ratione personae* of the subject, whether international criminal responsibility could be attributed to a State;

(b) With regard to the implementation of the Code, the Commission wanted the General Assembly to indicate its mandate more clearly, in particular with regard to the preparation of a statute of an international criminal jurisdiction.¹

4. However, the debates in the Sixth Committee of the

* Incorporating document A/CN.4/377/Corr.1.

¹ See *Yearbook . . . 1983*, vol. II (Part Two), p. 16, para. 69.

General Assembly have not dispelled this uncertainty. In its resolution 38/138 of 19 December 1983, the General Assembly "recommends that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics in its current programme." Under these circumstances, the Special Rapporteur considers that, for the time being, the subject should be limited to the less controversial questions until more precise replies are received from the General Assembly and from Governments.

5. As things stand, it appears that minimum agreement can be reached only as regards the following approach: to reconsider the 1954 draft code² and expand, as appropriate, the list of offences proposed by it so as to reflect the international reality of today. Of course, such an approach leaves intact the above-mentioned problems, which might be taken up again at a later stage.

6. The preparation of this report has also been guided by another consideration: it appeared reasonable and logical that, before draft articles were submitted, agreement should first be reached on the list of offences classified as offences against the peace and security of mankind. It would serve no purpose, and would be a waste of time, to prepare articles on offences which the Commission would not subsequently retain as relevant to the subject. This report will therefore deal solely with the content *ratione materiae*. It will be confined to a catalogue. Its purpose is to formulate a list of offences today considered as offences against the peace and security of mankind, in other words to bring up to date the list prepared by the Commission in 1954.

7. The scope of this report having thus been provisionally delimited, the Special Rapporteur's approach will be dominated by the following consideration: the Commission is to prepare a *code of offences against the peace and security of mankind, and not an international penal code*. Consequently, many offences which undoubtedly constitute international crimes will not, for that reason alone, be included in the proposed draft. Indeed, the following must always be borne in mind: *all offences against the peace and security of mankind are international crimes, but not every international crime is necessarily an offence against the peace and security of mankind*.

8. It will therefore be necessary to examine international crimes to see which constitute offences against the peace and security of mankind. It will be recalled in this connection that the criterion chosen by the Commission at its thirty-fifth session was that of *extreme seriousness*.³ The Commission was unanimous on that point. The difficulty is that this criterion is a highly subjective one, which is bound up with the state of the international conscience at a given moment. That is not unique to the subject dealt with here. In internal law, the classification of offences into petty offences, less serious offences and serious offences is dependent on subjective criteria which take into account

the seriousness of the act involved, and this seriousness itself is evaluated in accordance with the state of public conscience, political and ethical convictions, and so on. The international dimension simply means that the offences have greater repercussions in that they affect peoples, races, nations, cultures, civilizations and mankind when they conflict with universal values. The seriousness is evaluated in terms of these elements.

9. Article 19 of part 1 of the draft articles on State responsibility⁴ defines an international crime with reference to this criterion of seriousness. However, while this criterion has always been the distinguishing feature of international crimes, it should be recognized that its basis was, for a long time, a narrow one, merging principally with *aggression* or *war crimes*. The concept of a crime against humanity, which emerged mainly after the Second World War, was closely associated with the state of war, and the Charter of the Nürnberg International Military Tribunal itself recognized as crimes against humanity only those committed in the context of war. Belligerency and criminality were intimately associated.

10. Today, the concept of an international crime has acquired a greater degree of autonomy and covers all offences which seriously disturb international public order. The way towards this change had already been opened widely by legal theory. Georges Scelle said that "any action which disturbed international public order was a crime under international law."⁵ Vespasien V. Pella considered that "actions or non-actions which violate the elementary principles considered as absolutely necessary for the maintenance of universal order and of international peace" were international infractions.⁶ In his study on the criminal responsibility of the Hitlerites, Professor Trainin also went beyond the concept of a war crime and considered an international crime to be "an infringement of the connection between States and peoples, a connection which constitutes the basis of relations between nations and countries."⁷

11. All these definitions converge, in substance, with article 19 of part 1 of the draft articles on State responsibility, according to which an international crime results from the breach of an international obligation so essential for the protection of fundamental interests that its breach is recognized as a crime by the international community as a whole. It is therefore clear that the concept of an international crime today goes beyond the Nürnberg context in the sense that it is less connected with the crimes of the Second World War, and covers far wider areas. Moreover, the need to revise the 1954 draft code is justified, in part, by this extension of the concept of an international crime. The 1954 draft itself departed from the Nürnberg context by defining crimes against humanity regardless of any relation to war crimes.

² *Yearbook ... 1954*, vol. II, pp. 151-152 document A/CN.4/39, para. 54. The text of the draft code is reproduced in *Yearbook ... 1983*, vol. II (Part Two), p. 11, para. 33.

³ *Yearbook ... 1983*, vol. II (Part Two), pp. 13-14, paras. 47-48.

⁴ *Yearbook ... 1976*, vol. II (Part Two), pp. 95-96. See also *Yearbook ... 1983*, vol. II (Part Two), p. 14, para. 53.

⁵ *Yearbook ... 1949*, p. 188, summary record of the 26th meeting, para. 34.

⁶ Pella, "The criminality of wars of aggression and the organization of international repressive measures", report submitted at the twenty-third Inter-Parliamentary Conference (see Inter-Parliamentary Union, *XXIIIrd Conference* (Washington and Ottawa, 1925), p. 103).

⁷ A. N. Trainin, *Hitlerite Responsibility under Criminal Law* (London, Hutchinson, 1945).

12. However, although today there is a definition of an international crime, an offence against the peace and security of mankind has yet to be defined. Whence does such an offence derive its distinctiveness? At its thirty-fifth session, the Commission took the view that offences against humanity constituted the category of the most serious offences.⁸ The difficulty lies in distinguishing between the most serious and the less serious. There is no objective dividing line between the two, and even if such a dividing

line existed, it would shift with changes in international opinion.

13. That is why it is not enough to establish the excessively general criterion of seriousness. A catalogue of conventions, resolutions and declarations adopted by the international community must be compiled, so that some useful lessons may be learned.

14. In this matter, the Commission is amply assisted by its previous work, and this report may thus be divided into two parts: (a) offences covered by the 1954 draft code; (b) offences classified since 1954.

⁸ *Yearbook* . . . 1983, vol. II (Part Two), pp. 13-14, para. 47.

CHAPTER I

Offences covered by the 1954 draft code

15. First of all, it should be ascertained whether the Commission is to include all the offences covered by the 1954 draft code. That draft dealt with three categories of offences, which will be considered in succession:

(a) Offences against the sovereignty and territorial integrity of States;

(b) Offences violating the prohibitions and limitations on armaments or the laws and customs of war;

(c) Crimes against humanity, also called crimes of *lèse-humanité*.

A. Offences against the sovereignty and territorial integrity of States

16. The offences against the sovereignty and territorial integrity of States contained in the 1954 draft code consist basically of aggression and its offshoots: civil war, terrorism, annexation of territory belonging to another State or intervention in its internal or external affairs. These offences are covered in paragraphs (1) to (6), (8) and (9) of article 2 of the 1954 draft, which read 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.

...

(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.

17. All these provisions derive from the general principles of law and from Article 2, paragraph 4, of the Charter of the United Nations. They are reflected also in later provisions, in particular articles 2, 3 and 4 of the draft declaration on rights and duties of States (General Assembly resolution 375 (IV) of 6 December 1949) and in paragraph 3 of General Assembly resolution 290 (IV) of 1 December 1949, which calls upon every nation to refrain from any threats or acts, direct or indirect, aimed at fomenting civil strife and subverting the will of the people in any State, as well as in 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).

18. It should be noted also that these principles already influence the law of treaties and the law of international responsibility. Today, instruments such as the 1969 Vienna Convention on the Law of Treaties⁹ (articles 51 and 52) make express mention of coercion of a representative of a State or coercion of a State as grounds for the invalidity of a treaty, and the draft articles on State responsibility deal (article 28 of part 1)¹⁰ with the responsibility of a State for coercion exerted on another State to secure the commission of an internationally wrongful act.

19. At the present time it is thus clear that the paragraphs quoted above from article 2 of the 1954 draft code are supported by a very broad conventional base and cannot be called into question today, at least in so far as the substance is concerned, while the question of the wording

⁹ United Nations, *Juridical Yearbook* 1969 (Sales No. E.71.V.4), p. 140.

¹⁰ *Yearbook* . . . 1979, vol. II (Part Two), p. 94.

remains open. In this connection, the new Definition of Aggression¹¹ will perhaps make it possible to draft a more detailed text.

B. Offences violating the prohibitions and limitations on armaments or the laws and customs of war

20. The second group of provisions contained in the 1954 draft code relates to *violations of restrictions and limitations on armaments and of the laws and customs of war*.

21. Paragraph (7) of article 2 refers to:

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.

22. Paragraph (12), which is very brief, refers to:

Acts in violation of the laws or customs of war.

These provisions, which are designed to limit the risks of war and then, if war breaks out, to render it less cruel, show a certain realism and are given concrete expression in many conventions, in particular the four Geneva Conventions of 12 August 1949¹² and the Additional Protocols of 8 June 1977.¹³

23. The international community has long been concerned with arms limitation. Even before the Hague Convention of 1907,¹⁴ there was the St. Petersburg Declaration of 11 December 1868,¹⁵ and subsequently the Hague Convention of 1899,¹⁶ banning explosive weapons and asphyxiating gases respectively. Then came the Treaty of Washington of 6 February 1922¹⁷ (not ratified), which was based on article 171 of the Treaty of Versailles,¹⁸ and then the Geneva Protocol of 17 June 1925,¹⁹ which established a general prohibition on the use of asphyxiating gases.

24. Following the Second World War, the United Nations embarked on a systematic study of the rules relating to the prohibition or restriction of the use of "certain weapons".²⁰

25. The efforts made to update the prohibitions of the Geneva Protocol of 1925 resulted in the Convention on the

Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972,²¹ which does not, unfortunately, cover chemical weapons.

26. But what about nuclear weapons? These are mentioned by the General Assembly for the first time in its resolution 41 (I) of 14 December 1946, and subsequently in many other resolutions: resolutions 299 (IV) of 23 November 1949, 380 (V) of 17 November 1950, 502 (VI) of 11 January 1952, 704 (VII) of 8 April 1953, 715 (VIII) of 28 November 1953, 808 (IX) of 4 November 1954, 914 (X) of 16 December 1955, 1653 (XVI) of 24 November 1961, 1801 (XVII) of 14 December 1962 and 2164 (XXI) of 5 December 1966.

27. However, there is no text prohibiting the use of nuclear weapons for combat purposes. Such weapons certainly fall within the category of weapons of mass destruction, but that does not resolve the problem. Many delegations have raised the problem of the use of nuclear weapons and called for its explicit condemnation as an offence against the peace and security of mankind. It is argued, however, that these weapons are based on the strategic concept of deterrence. Seen from this viewpoint, the problem of prohibition would seem to be insoluble, because prohibition would run counter to the very concept of deterrence. It will be noted that the draft international penal code drawn up by the International Association of Penal Law remains silent on the subject.²² The debate will be opened in chapter II of this report. It is necessary to consider now the provisions of the draft relating to the third group of offences, those termed crimes against humanity.

C. Crimes against humanity

28. Crimes against humanity are dealt with in paragraphs (10) and (11) of article 2 of the 1954 draft code, 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

¹¹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹² United Nations, *Treaty Series*, vol. 75.

¹³ United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*

¹⁴ J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100.

¹⁵ Déclaration relative à l'interdiction des balles explosives en temps de guerre (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1873), vol. XVIII, p. 474).

¹⁶ Scott, *op. cit.*, p. 225.

¹⁷ M. O. Hudson, ed., *International Legislation* (Washington (D.C.), 1931), vol. II (1922-1924), p. 794, No. 66.

¹⁸ G. F. de Martens, ed., *op. cit.*, 3rd series (Leipzig, Weicher, 1923), vol. XI, p. 323.

¹⁹ League of Nations, *Treaty Series*, vol. XCIV, p. 65.

²⁰ See *Napalm and Other Incendiary Weapons and All Aspects of their Possible Use* (United Nations publication, Sales No. E.73.I.3). See also the report on conventional weapons prepared within the framework of the

fourth session of the Diplomatic Conference on Humanitarian Law (Geneva, March-June 1977), *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977), vol. XVI, p. 505, document CDDH/IV/224/Rev.1 (Bern, Federal Political Department, 1978).

²¹ United Nations, *Treaty Series*, vol. 1015, p. 163.

²² C. Bassouni, *International Criminal Law - A Draft International Criminal Code* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980).

State or by private individuals acting at the instigation or with the toleration of such authorities.

29. All these acts constitute crimes against humanity, although this was not specifically mentioned in the 1954 draft. Moreover, these provisions are but a restatement of article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.²³ Some thought that there was no point in making further mention of the crime of genocide in the 1954 draft.²⁴ They considered that the Convention on Genocide should be totally autonomous in order to avoid the difficulties that might arise in certain instances, in particular in a case where measures for the implementation of the code were not taken, in the event that States that were parties to both instruments entered reservations with regard to one or the other. They also considered that genocide is a crime against humanity and is covered by that category of offences.

30. In fact, it seems difficult not to mention genocide in the code, because it is a typical offence. The mention of genocide would not deprive the 1948 Convention of its autonomy. It should further be noted that article 19 of part I of the draft articles on State responsibility²⁵ highlights genocide by including it in the list of serious violations of international law.

31. It may be wondered whether the category of offences grouped under the term "crimes against humanity" has a certain specificity and obeys its own régime, distinct from the general régime of the protection of human rights. The problem of human rights has, for several decades, been assuming considerable proportions. A whole legal system has developed, based on the defence of the individual as a subject of law. This system is aimed principally at defending the individual against abuses of power, and laws and courts to protect individual rights exist in many countries.

32. However, human rights violations considered in this light should not be confused with crimes against humanity. The latter are different. In the first case, a person is affected as an individual, or more precisely as a human being, vested as such with imprescriptible rights, such as freedom of religion, freedom of opinion and expression, freedom to come and go, freedom of association and freedom of assembly. A crime against humanity, however, relates to different concepts: race, nationality, and political or religious entities. It is directed against groups born or constituted on the basis of these criteria. If such a crime affects the individual, it does so indirectly; the crime is directed against him not as an individual, but because he belongs to a given nation, ethnic group or political or religious grouping.

33. In order to draw a distinction between violations of human rights thus defined and crimes against humanity, it could be said that, in the case of the former, it is the individual whose fundamental rights are infringed, whereas in the case of the latter, the offences concern all mankind. If

this distinction were watertight, it could serve as a dividing line and it would then be said that violations of human rights, in the sense of the rights of the individual, fall within the scope of internal law, whereas crimes against humanity fall within the scope of international law. As noted above (paragraph 31), many internal legal systems have set up mechanisms to defend the rights of the individual by making it possible to seek remedy in the national courts against abuses of power. It is true that the primary aim of such legal action is to secure the annulment of improper decisions or to obtain civil compensation. However, when the acts involved are also criminal in nature, their perpetrators can be prosecuted in the criminal courts. This is true, for example, of acts of violence committed by agents of the State.

34. However, the protection of the aforesaid individual rights is currently being extended to some degree into the international sphere. This trend is reflected in the Universal Declaration of Human Rights of 10 December 1948,²⁶ and the International Covenant on Civil and Political Rights of 16 December 1966.²⁷ Furthermore, in some regional organizations individuals are permitted in certain cases to sue their Governments in the international courts for actions which they consider to be contrary to fundamental human rights. For example, there is a European Court of Human Rights. At present the distinction is not as definite as it might seem. The two types of violations cannot be entirely separated from one another, for they overlap. Mass violations of human rights by a State within its own sphere of sovereignty are no different, in essence, from crimes of *lèse-humanité* committed by a State against the nationals of another State. When violations of human rights attain a certain dimension or a certain degree of *cruelty* within a State, they offend the universal conscience and tend to fall within the province of international law. At this point it is necessary to ask whether the two concepts—that of crimes against humanity and that of violation of human rights considered from the standpoint of the freedoms of the individual—are autonomous. According to Stanislas Plawski:

... Fundamental human rights are covered by public international law and their destruction jeopardizes the very existence of that law and of international morality, on which that law is based. Any challenge to human rights imperils the principles of human civilization.²⁸

That is also the opinion of Pella, who writes in his memorandum on the draft code of offences against the peace and security of mankind that "the international protection of human rights and the protection of international peace form an indivisible whole."²⁹ Pella cites numerous authorities in support of the thesis of the indivisibility of the international protection of human rights and the defence of peace, in particular President Truman, who, in an address delivered on 24 October 1949, on the occasion of the laying of the cornerstone of the United Nations building, said that "disregard of human rights is the beginning of tyranny and,

²³ United Nations, *Treaty Series*, vol. 78, p. 277.

²⁴ See Pella, "La codification du droit pénal international", *Revue générale de droit international public* (Paris), vol. LVI (1952), pp. 398-399.

²⁵ See footnote 4 above.

²⁶ General Assembly resolution 217 A (III).

²⁷ United Nations, *Treaty Series*, vol. 999, p. 171.

²⁸ S. Plawski, *Etude des principes fondamentaux du droit international pénal* (Paris, Librairie générale de droit et de jurisprudence, 1972), p. 106.

²⁹ *Yearbook* ... 1950, vol. II, p. 278, para. 44.

too often, the beginning of war.”³⁰ Similarly, Henri Laugier, Assistant Secretary-General of the United Nations, said that “any deliberate and systematic violation of human rights in a country is a threat to the peace of the world, and consequently cannot be shielded by national sovereignty.”³¹

35. Just recently, Jean-René Dupuy, Professor at the Collège de France, in an interview published in the newspaper *Le Monde*, referred to “human rights without which peace is violence” and to “non-intervention in the internal affairs of other States, which is the surest means of shutting out what may be happening inside other countries.”³²

36. It is true that human rights have a certain normative content, on the basis of which efforts are on occasion made to regulate the conduct of nations; but this is no reason for indulging in excessive optimism. It cannot be maintained, without exaggeration, that all violations of human rights fall within the scope of international law. Here again, the seriousness of the violation is the deciding factor. Pella recognized this in his memorandum:

... For the time being the only offences having the status of international offences would be those which are of particular seriousness and which for that reason constitute crimes against humanity.

But he added:

Within these limits, ... the mere fact that an individual is the victim of a violation of internationally recognized human rights creates a direct relationship between him and the international community.³³

37. Thus in certain cases protection of human rights tends to be detached from internal law and to fall directly within the scope of international law. Indeed, as has just been said (paragraph 34 above), beyond a certain point, violations of a human right are in substance tantamount to crimes against humanity.

38. There are countless international instruments relating to the protection of human rights. They relate, in particular, to compulsory labour, discrimination in respect of employment and occupation, equal remuneration for male and female workers, religious intolerance, the penitentiary system, the right of asylum, the status of refugees, medical

ethics and so forth. But although violations of the obligations deriving from these conventions constitute violations of human rights in the broad sense of the term, they are not necessarily “crimes against humanity” for the purposes of this code.

39. The debate which has just been started is not purely theoretical. The point at issue is whether, aside from “crimes against humanity”, which will be the subject of a separate chapter in the draft articles, it would also be advisable, with respect to the instruments just mentioned, and in particular the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966, to draw up provisions relating to the protection of human rights, these rights being envisaged from the standpoint just described.

40. The matter dealt with here is one in which it is difficult to draw distinctions, and it would be hazardous to try to do so. Violations of human rights may at one time fall within the scope of internal law and at another within that of international law, depending on their seriousness. If the violation goes beyond a certain point, it falls within the category of international crimes and, depending on its seriousness, it may be at the top of the scale, in other words it may be a crime against humanity. There is strictly speaking no difference of nature between the two concepts, only a difference of degree. Once they exceed a certain degree of seriousness, violations of human rights are indistinguishable from “crimes against humanity.” It is equally difficult to distinguish crimes against humanity from war crimes. Often a single deed constitutes both a crime against humanity and a war crime; as already noted, it was only when sufficient time had elapsed after the Nürnberg trials that the concept of a crime against humanity finally acquired its own autonomy and became detached from the state of war.

41. With the above-mentioned reservations, it would seem that, subject to the wording of the articles, the list of offences that were classified as offences against the peace and security of mankind in 1954 should be maintained. Not only does it have a sound basis in custom but it has also been strengthened and consolidated by numerous later instruments.

42. The next step is to consider, in the light of the new conventions and declarations subsequently drawn up, what offences should be included to complete the list established in 1954.

CHAPTER II

Offences classified since the 1954 draft code

43. The scope of international law has been broadened since the Second World War, and such law is therefore becoming increasingly concerned with reprehensible acts and practices that formerly fell within the sphere of the exclusive sovereignty of States.

A. Relevant instruments

44. The vigour with which these practices and these acts

are denounced is reflected in resolutions, declarations and conventions, the most important of which are the following:

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

(2) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of

³⁰ See *The New York Times*, 25 October 1949, p. 7.

³¹ Address made at the American Civil Liberties Union, New York, 22 February 1950.

³² *Le Monde dimanche* (Paris), 15 January 1984, p. xiii.

³³ See footnote 29 above.

Their Independence and Sovereignty (General Assembly resolution 2131 (XX) of 21 December 1965);

(3) The various resolutions on *apartheid*, the abundance of which shows that *apartheid* has been a matter of great concern;³⁴

(4) 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);

(5) 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).

(6) The two Additional Protocols to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977;³⁵

(7) 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);

(8) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973;³⁶

(9) 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);

(10) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976;³⁷

(11) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, of 26 November 1968;³⁸

(12) Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970³⁹ and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 23 September 1971;⁴⁰

(13) International Convention against the Taking of Hostages, of 17 December 1979;⁴¹

(14) Supplementary Convention on the Abolition of

Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956;⁴²

(15) International Covenant on Civil and Political Rights, of 16 December 1966;⁴³

(16) International Covenant on Economic, Social and Cultural Rights, of 16 December 1966;⁴⁴

(17) 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;⁴⁵

(18) 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;⁴⁶

(19) Declaration on the Prevention of Nuclear Catastrophe (General Assembly resolution 36/100 of 9 December 1981);

(20) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, of 5 December 1979;⁴⁷

(21) Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, of 5 August 1963;⁴⁸

(22) 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;⁴⁹

(23) Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

45. This list is not exhaustive, but it contains the most important instruments, some of which strengthen or supplement existing provisions, as in the case of the Definition of Aggression. Other instruments, on the other hand, constitute innovations, as in the case of those relating to colonialism, *apartheid* and the environment. The same is true of those relating to the taking of hostages, torture and acts of violence against internationally protected persons, although in the case of the last-named acts customary law preceded written law to a great extent. This even constitutes a typical example of instances in which customary law has paved the way for written law.

46. It is a question of identifying, through these various instruments and in the light of article 19 of part 1 of the draft articles on State responsibility, which offences are to be regarded as offences against the peace and security of mankind and should therefore be added to the 1954 list. The combination of two methods—deductive and inductive—will thus make it possible to avoid the pitfalls inher-

³⁴ See the following General Assembly resolutions: 2775 E (XXVI) of 29 November 1971, 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, 37/69 A of 9 December 1982 and 38/39 A of 5 December 1983.

³⁵ See footnote 13 above.

³⁶ United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 74.

³⁷ *Ibid.* 1976 (Sales No. E.78.V.5), p. 125.

³⁸ United Nations, *Treaty Series*, vol. 754, p. 73.

³⁹ *Ibid.*, vol. 860, p. 105.

⁴⁰ *Ibid.*, vol. 974, p. 177.

⁴¹ United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

⁴² United Nations, *Treaty Series*, vol. 226, p. 3.

⁴³ *Ibid.*, vol. 999, p. 171.

⁴⁴ *Ibid.*, vol. 993, p. 3.

⁴⁵ United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), p. 113.

⁴⁶ United Nations, *Treaty Series*, vol. 995, p. 115.

⁴⁷ United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 109.

⁴⁸ United Nations, *Treaty Series*, vol. 480, p. 43.

⁴⁹ *Ibid.*, vol. 610, p. 205.

ent in a subject that lends itself too much to generalities. Some offences automatically have a place in this new list, whereas others, as will be seen, cannot be included without reservations.

B. Minimum content

47. In the case of offences in the former category, there is wide international agreement that they should be placed at the head of the parade of the hideous monstrosities that constitute international crimes. Some of the crimes that fall into this category are colonialism, *apartheid* and serious damage to the environment. The taking of hostages, violation of the international protection afforded to diplomats and certain other groups of people, as well as mercenarism, should be added to this category.

48. The condemnation of colonialism falls within the sphere of *jus cogens*, and it is surprising that no reference should have been made to this phenomenon in a draft code drawn up in 1954. It was necessary to wait until 1960 for the adoption of the well-known Declaration on the Granting of Independence to Colonial Countries and Peoples, outlawing colonialism. However, the Charter of the United Nations itself already contained the principle of the condemnation of colonialism.

49. According to paragraph 1 of the 1960 Declaration:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an *impediment to the promotion of world peace** and co-operation.

This offence is once again classified as a crime in article 19 of part 1 of the draft articles on State responsibility, in which colonialism is regarded as a serious breach of an obligation that is essential for safeguarding the dignity of peoples and their right to self-determination.

50. *Apartheid* falls within the same category, and here again the same lacuna may be noted in the 1954 draft code. Now, article 1 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination⁵⁰ states:

Article 1

Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a *fact capable of disturbing peace and security among peoples.**

Similarly, article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966⁵¹ requires States parties to condemn racial segregation and *apartheid* and to eradicate all racist practices from their territories. Article 1 of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, of 30 November 1973,⁵² states that: "The States parties to the present Convention declare that

apartheid is a *crime** against humanity", and that inhuman acts resulting from the policies and practices of *apartheid* constitute "a *serious threat to international peace and security**". Lastly, article 19 of part 1 of the draft articles on State responsibility lists *apartheid* as an international crime.

51. It is now necessary to proceed to consideration of damage to the environment. A number of conventions deal with protection of the environment, including the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof;⁵³ the Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water;⁵⁴ the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies;⁵⁵ and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.⁵⁶ Lastly, article 19 of part 1 of the draft articles on State responsibility also cites serious damage to the environment as an international crime.

52. The problems to which the use of nuclear weapons give rise would appear, on the other hand, to constitute the squaring of the circle. Many delegations at the United Nations have expressed the wish to have the fact that a State is the first to use nuclear weapons regarded as a crime against humanity. A resolution to that effect has even been adopted.⁵⁷ It is true that the prohibition of the use of nuclear weapons is based on impeccable logic, since it fits into the general framework of the prohibition of weapons of mass destruction, of which nuclear weapons are the prototype. The devastating effects of these weapons are immeasurable, and the horror they evoke is without parallel. However, there is also an element of ambiguity as to the purpose of these weapons: although they are capable of destruction, they are supposed to provide protection, in other words to safeguard peace and security. It is concluded, on the basis of that reasoning, that their prohibition would nullify their deterrent effect and therefore be counterproductive.

53. It is for the Commission to take a decision in this matter and to establish whether a special reference should be made in the code to the use of nuclear weapons. The truth is that, given the current state of affairs, the use of nuclear weapons, unlike that of certain other weapons, which is prohibited by a convention, has not yet been dealt with at all in positive law. The Commission must distinguish between what is desirable and what is possible and maintain a reasonably realistic stance. Moreover, the problems to which nuclear weapons give rise do not appear to be as specific as they might look. Any type of weapon generally gives rise to two sets of problems, relating either to its limitation or to its prohibition. If they are considered from these two angles, the provisions concerning the violation of the prohibitions, limitations and restrictions on

⁵³ See footnote 46 above.

⁵⁴ See footnote 48 above.

⁵⁵ See footnote 49 above.

⁵⁶ See footnote 37 above.

⁵⁷ General Assembly resolution 36/100 of 9 December 1981.

⁵⁰ General Assembly resolution 1904 (XVIII) of 20 November 1963.

⁵¹ United Nations, *Treaty Series*, vol. 660, p. 195.

⁵² *Ibid.*, vol. 1015, p. 243.

weapons that are to be included in the code should cover the hypothesis of a prohibition of nuclear weapons, should such a prohibition be laid down at some stage in special conventions.

54. To turn to an entirely different question, particular attention should today be paid to the taking of hostages. The practice of taking hostages is an unacceptable way of exerting pressure on States in order to force them to act or not to act, and to prevail on them to take action that is not in keeping with their wishes. The most disturbing aspect of this issue is that the taking of hostages is sometimes a method of implementing national policy used by States, either directly, or indirectly through protection of or provision of assistance to the perpetrators of this crime. Moreover, hostage-taking is often accompanied by another offence, namely, the offence of committing acts of violence against internationally protected persons. In fact, such persons are often the very target of those who take hostages. During the Second World War, the Nazis engaged extensively in the practice of hostage-taking, but in that particular context the taking of hostages was regarded as a violation of the laws and customs of war, because it was the civilian population that was often the victim of such measures. The offence in question was therefore linked with armed conflict. The matter was also considered from that standpoint in the Fourth Geneva Convention of 1949⁵⁸ (arts. 3 and 34). Today, hostages are taken in the context of terrorist activities in peacetime. In 1979, the General Assembly adopted the International Convention against the Taking of Hostages.⁵⁹ The phenomenon in question has become so widespread that it is now necessary that hostage-taking be dealt with in a special provision in the draft code, in cases where it involves an international element.

55. For the same reasons, acts of violence against internationally protected persons should now be covered by the code. Very often the real target of such acts of violence is not so much the protected persons as the State which they represent. Moreover, it is an easy means of attaining political objectives or settling disputes without using the means that exist for the peaceful settlement of such disputes. Pella, in his study on the codification of international criminal law,⁶⁰ recommended that such an offence should be considered as an international offence. In 1954, the Commission did not deem it necessary to include it in the list of offences. Those who prepared the 1954 draft code cannot be faulted for not having anticipated the tremendous upsurge that would take place in such acts of violence, which are shaking even the most solidly established traditions. Kidnappings, illegal confinements, summary executions of diplomats are everyday occurrences and, as has been pointed out, the motive is often purely political.

56. Charges in respect of such acts would now be based not only on custom but also on sound treaty bases, in particular on the 1961 Vienna Convention on Diplomatic Relations⁶¹ (arts. 29 *et seq.*), the 1963 Vienna Convention

on Consular Relations⁶² (arts. 40-41), the 1969 Convention on Special Missions⁶³ (art. 29) and, above all, the 1975 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.⁶⁴ Provisions are also being envisaged in the draft articles on the status of the diplomatic courier.

57. The obligation incumbent upon an internationally protected person to respect the laws and regulations of the receiving or host State is set forth in the Vienna Convention on Diplomatic Relations (art. 41), the Vienna Convention on Consular Relations (art. 55), and the Convention on Special Missions (art. 47). Any breach of that obligation that might pose a threat to public order in the receiving country is an international offence. If the breach is organized by a State, then it is likely to be a threat to peace.

58. It would therefore appear that the above-mentioned offences certainly fall within the scope of the codification. Under article XII of the draft international penal code drawn up by the International Association of Penal Law, such offences are considered international offences and there is no doubt as to their impact on the peace and security of mankind.⁶⁵ On those grounds it would appear that they should be covered by the code.

59. Mercenarism is another equally blameworthy practice. Mercenarism is of concern to the international community. It is above all a source of grave concern for young States. Before the adoption, in 1977, of the Protocols⁶⁶ additional to the 1949 Geneva Conventions, mercenarism had been of interest to jurists and diplomats only from the standpoint of humanitarian law. The question then was whether a mercenary could be considered a combatant and as such enjoy the protection granted to combatants under humanitarian law. The 1977 Protocols broadened the notion of combatant; that term is no longer limited to members of a regular army but also covers guerrillas and, generally speaking, a new category, namely, persons struggling against colonial domination. As the Third Geneva Convention of 1949⁶⁷ had already extended the status of combatant to "partisans", that is to say to members of resistance movements, this provision was adopted in order to protect combatants in national liberation struggles also; this posed the problem of the status of mercenaries. But what is a mercenary?

60. Mercenarism is characterized by two main elements:

(a) A mercenary is motivated primarily by gain. He provides his services in exchange for remuneration;

(b) A mercenary is not a national of and has no ties to the country for which he is fighting other than a contract of service with the group or entity for which he is fighting.

The problem which arises in this report is different from

⁵⁸ *Ibid.*, vol. 596, p. 261.

⁵⁹ United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

⁶⁰ See footnote 36 above.

⁶¹ See footnote 22 above.

⁶² See footnote 13 above.

⁶³ See footnote 12 above.

⁵⁸ See footnote 12 above.

⁵⁹ See footnote 41 above.

⁶⁰ Pella, "La codification du droit pénal international", *loc. cit.*, p. 378.

⁶¹ United Nations, *Treaty Series*, vol. 500, p. 95.

that which concerned those who drafted the 1977 Protocols. The point at issue then was to determine what guarantees a mercenary could be given if he was wounded or captured, for example. It was decided that, since a mercenary was not a *combatant* in the sense of the Geneva Conventions and Protocols, he could not invoke the guarantees accorded to such combatants. The most he could be given was the minimum status, that is to say the fundamental guarantees accorded to all human beings.

61. The problem here is different in nature. The point at issue now is to determine whether mercenarism is an offence against the peace and security of mankind. Some delegations in the United Nations have expressed the hope that the use of mercenaries would be condemned as an offence against the peace and security of mankind. In paragraph 5 of its resolution on the basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes,⁶⁸ the General Assembly provides:

5. The use of mercenaries by colonial and racist régimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

62. In this resolution the problem was tackled from the standpoint of national liberation struggles; however, States that have since become independent now find that their existence is threatened by the phenomenon of mercenarism. At their meeting in Libreville, Gabon, from 23 to 30 June 1977, the African States adopted a Convention for the Elimination of Mercenarism in Africa.⁶⁹ They emphasized in the preamble the "grave threat which the activities of mercenaries present to the independence, sovereignty, security, territorial integrity and harmonious development of member States of the Organization of African Unity."

63. After defining mercenarism in article 1, paragraph 1, the Convention goes on to state, in paragraph 2:

2. *The crime of mercenarism is committed** by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practises any of the following acts:

(a) Shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;

(b) Enlists, enrolls or tries to enrol in the said bands;

(c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces.

64. In paragraph 3, the Convention provides:

3. Any person, natural or juridical, who commits the crime of mercenarism as defined in paragraph 1 of this article, commits an offence considered as a *crime against peace and security in Africa and shall be punished as such.**

65. In article 7, the Convention further provides that each contracting State shall make *the crime of mercenarism** punishable by the severest penalties under its laws. This recognized jurisdiction of States does not exclude a possible future international jurisdiction.

66. This point at issue is therefore to determine whether mercenarism, recognized as a crime by the African States and condemned by a resolution of the General Assembly (see para. 61 above) should be included in the present draft code. There seems to be no reason why it should not. Mercenarism is a crime which, by reason of its objective (threatening the sovereignty and integrity of a State), constitutes an offence against the peace and security of mankind.

67. Apart from these offences, the classification of which does not seem to involve any difficulties, there are others which are controversial.

C. Maximum content

68. It is at this stage that the difficulty in drawing a line between offences against the peace and security of mankind and other international offences becomes apparent. Everything depends on the prevailing circumstances, current trends and sensitivities. Pella, whose comprehensive approach to this subject is well known, tended to broaden the scope of offences against the peace and security of mankind. In borderline cases, the two concepts were almost completely identical. In his work on the codification of international criminal law,⁷⁰ he proposed a list much longer than that adopted by the Commission in 1954. He considered it regrettable that the Commission had not included offences such as the dissemination of false or distorted news or forged documents in the knowledge that they were harmful to international public order, insulting behaviour towards a foreign State, abusive exercise of police powers on the high seas, and counterfeiting of money or banknotes, committed, connived at or tolerated by the authorities of one State to the detriment of the credit of another State. The approach taken by Pella is logical. It corresponds exactly to his conception of an international offence. In the memorandum to which reference has been made (para. 34 above), he observed that the expression "offences against the peace and security of mankind" was a generic term which covered all *international offences*, in other words, "any action or omission violating the fundamental requirements for the maintenance of international order."⁷¹

69. The Commission did not adopt this broad concept of an offence against the peace and security of mankind. No doubt the scope of offences against international peace and security will become broader with the expansion of *jus cogens* and the conclusion of additional international conventions, but it would seem that at the current stage it would be prudent to avoid taking an excessively comprehensive approach in this area. Furthermore, it is difficult to argue that all international offences are crimes, since article

⁶⁸ General Assembly resolution 3103 (XXVIII) of 12 December 1973.

⁶⁹ OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

⁷⁰ Pella, "La codification du droit pénal international" *loc. cit.*, p. 377-379.

⁷¹ *Yearbook . . . 1950*, vol. II, pp. 296 and 295, document A/CN.4/39, paras. 41 and 40 respectively.

19, paragraph 4, part 1 of the draft articles on State responsibility recognizes the existence of international delicts. Nevertheless, it would seem worth while to reconsider the proposed list.

70. Pella proposed that the following acts should be considered offences against the peace and security of mankind:

1. Counterfeiting of money or banknotes committed, connived at or tolerated by one State to the detriment of the credit of another State;
2. Forgery of passports or equivalent documents;
3. Abusive exercise of police powers on the high seas;
4. Dissemination of false or distorted news or forged documents in the knowledge that they are harmful to international relations;
5. Insulting behaviour towards a foreign State.⁷²

71. With regard to the first of these acts, Pella based his comments on his memorandum submitted in 1927 to the Mixed Committee for the Suppression of Counterfeiting Currency which the Council of the League of Nations had established following a case in which a State had been involved because it had permitted or connived at the counterfeiting of bank notes. This memorandum stated:

... it may however happen that that very State is compromised in such acts by having encouraged them, or at least tolerated them. In such a case, counterfeiting becomes an inter-State offence.

...

These offences should not be confused either with ordinary crimes or with political offences properly so-called, since they violate *the elementary principles considered to be absolutely indispensable for the maintenance of world order and international peace.*

Such cases may raise the problem of State responsibility. Thus the following principle, extracted from an opinion contained in a United States Supreme Court judgment, has been operative in the United States since 1887: "The law of nations requires *every national Government* to use due diligence to prevent a wrong being done within its own territory to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation, has long been recognized...*" (*United States v. Arjona*, 120 U.S.479.499 (1887)).⁷³

In 1925, the Inter-Parliamentary Conference, meeting in Washington, had already included in a list of international offences "the counterfeiting of money and banknotes, and any other disloyal acts committed or connived at by one State for the purpose of injuring the financial credit of another State."⁷⁴

72. With regard to the second point, concerning the forgery of passports or other diplomatic documents, Pella based his comments on article 14 of the Convention for

⁷² Pella, "La codification du droit pénal international", *loc. cit.*, p. 378; and *Yearbook* ... 1950, vol. II, pp. 343-346 and 354-355, document A/CN.4/39, paras. 129-136 and 151-154.

⁷³ League of Nations, document [C] F. M. 4 of 23 June 1927, p. 36, paras. 102 and 104.

⁷⁴ Resolution III of the criminality of wars of aggression and the organization of international repressive measures, annex (Inter-Parliamentary Union, *XXIIIrd Conference* (see footnote 6 above), p. 49).

the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)⁷⁵ and on a draft text adopted by the Seventh International Conference for the Unification of Criminal law, held at Cairo in January 1939.⁷⁶

73. Pella likewise considered that the abusive exercise of police powers on the high sea should be included among the acts "likely to lead to international disputes" to be condemned in the code.⁷⁷ It is true that, apart from certain derogations that entitle a State, in suspicious circumstances, to determine the identity of a ship, the principle of the freedom of the high seas prohibits interference with navigation, and violation of that freedom constitutes an internationally wrongful act. However, every internationally wrongful act is not a crime against the peace and security of mankind.

74. With regard to the dissemination of false news, this can certainly disturb international public order, but it is doubtful whether, given the current state of international awareness and the opportunities for immediate corrective reaction and denial, it could be a source of armed conflict.

75. As regards insulting behaviour towards a foreign State, it is common knowledge that under national legislation insulting behaviour towards foreign Heads of State is often punished by correctional penalties, and it seems probable that States have become less sensitive and no longer attach to such behaviour the importance accorded to it in earlier centuries, when the State was often identified with the sacred person of the sovereign.

76. Generally speaking, although the offences mentioned above are undoubtedly international offences, the question remains whether they should be included in a code of offences against the peace and security of mankind.

77. The General Assembly certainly did not intend the Commission to prepare a text too broad in scope, in which the essential elements might be overlooked. A careful review of the records of the Sixth Committee shows that at no time during its debates was it suggested that any of these offences should be covered by the codification. Furthermore, these offences are not mentioned in the relevant resolutions. An offence against the peace and security of mankind is distinguished from other international offences by the horror and cruelty, savagery and barbarity involved. Basically, such an offence attacks the very foundations of contemporary civilization and the values on which it is based. That is what gives it its special character, its tone, its consistency, and its unusual dimensions.

78. It would therefore seem that the list reviewed above should not be covered by the codification. There are many other international offences which are undoubtedly hateful or degrading in character (drug trafficking, international trafficking in obscene publications, etc.), but it would be more appropriate to deal with such offences in an international penal code than in a instrument limited to offences against the peace and security of mankind.

⁷⁵ League of Nations, document C.546.M.383.1937.V.

⁷⁶ *Actes de la VII^e Conférence internationale pour l'unification du droit pénal*, Cairo, 12-18 January 1939 (Paris, Pedone, 1939), pp. 473-474.

⁷⁷ *Yearbook* ... 1950, vol. II, p. 355, document A/CN.4/39, para. 154.

CHAPTER II

Conclusion

79. Consequently, a new draft code of offences against the peace and security of mankind should include:

A. *Offences covered by the 1954 draft code, namely:*

1. Aggression, and the threat of and preparation for aggression;
2. The organization of armed bands by a State for incursions into the territory of another State;
3. The undertaking or encouragement by a State of activities calculated to foment civil strife in the territory of another State;
4. The violation of restrictions or limitations on armaments, on military training, or on fortifications;
5. The annexation of the territory of a State by another State;
6. Intervention in the internal or external affairs of a State by another State;
7. War crimes;
8. Genocide;
9. Crimes against humanity;

B. *Certain violations of international law recognized by the international community since 1954, namely:*

10. Colonialism;
11. *Apartheid*;
12. The taking of hostages;
13. Mercenarism;
14. The threat or use of violence against internationally protected persons;
15. Serious disturbance of the public order of the receiving country by a diplomat or an internationally protected person;
16. The taking of hostages organized or encouraged by a State;
17. Acts causing serious damage to the environment.

With regard to damage to the environment, the Commission could consider whether such damage involves the entire area covered by the prohibition of testing or the emplacement of weapons in certain territories. The relevant conventions have already been mentioned. In other words, it will be for the Commission to determine whether it intends to make the unlawful emplacement of weapons an offence distinct from acts causing damage to the environment.

80. Lastly, in the view of many delegations in the Sixth Committee, "economic aggression" should be considered as a specific offence. They believe that independence is theoretical, and has no real meaning, if it is not combined with economic independence. They base their views on the International Covenant on Economic, Social and Cultural Rights⁷⁸ the Declaration on the Inadmissibility of Inter-

vention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty,⁷⁹ and above all on the declaration on permanent sovereignty over natural resources.⁸⁰ This problem will have to be discussed. The aggression covered by the draft code and subsequently defined in 1974 is primarily military aggression. That is different from the aggression which the sponsors of this new proposal have in mind; they believe that there are economic measures which, in unequal relationships, take the form of aggression. The question is whether the meaning of the term "aggression" is not traditionally so linked to the use of armed force that it cannot safely be extended to cover other coercive measures of a different character. Moreover, the expression "economic aggression" is perhaps more suited to political than to legal parlance. The political vocabulary can accommodate vibrations and auras that stimulate the popular imagination, and certain political expressions are incompatible with the austere language of law; they cannot be confined within stark formulas which deprive them of their charisma. What constitutes "economic aggression"? What are its constituent elements? These questions are not easy to answer prior to a thorough debate. In any event, this is the list of acts that cause concern to the international community.

81. The Commission will decide whether it is desirable to lengthen or shorten this list. The list does not prejudge the way in which the articles might be drafted. With regard to aggression, war crimes and crimes against humanity, new instruments have been adopted, which may make it necessary to change the presentation and wording of some articles, or even to render their substance more precise. These instruments include the 1956 Supplementary Convention on the Abolition of the Slave Trade (see para. 44 above, point 14); the Definition of Aggression (*ibid.*, point 23); the 1977 Additional Protocols to the 1949 Geneva Conventions (*ibid.*, point 6); the 1979 International Convention on the Taking of Hostages (*ibid.*, point 13); and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (*ibid.*, point 17).

82. As already stated, however, the primary purpose of this report is to delimit the subject *ratione materiae* by defining the offences that might be considered to be offences against peace and security. It would have been pointless for the Special Rapporteur to submit draft articles prejudging the existence of offences that have not yet been recognized by the Commission as crimes against the peace and security of mankind.

83. Lastly, it should be noted that this report deliberately deals only with the special part of the code and therefore leaves aside for the time being the general principles and the rules applicable to international penal law as a whole, which will be examined at a later stage.

⁷⁸ See footnote 44 above.

⁷⁹ General Assembly resolution 2131 (XX) of 21 December 1965.

⁸⁰ General Assembly resolution 1803 (XVII) of 14 December 1962.

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 6]

DOCUMENT A/CN.4/381*

Second report on the law of the non-navigational uses of international watercourses, by Mr. Jens Evensen, Special Rapporteur

[Original: English]
[24 April 1984]

CONTENTS

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
I. STATUS OF WORK ON THE TOPIC	1-8	103
II. INTRODUCTION (chapter I of the draft)	9-44	104
Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention	20-30	105
Text of article 1	23	106
Specific ground-water aspects	26-30	107
Article 2. Scope of the present Convention	31-32	107
Text of article 2	32	108
Article 3. Watercourse States	33-35	108
Text of article 3	34	108
Article 4. Watercourse agreements	36-40	108
Text of article 4	37	108
Article 5. Parties to the negotiation and conclusion of watercourse agreements	41-44	109
Text of article 5	44	109
III. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES (chapter II of the draft)	45-58	109
Article 6. General principles concerning the sharing of the waters of an international watercourse	48-51	110
Text of article 6	49	110
Article 7. Equitable sharing in the uses of the waters of an international watercourse	52-53	110
Text of article 7	52	111
Article 8. Determination of reasonable and equitable use	54-56	111
Text of article 8	55	111
Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States	57-58	112
Text of article 9	57	112
IV. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSES (chapter III of the draft)	59-80	112
Article 10. General principles of co-operation and management	64-66	113
Text of article 10	64	113

* Incorporating document A/CN.4/381/Corr.1.

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
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; <i>and</i>		
Article 14. Failure of watercourse States to comply with the provisions of articles 11 to 13 .	67-74	113
Text of article 11	68	114
Text of article 12	70	114
Text of article 13	72	115
Text of article 14	74	115
Article 15. Management of international watercourses. Establishment of commissions . . .	75-76	116
Text of article 15	76	116
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; <i>and</i>		
Article 19. Restricted information	77-80	117
Text of article 16	77	117
Text of article 17	78	117
Text of article 18	79	118
Text of article 19	80	118
V. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL AND REGIONAL SITES (chapter IV of the draft)	81-100	118
Article 20. General provisions on the protection of the environment; <i>and</i>		
Article 21. Purposes of environmental protection	82-83	118
Text of article 20	82	118
Text of article 21	83	119
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; <i>and</i>		
Article 25. Emergency situations regarding pollution	84-89	119
Text of article 22	84	119
Text of article 23	86	120
Text of article 24	88	120
Text of article 25	89	120
Article 26. Control and prevention of water-related hazards	90	121
Text of article 26	90	121
Article 27 [new article 15 <i>bis</i>]. Regulation of international watercourses	91-93	121
Text of article 27 [new article 15 <i>bis</i>]	93	121
Article 28. Safety of international watercourses, installations and constructions, etc.; <i>and</i>		
Article 28 <i>bis</i> . Status of international watercourses, their waters and constructions, etc. in armed conflicts	94-97	121
Text of article 28	94	122
Text of new article 28 <i>bis</i>	96	122
Article 29 [new article 15 <i>ter</i>]. Use preferences	98-99	122
Text of article 29 [new article 15 <i>ter</i>]	98	122
Article 30. Establishment of international watercourses or parts thereof as protected national or regional sites	100	123
Text of article 30	100	123
VI. PEACEFUL SETTLEMENT OF DISPUTES (chapter V of the draft)	101-112	123
Article 31. Obligation to settle disputes by peaceful means	103	123
Text of article 31	103	124
Article 31 <i>bis</i> . Obligations under general, regional or bilateral agreements or arrangements . .	104	124
Text of article 31 <i>bis</i>	104	124
Article 32. Settlement of disputes by consultations and negotiations; <i>and</i>		
Article 33. Inquiry and mediation	105-106	124
Text of article 32	105	124
Text of article 33	106	125
Article 34. Conciliation;		
Article 35. Functions and tasks of the Conciliation Commission; <i>and</i>		
Article 36. Effects of the report of the Conciliation Commission. Sharing of costs	107-110	125
Text of article 34	109	126

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
Articles 35 and 36	110	126
Article 37. Adjudication by the International Court of Justice, another international court or a permanent or <i>ad hoc</i> arbitral tribunal; and		
Article 38. Binding effect of adjudication	111-112	126
Text of article 37	111	127
Article 38	112	127
VII. FINAL PROVISIONS (chapter VI of the draft)	113-114	127
Article 39. Relationship to other conventions and international agreements	113	127
Text of article 39	113	127

CHAPTER I

Status of work on the topic

1. A first report to the International Law Commission on the non-navigational uses of international watercourses was introduced by the present Special Rapporteur to the Commission at its thirty-fifth session in 1983.¹ Based, *inter alia*, on the work of the two previous Special Rapporteurs on the topic, the Special Rapporteur proposed an outline for a draft convention consisting of 39 articles contained in six chapters. The aim was to present a more or less comprehensive, albeit preliminary, draft which might serve as a concrete basis for an exchange of views on the topic in the Commission and subsequently in the Sixth Committee of the General Assembly.

2. The Special Rapporteur considered that there were compelling reasons for such a comprehensive, concrete approach. The fundamental importance of this topic politically and economically, as well as in terms of international law, is generally acknowledged. Fresh water is a source of life for all living things, including fauna and flora. Its quantity and quality are of fundamental importance for all countries, not least in the developing world. The rational administration and management of this invaluable resource are of constantly increasing significance in the wake of the population explosion, the urbanization and industrialization of the globe, the increasing pollution hazards, deforestation and desertification—in short, the increasing power of man to tamper with the laws of nature and ecology. Adequate fresh water supply has become a world problem. According to WHO, lack of adequate fresh water is a major scourge for more than one third of the population of the world.

3. In preparing for his first report, the Special Rapporteur felt the acute necessity of obtaining guidance from the Commission as well as from the Sixth Committee of the General Assembly on all the main issues involved. He thought that that guidance should, to the extent possible, focus on concrete issues and aspects. That goal could best be achieved by placing a comprehensive concrete first draft before the Commission and the Sixth Committee. Because of the delicate nature of many of the factors involved, it

seemed inadvisable for the Special Rapporteur to look at the various aspects of the topic as isolated questions. A comprehensive approach seemed necessary in order to strike the right balance in those matters between the interdependence of riparian States and their sovereignty, independence and right to benefit from the natural resources within their borders. To strike this highly delicate balance must be one of the major concerns in preparing the law of the non-navigational uses of international watercourses. The discussions of his first report in the Commission during its thirty-fifth session, in 1983,² and in the Sixth Committee of the General Assembly at its thirty-eighth session,³ were extremely helpful to the Special Rapporteur in that respect. But those discussions also seemed to imply that the Special Rapporteur had not been entirely successful in striking the necessary balance between the interests involved.

4. The discussions in the Commission as well as in the Sixth Committee were of a preliminary nature. That was due to the preliminary nature of the text presented to those organs as well as from the magnitude and complexity of the topic. Thus it seems difficult to draw too absolute conclusions from those discussions, as the purpose of submitting preliminary draft articles was to obtain the reaction of the Commission to such tentative articles. However, the Special Rapporteur received invaluable guidance from the discussions not only in the form of general comments, but also in the form of concrete proposals on specific issues and formulations.

5. As to the more general questions and issues discussed, the approach of a *framework agreement* seemed to have considerable support. But it was also stressed that the drawing up of a framework agreement was a delicate task. In formulating the general principles and the concrete articles of a convention on the non-navigational uses of international watercourses, that fact must constantly be taken into consideration.

¹ *Yearbook* . . . 1983, vol. II (Part One), p. 155, document A/CN.4/367.

² *Yearbook* . . . 1983, vol. II (Part Two), pp. 65 *et seq.*, paras. 207-260.

³ 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. F.

6. At the same time, it was repeatedly emphasized that each international watercourse had its distinctive characteristics and thus its specific and unique set of problems, both those deriving from the hands of mother nature and those arising from the political, economic and legal issues involved. But international watercourses also have common features and follow general laws which likewise will make their imprint on the management, administration and use of international watercourses. Thus, in drawing up a draft convention on this topic, it seems essential to recognize and accept the common features of international watercourses, but also to accept the limitations to the venture of drawing up an international instrument on international watercourses on account of the unique features of each watercourse. Consequently the Special Rapporteur agrees that specific watercourse agreements pertaining to a special watercourse of parts thereof, to the watercourses of a region or to special activities in or uses of watercourses, may frequently be required for the satisfactory administration and management of international watercourses. Nevertheless, such concrete approaches to specific watercourses or specific problems do not make a general framework agreement on the topic superfluous. A framework convention should accept the necessity and validity of such specific watercourse agreements, whether concluded prior or subsequent to the adoption of a general convention on the non-navigational uses of international watercourses.

7. As stated by the previous Special Rapporteur, Mr. Schwebel, in his first report, submitted to the Commission at its thirty-first session, in 1979:

One of the problems that must be faced in drafting articles on the law of the uses of international watercourses is the immense diversity of international river systems. In size, they range from such enormous systems as the Congo, the Amazon, the Mississippi and the Ganges, all of which drain more than 1 million square kilometres, to the smallest of streams. Many are located in arid parts of the earth . . . Many others are in water surplus areas, so that the major concern is not too little water but too much . . . In short, there are international watercourses in almost every part of the world, and this means that their physical characteristics and the human needs they serve are subject to the same extreme variations as are found in other respects throughout the world.

Each watercourse is unique. Each has a special congeries of uses which differs from that of any other system. One may be used principally for drinking and household purposes, another for irrigation, a third for industrial production and a fourth for hydroelectric production. Normally, of

course, a river serves—or has the potential for serving—a variety of uses. . . .⁴

In the discussions in the Commission as well as in the Sixth Committee of the General Assembly, the importance of preparing a general convention on the non-navigational uses of international watercourses was acknowledged. But the importance of preserving the validity of existing specific watercourse agreements and the possibility of concluding such agreements in the future as necessary elements in the law of international watercourses were likewise emphasized. Thus, as stated by the previous Special Rapporteur in his second report, there is a “need for a method of dealing with watercourse problems that would permit the development of principles of general applicability within a framework sufficiently flexible to allow adaptation to the unique aspects”⁵ of each individual watercourse.

8. The discussion of the present Special Rapporteur’s first report in the Commission as well as in the Sixth Committee in 1983 seems to support the approach chosen by the previous special rapporteurs, as well as by the present Special Rapporteur, that the term “uses” should not be taken in the narrow sense of the term but should also relate to such issues as environmental protection and pollution, prevention and control of water-related hazards, as well as the various aspects thereof.⁶ Considerable attention was focused on drought and its disastrous consequences and on the report of the United Nations Water Conference, held at Mar del Plata, Argentina, in 1977, which drew attention to the fact that “the negative economic impact of water-related natural disasters in developing countries was greater than the total value of all the bilateral and multi-lateral assistance given to these countries.”⁷ In the work towards mitigating the disastrous effects of drought, the co-ordinated development and management of water resources as well as drought forecasting on a long-term basis should be viewed as a key element.⁸

⁴ *Yearbook . . . 1979*, vol. II (Part One), p. 159, document A/CN.4/320, paras. 63-64.

⁵ *Yearbook . . . 1980*, vol. II (Part One), p. 160, document A/CN.4/332 and Add.1, para. 3.

⁶ Document A/CN.4/367 (see footnote 1 above), paras. 60-63.

⁷ See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), p. 112, part three, para. 100.

⁸ Document A/CN.4/367 (see footnote 1 above), para. 63.

CHAPTER II

Introduction

[Chapter I of the draft]

9. In his second report, the Special Rapporteur has attempted to take into consideration the observations made in the course of the discussions in the Commission at its thirty-fifth session, and in the Sixth Committee of the General Assembly at its thirty-eighth session, in 1983.⁹

⁹ See footnotes 2 and 3 above, respectively.

The Special Rapporteur has been somewhat in doubt about how to approach this task.

10. The Special Rapporteur’s first draft was rather voluminous, as it attempted to represent a comprehensive approach to the topic in order to focus attention on concrete issues as well as on concrete formulations. By the same token, his proposals were intended to be of a prelimi-

nary and tentative nature, to be amended and refined extensively as a consequence of the first rounds of a comprehensive debate. However, he had included in his draft the six articles provisionally adopted by the Commission at its thirty-second session, in 1980¹⁰—with some minor changes—as the starting-point for his proposed draft of a convention.

11. In the course of the discussions in the Commission, and especially in the Sixth Committee, those six articles were subjected to close examination, in the same manner as the rest of the proposed articles. The concepts of “watercourse system” and “system States”, in particular, were analysed in considerable detail.

12. The concepts of “international watercourse system”, “system States” and “system agreements” had been introduced by the previous Special Rapporteur in his second report on the topic.¹¹ At its thirty-second session, in 1980, the Commission endorsed the “international watercourse system” concept in the note it adopted describing its tentative understanding of what was meant by the term “international watercourse system” (see para. 21 below), and in articles 1 to 4 which it provisionally adopted at the same session.

13. The concepts of “international watercourse system”, “system States” and “system agreements” were likewise applied by the present Special Rapporteur in the draft convention proposed in his first report. However, in that context the Special Rapporteur emphasized that, in his opinion:

... a definition of international watercourses based on a doctrinal approach to the topic would be counter-productive, whether the definition is based on the drainage basin concept or on other concepts of a doctrinal nature. The definition of the term “international watercourse” should not have as its purpose to create a superstructure from which to distil or extract legal principles. Such an approach would defy the purpose of drafting principles of general applicability that were sufficiently flexible “to allow adaptation to the unique aspects” of each individual international watercourse.¹²

He stressed, however, that it might be useful to attempt to formulate a definition of an international watercourse for the purposes of the draft convention.

14. The Special Rapporteur reverted to that question in his comments to article 1, entitled “Explanation (definition) of the term ‘international watercourse system’ as applied in the present Convention”. He stated, *inter alia*:

For several reasons, the concept of “international drainage basin” met with opposition in the discussions both of the Commission and of the Sixth Committee of the General Assembly. Concern was expressed that “international drainage basin” might imply a certain doctrinal approach to all watercourses regardless of their special characteristics and regardless of the wide variety of issues of special circumstances of each case. It was likewise feared that the “basin” concept put too much emphasis on the land areas within the watershed, indicating that the physical land area of a basin might be governed by the rules of international water resources law.¹³

15. The purpose of introducing and adopting the con-

cepts of “international watercourse system”, “system States” and “system agreements” was to apply terms that would not be exposed to the reservation and criticism with which the concept “international drainage basin” had been met. But those efforts did not seem entirely successful. Certain doubts were raised at the thirty-fifth session of the Commission.

16. A number of representatives in the Sixth Committee commended the approach adopted with regard to article 1, which had been drafted in a purely descriptive manner and from which no legal rules could be deduced. The expressions “international watercourse system” and “system States” should be considered as convenient descriptive tools from which no legal rules or principles could be deduced. However, others maintained that the terms “watercourse system” and “system States” were not distinguishable to any appreciable extent from the “drainage basin” concept, and should therefore be avoided. Furthermore, according to those representatives, no practical advantage seemed to arise from the use of the “watercourse system” concept. It was likewise stressed that the “unitary approach” inherent in the “drainage basin” concept did not differ much from the approach inherent in the “watercourse system” concept.¹⁴

17. Other representatives, however, maintained that the approach adopted in the draft, based on the concepts of “watercourse system” and “system States”, was an objective and valuable approach that should not be lightly abandoned.¹⁵

18. The drafting of a convention on the topic under consideration involves political as well as legal aspects. In order to achieve the aim of conceiving a draft framework convention broadly acceptable to the international community, the political aspects of the task should not be underestimated. The discussions in the Sixth Committee of the General Assembly in 1983 seem to indicate that the use of the “system” concept approach may be a serious hurdle in the search for a generally acceptable instrument. Admittedly, the discussions of a preliminary draft are in themselves of a preliminary character. Even so, the Special Rapporteur deems that it might be advisable to indicate certain changes and amendments in the preliminary draft in order to ascertain whether such possible “refinements” will be accepted as improvements of the text or will be met with new reservations or additional criticism, implying that they would give little or no assurance of making the draft more generally acceptable.

19. Accordingly, in the present report, the Special Rapporteur tentatively suggests some changes in and amendments to articles of the draft convention contained in his first report. On the basis of the discussions in the Commission and the Sixth Committee, the outline of the draft and of the chapters has been slightly restructured. Some additional articles have likewise been included in the draft.

ARTICLE I. Explanation (definition) of the term “international watercourse” as applied in the present Convention

20. At the time of the provisional adoption, at its thirty-

¹⁰ *Yearbook* . . . 1980, vol. (Part Two), pp. 110 *et seq.*

¹¹ *Yearbook* . . . 1980, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

¹² Document A/CN.4/367 (see footnote 1 above), para. 14.

¹³ *Ibid.*, para. 71.

¹⁴ See “Topical summary . . .” (A/CN.4/L.369), paras. 379-380 and 385-386.

¹⁵ *Ibid.*, para. 396.

second session, in 1980, of six articles (arts. 1 to 5 and X), the Commission felt that discussions had not yet reached a sufficiently advanced stage to provide for a definition. Consequently, it confined its provisional efforts to a descriptive note giving concrete indications and introducing the concepts of "watercourse system" and "international watercourse system".¹⁶

21. The note adopted by the Commission indicated the Commission's tentative understanding of what was meant by the term "international watercourse system". It provided as follows:

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and ground water 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.¹⁷

22. In article 1 of his first report, the Special Rapporteur provided an "Explanation (definition) of the term 'international watercourse system' as applied in the present Convention". As stated above (para. 16), the use of the terms "international watercourse system" and "system States" met with considerable opposition in the discussions in the Sixth Committee. As a consequence, the Special Rapporteur has made an attempt to reformulate article 1 and subsequent articles in order to ascertain whether the aforementioned terms are necessary or useful.¹⁸

23. The Special Rapporteur tentatively proposes the following amended text¹⁹ of article 1:

¹⁶ *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 89.

¹⁷ *Ibid.*, para. 90.

¹⁸ All changes (amendments, additions or deletions) made to the original text of the draft are shown in italics in the titles of chapters and in the body of the text, and in roman type in the titles of articles.

¹⁹ See footnote 18 above.

Article 1 as presented in the first report read as follows:

"CHAPTER I. INTRODUCTORY ARTICLES

"Article 1. Explanation (definition) of the term "international watercourse system" as applied in the present Convention

"1. An 'international watercourse system' is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States.

"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.

"Deltas, river mouths or other similar formations with brackish or salt water forming a natural part of an international watercourse system shall likewise be governed by the provisions of the present Convention.

"2. To the extent that a part or parts of a watercourse system situated in one system State are not affected by or do not affect uses of the watercourse system in another system State, such parts shall not be treated as part of the international watercourse system for the purposes of the present Convention".

CHAPTER I

INTRODUCTORY ARTICLES

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.*

24. In proposing this new formulation of article 1, the Special Rapporteur has relied heavily on the note provisionally adopted by the Commission in 1980 (see para. 21 above). For the reasons already indicated, the Special Rapporteur has deleted, in his amended version of article 1, any reference to "watercourse system" or "system States", etc. He likewise considers it useful to emphasize that the explanations of terms given in the draft are solely "for the purposes of the present Convention". Furthermore, the Special Rapporteur feels that it may not be useful, in the text of article 1, to make reference to the "hydrographic components such as rivers, lakes, canals, glaciers and ground water constituting by virtue of their physical relationship a unitary whole". The Special Rapporteur feels that such an express reference in the article may once more open up the discussion of the merits of the "drainage basin" concept or "watercourse system" concept in connection with the ongoing attempts to formulate a broadly acceptable framework agreement. It goes without saying that the Special Rapporteur accepts as a fact that international watercourses have a wide variety of "source components". They may, *inter alia*, include rivers, lakes, canals, tributaries, streams, brooks and springs, glaciers and snow-capped mountains, swamps, ground water and other types of aquifers. But the nature and types of these components as well as their concrete relevance will vary from watercourse to watercourse, from region to region.

25. Consequently the Special Rapporteur considers that a more flexible approach is to make a broad reference to the relevant components and parts only, and then in the commentary to the article to refer to various types of such components, without attempting of course to give an exhaustive enumeration. The relative importance of the various components may of course vary with the uses and

problems involved. Thus pollution problems, especially the problems of persistent and dangerous pollutants, may be more relevant in regard to a wider variety of components and over wider areas than other problems, thus again enhancing the relevancy of components.

Specific ground-water aspects

26. In concluding his observations on article 1, the Special Rapporteur will devote a few paragraphs to the aspect of ground water and aquifers. Ground water, as mentioned above, forms an important component of international watercourses at their source as well as along the entire course or part of the course of such rivers. However, in many areas of the earth underground water deposits have become or have the potential to become major water resources for human use in one way or another. Mention may be made of desert areas like the Sahara region or arid areas like the Sonora and Arizona border regions of Mexico and the United States of America. Especially in border regions, the increasing demand for water and improved technology for drilling for untapped ground-water resources create conflicts or possibilities of potential conflicts over transboundary ground-water resources independently of the existence of international watercourses. These problems are sometimes related to the increased pollution of international watercourses, such as the salinization of the Colorado River in Arizona. That pollution caused considerable damage to Mexican agriculture in the Sonora region and resulted *inter alia*, in the drilling of a major field of deep water wells by the Mexican authorities in the San Luis area with the capacity to extract some 160,000 acre feet (197,358,000 cubic metres) of water annually. As the waters thus used belonged to a transboundary ground-water resource, the project threatened to reduce the ground-water resources on the United States side of the border if indiscriminately drawn on.

27. The United States-Mexican International Boundary and Water Commission, which had dealt with this problem in 1944,²⁰ acknowledged in its recommendation (minute 242 of 30 August 1973) that ground-water exploitation had become a major new issue in Mexican-United States relations. The recommendation sought to limit the annual extraction of transboundary ground water by each nation to a maximum level of 160,000 acre feet (197,358,000 cubic metres).²¹

28. The International Boundary and Water Commission considered its recommendation as a tentative and interim measure pending the conclusion of a comprehensive agreement on ground water in the border area. The Commission

²⁰ Originally established in 1889 as the International Boundary Commission whose original functions were limited to boundary adjustments, its jurisdiction was gradually expanded to the development and management of water resources, including storage, diversion, flood control, channel rectifications, sewage and sanitation controls, salinity control and hydroelectric power production. See the Treaty of 3 February 1944 between the United States of America and Mexico (United Nations, *Treaty Series*, vol. 3, p. 313).

²¹ See United States of America, *The Department of State Bulletin*, vol. LXIX, No. 1787, 24 September 1973, pp. 395-396. See also S. P. Mumme, "The U.S.-Mexican conflict over transboundary ground waters: some institutional and political considerations", *Case Western Reserve Journal of International Law* (Cleveland, Ohio), vol. 12, No. 3, (1980), p. 505.

foresaw additional ground-water conflicts in at least six other hydrological regions located throughout the length of the United States-Mexican border.²²

29. The conservation and management of transboundary ground-water resources have much in common with the management and administration of international watercourses. Admittedly, ground-water resources will to a large extent be a relevant component or part of an international watercourse and should as such fall under the applicable rules and principles laid down in a framework convention on the non-navigational uses of international watercourses.

30. On the other hand, ground-water resources may form totally independent resources unrelated to a specific surface watercourse. Especially in deserts and arid areas, such resources may be of paramount importance and must be conserved and managed with wisdom and scientific knowledge. It must be admitted that neither general principles of international law nor specific instruments of international law are sufficiently developed to meet adequately these problems and conflict areas in general. The principles and rules elaborated in a framework convention and in specific watercourse agreements may have a bearing on or be analogously applied to independent ground-water resources. But the Special Rapporteur holds the view that the present elaboration of a watercourse convention should not attempt to include such special resources under its general domain, nor should special provisions be included in such an instrument to regulate such specific resources.²³

ARTICLE 2. Scope of the present Convention

31. As stated in the first report,²⁴ the proposed article 2 corresponded to article 1 provisionally adopted by the Commission at its thirty-second session, in 1980. The discussion in the Sixth Committee in 1983 revealed no major reservations to the article as proposed in the first report.

32. Taking* into account the adjustments explained above, article 2 as amended²⁵ reads as follows:

²² Mumme, *loc. cit.*, p. 506.

²³ For an interesting examination, see "Studies of shared ground-water resources in North-East Africa", prepared by the Ministry of Irrigation of Egypt, presented at the Interregional Meeting of International River Organizations, convened by the United Nations at Dakar, Senegal, from 5 to 14 May 1981, and included in the proceedings of the Meeting: United Nations, *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (Sales No. E.82.II.A.17), p. 303, part three: "Selected papers prepared by international river organizations, Governments and intergovernmental organizations."

²⁴ Document A/CN.4/367 (see footnote 1 above), para 76.

²⁵ See footnote 18 above.

Article 2 as presented in the first report read as follows:

"Article 2. Scope of the present Convention

"1. The present Convention applies to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourse systems and their waters.

"2. The use of the waters of international watercourse systems for

(Continued on next page.)

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.

ARTICLE 3. Watercourse States

33. As stated in the first report,²⁶ article 3 on system States proposed by the Special Rapporteur corresponded to article 2 provisionally adopted by the Commission at its thirty-second session, in 1980. The article contained a definition of the term "system State". If the concepts of "watercourse system" and "system States" are abandoned, the question arises whether the article should be deleted as superfluous. The Special Rapporteur holds the opinion that tentatively the article should be retained but amended so as to give a definition of "watercourse States" instead of "system States". The Special Rapporteur has introduced a minor additional amendment in order to make it clear that no legal rules or principles could be deduced from this article.

34. Article 3 as amended²⁷ provides 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*.

35. The reference to "relevant component or parts" is intended to convey the opinion hereinbefore expressed that each watercourse is unique, as it has unique features of its own. What should be considered as "relevant components or parts" must be decided in each separate case.

ARTICLE 4. Watercourse agreements

36. Article 4, on "system agreements", proposed in the first report, was taken verbatim from article 3 provisionally adopted by the Commission at its thirty-second ses-

(Footnote 25 continued.)

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."

²⁶ Document A/CN.4/367 (see footnote 1 above), para. 77.

²⁷ See footnote 18 above.

Article 3 as presented in the first report read as follows:

"Article 3. System States

"For the purposes of the present Convention, a State in whose territory components/part of the waters of an international watercourse system exist[s] is a system State."

sion in 1980. Certain proposals for drafting changes were put forward during the discussions of the first report in the Commission and in the Sixth Committee. Among criticisms of a substantive nature, the concern was expressed that the formulation contained in paragraph 1 that "A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention . . ." seemed to imply a degradation of previously concluded watercourse agreements. Possibly it implied that already existing agreements must be re-evaluated and adjusted to the provisions of the draft convention. It was not the purpose of that formulation to establish such a hard and fast rule.

37. In the light of amendments already made in the preceding draft articles and the observations made concerning article 4 in the discussions, the Special Rapporteur proposes an amended text,²⁸ 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.*

38. The new formulations proposed in article 4, paragraph 1, should alleviate any misgivings as to whether

²⁸ See footnote 18 above.

Article 4 as presented in the first report read as follows:

"Article 4. System agreements

"1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention 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."

States parties to the convention should have the obligation to change or readjust special watercourse agreements and be obliged to draft possible new agreements in strict compliance with the provisions of the framework convention. The Special Rapporteur will not in this context enter into an examination of the question to what extent the convention—especially when entering into force—should be considered as *jus cogens* for special watercourse agreements. Great caution should, in the opinion of the Special Rapporteur, be exercised, especially in claiming that special watercourse agreements in force must be re-examined in the light of the provisions of the framework convention.

39. In the opinion of the Special Rapporteur, considerable restraint should be demonstrated in regard to allegations that special watercourse agreements concluded in good faith subsequent to the entry into force of the framework convention would have to apply and adjust the provisions of the framework convention to a special watercourse agreement or arrangement if the States parties held a different opinion. This view has been expressed in the new formulations suggested in paragraph 1 of article 4.

40. Minor amendments have been made to paragraphs 2 and 3 of article 4 on the basis of the discussions in 1983.

ARTICLE 5. Parties to the negotiation and conclusion of watercourse agreements

41. As stated in the first report,²⁹ the proposed article 5 corresponds verbatim to article 4 provisionally adopted by the Commission at its thirty-second session, in 1980. The underlying principle of the article, namely that any watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement concerning the watercourse as a whole, was discussed. In the Sixth Committee, some representatives objected to the adoption of this notion as a general principle. The very nature of the issues involved in managing and controlling international watercourses and the obvious need for close co-operation between watercourse nations seem, however, to justify the inclusion of this principle.

42. The more limited principle contained in paragraph 2 of article 5, namely that a watercourse whose rights or interests may be affected “to an appreciable extent” by an agreement between other watercourse States with regard to a part of a watercourse, or to a particular programme or

²⁹ Document A/CN.4/367 (see footnote 1 above), para. 79.

use, shall have a right to participate in such negotiations, seems likewise justified. The wording of paragraph 2 provides that such a State has the right to participate in the negotiations in order to make its concerns known to the negotiating States. But contrary to paragraph 1, paragraph 2 contains no express provision to the effect that such a State is entitled to become a party to the said special agreement. However, the last words of paragraph 2, referring to article 4 on special watercourse agreements, seems to becloud somewhat this interpretation. The Special Rapporteur proposes that the reference to article 4 should be deleted. The reference in the article to “system agreements” must likewise be adjusted.

43. The Special Rapporteur furthermore holds the opinion that the legal standard “to an appreciable extent”, stated in paragraph 2, is preferable to formulations such as “to a substantial extent”, etc. Whatever standard is used, a concrete evaluation must take place in each instance.

44. Accordingly, the Special Rapporteur proposes an amended text,³⁰ 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*.

³⁰ See footnote 18 above.

Article 5 as presented in the first report read as follows:

“Article 5. 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 4 of the present Convention.”

CHAPTER III

General principles, rights and duties of watercourse States

[Chapter II of the draft]

45. The Special Rapporteur dealt with the general principles and the rights and duties of “system” States in chapter II of the draft convention presented in the first report. Fruitful exchanges of views took place in 1983 in

the Commission, at its thirty-fifth session, and subsequently in the Sixth Committee of the General Assembly, at its thirty-eighth session.

46. A certain refinement in the general outline of the draft

convention was proposed. Thus it was suggested that articles 11 to 14, on notification, procedures in case of protest, etc., belonged in the chapter on general principles rather than in chapter III, on co-operation and management in regard to international watercourses. The Special Rapporteur has considered these proposals, but has come to the conclusion that it is preferable to retain a chapter on general principles with regard to rights and obligations and to assemble the more detailed and procedural articles on management and co-operation in chapter III.

47. As to the substance, considerable doubt and opposition were expressed with regard to the concept of the waters of a watercourse being a "shared natural resource". In that context, it was suggested that the Special Rapporteur had not been successful in expressing the basic principle of sovereignty, to the effect that States had the right to utilize the waters of a watercourse system within their territories pursuant to their needs provided that they did not thereby cause damage or harm to the rights and interests of other States. In the present report, the Special Rapporteur has tried to meet these reservations with certain amendments to article 6.

ARTICLE 6. General principles concerning the sharing of the waters of an international watercourse

48. In article 6 as initially proposed, and entitled "The international watercourse system—a shared natural resource. Use of this resource", the Special Rapporteur introduced the concept of the international watercourse system as a "shared natural resource". That article, with some minor changes, was taken almost verbatim from article 5 as provisionally adopted by the Commission at its thirty-second session, in 1980. In view of the opposition to the concept of an international watercourse as a "shared natural resource" expressed by a number of representatives during the discussions on the first report, it seems doubtful whether it will prove conducive to the attainment of a generally acceptable convention to retain that concept in the form in which it was expressed in article 6. In the light of those discussions, the Special Rapporteur has also deemed it useful to lay down expressly the obvious starting-point that a State within its territory has the right to a fair and equitable share of the uses of the waters of an international watercourse.

49. As a consequence, the Special Rapporteur proposes an amended text,³¹ as follows:

³¹ See footnote 18 above.

Article 6 as presented in the first report read as follows:

"CHAPTER II
"GENERAL PRINCIPLES: RIGHTS AND DUTIES
OF SYSTEM STATES

*"Article 6. The international watercourse system —
a shared natural resource. Use of this resource*

"1. To the extent that the use of an international watercourse system and its waters in the territory of one system State affects the use of a watercourse system or its waters in the territory of another system State or other system States, the watercourse system and its waters are, for the purposes of the present Convention, a shared natural resource. Each system State is entitled to a reasonable and equitable participation (within its territory) in this shared resource.

CHAPTER II

GENERAL PRINCIPLES, RIGHTS AND
DUTIES OF WATERCOURSE STATES

**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.*

50. Article 6 expresses a basic principle which, in article IV of the Helsinki Rules on the Uses of the Waters of International Rivers of 1966,³² has been expressed as follows as far as the drainage basin concept is concerned:

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

51. Paragraph 1 of the proposed text is new. Paragraph 2 uses to some extent the wording of the original paragraphs 1 and 2. The formulation "watercourse system" as "a shared natural resource" has not been retained, for the reasons mentioned above. Certain observations contained in the commentary to the original article 6³³ also seem pertinent, to some extent, to the amended text.

ARTICLE 7. Equitable sharing in the uses of the waters of an international watercourse

52. In article 7 proposed in his first report, the Special Rapporteur introduced provisions concerning the "equitable sharing in the uses of an international watercourse system and its waters". The article was a corollary to article 6. In view of the amendments to article 6 and the discussions on the first report in 1983, the Special Rapporteur proposes an amended text,³⁴ as follows:

"2. An international watercourse system and its waters which constitute a shared natural resource shall be used by system States in accordance with the articles of the present Convention and other agreements or arrangements entered into in accordance with articles 4 and 5."

³² Rules adopted by the International Law Association at its Fifty-second Conference, held at Helsinki in 1966. See ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.* See also *Yearbook ... 1974*, vol. II (Part Two), pp. 387 *et seq.*, document A/CN.4/274, para. 405.

³³ Document A/CN.4/367 (see footnote 1 above), paras. 83-84.

³⁴ See footnote 18 above.

Article 7 as presented in the first 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 of the international watercourse and its components.

53. The amendments made to draft article 7 are minor. By and large, the commentary to the article contained in the first report³⁵ is applicable to the amended text.

ARTICLE 8. Determination of reasonable and equitable use

54. In the view of the Special Rapporteur, article 8, on determination of reasonable and equitable use of an international watercourse, is a useful corollary to the legal standard set forth in article 7. Although not exhaustive, the enumeration of factors contained in article 8 provides elements for a better understanding of the content, nature and interpretation of the legal standard applied in article 7.

55. On the basis of the 1983 discussions and the ideas set forth at that time, the Special Rapporteur proposes an amended text,³⁶ as follows:

"Article 7. Equitable sharing in the uses of an international watercourse system and its waters

"An international watercourse system and its waters shall be developed, used and shared by system States 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 watercourse system concerned, with adequate protection and control of the watercourse system and its components."

³⁵ Document A/CN.4/367 (See footnote 1 above), paras. 87-93.

³⁶ See footnote 18 above.

Article 8 as presented in the first report read as follows:

"Article 8. Determination of reasonable and equitable use

"1. In determining whether the use by a system State of a watercourse system or its waters 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 watercourse system concerned. Among such factors are:

"(a) the geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse system concerned;

"(b) the special needs of the system State concerned for the use or uses in question in comparison with the needs of other system States, including the stage of economic development of all system States concerned;

"(c) the contribution by the system State concerned of waters to the system in comparison with that of other system States;

"(d) development and conservation by the system State concerned of the watercourse system and its waters;

"(e) the other uses of a watercourse system and its waters by the State concerned in comparison with the uses by other system States, including the efficiency of such uses;

"(f) co-operation with other system States in projects or programmes to attain optimum utilization, protection and control of the watercourse system and its waters;

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;

(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 inter-

"(g) the pollution by the system State in question of the watercourse system in general and as a consequence of the particular use, if any;

"(h) other interference with or adverse effects, if any, of such use for the uses or interests of other system States including, but not restricted to, the adverse effects upon existing uses by such States of the watercourse system or its waters and the impact upon protection and control measures of other system States;

"(i) availability to the State concerned and to other system States of alternative water resources;

"(j) the extent and manner of co-operation established between the system State concerned and other system States in programmes and projects concerning the use in question and other uses of the international watercourse system and its waters in order to attain 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 system States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

"If the system 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."

national watercourse and its impact upon protection and control measures of other watercourse States;

(j) availability to the States 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.

56. The commentary to article 8 appearing in the first report³⁷ likewise applies to the amended text.

³⁷ Document A/CN.4/367 (see footnote 1 above), paras. 94-98.

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

57. The Special Rapporteur proposes an amended text,³⁸ 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.

58. The commentary to article 9 contained in the first report³⁹ is generally applicable to the amended text.

³⁸ See footnote 18 above.

Article 9 as presented in the first report read as follows:

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

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

³⁹ Document A/CN.4/367 (see footnote 1 above), paras. 99-101.

CHAPTER IV

Co-operation and management in regard to international watercourses

[Chapter III of the draft]

59. In chapter III of the draft convention proposed in the first report, the Special Rapporteur dealt with principles relevant to co-operation and management in regard to international watercourses. He expressed the view that co-operation among watercourse States, and the orderly and effective management and administration of such watercourses by States on the basis of co-operation and friendly relations among the States concerned, was a condition for the orderly protection and preservation of such resources in order to obtain optimum utilization of those resources so invaluable for mankind. It is increasingly recognized that such international co-operation and inter-State management and administration are necessary as an international political principle and as a principle of progressive international law as well. This follows, *inter alia*, from the basic tenets of international law and international relations as laid down in the Charter of the United Nations, Article 2, paragraphs 3 and 4, and Article 33, and in the United Nations Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;⁴⁰ it follows likewise from the principle of good-

⁴⁰ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

neighbourly relations between States. Furthermore, both the United Nations Water Conference, held at Mar del Plata, Argentina, from 14 to 25 March 1977, and the Inter-regional Meeting of International River Organizations, convened by the United Nations in Dakar, Senegal, from 5 to 14 May 1981, stressed the importance of inter-State co-operation and of the necessary organizational structure at both the international and the regional levels and for specific watercourses.

60. Thus recommendation 85 of the 1977 Mar del Plata Action Plan provides:

85. Countries sharing water resources, with appropriate assistance* from international agencies and other supporting bodies, on the request of the countries concerned*, should review existing and available techniques for managing* shared water resources and co-operate* in the establishment of programmes, machinery and institutions* necessary for the co-ordinated development* of such resources. Areas of co-operation* may with agreement of the parties concerned include planning, development, regulation, management, environmental protection, use and conservation, forecasting, etc.* Such co-operation should be a basic element in an effort to overcome major constraints such as the lack of capital and trained manpower as well as the exigencies of natural resource development.⁴¹

⁴¹ Report of the United Nations Water Conference ... (see footnote 7 above), p. 51, part one.

61. The urgent need for technical and financial support as well as for training possibilities through international agencies was likewise stressed at the Interregional Meeting of International River Organizations held at Dakar in 1981. Thus, in the summary of conclusions reached at the Meeting with regard to progress in co-operative arrangements, it was stated:

12. In the light of the desirability of intensifying exchange of information and experience among international river or lake organizations in various regions, and with a view to promoting greater co-operation between *neighbouring States*,* and where the *interested States request the establishment of new or strengthened institutional arrangements*,* it is desirable that the Secretary-General of the United Nations strengthen the support available within the Department of Technical Co-operation for Development to service the various needs for such organizations and of States concerned.⁴²

62. It was further concluded:

5. *The prevention and mitigation of floods, droughts** and other hazards natural and man-made, are increasingly of concern to the co-operating States because of the numerous changes that are taking place at accelerating rates within the watersheds; therefore, new or strengthened activities must be undertaken to deal effectively with the detrimental effects of water-related hazards and conditions. *The international river and lake organizations are appropriate bodies for initiating studies and recommending measures, contingency plans and warning systems*,* as well as for conducting the necessary ongoing review of conditions and the adequacy of measures undertaken.⁴³

63. In chapters III and IV of the draft convention proposed in his first report, the Special Rapporteur attempted to follow up the ideas and recommendations set forth by the United Nations Water Conference and the Dakar Meeting.

ARTICLE 10. General principles of co-operation and management

64. The Special Rapporteur has the impression, from the 1983 discussions, that this article might probably be generally acceptable. Consequently he has restricted his present efforts to some minor drafting changes, except for a new paragraph 2.

The amended text⁴⁴ reads as follows:

⁴² United Nations, *Experiences in the Development and Management* . . . (see footnote 23 above), p. 15, part one: Report of the Meeting, para. 49, conclusion 12.

⁴³ *Ibid.*, p. 14, para. 49, conclusion 5.

⁴⁴ See footnote 18 above.

Article 10 as presented in the first report read as follows:

"CHAPTER III

"CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSE SYSTEMS

"Article 10. General principles of co-operation and management

"1. System States sharing an international watercourse system shall, to the extent practicable, establish co-operation with regard to uses, projects and programmes related to such watercourse system in order to attain optimum utilization, protection and control of the watercourse system. Such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States.

"2. System States should engage in consultations (negotiations) and

CHAPTER III

CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSES

Article 10. General principles of co-operation and management

1. *Watercourse States sharing an international watercourse shall, to the extent practicable, establish co-operation with regard to uses, projects, programmes, planning and developments related to such watercourse in order to obtain optimum utilization, protection and control of the watercourse. Such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all the watercourse States concerned.*

2. *For these purposes watercourse States should obtain the appropriate assistance from the United Nations Organization and other relevant international agencies and supporting bodies, at the request of the watercourse States concerned.*

3. *Watercourse States should engage in consultations (negotiations) and the exchange of information and data on a regular basis concerning the administration, management and uses of such watercourse and other aspects of regional interest with regard to relevant watercourses.*

4. *Watercourse States shall, when necessary, establish joint commissions or similar agencies or arrangements as a means of promoting the objects and measures provided for in the present Convention.*

65. The commentary to article 10 appears in the first report.⁴⁵

66. A new paragraph 2 has now been included in order to focus attention on the obvious need for assistance, for example from the United Nations Department of Technical Co-operation for Development, etc. Such possibilities could not be formulated as a hard and fast legal obligation but as an indication of the tasks and institutional challenges of the appropriate organizations and agencies.

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; and

ARTICLE 14. Failure of watercourse States to comply with the provisions of articles 11 to 13

67. Article 11 on notification and article 12 on time-limits for reply to notifications did not seem controversial in principle, although proposals for improvement both with regard to drafting and substance were put forward during the 1983 discussions. Articles 13 and 14, especially

exchange of information and data on a regular basis concerning the administration and management of such watercourse and other aspects of regional interest with regard to watercourse systems.

"3. System States shall, when necessary, establish joint commissions or similar agencies or arrangements as a means of promoting the measures and objects provided for in the present Convention."

⁴⁵ Document A/CN.4/367 (see footnote 1 above), paras. 107-110.

article 13 on procedures in case of protest, caused wide concern. This was especially the case in relation to the provisions of paragraph 3 of article 13, which seemed to imply that a protesting State had a veto power, or at least the power to postpone for a longer or shorter period of time the construction of a disputed project or programme. The Special Rapporteur has attempted, in the new text he tentatively proposes, to take into consideration the conflicting interests involved on the basis of the above-mentioned exchanges of view.

68. With regard to *article 11*, on notification, the Special Rapporteur has merely made a few minor drafting amendments.

The amended text⁴⁶ reads as follows:

**Article 11. Notification to other watercourse States.
Content of notification**

1. Before a *watercourse* State undertakes, authorizes or permits a project or programme or alteration of or addition to existing projects or programmes with regard to the utilization, regulation, conservation, protection or management of an international *watercourse* which may cause appreciable harm to the rights or interests of another *watercourse* State or other *watercourse* States, the *watercourse* State concerned shall submit at the earliest possible date due notification to the *other* relevant *watercourse* State or States about such project, programme, alteration or addition.

2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other *watercourse* State or States to evaluate and determine as accurately as possible the potential for appreciable harm to the rights or interests of the *other watercourse State or States* by such intended project, programme, alteration or addition.

69. The commentary to article 11 is contained in the first report.⁴⁷

70. With regard to *article 12*, on time-limits for reply to notifications, the question was raised whether a time-limit of six months was sufficient for such reply. A reasonable extension of the time-limit has been provided for in paragraph 2 of article 12 in cases where the receiving State deems that additional data, information or specifications

are needed. The Special Rapporteur has now also included the possibility of an extension of the time-limit in article 12, paragraph 1. The provision contained in paragraph 3, to the effect that the notifying State shall not initiate the project or programme during the time-limits, obviously also applies to the extension of time-limits provided for in the above-mentioned paragraphs. Minor drafting amendments have also been made in article 12, the amended text of which⁴⁸ reads as follows:

Article 12. Time-limits for reply to notifications

1. In a notification transmitted in accordance with article 11, the notifying *watercourse* State shall allow the receiving *watercourse* State or States a *reasonable period of time* of not less than six months from the receipt of the notification to study and evaluate the potential for appreciable harm arising from the planned project, programme, alteration or addition and to communicate its reasoned decision to the notifying State.

Should the receiving State or States deem that the time-limit stipulated in the notification is not reasonable due to the complexity of the issues or the magnitude of the work involved or for other reasons, they may request a reasonable extension of the time-limit concerned.

2. Should the receiving *watercourse* State or States deem that additional information, data or specifications are needed for a proper evaluation of the *issues* involved, they shall inform the notifying State to this effect as expeditiously as possible. Justifiable requests for such additional *information*, data or specifications shall be met by the notifying State as expeditiously as possible and the parties shall agree to a reasonable extension of the time-limit set forth in the *notification*.

3. During the time-limits *set forth* in paragraphs 1 and 2 of this article, the notifying State may not initiate the *works* referred to in the notification without the consent of the *notified watercourse* State or States concerned.

⁴⁶ See footnote 18 above.

Article 12 as presented in the first report read as follows:

“Article 12. Time-limits for reply to notification

“1. In a notification transmitted in accordance with article 11, the notifying system State shall allow the receiving system State or States a period of not less than six months from the receipt of the notification to study and evaluate the potential for appreciable harm arising from the planned project or programme and to communicate its reasoned decision to the notifying system State.

“2. Should the receiving system State or States deem that additional information, data or specifications are needed for a proper evaluation of the problems involved, they shall inform the notifying system State to this effect as expeditiously as possible. Justifiable requests for such additional data or specifications shall be met by the notifying State as expeditiously as possible and the parties shall agree to a reasonable extension of the time-limit set forth in paragraph 1 of this article for the proper evaluation of the situation in the light of the available material.

“3. During the time-limits stipulated in paragraphs 1 and 2 of this article, the notifying State may not initiate the project and programme referred to in the notification without the consent of the system State or system States concerned.”

⁴⁶ See footnote 18 above.

Article 11 as presented in the first report read as follows:

*“Article 11. Notification to other system States.
Content of notification*

“1. Before a system State undertakes, authorizes or permits a project or programme or alteration or addition to existing projects and programmes with regard to the utilization, conservation, protection or management of an international *watercourse* system which may cause appreciable harm to the rights or interests of another system State or other system States, the system State concerned shall submit at the earliest possible date due notification to the relevant system State or system States about such projects or programmes.

“2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other system State or States to evaluate and determine as accurately as possible the potential for appreciable harm of such intended project or programme.”

⁴⁷ Document A/CN.4/367 (see footnote 1 above), paras. 111-115.

71. The commentary to article 12 is contained in the first report.⁴⁹

72. *Article 13* presented in the first report contained provisions concerning procedures in case of protest. During its consideration in 1983, doubts were raised as to the advisability of the provisions contained in paragraph 3 of the article, on the grounds that they might lead to unacceptable results if a suspension of the initiation of the planned project or programme should be the main guideline in such disputes. The Special Rapporteur has attempted to meet these objections in the following amended text,⁵⁰ which he tentatively proposes:

Article 13. Procedures in case of protest

1. If a *watercourse* State having received a notification in accordance with article 12 informs the notifying State of its determination that the project or programme referred to in the notification may cause appreciable harm to the rights or interests of the State concerned, the parties shall without undue delay commence consultations and negotiations in order to verify and determine the harm which may result from the planned project or programme. They should as far as possible arrive at an agreement with regard to such adjustments and modifications of the project or programme or agree to other solutions which will either eliminate the possible causes for any appreciable harm to the other *watercourse* State or otherwise give such State reasonable satisfaction.

2. If the parties are not able to reach such agreement through consultations and negotiations within a reasonable period of time, they shall without delay resort to the settlement of the dispute by other peaceful means in accordance

⁴⁹ Document A/CN.4/367 (see footnote 1 above), paras. 116-119.

⁵⁰ See footnote 18 above.

Article 13 as presented in the first report read as follows:

"Article 13. Procedures in case of protest

"1. If a system State having received a notification in accordance with article 12 informs the notifying State of its determination that the project or programme referred to in the notification may cause appreciable harm to the rights or interests of the State concerned, the parties shall without undue delay commence consultations and negotiations in order to verify and determine the harm which may result from the planned project or programme. They should as far as possible arrive at an agreement with regard to such adjustments and modifications of the project or programme or agree to other solutions which will either eliminate the possible causes for any appreciable harm to the other system State or otherwise give such State reasonable satisfaction.

"2. If the parties are not able to reach such agreement through consultations and negotiations within a reasonable period of time, they shall without delay resort to the settlement of the dispute by other peaceful means in accordance with the provisions of the present Convention, system agreements or other relevant agreement or arrangement.

"3. In cases where paragraph 1 of this article applies and the outstanding issues have not been resolved by agreement between the parties concerned, the notifying State shall not proceed with the planned project or programme until the provisions of paragraph 2 have been complied with, unless the notifying State deems that the project or programme is of the utmost urgency and that a further delay may cause unnecessary damage or harm to the notifying State or other system States.

"4. Claims for damage or harm arising out of such emergency situations shall be settled in good faith and in accordance with friendly neighbourly relations by the procedures for peaceful settlement provided for in the present Convention."

with the provisions of the present Convention, *watercourse* agreements or other relevant agreement or arrangement.

3. In cases where paragraph 1 of this article applies and *where* the outstanding issues have not been resolved by agreement between the parties concerned, the notifying State *may proceed with the planned project, programme, alteration or addition if that State deems that its rights or interests or the rights or interests of another watercourse State or other watercourse States may be substantially affected by a delay. In such cases the notifying State must proceed with the necessary works in good faith and in a manner conformable with friendly neighbourly relations.*

4. *Disputes and issues arising out of measures taken under paragraph 3 of this article must be settled as expeditiously as possible by the States concerned by means of the procedures for peaceful settlement provided for in chapter V of the present Convention, in relevant watercourse agreements or in other agreements or arrangements.*

73. The proposals set forth in article 13, paragraphs 3 and 4, are basically new proposals, based on the discussions in the Commission and in the Sixth Committee of the General Assembly in 1983.

74. *Article 14* proposed in the first report dealt with the failure of system States to comply with the provisions of articles 11 to 13. The substantive amendments now tentatively proposed to articles 11 to 13 also take account of the observations made with regard to the content and consequences of article 14. Consequently the Special Rapporteur proposes merely minor drafting changes in this article, the amended text of which⁵¹ reads as follows:

Article 14. Failure of watercourse States to comply with the provisions of articles 11 to 13

1. If a *watercourse* State having received a notification pursuant to article 11 fails to communicate to the notifying *watercourse* State within the time-limits provided for in article 12 its determination that the planned project or programme may cause appreciable harm to its rights or interests, the notifying *watercourse* State may proceed with the execution of the project or programme in accordance with

⁵¹ See footnote 18 above.

Article 14 as presented in the first report read as follows:

"Article 14. Failure of system States to comply with the provisions of articles 11 to 13

"1. If a system State having received a notification pursuant to article 11 fails to communicate to the notifying system State within the time-limits provided for in article 12 its determination that the planned project or programme may cause appreciable harm to its rights or interests, the notifying system State may proceed with the execution of the project or programme in accordance with the specifications and data communicated in the notification.

"In such cases the notifying system State shall not be responsible for subsequent harm to the other system State or States, provided that the notifying State acts in compliance with the provisions of the present Convention and provided that it is not apparent that the execution of the project or programme is likely to cause appreciable harm to the other system State or States.

"2. If a system State proceeds with the execution of a project or programme without complying with the provisions of articles 11 to 13, it shall incur liability for the harm caused to the rights or interests of other system States as a result of the project or programme in question."

the specifications and data communicated in the notification.

In such cases the notifying *watercourse* State shall not be responsible for subsequent harm to the other *watercourse* State or States, provided that the notifying State acts in compliance with the provisions of the present Convention and provided that it is not apparent that the execution of the project or programme is likely to cause appreciable harm to the other *watercourse* State or States.

2. If a *watercourse* State proceeds with the execution of a project or programme without complying with the provisions of articles 11 to 13, it shall incur liability for the harm caused to the rights or interests of other *watercourse* States as a result of the project or programme in question.

ARTICLE 15. Management of international watercourses. Establishment of commissions

75. In article 15 presented in the first report, the Special Rapporteur dealt in some detail with the management of international watercourses and the establishment of watercourse commissions. The history of the administration and management of international watercourses reveals a clear trend towards the institutionalization of the machinery for such administration, management and control. This trend is manifest in State practice as well as in the work of United Nations organs. In a paper on "Progress in co-operative arrangements" prepared by Professor Robert D. Hayton for the Interregional Meeting of International River Organizations, held in Dakar in 1981, the trend towards and the scope of river organizations are summed up in the following manner.

The range and effectiveness of the functions and powers vested in existing international river organizations, along with the scope of the treaty régime on which they are predicated, are prime indicators of the progress thus far achieved in key areas of institutionalized co-operation for the development, use and protection of shared water resources. These include, in order of increasing commitment to collaboration: (a) consultation, notification and data collection and exchange; (b) water resources utilization determinations; and (c) basin or system planning. Complementary areas of co-operation include (d) design and execution of projects; (e) design and execution of special programmes for such complex purposes as, *inter alia*, flood control, pollution abatement and drought mitigation; and (f) resolution of differences and formal disputes.⁵²

The first report contains a fuller commentary to article 15, particularly in connection with the joint watercourse commissions⁵³ referred to in paragraph 2 of that article.⁵⁴

76. The Special Rapporteur has made some minor changes in article 15, mainly of a drafting nature. The amended text⁵⁵ reads as follows:

⁵² United Nations, *Experiences in the Development and Management* . . . (see footnote 23 above), p. 66, part two: "Background papers". See also Guillermo J. Cano, "Institutional and legal arrangements", *ibid.*, pp. 44 *et seq.*

⁵³ See also the proceedings of the Dakar Meeting, which include detailed studies on various joint river commissions and other joint river authorities, *ibid.*, pp. 141 *et seq.*, part three: "Selected papers prepared by international river organizations . . .".

⁵⁴ Document A/CN.4/367 (see footnote 1 above), paras. 131-137.

⁵⁵ See footnote 18 above.

Article 15 as presented in the first report read as follows:

Article 15. Management of international watercourses. Establishment of commissions

1. *Watercourse* States shall, where it is deemed *practical and* advisable for the rational administration, management, protection and control of the *waters* of an international *watercourse*, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other *processes and* decision-making procedures for the purposes of promoting *effective and friendly co-operation between the watercourse States concerned with a view to enhancing optimum* utilization, protection and control of the international *watercourse* and its waters.

2. To this end, *watercourse* States should establish, where practical, bilateral, multilateral or regional joint watercourse commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

Such commissions may, *inter alia*, have the following functions:

(a) to collect, verify and disseminate information and data concerning utilization, protection and conservation of the international *watercourse or watercourses*;

(b) to propose and institute investigations and research concerning utilization, protection and control;

(c) to monitor the international *watercourse* on a continuous basis;

"Article 15. Management of international watercourse systems. Establishment of commissions

"1. System States shall, where it is deemed advisable for the rational administration, management, protection and control of an international watercourse system, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other decision-making procedures for the purposes of promoting optimum utilization, protection and control of the international watercourse system and its waters.

"2. To this end system States should establish, where practical, bilateral, multilateral or regional joint watercourse commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

"Such commissions may, *inter alia*, have the following functions:

"(a) to collect, verify and disseminate information and data concerning utilization, protection and conservation of the international watercourse system or systems;

"(b) to propose and institute investigations and research concerning utilization, protection and control;

"(c) to monitor on a continuous basis the international watercourse system;

"(d) to recommend to system States measures and procedures necessary for the optimum utilization and the effective protection and control of the watercourse system;

"(e) to serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to much commissions by system States;

"(f) to propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of system States."

(d) to recommend to *watercourse* States measures and procedures necessary for the optimum utilization and the effective protection and control of the *watercourse*;

(e) to serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by *watercourse* States;

(f) to propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of *watercourse* States.

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; and

ARTICLE 19. Restricted information

77. The discussions that took place in 1983 would seem to indicate that the provisions on collection, processing and dissemination of information and data contained in *article 16* of the draft convention were broadly acceptable. The Special Rapporteur proposes no substantive amendments to article 16, but only some drafting changes,⁵⁶ as follows:

Article 16. Collection, processing and dissemination of information and data

1. In order to ensure the necessary co-operation between *watercourse* States, the optimum utilization of a *watercourse* and a fair and reasonable distribution of the uses thereof among such States, each *watercourse* State shall, to the extent possible, collect and process the necess-

⁵⁶ See footnote 18 above.

Article 16 as presented in the first report read as follows:

"Article 16. Collection, processing and dissemination of information and data

"1. In order to ensure the necessary co-operation between system States, the optimum utilization of a *watercourse* system and a fair and reasonable distribution of the uses thereof among such States, each system State shall to the extent possible collect and process the necessary information and data available within its territory of a hydrological, hydrogeological or meteorological nature as well as other relevant information and data concerning, *inter alia*, water levels and discharge of water of the *watercourse*, ground water yield and storage relevant for the proper management thereof, the quality of the water at all times, information and data relevant to flood control, sedimentation and other natural hazards and relating to pollution or other environmental protection concerns.

"2. System States shall to the extent possible make available to other system States the relevant information and data mentioned in paragraph 1 of this article. To this end, system States should to the extent necessary conclude agreements on the collection, processing and dissemination of such information and data. To this end, system States may agree that joint commissions established by them or special (regional) or general data centres shall be entrusted with collecting, processing and disseminating on a regular and timely basis the information and data provided for in paragraph 1 of this article.

"3. System States or the joint commissions or data centres provided for in paragraph 2 of this article shall to the extent practicable and reasonable transmit to the United Nations or the relevant specialized agencies the information and data available under this article."

ary information and data available within its territory of a hydrological, hydrogeological or meteorological nature as well as other relevant information and data concerning, *inter alia*, water levels and discharge of water of the *watercourse*, ground water yield and storage relevant for the proper management thereof, the quality of the water at all times, information and data relevant to flood control, sedimentation and other natural hazards and relating to pollution or other environmental protection concerns.

2. *Watercourse* States shall, to the extent possible, make available to other *watercourse* States the relevant information and data mentioned in paragraph 1 of this article. To this end, *watercourse* States should, to the extent necessary, conclude agreements on the collection, processing and dissemination of such information and data. To this end, *watercourse* States may agree that joint commissions established by them or special (regional) or general data centres shall be entrusted with collecting, processing and disseminating on a regular and timely basis the information and data provided for in paragraph 1 of this article.

3. *Watercourse* States or the joint commissions or data centres provided for in paragraph 2 of this article shall, to the extent practicable and reasonable, transmit to the United Nations or the relevant specialized agencies the information and data available under this article.

78. *Article 17* concerning special requests for information and data, as contained in the first report, should be retained, with drafting changes⁵⁷ as follows:

Article 17. Special requests for information and data

If a *watercourse* State requests from another *watercourse* State information and data not covered by the provisions of article 16 pertaining to the *watercourse* concerned, the other *watercourse* State shall upon the receipt of such a request use its best efforts to comply expeditiously with the request. The requesting State shall refund the other State the reasonable costs of collecting, processing and transmitting such information and data, unless otherwise agreed.

79. *Article 18*, concerning special obligations in regard to information about emergencies, should be retained without substantive changes. The following drafting changes⁵⁸ are suggested:

⁵⁷ See footnote 18 above.

Article 17 as presented in the first report read as follows:

"Article 17. Special requests for information and data

"If a system State requests from another system State information and data not covered by the provisions of article 16 pertaining to the *watercourse* system concerned, the other system State shall upon the receipt of such a request use its best efforts to comply expeditiously with the request. The requesting State shall refund the other State the reasonable costs of collecting, processing and transmitting such information and data, unless otherwise agreed."

⁵⁸ See footnote 18 above.

Article 18 as presented in the first report read as follows:

"Article 18. Special obligations in regard to information about emergencies

"A system State should by the most rapid means available inform the other system State or States concerned of emergency situations or incidents of which it has gained knowledge and which have arisen in regard to a shared *watercourse* system—whether inside or outside its territory—which could result in serious danger of loss of human life or of property or other calamity in the other system States or States."

Article 18. Special obligations in regard to information about emergencies

A *watercourse* State should by the most rapid means available inform the other *watercourse* State or States concerned of emergency situations or incidents of which it has gained knowledge and which have arisen in regard to *the watercourse concerned*—whether inside or outside its territory— which could result in serious danger of loss of human life or of property or other calamity in the other *watercourse* State or States.

80. *Article 19*, dealing with restricted information, should be retained. The following drafting changes⁵⁹ are suggested:

⁵⁹ See footnote 18 above.

Article 19 as presented in the first report read as follows:

“Article 19. Restricted information

“1. Information and data the safeguard of which a system State considers vital for reasons of national security or otherwise need not be disseminated to other system States, organizations or agencies. A sys-

Article 19. Restricted information

1. Information and data the safeguard of which a *watercourse* State considers vital for reasons of national security or otherwise need not be disseminated to other *watercourse* States, organizations or agencies. A *watercourse* State withholding such information or data shall co-operate in good faith with other *watercourse* States in furnishing essential information and data, to the extent practicable, on the issues concerned.

2. Where a *watercourse* State for other reasons considers that the dissemination of information or data should be treated as confidential or restricted, other *watercourse* States shall comply with such a request in good faith and in accordance with good-neighbourly relations.

tem State withholding such information or data shall co-operate in good faith with other system States in furnishing essential information and data to the extent practicable on the issues concerned.

“2. Where a system State for other reasons considers that the dissemination of information or data should be treated as confidential or restricted, other system States shall comply with such a request in good faith and in accordance with good-neighbourly relations.”

CHAPTER V

Environmental protection, pollution, health hazards, natural hazards, safety and national and regional sites

[Chapter IV of the draft]

81. The various issues relating to environmental problems are dealt with in chapter IV of the draft convention.

ARTICLE 20. General provisions on the protection of the environment; and

ARTICLE 21. Purposes of environmental protection

82. Articles 20 and 21 deal with the broader aspects of the protection of the environment. The discussions in 1983, especially in the Sixth Committee, would seem to indicate that *article 20* was broadly acceptable. The Special Rapporteur does not propose amendments to the substance but only certain minor drafting changes along the lines of those made in preceding articles. Consequently, the following amended text⁶⁰ is suggested:

⁶⁰ See footnote 18 above.

Article 20 as presented in the first report read as follows:

“CHAPTER IV

“ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, REGULATION AND SAFETY, USE PREFERENCES, NATIONAL OR REGIONAL SITES

“Article 20. General provisions on the protection of the environment

“1. System States—individually and in co-operation—shall to the extent possible take the necessary measures to protect the environment

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

1. *Watercourse* States—individually and in co-operation—shall, to the extent possible, take the necessary measures to protect the environment of *the international*

of a *watercourse* system from unreasonable impairment, degradation or destruction or serious danger of such impairment, degradation or destruction by reason of causes or activities under their control and jurisdiction or from natural causes that are abatable within reason.

“2. System States shall—individually and through co-ordinated efforts—adopt the necessary measures and régimes for the management and equitable utilization of a joint *watercourse* system and surrounding areas so as to protect the aquatic environment, including the ecology of surrounding areas, from changes or alterations that may cause appreciable harm to such environment or to related interests of system States.

“3. System States shall—individually and through co-ordinated efforts—take the necessary measures in accordance with the provisions of the present Convention and other relevant principles of international law, including those derived from the United Nations Convention on the Law of the Sea of 10 December 1982, to protect the environment of the sea as far as possible from appreciable degradation or harm caused by means of the international *watercourse* system.”

watercourse concerned from unreasonable impairment, degradation or destruction or serious danger of such impairment, degradation or destruction by reason of causes or activities under their control and jurisdiction or from natural causes that are abatable within reason.

2. *Watercourse States* shall—individually and through co-ordinated efforts—adopt the necessary measures and régimes for the management and equitable utilization of an *international watercourse* and surrounding areas so as to protect the aquatic environment, including the ecology of surrounding areas, from changes or alterations that may cause appreciable harm to such environment or to related interests of *watercourse States*.

3. *Watercourse States* shall—individually and through co-ordinated efforts—take the necessary measures in accordance with the provisions of the present Convention and other relevant principles of international law, including those derived from the United Nations Convention on the Law of the Sea of 10 December 1982, to protect the environment of the sea as far as possible from appreciable degradation or harm caused by means of the international *watercourse concerned*.

83. The Special Rapporteur proposes the following drafting amendments⁶¹ to *article 21*.

Article 21. Purposes of environmental protection

The measures and régimes established under article 20 shall, *inter alia*, be designed to the extent possible:

- (a) to safeguard public health;
- (b) to maintain the quality and quantity of the waters of the international *watercourse concerned* at the level necessary for the use thereof for potable and other domestic purposes;
- (c) to permit the use of the waters for irrigation purposes and industrial purposes;
- (d) to safeguard the conservation and development of aquatic resources, including fauna and flora;
- (e) to permit, to the extent possible, the use of the *inter-*

⁶¹ See footnote 18 above.

Article 21 as presented in the first report read as follows:

"Article 21. Purposes of environmental protection

"The measures and régimes established under article 20 shall, *inter alia*, be designed to the extent possible:

- "(a) to safeguard public health;
- "(b) to maintain the quality and quantity of the waters of the international watercourse system at the level necessary for the use thereof for potable and other domestic purposes;
- "(c) to permit the use of the waters for irrigation purposes and industrial purposes;
- "(d) to safeguard the conservation and development of aquatic resources, including fauna and flora;
- "(e) to permit to the extent possible the use of the watercourse system for recreational amenities, with special regard to public health and aesthetic considerations;
- "(f) to permit to the extent possible the use of the waters by domestic animals and wildlife."

national watercourse for recreational amenities, with special regard to public health and aesthetic considerations;

(f) to permit, to the extent possible, the use of the waters by domestic animals and wildlife.

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; and

ARTICLE 25. Emergency situations regarding pollution

84. Articles 22 to 25 of the draft convention deal with the special issues of pollution. The definition of pollution contained in *article 22* seemed to be generally acceptable. The only changes proposed are slight changes in drafting,⁶² as follows:

Article 22. Definition of pollution

For the purposes of the present Convention, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international *watercourse* through the introduction by man, directly or indirectly, of substances, species or energy which results in effects detrimental to human health, safety or well-being or detrimental to the use of the waters for any beneficial purpose or to the conservation and protection of the environment, including the safeguarding of the fauna, the flora and other natural resources of the *watercourse* and surrounding areas.

85. In *article 23*, the Special Rapporteur proposes certain minor drafting changes.

86. Besides those drafting changes, he proposes a minor substantive amendment to paragraph 3, by the addition of a phrase at the end of the first sentence of the original text of that paragraph. Article 23 as amended⁶³ reads as follows:

⁶² See footnote 18 above.

Article 22 as presented in the first report read as follows:

"Article 22. Definition of pollution

"For the purposes of the present Convention, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse system through the introduction by man, directly or indirectly, of substances, species or energy which results in effects detrimental to human health, safety or well-being or detrimental to the use of the waters for any beneficial purpose or to the conservation and protection of the environment, including the safeguarding of the fauna, the flora and other natural resources of the watercourse system and surrounding areas."

⁶³ See footnote 18 above.

Article 23 as presented in the first report read as follows:

"Article 23. Obligation to prevent pollution

"1. No system State may pollute or permit the pollution of the waters of an international watercourse system which causes or may cause appreciable harm to the rights or interests of other system States in regard to their equitable use of such shared water resources or to other harmful effects within their territories.

"2. In cases where pollution emanating in a system State causes

(Continued on next page)

Article 23. *Obligation to prevent pollution*

1. No *watercourse* State may pollute or permit the pollution of the waters of an international *watercourse* which causes or may cause appreciable harm to the rights or interests of other *watercourse* States in regard to their equitable use of such *waters* or to other harmful effects within their territories.

2. In cases where pollution emanating in a *watercourse* State causes harm or inconveniences in other *watercourse* States of a less serious nature than those dealt with in paragraph 1 of this article, the *watercourse* State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The *watercourse* States concerned shall consult with a view to reaching agreement with regard to the necessary steps to be taken and to the defrayment of the reasonable costs for abatement or reduction of such pollution.

3. A *watercourse* State shall be under no obligation to abate pollution emanating from another *watercourse* State in order to prevent such pollution from causing appreciable harm to another *watercourse* State or other *watercourse* States, unless otherwise agreed in the relevant *watercourse* agreement or other agreement or arrangement. *Watercourse* States shall—as far as possible—expeditiously draw the attention of the pollutant State and of the States threatened by such pollution to the situation, its causes and effects.

87. In *article 24*, the Special Rapporteur proposes some minor drafting changes, along the lines of those made in preceding articles. In addition, in paragraph 2, he proposes some substantive amendments.

88. The proposed new paragraph 4 is virtually identical (with minor changes) with the second sentence of paragraph 2 of *article 24* as initially proposed. *Article 24*, as amended,⁶⁴ reads as follows:

(Footnote 63 continued)

harm or inconveniences in other system States of a less serious nature than those dealt with in paragraph 1 of this article, the system State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The system State concerned shall consult with a view to reaching agreement with regard to the necessary steps to be taken and to the defrayment of the reasonable costs for abatement or reduction of such pollution.

“3. A system State shall be under no obligation to abate pollution emanating from another system State in order to prevent such pollution from causing appreciable harm to a third system State. System States shall—as far as possible—expeditiously draw the attention of the pollutant State and of the States threatened by such pollution to the situation, its causes and effects.”

⁶⁴ See footnote 18 above.

Article 24 as presented in the first report read as follows:

“*Article 24. Co-operation between system States for protection against pollution. Abatement and reduction of pollution*

“1. System States of an international *watercourse* system shall co-operate through regular consultations and meetings or through their joint regional or international commissions or agencies with a view to exchanging on a regular basis relevant information and data on questions of pollution of the *watercourse* system in question and with a view to the adoption of the measures and régimes necessary in order to provide adequate control and protection of the *watercourse* system and its environment against pollution.

“2. The system States concerned shall, when necessary, conduct consultations and negotiations with a view to adopting a compre-

Article 24. *Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution*

1. International *watercourse* States shall, when necessary, co-operate through regular consultations and meetings or through their joint regional or international commissions or agencies with a view to exchanging on a regular basis relevant information and data on questions of pollution of the international *watercourse* concerned and with a view to the adoption of the measures and régimes necessary in order to provide adequate control and protection of the international *watercourse* and its environment against pollution.

2. *Watercourse* States shall, when necessary, co-operate with a view to establishing a comprehensive list of dangerous or persistent pollutants or other pollutants, the introduction of which into the waters of an international *watercourse* shall be prohibited, controlled or monitored.

3. *Watercourse* States shall, to the extent necessary, establish programmes for adequate measures and with timetables for the protection against pollution and abatement or mitigation of pollution of the international *watercourse* concerned.

4. *Watercourse* States shall, where expedient, establish the procedures and machinery necessary for the effective implementation of measures provided for in this article.

89. From the discussions that took place in 1983 it would appear that *article 25* was largely acceptable. The Special Rapporteur therefore proposes only some drafting changes,⁶⁵ as follows:

Article 25. *Emergency situations regarding pollution*

1. If an emergency situation arises from pollution or from similar hazards to an international *watercourse* or its environment, the *watercourse* State or States within whose

hensive list of pollutants, the introduction of which into the waters of the international *watercourse* system shall be prohibited, restricted or monitored. They shall, where expedient, establish the procedures and machinery necessary for the effective implementation of these measures.

“3. System States shall to the extent necessary establish programmes with the necessary measures and timetables for the protection against pollution and abatement or mitigation of pollution of the international *watercourse* system concerned.”

⁶⁵ See footnote 18 above.

Article 25 as presented in the first report read as follows:

“*Article 25. Emergency situations regarding pollution*

“1. If an emergency situation arises from pollution or from similar hazards to an international *watercourse* system or its environment, the system State or States within whose jurisdiction the emergency has occurred shall make the emergency situation known by the most rapid means available to all system States that may be affected by the emergency together with all relevant information and data which may be of relevance in the situation.

“2. The State or States within whose jurisdiction the emergency has occurred shall immediately take the necessary measures to prevent, neutralize or mitigate danger or damage caused by the emergency situation. Other system States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and effects caused by the emergency and should be refunded the reasonable costs for such measures by the State or States where the emergency arose.”

jurisdiction the emergency has occurred shall make the emergency situation known by the most rapid means available to all *watercourse* States that may be affected by the emergency together with all relevant information and data which may be of relevance in the situation.

2. The *watercourse* State or States within whose jurisdiction the emergency has occurred shall immediately take the necessary measures to prevent, neutralize or mitigate danger or damage caused by the emergency situation. Other *watercourse* States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and effects caused by the emergency and should be refunded the reasonable costs for such measures by the *watercourse* State or States where the emergency arose.

ARTICLE 26. Control and prevention of water-related hazards

90. Article 26 presented in the first report seemed largely acceptable. The Special Rapporteur proposes only some drafting changes,⁶⁶ as follows:

Article 26. Control and prevention of water-related hazards

1. *Watercourse* States shall co-operate in accordance with the provisions of the present Convention with a view to the prevention and mitigation of water-related hazardous conditions and occurrences, as the special circumstances warrant. Such co-operation should, *inter alia*, entail the establishment of joint measures and régimes, including structural or non-structural measures, and the effective monitoring in the international *watercourse* concerned of conditions susceptible of bringing about hazardous conditions and occurrences such as floods, ice accumulation and other obstructions, sedimentation, avulsion, erosion, deficient drainage, drought and salt-water intrusion.

2. *Watercourse* States shall establish an effective and timely exchange of information and data and early warning systems that would contribute to the prevention or mitigation of emergencies with respect to water-related hazardous conditions and occurrences relating to an international *watercourse*.

⁶⁶ See footnote 18 above.

Article 26 as presented in the first report read as follows:

"Article 26. Control and prevention of water-related hazards

"1. System States shall co-operate in accordance with the provisions of the present Convention with a view to the prevention and mitigation of water-related hazardous conditions and occurrences, as the special circumstances warrant. Such co-operation should, *inter alia*, entail the establishment of joint measures and régimes, including structural or non-structural measures, and the effective monitoring in the international *watercourse* system concerned of conditions susceptible of bringing about hazardous conditions and occurrences such as floods, ice accumulation and other obstructions, sedimentation, avulsion, erosion, deficient drainage, drought and salt-water intrusion.

"2. System States shall establish an effective and timely exchange of information and data and early warning systems that would contribute to the prevention or mitigation of emergencies with respect to water-related hazardous conditions and occurrences relating to an international *watercourse* system."

ARTICLE 27 [new article 15 bis]. Regulation of international watercourses

91. Article 27 presented in the first report seemed to be broadly acceptable. However, the suggestion was made that the article belonged in chapter III, dealing with co-operation and management in regard to international watercourses, rather than in chapter IV, on environmental protection, health hazards, etc.

92. The Special Rapporteur is inclined to share that view. He would propose that article 27 should be moved back and become a new article 15 bis, in which case the articles would have to be renumbered accordingly, article 15 bis becoming article 16, and so on.

93. The Special Rapporteur proposes only drafting amendments⁶⁷ to this article, as follows:

Article 27 [new article 15 bis]. Regulation of international watercourses

1. For the purposes of the present Convention, "regulation" means continuing measures for controlling, increasing, moderating or otherwise modifying the flow of the waters in an international *watercourse*. Such measures may include, *inter alia*, the storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works.

2. *Watercourse* States shall co-operate in a spirit of good faith and good-neighbourly relations in assessing the needs and possibilities for *watercourse* regulations with a view to obtaining the optimum and equitable utilization of the waters of the international *watercourse* concerned. They shall co-operate in preparing the appropriate plans for such regulations and negotiate with a view to reaching agreement on the establishment and maintenance—individually or jointly—of the appropriate regulations, works and measures and on the defrayal of the costs for such *watercourse* regulations.

ARTICLE 28. Safety of international watercourses, installations and constructions, etc.; and

ARTICLE 28 bis. Status of international watercourses, their waters and constructions, etc. in armed conflicts

94. In the light of the discussions that took place in 1983

⁶⁷ See footnote 18 above.

Article 27 as presented in the first report read as follows:

"Article 27. Regulation of international watercourse systems

"1. For the purposes of the present Convention, "regulation" means continuing measures for controlling, increasing, moderating or otherwise modifying the flow of the waters in an international *watercourse* system. Such measures may include, *inter alia*, the storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works.

"2. System States shall co-operate in a spirit of good faith and good-neighbourly relations in assessing the needs and possibilities for *water* system regulations with a view to obtaining the optimum and equitable utilization of shared *watercourse* resources. They shall co-operate in preparing the appropriate plans for such regulations and negotiate with a view to reaching agreement on the establishment and maintenance—individually or jointly—of the appropriate regulations, works and measures and on the defrayal of the costs for such *watercourse* regulations."

on *article 28*, the Special Rapporteur proposes, in addition to some drafting changes, a number of substantive amendments, in particular to paragraph 2 (b) of the article. Article 28 as amended⁶⁸ reads as follows:

Article 28. Safety of international watercourses, installations and constructions, etc.

1. *Watercourse States* shall employ their best efforts to maintain and protect the international watercourse or watercourses and the installations, constructions and works pertaining thereto.

2. To this end, the watercourse States concerned shall co-operate, consult and negotiate with a view to concluding agreements or arrangements concerning:

(a) relevant general conditions and specifications for the establishment, operation and maintenance of sites, installations, constructions and works of the international watercourse or watercourses concerned;

(b) the establishment of adequate safety standards and security measures, to the extent practicable, for the protection of the international watercourse or watercourses concerned and the waters thereof, including relevant sites, installations, constructions and works, from hazards and dangers due to the forces of nature, wilful or negligent acts or hazards and dangers created by faulty construction, insufficient maintenance or other causes.

3. The watercourse States concerned shall, as far as reasonable, exchange information and data concerning the safety and security issues dealt with in this article.

95. In his first report,⁶⁹ the Special Rapporteur took up the question of special protection for international watercourses, their waters, installations and constructions, etc., in cases of armed conflict, but he had hesitated to draft proposals on that issue. In the light of the discussions that took place on article 28 in the Commission and in the Sixth Committee of the General Assembly in 1983, the Special Rapporteur ventures to propose a new *article 28 bis*. He did

not deem it advisable to refer in the article to the two Geneva Protocols of 8 June 1977.⁷⁰

96. The new article 28 *bis* reads⁷¹ 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.

97. A question that will not be dealt with in this context is whether national watercourses should enjoy the same inviolability as international watercourses, the Special Rapporteur deeming this question as outside his present task.

ARTICLE 29 [new article 15 *ter*]. Use preferences

98. In view of the discussions that took place in the Commission and in the Sixth Committee of the General Assembly in 1983, especially with regard to article 13, paragraph 3 (see paragraph 72 above), the Special Rapporteur deems it appropriate to suggest certain amendments to article 29, and to transfer the article from chapter IV to chapter III (Co-operation and management in regard to international watercourses), so that it would come immediately after the new article 15 *bis* (formerly article 27). The amended text⁷² reads as follows:

Article 29 [new article 15 *ter*]. Use preferences

1. In establishing régimes, rules and recommendations for equitable participation in the utilization and benefits of

⁶⁸ See footnote 18 above.

Article 28 as presented in the first report read as follows:

"Article 28. Safety of international watercourse systems, installations and constructions"

"1. System States shall employ their best efforts to maintain and protect international watercourse systems and the installations and constructions pertaining thereto.

"2. To this end, system States shall co-operate and consult with a view to concluding agreements concerning:

"(a) relevant general and special conditions and specifications for the establishment, operation and maintenance of sites, installations, constructions and works of international watercourse systems;

"(b) the establishment of adequate safety standards and security measures for the protection of the watercourse system, its shared resources and the relevant sites, installations, constructions and works from hazards and dangers due to the forces of nature, wilful or negligent acts or hazards and dangers created by faulty construction, insufficient maintenance or other causes.

"3. System States shall as far as reasonable exchange information and data concerning the safety and security issues dealt with in this article."

⁶⁹ Document A/CN.4/367 (see footnote 1 above), paras. 45, 46 and 186.

⁷⁰ Protocols to the Geneva Conventions of 12 August 1949: Protocol I relating to the protection of victims of international armed conflicts; Protocol II relating to the protection of victims of non-international armed conflicts (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

⁷¹ See footnote 18 above.

⁷² See footnote 18 above.

Article 29 as presented in the first report read as follows:

"Article 29. Use preferences"

"1. In establishing systems or régimes for equitable participation in the utilization of an international watercourse system and its resources by all system States, no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in system agreements, other agreements or other legal principles and customs applicable to the watercourse system in question.

"2. In settling questions relating to conflicting uses, the requirements for and the effects of various uses shall be weighed against the requirements for and effects of other pertinent uses with a view to obtaining the optimum utilization of shared watercourse resources and the reasonable and equitable distribution thereof between the system States, taking into account all considerations relevant to the particular watercourse system.

an international *watercourse and its waters by the relevant watercourse States*, no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in *relevant watercourse agreements, or other agreements or arrangements, including relevant rules, principles or practices established for the international watercourse concerned*.

2. In settling questions relating to conflicting uses, the requirements for and the effects of *certain pertinent uses* shall be weighed against the requirements for and effects of *the other pertinent uses* with a view to obtaining the optimum utilization of *the waters of the international watercourse concerned, taking into consideration all pertinent uses for the purpose of providing the reasonable and equitable distribution thereof between the watercourse States and taking into account all considerations relevant to the particular international watercourse*.

3. Installations and constructions shall be established and operated in such a manner as not to cause appreciable harm to other equitable uses of the *watercourse*.

4. When an *issue* has arisen with regard to conflicting uses or use preferences in an international *watercourse, watercourse States* shall, in conformity with the principles of good faith and friendly neighbourly relations, *to the extent practicable, refrain from taking measures pertaining to the relevant conflicting uses which might aggravate the difficulty of resolving the questions at issue*.

“3. Installations and constructions shall be established and operated in such a manner as not to cause appreciable harm to other equitable uses of the watercourse system.

“4. When a question has arisen with regard to conflicting uses or use preferences in an international watercourse system, system States shall, in conformity with the principles of good faith and friendly neighbourly relations, refrain from commencing works on installations, constructions or other watercourse projects or measures pertaining to the relevant conflicting uses which might aggravate the difficulty of resolving the questions at issue.”

CHAPTER VI

Peaceful settlement of disputes

[Chapter V of the draft]

101. The issue of peaceful settlement of disputes has been dealt with in chapter V of the draft convention. The Special Rapporteur, in proposing articles 31 to 38, has drawn, *inter alia*, on the experiences gained in the Third United Nations Conference on the Law of the Sea and the United Nations Convention on the Law of the Sea of 10 December 1982.⁷⁵

102. It was stated by the members of the Commission as well as by representatives in the Sixth Committee of the General Assembly that compulsory settlement procedures should be provided for in the draft convention. The Special Rapporteur has tried to accommodate that concern to the extent that he has deemed it expedient to formulate prin-

⁷⁵ *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.5), p. 151, document A/CONF.62/122.

99. The commentary to article 29 contained in the first report⁷³ remains unchanged.

ARTICLE 30. Establishment of international watercourses or parts thereof as protected national or regional sites

100. The provisions of article 30 of the draft convention seemed to command broad acceptance. The Special Rapporteur has therefore confined himself to making minor drafting changes,⁷⁴ 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.

⁷³ Document A/CN.4/367 (see footnote 1 above), paras. 191-198.

⁷⁴ See footnote 18 above.

Article 30 as presented in the first report read as follows:

“Article 30. Establishment of international watercourse systems or parts thereof as protected national or regional sites

“1. A system State or system States may—for environmental, ecological, historic, scenic or other reasons—proclaim a watercourse system or part or parts thereof a protected national or regional site.

“2. Other system States and regional and international organizations or agencies should in a spirit of good faith and friendly neighbourly relations co-operate and assist such system State or States in preserving, protecting and maintaining such protected site or sites in their natural state.”

ciples to this effect that would command broad acceptance by the international community.

ARTICLE 31. Obligation to settle disputes by peaceful means

103. In article 31 of the draft convention the general principle is provided for that States shall settle their disputes by peaceful means in accordance with the Charter of the United Nations. The provisions proposed in article 31, paragraphs 1 and 2, are basically identical with those found in articles 279 and 280 of the 1982 United Nations Convention on the Law of the Sea.⁷⁶ Some minor drafting

⁷⁶ *Ibid.*, p. 198.

changes⁷⁷ have been made in article 31, which reads as follows:

CHAPTER V

PEACEFUL SETTLEMENT OF DISPUTES

Article 31. Obligation to settle disputes by peaceful means

1. *Watercourse States* as well as other States Parties shall settle disputes between them concerning the interpretation or application of the present Convention by peaceful means in accordance with Article 2 of the Charter of the United Nations and, to this end, shall seek solutions by the means indicated in Article 33, paragraph 1, of the Charter.

2. Nothing in this chapter shall impair the right of *watercourse States and other States Parties* to agree at any time to settle a dispute between them concerning the interpretation or application of the present Convention by any peaceful means of their own choice.

ARTICLE 31 bis. Obligations under general, regional or bilateral agreements or arrangements

104. In view of the discussions that took place in 1983, which to some extent focused on the possibility for providing for settlement procedures entailing binding decisions, provisions could be included in chapter V drawing attention to the obligation States parties may have under other general, regional or bilateral agreements to submit their disputes to binding adjudication or other binding settlement procedure. Article 282 of the 1982 United Nations Convention on the Law of the Sea⁷⁸ may afford a possible paradigm for such provisions. Accordingly, the Special Rapporteur ventures to propose the following new article 31 bis:⁷⁹

Article 31 bis. Obligations under general, regional or bilateral agreements or arrangements

If watercourse States or other States Parties which are parties to a dispute concerning the interpretation or appli-

⁷⁷ See footnote 18 above.

Article 31 as presented in the first report read as follows:

"CHAPTER V. SETTLEMENT OF DISPUTES

"Article 31. Obligation to settle disputes by peaceful means

"1. System States as well as other States Parties shall settle disputes between them concerning the interpretation or application of the present Convention by peaceful means in accordance with Article 2 of the Charter of the United Nations and, to this end, shall seek solutions by the means indicated in Article 33, paragraph 1, of the Charter.

"2. Nothing in this chapter impairs the right of States Parties (system States) to agree at any time to settle a dispute between them concerning the interpretation or application of the present Convention by any peaceful means of their own choice."

⁷⁸ *Official Records of the Third United Nations Conference on the Law of the Sea* . . . (see footnote 75 above), p. 198.

⁷⁹ See footnote 18 above.

cation of the present Convention have agreed through a general, regional or bilateral agreement or arrangement or otherwise that such dispute shall, at the request of a party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in articles 33 to 38 of this chapter, unless the parties to the dispute agree otherwise.

ARTICLE 32. Settlement of disputes by consultations and negotiations;
and

ARTICLE 33. Inquiry and mediation

105. Article 32 of the draft convention provides for settlement of disputes by consultations and negotiations as the obvious starting-point for procedures for peaceful settlement. From the discussions that took place in 1983 it would appear that the text of this article was generally acceptable. The Special Rapporteur therefore proposes only drafting changes,⁸⁰ as follows:

Article 32. Settlement of disputes by consultations and negotiations

1. When a dispute arises between *watercourse States* or other States Parties concerning the interpretation or application of the present Convention, the parties to the dispute shall proceed expeditiously with consultations and negotiations with a view to arriving at a fair and equitable solution to the dispute.

2. Such consultations and negotiations may be conducted directly between the parties to the dispute or through a *joint commission* or joint commissions established for the administration and management of the international *watercourse* concerned or through other regional or international organs or agencies agreed upon between the parties.

3. If the parties have not been able to arrive at a solution of the dispute within a reasonable period of time, they shall resort to the other procedures for peaceful settlement provided for in this chapter.

106. Inquiry and mediation were provided for in article 33 of the draft convention presented in the first report. During the discussions in 1983, it was proposed that the concept of "other fact-finding bodies" should be intro-

⁸⁰ See footnote 18 above.

Article 32 as presented in the first report read as follows:

"Article 32. Settlement of disputes by consultations and negotiations

"1. When a dispute arises between system States or other States Parties concerning the interpretation or application of the present Convention, the parties to the dispute shall proceed expeditiously with consultations and negotiations with a view to arriving at a fair and equitable solution to the dispute.

"2. Such consultations and negotiations may be conducted directly between the parties to the dispute or through joint commissions established for the administration and management of the international watercourse system concerned or through other regional or international organs or agencies agreed upon between the parties.

"3. If the parties have not been able to arrive at a solution of the dispute within a reasonable period of time, they shall resort to the other procedures for peaceful settlement provided for in this chapter."

duced in article 33, paragraph 1. The Special Rapporteur finds this a useful proposal, and has therefore amended⁸¹ the article as follows:

Article 33. Inquiry and mediation

1. In connection with the consultations and negotiations provided for in article 32, the *States* parties to a dispute concerning the interpretation or application of the present Convention may, by agreement, establish a Board of Inquiry or other fact-finding body of qualified persons or experts for the purpose of establishing the relevant facts pertaining to the dispute in order to facilitate the consultations and negotiations between the parties. The parties must agree to the composition of the Board of Inquiry or fact-finding body, the task to be entrusted to it, the time-limits for the accomplishment of its findings and other relevant guidelines for its work. The Board or fact-finding body shall decide on its procedure unless otherwise determined by the parties. The findings of the Board of Inquiry or fact-finding body are not binding on the parties unless otherwise agreed upon by them.

2. The parties to a dispute concerning the interpretation or application of the present Convention may by agreement request mediation by a third State, an organization or one or more mediators with the necessary qualifications and reputation to assist them with impartial advice in such consultations and negotiations as provided for in article 32. Advice given by such mediation is not binding upon the parties.

ARTICLE 34. Conciliation;

ARTICLE 35. Functions and tasks of the Conciliation Commission; and

ARTICLE 36. Effects of the report of the Conciliation Commission. Sharing of costs

107. Articles 34 to 37 of the draft convention provided for conciliation as the main procedure for peaceful settlement. The provisions proposed here correspond in their main aspects to the system provided for in annex V (Con-

⁸¹ See footnote 18 above.

Article 33 as presented in the first report read as follows:

"Article 33. Inquiry and mediation

"1. In connection with the consultations and negotiations provided for in article 32, the parties to a dispute concerning the interpretation or application of the present Convention may, by agreement, establish a Board of Inquiry of qualified experts for the purpose of establishing the relevant facts pertaining to the dispute in order to facilitate the consultations and negotiations between the parties. The parties must agree to the composition of the Board, the tasks entrusted to it, the time-limits for the accomplishment of its findings and other relevant guidelines for its work. The Board of Inquiry shall decide on its procedure unless otherwise determined by the parties. The findings of the Board of Inquiry are not binding on the parties unless otherwise agreed upon by them.

"2. The parties to a dispute concerning the interpretation or application of the present Convention may by agreement request mediation by a third State, an organization or one or more mediators with the necessary qualifications and reputation to assist them with impartial advice in such consultations and negotiations as provided for in article 32. Advice given by such mediation is not binding upon the parties."

ciliation) of the 1982 United Nations Convention on the Law of the Sea;⁸² in the "Model rules for the constitution of the Conciliation Commission" annexed to the 1966 Helsinki Rules;⁸³ in the 1957 European Convention for the Peaceful Settlement of Disputes;⁸⁴ and in the 1928 General Act for the Pacific Settlement of International Disputes⁸⁵ and the Revised General Act of 1949.⁸⁶ As stated in the first report,⁸⁷ "the establishment of conciliation commissions has in practice proved to be useful in the search for peaceful solutions to international disputes".

108. In the discussions in the Sixth Committee in 1983, the question was raised whether, unless the parties agreed otherwise, conciliation should be made compulsory if the parties had not agreed to submit the dispute in question to procedures that entailed a binding decision. A precedent for compulsory conciliation in such cases will be found in the 1982 United Nations Convention on the Law of the Sea, article 297, paragraph 3 (b).⁸⁸ If this line of procedure seems advisable, the following provision might replace the first subparagraph of paragraph 1 of article 34:

"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."

It should be noted that article 31 *bis* is not referred to in this provision.

109. The Special Rapporteur is inclined to recommend such compulsory conciliation procedures. If this proposal seems unacceptable, he would suggest some minor drafting changes⁸⁹ to paragraph 1. Two alternatives for paragraph 1 are indicated in the following text of article 34.

⁸² *Official Records of the Third United Nations Conference on the Law of the Sea . . .* (see footnote 75 above), pp. 214-215.

⁸³ ILA, *op. cit.* (footnote 32 above), pp. 531-532.

⁸⁴ United Nations, *Treaty Series*, vol. 320, p. 243.

⁸⁵ League of Nations, *Treaty Series*, vol. XCIII, p. 343.

⁸⁶ United Nations, *Treaty Series*, vol. 71, p. 101.

⁸⁷ Document A/CN.347 (see footnote 1 above), para. 214.

⁸⁸ *Official Records of the Third United Nations Conference on the Law of the Sea . . .* (see footnote 75 above), pp. 200-201.

⁸⁹ See footnote 18 above.

Article 34 as presented in the first report read as follows:

"Article 34. Conciliation

"1. If a system agreement or other regional or international agreement or arrangement so provides, or if the parties agree thereto with regard to a specific dispute concerning the interpretation or application of the present Convention, the parties shall submit such dispute to conciliation in accordance with the provisions of this article or with the provisions of such system agreement or regional or international agreement or arrangement.

"Any party to the dispute may institute such proceedings by written notification to the other party or parties, unless otherwise agreed upon.

"2. Unless otherwise agreed, the Conciliation Commission shall consist of five members. The party instituting the proceedings shall appoint two conciliators, one of whom may be its national. It

(Continued on next page.)

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.*

PARAGRAPH 1—ALTERNATIVE B

1. *If a watercourse agreement or other regional or international agreement or arrangement so provides, or if the parties agree thereto with regard to a specific dispute concerning the interpretation or application of the present Convention, the parties shall submit such dispute to conciliation in accordance with the provisions of this article or with the provisions of such watercourse agreement or regional or international agreement or arrangement.*

Any party to the dispute may institute such proceedings by written notification to the other party or parties, unless otherwise agreed upon.

2. *Unless otherwise agreed, the Conciliation Commission shall consist of five members. The party instituting the proceedings shall appoint two conciliators, one of whom may be its national. It shall inform the other party of its appointments in the written notification.*

The other party shall likewise appoint two conciliators, one of whom may be its national. Such appointment shall be made within thirty days from the receipt of the notification mentioned in paragraph 1 of this article.

3. *If either party to the dispute fails to appoint its conciliators as provided for in paragraphs 1 or 2 of this article, the other party may request the Secretary-General of the United Nations to make the necessary appointment or appointments, unless otherwise agreed upon between the parties. The Secretary-General of the United Nations shall*

(Footnote 89 continued.)

shall inform the other party of its appointments in the written notification.

“The other party shall likewise appoint two conciliators, one of whom may be its national. Such appointment shall be made within thirty days from the receipt of the notification mentioned in paragraph 1.

“3. If either party to the dispute fails to appoint its conciliators as provided for in paragraphs 1 or 2 of this article, the other party may request the Secretary-General of the United Nations to make the necessary appointment or appointments unless otherwise agreed upon between the parties. The Secretary-General of the United Nations shall make such appointment or appointments within thirty days from the receipt of the request.

“4. Within thirty days after all four conciliators have been appointed the parties shall choose by agreement the fifth member of the Commission from among the nationals of a third State. He shall act as the president of the Conciliation Commission. If the parties have not been able to agree within that period, either party may within fourteen days from the expiration of that period request the Secretary-General of the United Nations to make the appointment. The Secretary-General of the United Nations shall make such appointment within thirty days from the receipt of the request.”

make such appointment or appointments within thirty days from the receipt of the request.

4. *Within thirty days after all four conciliators have been appointed, the parties shall choose by agreement the fifth member of the Commission from among the nationals of a third State. He shall act as the president of the Conciliation Commission. If the parties have not been able to agree within that period, either party may within fourteen days from the expiration of that period request the Secretary-General of the United Nations to make the appointment. The Secretary-General of the United Nations shall make such appointment within thirty days from the receipt of the request.*

110. *Article 35 of the draft convention contains provisions concerning the functions and tasks of the Conciliation Commission. Article 36 deals with the effects of the report of the Conciliation Commission and the sharing of costs. The Special Rapporteur wishes to make no amendments to article 35⁹⁰ or to article 36.⁹¹*

ARTICLE 37. Adjudication by the International Court of Justice, another international court or a permanent or *ad hoc* arbitral tribunal; and

ARTICLE 38. Binding effect of adjudication

111. *Article 37 deals with settlement of disputes by adjudication by the International Court of Justice, another international court or a permanent or *ad hoc* arbitral tribunal, and article 38 with the binding effect of adjudication.*

⁹⁰ Article 35 as presented in the first report read as follows:

“Article 35. Functions and tasks of the Conciliation Commission

“1. Unless the parties otherwise agree, the Conciliation Commission shall determine its own procedure.

“2. The Conciliation Commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.

“3. The Conciliation Commission shall file its report with the parties within twelve months of its constitution, unless the parties otherwise agree. Its report shall record any agreement reached between the parties and, failing agreement, its recommendations to the parties. Such recommendations shall contain the Commission’s conclusions with regard to the pertinent questions of fact and law relevant to the matter in dispute and such recommendations as the Commission deems fair and appropriate for an amicable settlement of the dispute. The report with recorded agreements or, failing agreement, with the recommendations of the Commission shall be notified to the parties to the dispute by the Commission and also be deposited by the Commission with the Secretary-General of the United Nations, unless otherwise agreed by the parties.”

⁹¹ Article 36 as presented in the first report read as follows:

“Article 36. Effects of the report of the Conciliation Commission. Sharing of costs

“1. Except for agreements arrived at between the parties to the dispute through the conciliation procedure and recorded in the report in accordance with paragraphs 2 and 3 of article 35, the report of the Conciliation Commission—including its recommendations to the parties and its conclusions with regard to facts and law—is not binding upon the parties to the dispute unless the parties have agreed otherwise.

“2. The fees and costs of the Conciliation Commission shall be borne by the parties to the dispute in a fair and equitable manner.”

cation. The Special Rapporteur would propose only two minor drafting changes,⁹² both pertaining to article 37:

Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal

States may submit a dispute for adjudication to the International Court of Justice, to another international court or to a permanent or *ad hoc* arbitral tribunal if they have not been able to arrive at an agreed solution of the dispute by means of articles 31 to 36, provided that:

(a) the States parties to the dispute have accepted the jurisdiction of the International Court of Justice in accordance with Article 36 of the Statute of the Court or accepted the jurisdiction of the International Court of Justice or of another international court by a *watercourse* agreement or other regional or international agreement or specifically

⁹² See footnote 18 above.

Article 37 as presented in the first report read as follows:

"Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal"

"States may submit a dispute for adjudication to the International Court of Justice, to another international court or to a permanent or

have agreed to submit the dispute to the jurisdiction of the Court;

(b) the States parties to the dispute have accepted binding international arbitration by a permanent or *ad hoc* arbitral tribunal by a *watercourse* agreement or other regional or international agreement or specifically have agreed to submit the dispute to arbitration.

112. No change is proposed in *article 38*.⁹³

ad hoc arbitral tribunal if they have not been able to arrive at an agreed solution of the dispute by means of articles 31 to 36, provided that:

"(a) the States parties to the dispute have accepted the jurisdiction of the International Court of Justice in accordance with Article 36 of the Statute of the Court or accepted the jurisdiction of the International Court of Justice or of another international court by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to the jurisdiction of the Court;

"(b) the States parties to the dispute have accepted binding international arbitration by a permanent or *ad hoc* arbitral tribunal by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to arbitration."

⁹³ Article 38 as presented in the first report read as follows:

"Article 38. Binding effect of adjudication"

"A judgment or award rendered by the International Court of Justice, by another international court or by an arbitral tribunal shall be binding and final for States Parties. States Parties shall comply with it and in good faith assist in its execution."

CHAPTER VII

Final provisions

[Chapter VI of the draft]

ARTICLE 39. Relationship to other conventions and international agreements

113. With regard to article 39, the sole article included in chapter VI, on final provisions, the Special Rapporteur proposes some minor drafting amendments,⁹⁴ as follows:

⁹⁴ See footnote 18 above.

Article 39 as proposed in the first report read as follows:

"CHAPTER VI. FINAL PROVISIONS

"Article 39. Relationship to other conventions and international agreements"

"Without prejudice to article 4, paragraph 3, the provisions of the present Convention do not affect conventions or other international agreements in force relating to a particular international watercourse system or any part thereof, to international or regional watercourse systems or to a particular project, programme or use."

CHAPTER VI

FINAL PROVISIONS

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.

114. This article is based upon article X provisionally adopted by the Commission at its thirty-second session, in 1980.

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

[Agenda item 7]

DOCUMENT A/CN.4/378

Replies received in response to the questionnaire prepared by the Special Rapporteur with the assistance of the Secretariat

[Original: English]
[10 February 1984]

CONTENTS

	<i>Page</i>
INTRODUCTION	130
Questionnaire	130
REPLIES TO THE QUESTIONNAIRE	132
<i>Section</i>	
I. United Nations bodies	132
International Narcotics Control Board	132
<i>Appendix I.</i> Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961:	
Article 9. Composition and functions of the Board	132
Article 14. Measures by the Board to ensure the execution of the provisions of the Convention	132
<i>Appendix II.</i> Convention on Psychotropic Substances:	
Article 1. Use of terms (para. (c))	133
II. Specialized agencies and other organizations in the United Nations system	133
A. Food and Agriculture Organization of the United Nations	133
<i>Appendix A.I.</i> Constitution of the European Commission for the Control of Foot-and- Mouth Disease:	
Article XVII. Settlement of disputes	135
<i>Appendix A.II.</i> International Plant Protection Convention:	
Article IX. Settlement of disputes	136
<i>Appendix A.III.</i> Plant Protection Agreement for the South East Asia and Pacific Region:	
Article VII. Settlement of disputes	136
B. World Health Organization	136
<i>Appendix B.I.</i> International Health Regulations:	
Articles 2 to 22	137
Article 93	140
<i>Appendix B.II.</i> Constitution of the World Health Organization:	
Article 2 (subpara. (v)), article 18 (subpara. (m)) and article 22	140
C. International Atomic Energy Agency	141
<i>Appendix C.I.</i> Statute of the International Atomic Energy Agency:	
Articles II, III, IX, XI and XVI	142

<i>Section</i>	<i>Page</i>
III. Other intergovernmental organizations	144
Organisation for Economic Co-operation and Development	144
General reply to the questionnaire	144
Annex I. Environment	145
Annex II. Nuclear Energy Agency	148
Annex III. International Energy Agency	150
Annex IV. Trade	150
Annex V. Agriculture	151
Annex VI. Restrictive business practices	152
Annex VII. International investment and multinational enterprises	152
Annex VIII. Insurance	153
Annex IX. Protection of privacy and transborder flows of personal data	153
Annex X. Shipbuilding	153

Introduction

1. During its consideration, at its thirty-fifth session, of the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", the International Law Commission, in response to the proposal made by Mr. Quentin-Baxter, Special Rapporteur for the topic,¹ requested the Secretariat to circulate a questionnaire to selected international organizations.² It was hoped that the questionnaire might provide information on the obligations that States owed to each other and that they discharged as members of international organizations and, to that extent, "fulfil[led] or replace[d] some of the procedures indicated in sections 2, 3 and 4 of the schematic outline"³ of the topic.

2. On 11 August 1983, the Legal Counsel, on behalf of the Secretary-General addressed a questionnaire prepared

by the Special Rapporteur with the assistance of the Secretariat to 16 United Nations bodies, related organs, specialized agencies, other organizations within the United Nations system and other intergovernmental organizations, and requested them to submit their replies and information no later than 16 January 1984. The 16 organizations were chosen by the Secretariat, in consultation with the Special Rapporteur, on the basis of the possible bearing of their activities on matters inquired about in the questionnaire.

3. As of 9 February 1984, replies had been received from the following five organizations, accompanied by the relevant documents: the International Narcotics Control Board, the Food and Agriculture Organization of the United Nations, the World Health Organization, the International Atomic Energy Agency, and the Organization for Economic Co-operation and Development. The replies are reproduced below, and the documents are attached as appendices.

4. The text of the questionnaire reads as follows:

QUESTIONNAIRE

1. Is your organization involved in any form of co-operative activities among:
 - (a) States only?
 - (b) Non-State entities and States?
2. If the answer to question 1 is positive, please indicate the organization's legislative mandate for such co-operation.
3. Do the activities for which your organization facilitates co-operation mentioned in 1 above occur:
 - (a) Within the territorial jurisdiction of a State?
 - (b) Outside the territorial jurisdiction of a State?
4. Do the activities relate:
 - (a) To the physical use of the environment?
 - (b) To other activities, such as economic, monetary, etc.?
 If yes, please name them.
5. Does your organization's involvement in question 1 begin prior to the initiation of an activity? If the answer to this question is positive, please reply to the following:
 - (a) Does your organization assist in examining the impacts of a proposed activity within or outside of the territory of the State where it will be conducted?
 - (b) What is the composition of the group or the persons who collect the facts in question 5 (a); i.e. experts from the organization, from the member States, government delegations, etc.?

¹ *Yearbook . . . 1983*, vol. II (Part One), p. 220, document A/CN.4/373, para. 64.

² *Yearbook . . . 1983*, vol. II (Part Two), p. 83, para. 286.

³ *Ibid.*

- (c) Is your organization's involvement in the activities described in question 5 (a):
 - (i) Compulsory?
 - (ii) Voluntary on the part of the organization?
 - (iii) Upon the request of:
 - (a) The State where the activity will be conducted?
 - (b) Other States, members of the organization which might be affected by that activity?
 - (d) Does your organization circulate the facts obtained (by itself, or supplied to it by others) to other members of the organization or to those who might be affected by the proposed activity?
 - (e) May your organization suggest any modification in the proposed activity if it is expected to have outside impacts? If yes, please explain the nature of the suggestions, i.e. legislative, technical, time of operation, etc.
 - (f) What are some of the criteria which may affect making decisions regarding question 5 (e)?
 - (g) Are the decisions made by or through your organization in relation to question 5 (e):
 - (i) Recommendatory?
 - (ii) Compulsory?
6. Does your organization's involvement in question 1 begin after the initiation of an activity by its members? If the answer to this question is positive, please reply to the following:
- (a) Does your organization assist in examining the impacts of an ongoing activity, within or outside the territory where it is conducted?
 - (b) What is the composition of the group or the persons who collect the facts in question 6 (a), i.e. experts from the organization, from the member States, government delegations, etc.?
 - (c) Is your organization's involvement in the activities described in question 6:
 - (i) Compulsory?
 - (ii) Voluntary on the part of the organization?
 - (iii) Upon the request of:
 - (a) The State where the activity is being conducted?
 - (b) Other States, members of the organization which are affected by that activity?
 - (d) Does your organization circulate the facts obtained (by itself, or supplied to it by others) to other members of the organization or to those who are affected by the activity?
 - (e) May your organization suggest any modification in the activity which has or appears to have outside impacts? If yes, please explain the nature of the suggestions, i.e. legislative, technical, time of operation, etc.
 - (f) What are some of the criteria which may affect making decisions regarding question 6 (e)?
 - (g) Are the decisions made by or through your organization in relation to question 6 (e):
 - (i) Recommendatory?
 - (ii) Compulsory?
7. When there is a dispute among the organization's members regarding the negative consequences of a unilateral activity with other members, are they resolved through:
- (a) Direct negotiation among the parties?
 - (b) Negotiation among the parties with the organization's participation?
 - (c) Arbitration?
 - (d) The International Court of Justice or regional courts?
 - (e) Domestic courts?
8. Is your organization, in your opinion, with its structural, economic and political capabilities:
- (a) Sufficiently involved in co-operative activities?
 - (b) Could be more involved in co-operative activities?
9. Are there any other aspects of co-operative activities in which your organization is involved and have not been mentioned in the questionnaire? If yes, please explain.

Replies to the questionnaire

I. UNITED NATIONS BODIES

International Narcotics Control Board

[Original: English]
[7 October 1983]

1. It is the task of the International Narcotics Control Board to promote compliance by Governments with the international drug control treaties,¹ the aim of which is to assure and to limit the availability of drugs exclusively to legitimate uses. Action contrary to the provisions of these treaties, which have evolved gradually over a period of 70 years, must be considered prohibited by international law.

2. However, it may be submitted that this branch of treaty law reflects a principle of international solidarity in a wider sense. Thus article 14² of the Single Convention, as amended, deals not only with difficult drug control situations caused by the failure of a country (whether a party to the Convention or not) to carry out the provisions of the Convention, but also with situations existing in a country that has not failed to implement the treaty. This article, therefore, implies that a purely domestic situation, without any fault of the Government concerned, may cause significant difficulties for other countries. In such a case, not only would those other countries be justified in making a diplomatic approach to the Government concerned, but the Board itself has the right to ask that Government for explanations or propose the opening of consultations. Under the Convention, the Government in question is not legally bound to accept these proposals for submitting explanations or entering into consultations; only in the case of non-compliance is the Government obligated to furnish the requested explanations to the Board.

3. Article 14, as amended, further authorizes the Board to call upon the Government concerned to adopt appropriate remedial measures. Moreover, the article also gives the Board the right to propose to the Government that a study of the matter be carried out in its territory. Finally, the Board is empowered to draw public attention to a defaulting country, including a country whose continuous lack of action has created a situation amounting to a breach of law, and, in extreme cases, the Board may recommend a drug embargo against such countries.

4. In conclusion, it might be said that the international community of States, by accepting the obligations of the drug control treaties as well as the authority of the Board to propose certain measures against parties and non-parties, has acted in the awareness of a universal problem which can only be resolved in a spirit of global co-operation and solidarity.

¹ Art. 9 of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961 (see appendix I); and art. 1 (c) of the Convention on Psychotropic Substances (see appendix II).

² See appendix I.

APPENDIX I

Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961^a

[Articles 9 and 14]

Article 9. Composition and functions of the Board

1. The Board shall consist of thirteen members to be elected by the Council as follows:

(a) Three members with medical, pharmacological or pharmaceutical experience from a list of at least five persons nominated by the World Health Organization; and

(b) Ten members from a list of persons nominated by the Members of the United Nations and by Parties which are not Members of the United Nations.

2. Members of the Board shall be persons who, by their competence, impartiality and disinterestedness, will command general confidence. During their term of office they shall not hold any position or engage in any activity which would be liable to impair their impartiality in the exercise of their functions. The Council shall, in consultation with the Board, make all arrangements necessary to ensure the full technical independence of the Board in carrying out its functions.

3. The Council, with due regard to the principle of equitable geographic representation, shall give consideration to the importance of including on the Board, in equitable proportion, persons possessing a knowledge of the drug situation in the producing, manufacturing, and consuming countries, and connected with such countries.

4. The Board, in co-operation with Governments, and subject to the terms of this Convention, shall endeavour to limit the cultivation, production, manufacture and use of drugs to an adequate amount required for medical and scientific purposes, to ensure their availability for such purposes and to prevent illicit cultivation, production and manufacture of, and illicit trafficking in and use of, drugs.

5. All measures taken by the Board under this Convention shall be those most consistent with the intent to further the co-operation of Governments with the Board and to provide the mechanism for a continuing dialogue between Governments and the Board which will lend assistance to and facilitate effective national action to attain the aims of this Convention.

Article 14. Measures by the Board to ensure the execution of provisions of the Convention

1. (a) If, on the basis of its examination of information submitted by Governments to the Board under the provisions of this Convention, or of information communicated by United Nations organs or by specialized agencies or, provided that they are approved by the Commission on the Board's recommendation, by either other intergovernmental organizations or international non-governmental organizations which have direct competence in the subject-matter and which are in consultative status with the Economic and Social Council under Article 71 of the Charter of the United Nations or which enjoy a similar status by special agreement with the Council, the Board has objective reasons to believe that the aims of this Convention are being seriously endangered by reason of the failure of any Party, country or territory to carry out the provisions of this Convention, the Board shall have the right to propose to the Government concerned the opening of consultations or to request it to furnish

^a Adopted at New York on 8 August 1975 (United Nations, *Treaty Series*, vol. 976, p. 105).

explanations. If, without any failure in implementing the provisions of the Convention, a Party or a country or territory has become, or if there exists evidence of a serious risk that it may become, an important centre of illicit cultivation, production or manufacture of, or traffic in or consumption of drugs, the Board has the right to propose to the Government concerned the opening of consultations. Subject to the right of the Board to call the attention of the Parties, the Council and the Commission to the matter referred to in subparagraph (d) below, the Board shall treat as confidential a request for information and an explanation by a Government or a proposal for consultations and the consultations held with a Government under this subparagraph.

(b) After taking action under subparagraph (a) above, the Board, if satisfied that it is necessary to do so, may call upon the Government concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of this Convention.

(c) The Board may, if it thinks such action necessary for the purpose of assessing a matter referred to in subparagraph (a) of this paragraph, propose to the Government concerned that a study of the matter be carried out in its territory by such means as the Government deems appropriate. If the Government concerned decides to undertake this study, it may request the Board to make available the expertise and the services of one or more persons with the requisite competence to assist the officials of the Government in the proposed study. The person or persons whom the Board intends to make available shall be subject to the approval of the Government. The modalities of this study and the time-limit within which the study has to be completed shall be determined by consultation between the Government and the Board. The Government shall communicate to the Board the results of the study and shall indicate the remedial measures that it considers necessary to take.

(d) If the Board finds that the Government concerned has failed to give satisfactory explanations when called upon to do so under subparagraph (a) above, or has failed to adopt any remedial measures which it has been called upon to take under subparagraph (b) above, or that there is a serious situation that needs co-operative action at the international level with a view to remedying it, it may call the attention of the Parties, the Council and the Commission to the matter. The Board shall so act if the aims of this Convention are being seriously endangered and it has not been possible to resolve the matter satisfactorily in any other way. It shall also so act if it finds that there is a serious situation that needs co-operative action at the international level with a view to remedying it and that bringing such a situation to the notice of the Parties, the Council and the Commission is

the most appropriate method of facilitating such co-operative action; after considering the reports of the Board, and of the Commission if available on the matter, the Council may draw the attention of the General Assembly to the matter.

2. The Board, when calling the attention of the Parties, the Council and the Commission to a matter in accordance with paragraph 1 (d) above, may, if it is satisfied that such a course is necessary, recommend to Parties that they stop the import of drugs, the export of drugs, or both, from or to the country or territory concerned, either for a designated period or until the Board shall be satisfied as to the situation in that country or territory. The State concerned may bring the matter before the Council.

3. The Board shall have the right to publish a report on any matter dealt with under the provisions of this article, and communicate it to the Council, which shall forward it to all Parties. If the Board publishes in this report a decision taken under this article or any information relating thereto, it shall also publish therein the views of the Government concerned if the latter so requests.

4. If in any case a decision of the Board which is published under this article is not unanimous, the views of the minority shall be stated.

5. Any State shall be invited to be represented at a meeting of the Board at which a question directly interesting it is considered under this article.

6. Decisions of the Board under this article shall be taken by a two-thirds majority of the whole number of the Board.

APPENDIX II

Convention on Psychotropic Substances^a

Article 1. Use of terms

...

(c) "Board" means the International Narcotics Control Board provided for in the Single Convention on Narcotic Drugs, 1961.

...

^a Concluded at Vienna on 21 February 1971 (United Nations, *Treaty Series*, vol. 1019, p. 175).

II. SPECIALIZED AGENCIES AND OTHER ORGANIZATIONS IN THE UNITED NATIONS SYSTEM

A. Food and Agriculture Organization of the United Nations

[Original: English]
[16 January 1984]

Question 1

FAO is involved in many co-operative activities which take various forms and are carried out both with States and with non-State entities and States.

(a) The very purpose of the Organization, as an inter-governmental organization in the United Nations system, is to promote and to become involved in co-operative activities among States. In this regard the basic texts of the Organization speak for themselves, and a complete answer to this question is therefore provided under question 2.

(b) It is not clear whether the term non-State entities is intended to refer only to non-governmental institutions or to all institutions, governmental and non-governmental, international and national, which are not States. In any event, the answer to this question is in the affirmative, and details will also be given in the answer to question 2.

Question 2

The preamble to the FAO Constitution (1945)¹ starts with an acknowledgement by all States members of the organization of their determination "to promote the *common** welfare by furthering separate and *collective** action", and with a commitment of all members to "report to one another on the measures taken and the progress

¹ FAO, *Basic Texts*, vols. I and II, 1984 edition, sect. A.

achieved in the field of action set forth above” (essentially ensuring humanity’s freedom from hunger).

The development of international co-operation, of data collection and of dissemination of information, are all part of the basic functions of the Organization. Indeed, article I of the Constitution reads:

Article I. Functions of the Organization

1. The Organization shall *collect**, analyse, interpret and *disseminate** information relating to nutrition, food and agriculture. . . .

2. The Organization shall promote . . . *international** action with respect to:

...

(c) *the conservation of natural resources** . . . ;

3. It shall also be the function of the Organization:

(a) to furnish such technical assistance as Governments may request;

...

(c) generally to take all necessary and appropriate action to implement the purposes of the Organization as set forth in the preamble.

In addition, the FAO Conference may, in accordance with article XIV of the Constitution, approve and submit to member nations conventions and agreements concerning questions related to food and agriculture. Article XV envisages the conclusion of agreements between the Organization and member nations for the establishment of international institutions dealing with questions of food and agriculture. Under article VI of the Constitution, commissions, committees and working parties composed of States may be established and consultations held, thus providing FAO with other means of becoming involved in co-operative activities among States and, in accordance with the applicable rules, non-State entities through their participation in an observer capacity.

Article XIII of the Constitution deals specifically with the matter of co-operation with non-State entities. Co-operation among non-State entities and States is obviously envisaged through the Organization itself. Article XIII is echoed in sections M (Co-operation with international governmental organizations), N (Guiding lines regarding relationship agreements between FAO and intergovernmental organizations”), O (Co-operation with international non-governmental organizations”), P (FAO policy concerning relations with international non-governmental organizations) and Q (Granting of observer status (in respect of international governmental and non-governmental organizations) of the FAO *Basic Texts*).²

In addition to the legal basis for co-operation contained in the FAO Constitution, the legal basis for specific activities is also to be found in decisions taken from time to time by the governing bodies of FAO.

Question 3

(a) Most activities which FAO undertakes occur within the territorial jurisdiction of a State. However, the Fisher-

ies Department is also active in research, data collection and statistical work on high seas and Antarctic fisheries; the Agriculture Department has a subprogramme on remote sensing technology.

(b) See reply to (a) above.

Question 4

(a) A significant part of the activities of FAO relates to the physical use of the environment, agricultural development being largely based on natural resources. As agriculture is defined in paragraph 1 of article I of the FAO Constitution as including fisheries, marine products, forestry and primary forestry products, the programmes of FAO on these resources have been developed in parallel with its important programmes on soil and water resources management and conservation. The Standing Committees of the FAO Council that deal with agriculture, fisheries and forestry are open to all member nations that wish to participate and co-operate in the elaboration and orientation of the Organization’s programmes in those sectors. The majority of FAO field programme activities and projects financed out of regular programme funds (Technical Co-operation Programme) and extrabudgetary funds (e.g. UNDP and Trust Funds) relate to the management of the natural resources base for agricultural development. Member nations also use the good offices of FAO, as a secretariat servicing policy-making bodies, for the promotion of co-operative activities among themselves. As an executing agency for field activities, the Organization is fully involved in co-operative activities among States relating to the physical use of the environment.

(b) The same could be said for the whole series of co-operative activities related to other sectors, in particular the economic sector. For example, through the Committee on Commodity Problems and the Committee on World Food Security, the Organization is actively involved in economic, trade and food security programmes and activities. The FAO Development Department and Economic and Social Policy Department carry out regular and field programme activities which, in one way or another, involve the Organization in co-operative activities among States related to the economic and social sectors.

Question 5

The Interdepartmental Working Group on Environment and Energy (set up in 1969-1971), the main function of which is to advise the Director-General on environment and energy matters, recently took the initiative of looking into the possibility of introducing a formal environmental impact assessment (EIA) of field activities carried out by the Organization. It is premature to attempt to predict the outcome of such an initiative. At present no formal EIA exists. However, since environmental protection is a *sine qua non* of sustained long-term agricultural development, as a matter of course FAO has given environmental considerations an important role in its activities. It is therefore only natural that the need for a formal EIA has made itself felt less in FAO than in some organizations which, because of their primarily economic or financial character, have had to call on the formal EIA to make up for their having less experience in the technical aspects of environmental matters arising out of their development activities.

² *Ibid.*

(a) FAO has conducted research on the impact on the environment of irrigation, of tropical forest exploitation, of coastal zones development, of pest management, of trypanosomiasis control, of pesticide use, of the pulp and paper industry, and of the hides, skins and leather industry, to name a few examples. Such research covers impacts within or outside the limits of national jurisdiction.

(b) The composition of teams for country programming on project formulation missions, during which environmental data may, whenever relevant, be collected, varies according to the importance of each mission. Such teams are generally composed of experts from the Organization or of consultants.

(c) Field activities are carried out upon the request of the member nation(s) concerned.

(d) Article XI of the Constitution of FAO reads:

*Article XI. Reports by member nations
and associate members*

1. All member nations and associate members shall communicate regularly to the Director-General, on publication, the texts of laws and regulations pertaining to matters within the competence of the Organization which the Director-General considers useful for the purposes of the Organization.

2. With respect to the same matters, all member nations and associate members shall also communicate regularly to the Director-General statistical, technical and other information published or otherwise issued by, or readily available to, the Government. The Director-General shall indicate from time to time the nature of the information which would be most useful to the Organization and the form in which this information might be supplied.

3. Member nations and associate members may be requested to furnish, at such times and in such form as the Conference, the Council or the Director-General may indicate, other information, reports or documentation pertaining to matters within the competence of the Organization, including reports on the action taken on the basis of resolutions or recommendations of the Conference.

Much of the information obtained—including information based on experience gained in specific programmes or projects having an environmental impact—is available to all member nations of FAO through various FAO publications and reports.

All mission reports are for internal use only, but they may be printed and distributed after final clearance by the Organization, and with the approval of the member nation(s) concerned.

(e) Yes, through suggestions of any nature formulated in the mission reports.

(f) No fixed criteria are established.

(g) Always advisory.

Question 6

Yes. Answers provided under question 5 apply *mutatis mutandis* to question 6.

Question 7

Disputes among member States of FAO regarding the negative consequences of a unilateral activity of one member State on one or more other members would normally be settled in accordance with the mode of settlement agreed upon by the parties to the dispute or by whatever compulsory mode of settlement may be applicable.

Although the Organization as such does not normally become directly involved in disputes to which its member States may be parties, there are certain conventions and agreements concluded under the FAO Constitution which give the Director-General of the Organization a particular role in the procedure for the settlement of disputes. Thus, article XVII of the Constitution of the European Commission for the Control of Foot-and-Mouth Disease³ provides that members may request the Director-General of FAO to appoint a committee to settle disputes. Article IX of the International Plant Protection Convention⁴ is drafted along similar lines, as well as article VII of the Plant Protection Agreement for the South East Asia and Pacific Region.⁵

In addition, under article XVIII, paragraph 1, of the FAO Constitution any question or dispute concerning the interpretation of the Constitution, if not settled by the Conference, shall be referred to the International Court of Justice. The Organization, by virtue of article XVII, paragraph 2, of its Constitution and its relationship agreement with the United Nations, may request an advisory opinion of the Court on legal questions arising within the scope of its activities.

Finally, it should also be mentioned that no dispute between member States relating to physical transboundary harm has arisen out of activities carried out by FAO.

...

Question 9

Yes, but such activities are not pertinent to the topic to which the questionnaire relates.

³ See appendix A.I.

⁴ See appendix A.II.

⁵ See appendix A.III.

APPENDIX A.I

**Constitution of the European Commission for the Control
of Foot-and-Mouth Disease^a**

Article XVII. Settlement of disputes

1. If there is any dispute regarding the interpretation or application of this Constitution, the member or members concerned may request the Director-General of the Organization to appoint a committee to consider the question in dispute.

2. The Director-General shall thereupon, after consultation with the members concerned, appoint a committee of experts which shall include representatives of those members. This committee shall consider the question in dispute, taking into account all documents and other forms of evidence submitted by the members concerned. This committee shall submit a report to the Director-General of the Organization who shall transmit it to the members concerned and to the other members of the Commission.

3. The members of the Commission agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the members concerned of the matter out of which the disagreement arose.

4. The members concerned shall share equally the expenses of the experts.

^a Adopted at Rome, 11 December 1953 (United Nations, *Treaty Series*, vol. 191, p. 285).

APPENDIX A.II

International Plant Protection Convention^a

Article IX. Settlement of disputes

1. If there is any dispute regarding the interpretation or application of this Convention, or if a contracting Government considers that any action by another contracting Government is in conflict with the obligations of the latter under articles V and VI of this Convention, especially regarding the basis of prohibiting or restricting the imports of plants or plant products coming from its territories, the Government or Governments concerned may request the Director-General of FAO to appoint a committee to consider the question in dispute.

2. The Director-General of FAO shall thereupon, after consultation with the Governments concerned, appoint a committee of experts which shall include representatives of those Governments. This committee shall consider the question in dispute, taking into account all documents and other forms of evidence submitted by the Governments concerned. This committee shall submit a report to the Director-General of FAO who shall transmit it to the Governments concerned, and to other contracting Governments.

3. The contracting Governments agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the Governments concerned of the matter out of which the disagreement arose.

4. The Governments concerned shall share equally the expenses of the experts.

^a Concluded at Rome, 6 December 1951 (United Nations, *Treaty Series*, vol. 150, p. 67).

APPENDIX A.III

Plant Protection Agreement for the South-East Asia and Pacific Region^a

Article VII. Settlement of disputes

If there be any dispute regarding the interpretation or implementation of this Agreement, or regarding action taken by any Contracting Government under this Agreement, and such dispute cannot be resolved by the Committee, the Government or Governments concerned may request the Director-General of the Organization to appoint a committee of experts to consider such dispute.

^a Concluded at Rome, 27 February 1956 (United Nations, *Treaty Series*, vol. 247, p. 400).

B. World Health Organization

[Original: English]
[22 December 1983]

1. The information set out below does not conveniently fit into the scheme of the questionnaire. In the first place, the activities concerned are relevant to the subject of the letter of the Secretariat but are outside the focus of the questionnaire: they are essentially either a *lack of activity* (in the case of disease) or a *normal and continuing activity* (in the case of international transport facilities). The ac-

tivities can have an impact on health in all countries of the world. WHO also has some experience and procedures relating to fact-finding missions; the purpose of these is partly informational—to warn other countries of a danger to health or to assure them of the absence of such a danger; but the main purpose is often to enable assistance to be provided to the country concerned.

2. The measures that States must take (as opposed to the maximum measures that they are permitted to take) in the interest of health are mainly set out in articles 2 to 22 of the International Health Regulations 1969.¹ They relate to the duties of States in the case of outbreaks of “a disease subject to the Regulations” (art. 1) and to the duties concerning sanitary facilities in ports and airports. The International Health Regulations are, pursuant to article 22 of the WHO Constitution,² binding on most WHO member States.

3. Article 93 of the International Health Regulations³ provides for a procedure for the referral to the Organization of any question or dispute concerning the interpretation or application of the Regulations. This procedure, however, has not been invoked with respect to the provisions establishing positive duties on States (mainly arts. 2 to 22) as opposed to the other (facilitation) provisions of the Regulations.

4. In accordance with article 11, paragraph 3, of the International Health Regulations:

3. The Organization may, with the consent of the Government concerned, investigate an outbreak of a disease subject to the Regulations which constitutes a serious threat to neighbouring countries or to international health. Such investigation shall be directed to assist Governments to organize appropriate control measures and may include on-the-spot studies by a team.

Article 21, paragraphs 1 and 2, requires the Organization, at the request of the national health administration concerned, to certify, after appropriate investigation, that specified facilities at airports fulfil the conditions required by the Regulations.

5. Neither of the above two procedures has in fact been formally invoked in the context of investigations carried out with respect to the International Health Regulations.

6. The fact-finding missions of the Organization have been carried out on the initiative of World Health Assembly, at the request of States or at the request of organs of the United Nations. The legal basis can be found in the constitutional provision relating to technical co-operation, and in the general function of WHO and the World Health Assembly to take appropriate action to attain or further the objectives of the Organization (art. 2 (v) and art. 18 (m), of the Constitution).⁴

7. Investigations falling within the scope of the subject of the letter of the Secretariat, in that they were relevant to international health, were made pursuant to resolution WHA 13.55.⁵ Under this resolution, the World Health

¹ See appendix B.I.

² See appendix B.II.

³ See appendix B.I.

⁴ See appendix B.II.

⁵ Resolution WHA 13.55 adopted at the Thirteenth World Health Assembly, in May 1960, provides:

Assembly requested the Director-General "to establish an official register listing areas where malaria eradication has been achieved, after inspection and certification by a WHO evaluation team" (para. 5).

8. There is no fixed procedure governing the fact-finding missions organized by WHO. The number of experts varies, and in most cases does not exceed three. The choice of the members normally depends upon the directions of the authority which took the initiative for the mission. In the case of missions requested by Governments, the experts are designated by the Director-General. The terms of reference are normally clear from the purposes of the mission itself or from the resolution establishing it.

9. The report of the mission is submitted to the authority requesting the mission, as well as to the Government concerned. Where the investigation is requested by a Government, the distribution of the report is left to the discretion of that Government.

10. Mention should be made of one exceptional case (in 1970) which does not fit into the pattern outlined above: a Government requested urgent assistance from WHO in the face of the outbreak of an epidemic. As a necessary incident to its assistance, a WHO team carried out an investigation in the country and identified the disease as cholera due to the *eltor* vibrio. This is a disease that, under the Inter-

national Health Regulations, must be immediately notified to the Organization (art. 3), and the Organization must promptly transmit the information received to all health administrations (art. 11, para. 1). The Government, however, refused to make the notification, and the Director-General considered that he had a constitutional duty, nevertheless, to publish the results of the investigation.

11. Finally, it should be stressed that the purpose of WHO fact-finding missions is to obtain information as a means of assisting the Government concerned rather than to obtain information *per se*.

APPENDIX B.I

International Health Regulations^a

[Articles 2 to 22 and article 93]

PART II. NOTIFICATIONS AND EPIDEMIOLOGICAL INFORMATION

Article 2

For the application of these Regulations, each State recognizes the right of the Organization to communicate directly with the health administration of its territory or territories. Any notification or information sent by the Organization to the health administration shall be considered as having been sent to the State, and any notification or information sent by the health administration to the Organization shall be considered as having been sent by the State.

Article 3¹

1. Each health administration shall notify the Organization by telegram or telex within twenty-four hours of its being informed that the first case of a disease subject to the Regulations, that is neither an imported case nor a transferred case, has occurred in its territory, and, within the subsequent twenty-four hours, notify the infected area.

2. In addition each health administration will notify the Organization by telegram or telex within twenty-four hours of its being informed:

(a) that one or more cases of a disease subject to the Regulations has been imported or transferred into a non-infected area—the notification to include all information available on the origin of infection;

(b) that a ship or aircraft has arrived with one or more cases of a disease subject to the Regulations on board—the notification to include the name of the ship or the flight number of the aircraft, its previous and subsequent ports of call, and the health measures, if any, taken with respect to the ship or aircraft.

3. The existence of the disease so notified on the establishment of a reasonably certain clinical diagnosis shall be confirmed as soon as possible by laboratory methods, as far as resources permit, and the result shall be sent immediately to the Organization by telegram or telex.

¹ (1) The notification of an infected area by a health administration must be limited to the territory of that health administration. The initial notification of the extent of the infected area may in certain cases be provisional in nature. When, on epidemiological investigation, redefinition of the infected area is indicated, the health administration should inform the Organization as soon as possible of any change in the initial notification. (WHO, *Official Records*, No. 177, 1969, p. 554.)

(2) In the absence of information on the origin of infection, as required under subparagraph 2 (a), a negative report is in conformity with the Regulations. It is then for the health administration to follow up the notification with such information as may later become available, as soon as possible. (*Ibid.*, No. 135, 1964, p. 32.)

(3) In an effort to avoid delays, health administrations might consider having certain health authorities, e.g., those at towns and cities adjacent to a port or an airport, notify the Organization directly. (*Ibid.*, p. 36; and *ibid.*, No. 143, 1965, p. 45.)

(4) Countries receiving travellers from infected areas should keep the measures applied to a necessary minimum. (*Ibid.*, No. 217, 1974, p. 55.)

^a WHO, *International Health Regulations*, 3rd ed., annotated (Geneva, 1983).

"The Thirteenth World Health Assembly,

"Having considered the report of the Director-General on the development of the malaria eradication programme;

"Noting the satisfactory progress that has been made in the world-wide campaign for malaria eradication;

"Recognizing that the operational supervision and epidemiological assessment which are essential for the continuing success of the campaign can only be ensured by the adequate staffing of national malaria eradication services with fully trained personnel;

"Noting the steps that have been taken by the Director-General to provide increased facilities for the training of the required national personnel as well as to meet the request for technical advisory services needed by the Governments;

"Believing that it is important to keep constantly in mind the essential element of urgency in malaria eradication programmes, which must be time-limited programmes, and that adequate organizational and financial support is indispensable; and

"Recognizing that co-ordination between neighbouring countries is of special importance to countries reaching an advanced stage in their eradication programmes and that a fundamental element for such co-ordination is the regular reporting of the progress of operations and more particularly of epidemiological assessment,

"1. Urges Governments concerned to intensify their efforts for the training and provision of adequate technical and administrative personnel required to strengthen the supervisory and epidemiological assessment activities of their malaria eradication services, taking full advantage of the facilities provided by the Organization;

"2. Urges Governments concerned to accord to their national malaria eradication programmes the priority needed for the successful completion of the campaign within the shortest period of time;

"3. Requests Governments concerned to continue to keep the Organization regularly informed of the progress of their malaria eradication programmes and, in particular, of their epidemiological assessment activities;

"4. Requests the Director-General to keep under constant review the progress of the world-wide programme, to make available to Governments such technical advisory services as may be required, and to continue to take all the necessary steps to ensure the proper co-ordination of programmes throughout the world; and

"5. Requests the Director-General to establish an official register listing areas where malaria eradication has been achieved, after inspection and certification by a WHO evaluation team."

Article 4²

1. Each health administration shall notify the Organization immediately of evidence of the presence of the virus of yellow fever, including the virus found in mosquitoes or in vertebrates other than man, or the plague bacillus, in any part of its territory, and shall report the extent of the area involved.

2. Health administrators, when making a notification of rodent plague, shall distinguish wild-rodent plague from domestic-rodent plague and, in the case of the former, describe the epidemiological circumstances and the area involved.

Article 5

Any notification required under paragraph 1 of article 3 shall be promptly supplemented by information as to the source and type of the disease, the number of cases and deaths, the conditions affecting the spread of the disease, and the prophylactic measures taken.

Article 6

1. During an epidemic the notifications and information required under article 3 and article 5 shall be followed by subsequent communications sent at regular intervals to the Organization.

2. These communications shall be as frequent and as detailed as possible. The number of cases and deaths shall be communicated at least once a week. The precautions taken to prevent the spread of the disease, in particular the measures which are being applied to prevent the spread of the disease to other territories by ships, aircraft, trains, road vehicles, other means of transport, and containers leaving the infected area, shall be stated. In the case of plague, the measures taken against rodents shall be specified. In the case of the diseases subject to the Regulations which are transmitted by insect vectors, the measures taken against such vectors shall also be specified.

Article 7³

1. The health administration for a territory in which an infected area has been defined and notified shall notify the Organization when that area is free from infection.

2. An infected area may be considered as free from infection when all measures of prophylaxis have been taken and maintained to prevent the recurrence of the disease or its spread to other areas, and when:

(a) in the case of plague or cholera, a period of time equal to at least

² (1) See the definition of "infected area" in article 1 of the Regulations.

(2) One of the following criteria should be used in determining activity of the virus in vertebrates other than man:

(i) the discovery of the specific lesions of yellow fever in the liver of vertebrates indigenous to the area, or

(ii) the isolation of yellow fever virus from any indigenous vertebrates. (WHO, *Official Records*, No. 64, 1955, p. 69.)

(3) Measures need not normally be taken against an area which has been notified as infected with wild-rodent plague, unless there is evidence that the wild-rodent plague has infiltrated or is tending to infiltrate into the domestic rodent population, and thus threatens international traffic. (*Ibid.*, No. 56, 1954, p. 47; and *ibid.*, No. 64, 1955, p. 38.)

³ (1) The period stipulated in paragraph 2 should begin when the last case is identified as a case, irrespective of the time at which the person may have been isolated. (WHO, *Official Records*, No. 127, 1963, p. 33.)

(2) The time-limits in paragraph 2 (a), equal to twice the incubation period of the disease, are minimum limits and health administrations may extend them before declaring an infected area in their territory free from infection and continue for a longer period their measures of prophylaxis to prevent the recurrence of the disease or its spread to other areas. (*Ibid.*, No. 72, 1956, p. 38; and *ibid.*, No. 79, 1957, p. 499.)

twice the incubation period of the disease, as hereinafter provided, has elapsed since the last case identified has died, recovered or been isolated, and there is no epidemiological evidence of spread of that disease to any contiguous area;

(b) (i) in the case of yellow fever not transmitted by *Aedes aegypti*, three months have elapsed without evidence of activity of the yellow-fever virus;

(ii) in the case of yellow fever transmitted by *Aedes aegypti*, three months have elapsed since the occurrence of the last human case, or one month since that occurrence if the *Aedes aegypti* index has been continuously maintained below 1 per cent;

(c) (i) in the case of plague in domestic rodents, one month has elapsed since the last infected animal was found or trapped;

(ii) in the case of plague in wild rodents, three months have elapsed without evidence of the disease in sufficient proximity to ports and airports to be a threat to international traffic.

Article 8⁴

1. Each health administration shall notify the Organization of:

(a) the measures which it has decided to apply to arrivals from an infected area and the withdrawal of any such measures, indicating the date of application or withdrawal;

(b) any change in its requirements as to vaccination for any international voyage.

2. Any such notification shall be sent by telegram or telex, and whenever possible in advance of any such change or of the application or withdrawal of any such measure.

3. Each health administration shall send to the Organization once a year, at a date to be fixed by the Organization, a recapitulation of its requirements as to vaccination for any international voyage.

4. Each health administration shall take steps to inform prospective travellers, through the co-operation of, as appropriate, travel agencies, shipping firms, aircraft operators or by other means, of its requirements and of any modifications thereto.

Article 9

In addition to the notifications and information required under articles 3 to 8 inclusive, each health administration shall send to the Organization weekly:

(a) a report by telegram or telex of the number of cases of the diseases subject to the Regulations and deaths therefrom during the previous week in each of its towns and cities adjacent to a port or an airport, including any imported or transferred cases,

(b) a report by airmail of the absence of such cases during the periods referred to in subparagraphs (a), (b) and (c) of paragraph 2 of article 7.

Article 10

Any notification and information required under articles 3 to 9 inclusive shall also be sent by the health administration, on request, to any diplomatic mission or consulate established in the territory for which it is responsible.

⁴ (1) The requirements of countries, as notified by health administrations, are published in the WHO publication, *Vaccination Certificate Requirements for International Travel and Health Advice to Travellers* (Geneva, 1984). Amendments to this publication appear in the *Weekly Epidemiological Record*.

(2) Measures believed to be in excess of the Regulations shall be published by the Organization accompanied by the phrase: "It appears that conformity of this measure with the Regulations may be open to question and the Organization is in communication with the health administration concerned." (WHO, *Official Records*, No. 56, 1954, p. 55; and *ibid.*, No. 79, 1957, p. 499.)

Article 11⁵

1. The Organization shall send to all health administrations, as soon as possible and by the means appropriate to the circumstances, all epidemiological and other information which it has received under articles 3 to 8 inclusive and paragraph (a) of article 9 as well as information as to the absence of any returns required by article 9. Communications of an urgent nature shall be sent by telegram, telex or telephone.

2. Any additional epidemiological data and other information available to the Organization through its surveillance programme shall be made available, when appropriate, to all health administrations.

3. The Organization may, with the consent of the Government concerned, investigate an outbreak of a disease subject to the Regulations which constitutes a serious threat to neighbouring countries or to international health. Such investigation shall be directed to assist Governments to organize appropriate control measures and may include on-the-spot studies by a team.

Article 12

Any telegram or telex sent, or telephone call made, for the purposes of articles 3 to 8 inclusive and article 11 shall be given the priority appropriate to the circumstances; in any case of exceptional urgency, where there is risk of the spread of a disease subject to the Regulations, the priority shall be the highest available under international telecommunication agreements.

Article 13⁶

1. Each State shall forward annually to the Organization, in accordance with article 62 of the Constitution of the Organization, information concerning the occurrence of any case of a disease subject to the Regulations due to or carried by international traffic, as well as on the action taken under these Regulations or bearing upon their application.

2. The Organization shall, on the basis of the information required by paragraph 1 of this article, of the notifications and reports required by these Regulations, and of any other official information, prepare an annual report on the functioning of these Regulations and on their effect on international traffic.

3. The Organization shall review the epidemiological trends of the diseases subject to the Regulations, and shall publish such data, not less than once a year, illustrated with maps showing infected and free areas of the world, and any other relevant information obtained from the surveillance programme of the Organization.

PART III. HEALTH ORGANIZATION

Article 14⁷

1. Each health administration shall ensure that ports and airports in its territory shall have at their disposal an organization and equipment adequate for the application of the measures provided for in these Regulations.

⁵ Notification to health administrations by means of the *Weekly Epidemiological Record* and the automatic telex reply service discharges the Organization's responsibilities for notification under articles 11 (first sentence), 20, 21, 22, 69 and 85. (WHO, *Official Records*, No. 56, 1954, pp. 55 and 66.) (See also annex IV of the Regulations: WHO Epidemiological Service to Member States.)

⁶ All health administrations should report, even negative information, on the occurrence of diseases subject to the Regulations and other matters relative to the functioning of the Regulations. (WHO, *Official Records*, No. 217, 1974, p. 58; and *ibid.*, No. 240, 1977, p. 45.)

⁷ (1) Microbiological sampling of drinking water and food should be part of an overall sanitation programme. (WHO, *Official Records*, No. 217, 1974, p. 58.)

(2) All national health administrations should ensure the quality of food and water provided in airports and aircraft. (*Ibid.*, No. 240, 1977, p. 45.)

2. Every port and airport shall be provided with pure drinking water and wholesome food supplied from sources approved by the health administration for public use and consumption on the premises or on board ships or aircraft. The drinking water and food shall be stored and handled in such a manner as to ensure their protection against contamination. The health authority shall conduct periodic inspections of equipment, installations and premises, and shall collect samples of water and food for laboratory examinations to verify the observance of this article. For this purpose and for other sanitary measures, the principles and recommendations set forth in the guides on these subjects published by the Organization shall be applied as far as practicable in fulfilling the requirements of these Regulations.

3. Every port and airport shall also be provided with an effective system for the removal and safe disposal of excrement, refuse, waste water, condemned food, and other matter dangerous to health.

Article 15

There shall be available to as many of the ports and airports in a territory as practicable an organized medical and health service with adequate staff, equipment and premises, and in particular facilities for the prompt isolation and care of infected persons, for disinfection, disinsecting and deratting, for bacteriological investigation, for the collection and examination of rodents for plague infection, for collection of water and food samples and their dispatch to a laboratory for examination, and for other appropriate measures provided for by these Regulations.

Article 16

The health authority for each port and airport shall:

- (a) take all practicable measures to keep port and airport installations free of rodents;
- (b) make every effort to extend rat-proofing to the port and airport installations.

Article 17

1. Each health administration shall ensure that a sufficient number of ports in its territory shall have at their disposal adequate personnel competent to inspect ships for the issue of the Deratting Exemption Certificates referred to in article 53, and the health administration shall approve such ports for that purpose.

2. The health administration shall designate a number of these approved ports, depending upon the volume and incidence of its international traffic, as having at their disposal the equipment and personnel necessary to derat ships for the issue of the Deratting Certificates referred to in article 53.

3. Each health administration which so designates ports shall ensure that Deratting Certificates and Deratting Exemption Certificates are issued in accordance with the requirements of the Regulations.

Article 18

1. Depending upon the volume of its international traffic, each health administration shall designate as sanitary airports a number of the airports in its territory, provided they meet the conditions laid down in paragraph 2 of this article, and the provisions of article 14.

2. Every sanitary airport shall have at its disposal:

- (a) an organized medical service and adequate staff, equipment and premises;

(3) See the following WHO publications: *Guide to Ship Sanitation* (1967); *Vector Control in International Health* (1972); *Guide to Hygiene and Sanitation in Aviation* (2nd ed., 1977); *Guidelines for Drinking-water Quality* are in preparation.

(b) facilities for the transport, isolation, and care of infected persons or suspects;

(c) facilities for efficient disinfection and disinsecting, for the control of vectors and rodents, and for any other appropriate measure provided for by these Regulations;

(d) a bacteriological laboratory, or facilities for dispatching suspected material to such a laboratory;

(e) facilities within the airport or available to it for vaccination against yellow fever.

Article 19

1. Every port and the area within the perimeter of every airport shall be kept free from *Aedes aegypti* in its immature and adult stages and the mosquito vectors of malaria and other diseases of epidemiological significance in international traffic. For this purpose active anti-mosquito measures shall be maintained within a protective area extending for a distance of at least 400 metres around the perimeter.

2. Within a direct transit area provided at any airport situated in or adjacent to an area where the vectors referred to in paragraph 1 of this article exist, any building used as accommodation for persons or animals shall be kept mosquito-proof.

3. For the purposes of this article, the perimeter of an airport means a line enclosing the area containing the airport buildings and any land or water used or intended to be used for the parking of aircraft.

4. Each health administration shall furnish data to the Organization once a year on the extent to which its ports and airports are kept free from vectors of epidemiological significance in international traffic.

Article 20^b

1. Each health administration shall send to the Organization a list of the ports in its territory approved under article 17 for the issue of:

- (i) Deratting Exemption Certificates only, and
- (ii) Deratting Certificates and Deratting Exemption Certificates.

2. The health administration shall notify the Organization of any change which may occur from time to time in the list required by paragraph 1 of this article.

3. The Organization shall send promptly to all health administrations the information received in accordance with this article.

Article 21

1. The Organization shall, at the request of the health administration concerned, arrange to certify, after any appropriate investigation, that a sanitary airport in its territory fulfils the conditions required by the Regulations.

2. The Organization shall, at the request of the health administration concerned, and after appropriate investigation, certify that a direct transit area at an airport in a yellow-fever infected area in its territory fulfils the conditions required by the Regulations.

3. These certifications shall be subject to periodic review by the Organization, in co-operation with the health administration concerned, to ensure that the required conditions are fulfilled.

Article 22

1. Wherever the volume of international traffic is sufficiently important and whenever epidemiological conditions so require, facilities for

the application of the measures provided for in these Regulations shall be made available at frontier posts on railway lines, on roads and, where sanitary control over inland navigation is carried out at the frontier, on inland waterways.

2. Each health administration shall notify the Organization when and where such facilities are provided.

3. The Organization shall send promptly to all health administrations the information received in accordance with this article.

...

Article 93

1. Any question or dispute concerning the interpretation or application of these Regulations or of any Regulations supplementary to these Regulations may be referred by any State concerned to the Director-General who shall attempt to settle the question or dispute. If such question or dispute is not thus settled, the Director-General on his own initiative, or at the request of any State concerned, shall refer the question or dispute to the appropriate committee or other organ of the Organization for consideration.

2. Any State concerned shall be entitled to be represented before such committee or other organ.

3. Any such dispute which has not been thus settled may, by written application, be referred by any State concerned to the International Court of Justice for decision.

APPENDIX B.II

Constitution of the World Health Organization^a

Article 2

In order to achieve its objective, the functions of the Organization shall be:

...

(v) generally to take all necessary action to attain the objective of the Organization.

Article 18

The functions of the Health Assembly shall be:

...

(m) to take any other appropriate action to further the objective of the Organization.

Article 22

Regulations adopted pursuant to article 21 shall come into force for all members after due notice has been given of their adoption by the Health Assembly except for such members as may notify the Director-General of rejection or reservations within the period stated in the notice.

^b Health administrations are urged to make from time to time a review of the ports designated under the Regulations in order to determine whether such designations meet the conditions of traffic. (WHO, *Official Records*, No. 127, 1963, p. 35.)

^a WHO, *Basic Documents*, 35th ed. (Geneva, 1985), p. 1.

C. International Atomic Energy Agency

[Original: English]
[13 January 1984]

GENERAL COMMENTS

1. The problem of "international liability for injurious consequences arising out of acts not prohibited by international law" encompasses issues that have some relevance to the area of IAEA involvement in international co-operation.

2. The need for international regulation of inherently hazardous forms of activities with potentially transfrontier implications has led to the adoption of international recommendations or agreements on some specific subject-matters, including peaceful applications of nuclear energy. Although the issues of liability to third parties that may arise from such applications are outside the Agency's specific functions, they are regulated by an international convention adopted under its aegis, the 1963 Vienna Convention on Civil Liability for Nuclear Damage.¹

3. The development by IAEA of various safety standards for nuclear activities or installations for peaceful purposes and their progressive adoption and application by member States in accordance with their own requirements could contribute to enhancing the safety of such activities or installations and, thereby, preventing or reducing the risk of injurious consequences both within and beyond national boundaries. More specifically, with respect to an assessment of transboundary radiation detriment, IAEA has recently sponsored research with a view to the formulation of an internationally recognized minimum value of radiation detriment that could help to overcome the use of different values for assessing transboundary detriment as compared with that incurred in the country from which it originates.

4. In order to facilitate co-operation among member States for preventing and limiting injurious effects in cases where a nuclear accident may have significant radiological impact in other States, IAEA will convene in 1984 an expert group to consider the need for prior arrangements among the States concerned for establishing a threshold of reportable events, integrated planning and information exchange on a transboundary release of radioactive material. This is in follow-up to the work carried out by two earlier expert groups which met in 1982 and 1983, which resulted in a set of *Guidelines for Mutual Emergency Assistance Arrangements in Connection with a Nuclear Accident or Radiological Emergency*² published by IAEA for use by member States as advisory material.

REPLIES TO THE QUESTIONNAIRE

Question 1

(a) Yes. Under the provisions of its Statute, IAEA is empowered to carry out activities among member States in

¹ IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 7.

² INFCIRC/310. IAEA publication (Vienna), January 1984.

the area of its responsibility to "seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world" (art. I).

(b) Yes. In carrying out its functions, IAEA "is authorized to enter into an agreement or agreements establishing an appropriate relationship between the Agency and the United Nations and any other organizations the work of which is related to that of the Agency" (art. XVI). Various forms of co-operation have thus been established with a number of organizations within the United Nations system (UNESCO, ILO, WHO, WMO, ICAO, FAO, IMO, UNEP, UNDP, etc.) and certain global or regional international organizations (OAU, CMEA, EURATOM, NEA/OECD, OAS/IANEC, etc.).

Question 2

The authority of IAEA to carry out international co-operation activities in its particular field of competence derives basically from various provisions of its Statute, namely, articles II, III, IX, XI, and XVI.³

More detailed rules and procedures for furnishing technical assistance by IAEA to member States are laid down in a special document—the *Revised Guiding Principles and General Operating Rules to Govern the Provisions of Technical Assistance*—approved by the Board of Governors on 21 February 1979.⁴

Specific terms and conditions under which technical assistance projects are implemented are embodied in the Revised Supplementary Agreement to the UNDP Basic Assistance Agreement providing, by reference, for the application of the provisions of that Agreement in addition to those required by the IAEA Statute (non-military diversion of the assistance received, application of relevant safety measures, settlement of disputes).

Question 3

(a) Yes. The co-operative activities of IAEA are, in general, restricted to the territory of the member States where such activity is undertaken. One of the basic principles governing the provision of technical assistance by IAEA is that the technical assistance activities of the Agency "shall be carried out with due observance of the sovereign rights of States" (art. III.D).

(b) Yes. Part of the Agency's activities also concerns areas that lie beyond the territorial jurisdiction of States, i.e. the high seas. For example, under the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972,⁵ IAEA has been entrusted with (a) defining high-level radioactive wastes and other such matter unsuitable for dumping at sea, and (b) making recommendations to be taken fully into account by the Contracting Parties in issuing permits for the dumping at sea of radioactive matter not prohibited under the Convention.

Similar responsibility is provided for in the Barcelona Convention for the protection of the Mediterranean Sea against Pollution, 1976.⁶

³ See appendix C.I.

⁴ INFCIRC/267 (March 1979).

⁵ United Nations, *Treaty Series*, vol. 1046, p. 120.

⁶ To appear in United Nations, *Treaty Series*, No. 16908.

Question 4

(a) Yes. The activity of IAEA relates, in broad terms, to research on, and development and practical application of, nuclear energy for peaceful purposes.

(b) Yes. One of the major statutory functions of IAEA is to establish and administer safeguards. Essentially, these constitute a means of verifying the fulfilment of international undertakings by States under agreements concluded with IAEA in connection with treaty obligations (e.g. Treaty on the Non-Proliferation of Nuclear Weapons,⁷ Tlatelolco Treaty⁸) and other legal arrangements.

IAEA is also actively engaged in fostering the exchange of scientific information in nuclear science and technology, and in providing for scientists and technicians, with particular regard to the special needs of developing countries.

Question 5

(a) (b) (c) Yes. At the request of a member State considering a project, IAEA provides assistance in performing data collections and various studies and assessments from the outset. These missions are performed by teams of international experts that may consist of specialists from the secretariat and/or from member States. The assignments are usually carried out in close co-operation with officials and other experts from the requesting country. Where necessary, a joint team of specialists can be established.

(d) Reports resulting from such missions are subject to a two-step procedure for their use. They are first submitted to the authorities of the State for which the project was carried out. Subsequently, if not objected to by the State concerned, they may be released for the general information and benefit of other member States.

(e) (f) (g) The findings and conclusions of such missions are advisory and are presented in the form of suggestions and recommendations of a technical nature. The national authorities concerned may be advised to carry out further in-depth studies on particular topics (e.g. environmental impact assessments, economic feasibility) or to give special attention to preparatory steps required, such as organizational infrastructure, regulatory framework, manpower training and development, evaluation of supplies availability and quality performance, or to delay a project. Regional co-operation may also be encouraged. The study methodology for project assessment does not specifically envisage the evaluation of the transboundary impacts of a contemplated activity. However, in the case of nuclear project, advice on siting and safety requirements are designed *per se* to prevent nuclear damage, no matter where it may be caused, within or outside the territory of a State.

Question 6

Yes. See replies to question 5.

Question 7

(a) (b) (c) (d) (e) IAEA has no statutory authority to per-

form functions relating to peaceful settlement of disputes among its member States. In case of such disputes, member States, in principle, are bound to act in accordance with their obligations under Chapter VI of the United Nations Charter.

However, special provisions for settlement of disputes through negotiation or other means as may be agreed by the parties concerned, or through arbitration, have been invariably embodied in all agreements of various types concluded between IAEA and its member States.

Question 8

(a) (b) Within its statutory framework, IAEA is largely involved in world-wide co-operative activities and has the potential, under its Statute, to increase such international co-operation, depending upon the consensus of its member States.

Question 9

No.

APPENDIX C.1

Statute of the International Atomic Energy Agency³

[Articles II, III, IX, XI and XVI]

Article II. Objectives

The Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.

Article III. Functions

A. The Agency is authorized:

1. To encourage and assist research on, and development and practical application of, atomic energy for peaceful uses throughout the world; and, if requested to do so, to act as an intermediary for the purposes of securing the performance of services or the supplying of materials, equipment, or facilities by one member of the Agency for another; and to perform any operation or service useful in research on, or development or practical application of, atomic energy for peaceful purposes;

2. To make provision, in accordance with this Statute, for materials, services, equipment, and facilities to meet the needs of research on, and development and practical application of, atomic energy for peaceful purposes, including the production of electric power, with due consideration for the needs of the underdeveloped areas of the world;

3. To foster exchange of scientific and technical information on peaceful uses of atomic energy;

4. To encourage the exchange and training of scientists and experts in the field of peaceful uses of atomic energy;

5. To establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any

⁷ United Nations, *Treaty Series*, vol. 729, p. 161.

⁸ *Ibid.*, vol. 634, p. 281.

³ IAEA, *Statute of the International Atomic Energy Agency*, as amended up to 1 June 1973 (Vienna, 1973).

bilateral or multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy;

6. To establish or adopt, in consultation and, where appropriate, in collaboration with the competent organs of the United Nations and with the specialized agencies concerned, standards of safety for protection of health and minimization of danger to life and property (including such standards for labour conditions), and to provide for the application of these standards to its own operations as well as to the operations making use of materials, services, equipment, facilities, and information made available by the Agency or at its request or under its control or supervision; and to provide for the application of these standards, at the request of the parties, to operations under any bilateral or multilateral arrangement, or, at the request of a State, to any of that State's activities in the field of atomic energy;

7. To acquire or establish any facilities, plant and equipment useful in carrying out its authorized functions, whenever the facilities, plant, and equipment otherwise available to it in the area concerned are inadequate or available only on terms it deems unsatisfactory.

B. In carrying out its functions, the Agency shall:

1. Conduct its activities in accordance with the purposes and principles of the United Nations to promote peace and international co-operation, and in conformity with policies of the United Nations furthering the establishment of safeguarded world-wide disarmament and in conformity with any international agreements entered into pursuant to such policies;

2. Establish control over the use of special fissionable materials received by the Agency, in order to ensure that these materials are used only for peaceful purposes;

3. Allocate its resources in such a manner as to secure efficient utilization and the greatest possible general benefit in all areas of the world, bearing in mind the special needs of the underdeveloped areas of the world;

4. Submit reports on its activities annually to the General Assembly of the United Nations and, when appropriate, to the Security Council: if in connection with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security, and may also take the measures open to it under this Statute, including those provided in paragraph C of article XII;

5. Submit reports to the Economic and Social Council and other organs of the United Nations on matters within the competence of these organs.

C. In carrying out its functions, the Agency shall not make assistance to members subject to any political, economic, military, or other conditions incompatible with the provisions of this Statute.

D. Subject to the provisions of this Statute and to the terms of agreements concluded between a State or a group of States and the Agency which shall be in accordance with the provisions of the Statute, the activities of the Agency shall be carried out with due observance of the sovereign rights of States.

Article IX. Supplying of materials

A. Members may make available to the Agency such quantities of special fissionable materials as they deem advisable and on such terms as shall be agreed with the Agency. The materials made available to the Agency may, at the discretion of the member making them available, be stored either by the member concerned or, with the agreement of the Agency, in the Agency's depots.

B. Members may also make available to the Agency source materials as defined in article XX and other materials. The Board of Governors shall determine the quantities of such materials which the Agency will accept under agreements provided for in article XIII.

C. Each member shall notify the Agency of the quantities, form, and composition of special fissionable materials, source materials, and other materials which that member is prepared, in conformity with its laws, to make available immediately or during a period specified by the Board of Governors.

D. On request of the Agency a member shall, from the materials which it has made available, without delay deliver to another member or group of members such quantities of such materials as the Agency may specify, and shall without delay deliver to the Agency itself such quantities of such materials as are really necessary for operations and scientific research in the facilities of the Agency.

E. The quantities, form and composition of materials made available by any member may be changed at any time by the member with the approval of the Board of Governors.

F. An initial notification in accordance with paragraph C of this article shall be made within three months of the entry into force of this Statute with respect to the member concerned. In the absence of a contrary decision of the Board of Governors, the materials initially made available shall be for the period of the calendar year succeeding the year when this Statute takes effect with respect to the member concerned. Subsequent notifications shall likewise, in the absence of a contrary action by the Board, relate to the period of the calendar year following the notification and shall be made no later than the first day of November of each year.

G. The Agency shall specify the place and method of delivery and, where appropriate, the form and composition, of materials which it has requested a member to deliver from the amounts which that member has notified the Agency it is prepared to make available. The Agency shall also verify the quantities of materials delivered and shall report those quantities periodically to the members.

H. The Agency shall be responsible for storing and protecting materials in its possession. The Agency shall ensure that these materials shall be safeguarded against (1) hazards of the weather, (2) unauthorized removal or diversion, (3) damage or destruction, including sabotage, and (4) forcible seizure. In storing special fissionable materials in its possession, the Agency shall ensure the geographical distribution of these materials in such a way as not to allow concentration of large amounts of such materials in any one country or region of the world.

I. The Agency shall as soon as practicable establish or acquire such of the following as may be necessary:

1. Plant, equipment, and facilities for the receipt, storage, and issue of materials;
2. Physical safeguards;
3. Adequate health and safety measures;
4. Control laboratories for the analysis and verification of materials received;
5. Housing and administrative facilities for any staff required for the foregoing.

J. The materials made available pursuant to this article shall be used as determined by the Board of Governors in accordance with the provisions of this Statute. No member shall have the right to require that the materials it makes available to the Agency be kept separately by the Agency or to designate the specific project in which they must be used.

Article XI. Agency projects

A. Any member or group of members of the Agency desiring to set up any project for research on, or development or practical application of, atomic energy for peaceful purposes may request the assistance of the Agency in securing special fissionable and other materials, services, equipment, and facilities necessary for this purpose. Any such request shall be accompanied by an explanation of the purpose and extent of the project and shall be considered by the Board of Governors.

B. Upon request, the Agency may also assist any member or group of members to make arrangements to secure necessary financing from out-

side sources to carry out such projects. In extending this assistance, the Agency will not be required to provide any guarantees or to assume any financial responsibility for the project.

C. The Agency may arrange for the supplying of any materials, services, equipment, and facilities necessary for the project by one or more members or may itself undertake to provide any or all of these directly, taking into consideration the wishes of the member or members making the request.

D. For the purpose of considering the request, the Agency may send into the territory of the member or group of members making the request a person or persons qualified to examine the project. For this purpose the Agency may, with the approval of the member or group of members making the request, use members of its own staff or employ suitably qualified nationals of any member.

E. Before approving a project under this article, the Board of Governors shall give due consideration to:

1. The usefulness of the project, including its scientific and technical feasibility;
2. The adequacy of plans, funds, and technical personnel to assure the effective execution of the project;
3. The adequacy of proposed health and safety standards for handling and storing materials and for operating facilities;
4. The inability of the member or group of members making the request to secure the necessary finances, materials, facilities, equipment, and services;
5. The equitable distribution of materials and other resources available to the Agency;
6. The special needs of the underdeveloped areas of the world; and
7. Such other matters as may be relevant.

F. Upon approving a project, the Agency shall enter into an agreement with the member or group of members submitting the project, which agreement shall:

1. Provide for allocation to the project of any required special fissionable or other materials;
2. Provide for transfer of special fissionable materials from their then place of custody, whether the materials be in the custody of the Agency or of the member making them available for use in Agency projects, to the member or group of members submitting the project, under conditions

which ensure the safety of any shipment required and meet applicable health and safety standards;

3. Set forth the terms and conditions, including charges, on which any materials, services, equipment, and facilities are to be provided by the Agency itself, and, if any such materials, services, equipment, and facilities are to be provided by a member, the terms and conditions as arranged for by the member or group of members submitting the project and the supplying member;

4. Include undertakings by the member or group of members submitting the project: (a) that the assistance provided shall not be used in such a way as to further any military purpose; and (b) that the project shall be subject to the safeguards provided for in article XII, the relevant safeguards being specified in the agreement;

5. Make appropriate provision regarding the rights and interests of the Agency and the member or members concerned in any inventions or discoveries, or any patents therein, arising from the project;

6. Make appropriate provision regarding settlement of disputes;

7. Include such other provisions as may be appropriate.

G. The provisions of this article shall also apply where appropriate to a request for materials, services, facilities, or equipment in connection with an existing project.

Article XVI. Relationship with other organizations

A. The Board of Governors, with the approval of the General Conference, is authorized to enter into an agreement or agreements establishing an appropriate relationship between the Agency and the United Nations and any other organizations the work of which is related to that of the Agency.

B. The agreement or agreements establishing the relationship of the Agency and the United Nations shall provide for:

1. Submission by the Agency of reports as provided for in subparagraphs B-4 and B-5 of article III;
2. Consideration by the Agency of resolutions relating to it adopted by the General Assembly or any of the Councils of the United Nations and the submission of reports, when requested, to the appropriate organ of the United Nations on the action taken by the Agency or by its members in accordance with this Statute as a result of such consideration.

III. OTHER INTERGOVERNMENTAL ORGANIZATIONS

Organisation for Economic Co-operation and Development

*[Original: English]
[8 and 13 February 1984]*

The Organisation's reply is presented in two parts. The first part is a general reply to the questionnaire, summarizing the position in OECD as a whole. The second part consists of a series of detailed replies concerning activities in specific fields presented in the form of annexes; it is accompanied by documents of the Organisation concerning these activities.¹ Annexes I (Environment) and II (Nuclear energy) deal with both substantive and procedural

aspects; annexes III to X deal with activities that do not come within the substantive scope of the questionnaire (i.e. international liability for injurious consequences arising out of acts not prohibited by international law) but concern procedural matters that fall within the purview of the second purpose of the questionnaire which, as explained in the Secretariat's letter of 11 August 1983, is to obtain information about procedures used by international organizations involved in co-operation in any other areas which may be useful as models.

GENERAL REPLY TO THE QUESTIONNAIRE

Question 1

OECD takes part in co-operative activities conducted principally by States but which, in the field of energy, and in specific circumstances, sometimes also involve non-State entities.

¹ These documents are too voluminous to be reproduced here, but they may be consulted in the Codification Division; their titles are indicated at the end of the corresponding annexes.

[N.B. the term "activity" is used in the broad sense given to it in the "definitions" contained in the schematic outline of the topic annexed to the letter of the Secretariat.]

Question 2

The Organisation's general mandate for such co-operation is to be found in the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960,² in particular in the sixth preambular paragraph to the Convention and in articles 3, 5 (c) and 12 of the Convention. In addition, specific mandates for such co-operation may be found in the terms of reference of agencies and committees which are subsidiary bodies of the Organisation as well as in agreements and arrangements concluded among member countries or between member countries and entities other than States.

Question 3

The co-operative activities carried out in OECD or developed through OECD normally occur within the territorial jurisdiction of member countries but occasionally take place outside those limits (for example on the high seas).

Question 4

(a) Certain activities relate to the physical use of the environment *per se*, at least indirectly, but more often such activities in the field of the environment relate to the consequences for the environment of undertakings or operations carried out by member countries or within member countries.

(b) Activities also relate to the fields of economy, trade, monetary and fiscal problems, energy, multinational enterprises and agriculture, transborder flows of personal data and shipbuilding.

Questions 5 and 6

The distinction made in questions 5 (involvement of the Organisation *prior* to the initiation of the activity) and 6 (involvement *after* the initiation of the activity) is not entirely relevant in the context of actual practice and procedures in OECD, inasmuch as the very concept of "involvement" is subject to varying interpretations. Consequently, the Organisation prefers to answer questions 5 and 6 together.

(a) The Organisation does not normally assist in examining the impact of a proposed activity within or outside the territory of the State where it will be conducted.

(b) In exceptional cases where such impact might be examined, the group would be composed of both experts from the Organisation and representatives of member countries.

(c) The Organisation's involvement in activities cannot be characterized in an abstract manner as either compulsory or voluntary. The OECD Convention does not establish a statutory obligation for the Organisation to be "involved" in co-operative activities, but it provides a framework and procedures for such involvement if the

member countries so wish. Thus, pursuant to an act of the OECD Council (composed of a representative of each member), the Organisation's involvement may become compulsory as defined in that act.

(d) Communication of the facts by the Organisation will depend on the particular procedures or arrangements, but in any case will be restricted to Governments.

(e) In the substantive context of the questionnaire as it is circumscribed in the schematic outline of the topic prepared by the Special Rapporteur, the Organisation would not normally be in a position to suggest modifications in a national activity. On the other hand, there are numerous cases where procedures have been established within the Organisation for proposing and even requiring modification in a national action which is contrary to an obligation undertaken within the framework of the Organisation; these are described in the annexes to the Organisation's reply.

(f) The criteria which would be relevant to the case dealt with in subparagraph (e) would not be of a general nature, but would be specific to the subject-matter.

(g) Decisions taken concerning question 5 (e) would normally be of a recommendatory nature.

Question 7

In the case of a dispute among the Organisation's members regarding the negative consequences of a unilateral activity with other members, the Organisation may be involved in resolving the dispute if specific provision has been made to that effect in respect of a given activity, but normally such disputes would be resolved directly among the parties concerned by negotiation. The parties might resort to arbitration or to the International Court of Justice or to a regional court if they so wished, but that is outside the Organisation's purview.

Question 8

The Organisation plays a wide and important role in international co-operative activities; naturally, further development of its role is subject to political factors as well as to the evolution of economic, social and technical developments.

Question 9

As explained in the Organisation's introductory remarks, its reply includes a series of annexes which cover two aspects of the subject. Annexes I and II describe activities which fall within the substantive scope of the subject and which may include procedural aspects as well, while annexes III to X cover only procedural questions.

ANNEX I

Environment

1. The Environment Committee was established by a resolution of the OECD Council of 22 July 1970. Under its present terms of reference,³ the Committee is responsible for:

² Council of Europe, *European Yearbook*, vol. VIII (1960) (The Hague, Martinus Nijhoff, 1961), p. 259.

³ Council resolution of 22 July 1980 [C(80)74(Final)].

“(a) Examining on a co-operative basis common problems or foreseeable common problems related to the protection of the environment and to the enhancement of environmental quality with a view to proposing effective means of preventing, minimizing or solving them, taking into account all relevant factors, including economic and energy considerations;

“(b) Encouraging wherever appropriate the harmonization of environmental policies among Member countries;

“(c) Providing Member Governments with policy options or guidelines to prevent or minimize conflicts that could arise between Member countries in the use of shared environmental resources or as the result of national environmental policies; the Committee may organize as appropriate, and with the agreement of the countries concerned, consultations to that effect;

“(d) Reviewing and consulting on actions taken or proposed by Member countries in the environmental field and assessing the results of these actions;

“(e) Assisting Member countries to develop improved means of assessing trends in environmental quality and, on an internationally comparable basis, to improve the information base for decisions pertaining to environmental policy.”

2. The Organisation carries out a wide range of activities in the field of the environment, several of which fall within the purview of the questionnaire. Details concerning each of these are given hereinafter.

(a) TRANSFRONTIER POLLUTION

3. The Transfrontier Pollution Group was set up by the Environment Committee in 1975 to examine administrative, legal and institutional aspects of transfrontier pollution with a view to developing practical guidelines and, in so doing, to contribute to the development of harmonized transfrontier pollution policies. The Group is composed of representatives of Governments and designated experts. The work of the Group has been suspended since December 1982 but could be reinstated by decision of the Environment Committee.

4. As a result of the work carried out by the Group, OECD has developed a series of principles related to the solution of transfrontier pollution issues; reports have been prepared on responsibility, liability, information and consultation.

5. Two reports were submitted by the Environment Committee to the Council on the international responsibility of States for protecting the environment against transfrontier pollution.^b The reports raise a number of questions, including the exchange of mutual information and consultation on transfrontier pollution problems and the establishment of procedures for the settlement of disputes in regard to transfrontier pollution problems that cannot be resolved by negotiation. The second report underlines, however, that the practices described outline the main features of a consistent policy of protection against transfrontier pollution but that they are given only by way of illustration. The question whether any of these practices constitute an obligation under international law was not considered.

6. In its published report on the implementation of a régime of equal right of access and non-discrimination in relation to transfrontier pollution,^c the Secretary-General noted that the principle of information and consultation fell within the framework of inter-State relations. Information and consultation procedures at that level were already an international “responsibility” of States in relation to transfrontier pollution and might have become—or were in the process of becoming—a custom reflected in the practice of States and in international agreements (the concept of responsibility was used here in the sense given to it in the first interim report of the Environment Committee to the Council on responsibility and liability of States in matters of transfrontier pollution,^d a report

^b See, at the end of the present annex, documents 1 and 2.

^c *Ibid.*, document 20.

^d *Ibid.*, document 1.

which distinguished between the “responsibility” of States in relation to the protection of the environment at the international level and the international legal liability of States in relation to transfrontier pollution). But OECD has not been a forum for discussing concrete issues of transfrontier pollution at the request of one or more aggrieved parties.

(b) TRANSFRONTIER MOVEMENT OF HAZARDOUS WASTE

7. Work on the transfrontier movement of hazardous waste was initiated in 1982 in the framework of the Waste Management Policy Group of the Environment Committee. The terms of reference of the Group cover a wide range of problems concerning waste management policy; the Group was assigned the task of advising the Environment Committee on major new and emerging problems and issues and on appropriate policy options for better waste management, and of recommending ways and means for national and international action.

8. As regards the specific problem at hand, OECD is currently engaged in a programme of activities which should lead to the adoption of guidelines for controlling transfrontier movement of hazardous waste. The first decision and the first recommendation on this subject were adopted by the OECD Council on 1 February 1984.^e A seminar to be held in May-June 1984 on legal and institutional aspects of transfrontier movements of hazardous waste should be a starting point for elaborating new OECD recommendations or decisions on this issue.

9. It may be doubted, however, whether transfrontier movements of hazardous waste fall strictly within the scope of the questionnaire. The “export” activity may give rise to damage in the importing country; however, the activity which gives rise to damage is in fact the transport activity or the elimination activity within the territory of the importing State.

10. The exporter or the producer of the waste could nevertheless have some responsibility in relation to what happens in the importing country. In particular, he might be under a legal obligation to disclose all pertinent information and to notify the importing State. A trend in the direction of defining the responsibility of the exporter or the producer can already be detected. It might lead to the creation of liability for pollution damage arising in the importing country.

11. Responsibility of the exporting State might also emerge in the future as a result of international agreements to be concluded. For instance, an exporting State might be under the obligation to notify an importing State before a transfrontier movement takes place when such movement concerns some very dangerous waste.

12. The decision and the recommendation adopted on 1 February 1984 contain:

An obligation set out in the decision that member countries control the transfrontier movements of hazardous waste and for this purpose ensure that the competent authorities of the countries concerned are provided with adequate and timely information concerning such movements;

A recommendation containing principles designed to implement the decision, including the provision of additional information at the request of the importing country and the possibility of prohibiting an export at the request of the importing country; and

An instruction to the Environment Committee to review action taken by member countries in pursuance of the decision and the recommendation.

(c) TRANSPORT OF AIR POLLUTANTS OVER LONG DISTANCE: SULPHUR OXIDES

13. In the late 1960s, reports began to appear in the specialized press of damage to fish and forests in southern Scandinavia resulting from acid precipitations, and the opinion was expressed that that acidity was related to the increasing use of fossil fuels in the neighbouring industrial countries. The OECD Air Management Policy Group served as a forum to discuss the problem in the 1960s and, after some debate, the countries concerned

^e *Ibid.*, document 18.

agreed to launch a research programme in co-operation in order to establish the facts.

14. In 1972, after about two years of preparatory work supported by the Scandinavian Council for Applied Research, the OECD Council set up a co-operative technical programme to measure the long-range transport of air pollutants. The objective was "to determine the relative importance of local and distant sources of sulphur compounds in terms of their contribution to the air pollution over a region, special attention being paid to the question of acidity in atmospheric precipitations".^f

15. Eleven member countries participated: Austria; Belgium; Denmark; Finland; France; Germany, Federal Republic of; Netherlands; Norway; Sweden; Switzerland and the United Kingdom. The programme was supervised by a Steering Committee composed of delegates nominated by the Governments of participating countries. The individual countries were responsible for the allocation and funding of the resources needed to carry out the necessary measurements. Co-ordination of measurements and analysis of data were the responsibility of a Central Co-ordinating Unit at the Norwegian Institute for Air Research. This latter work was funded by special contributions from participating countries.

16. As a result of extensive co-operation between scientists and laboratories in the participating countries, a report was prepared and published in 1977 by OECD on the OECD Programme on Long-Range Transport of Air Pollutants.^g This report represents the concerted views of the Steering Committee and gives, in particular, a breakdown of the amount of sulphur deposits in Western European countries and originating in each Western European country. It confirms that sulphur compounds travel long distances in the atmosphere and that the air quality in any one European country is measurably affected by emissions from other European countries. The study shows that, in half the countries examined, the major part of total estimated deposition in 1974 originated from foreign emissions. It indicates clearly that, even if a country wanted to reduce substantially the total deposition of sulphur within its borders, it could achieve only a limited improvement if similar action were not taken in a number of other countries.

17. This work provided a basis for the negotiation of the Convention on Long Range Transboundary Air Pollution (Geneva, 1979)^h and is pursued under the Co-operative Programme for the Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP).

18. OECD also published, in 1981, a methodological study on *The Costs and Benefits of Sulphur Oxide Control*. This study, which required three years of research, represents the first serious attempt to develop a methodology for cost/benefit analysis in this particular field. The study describes how the impact of different control scenarios on ambient air quality is estimated and how the costs of control are calculated. It assesses the benefits of control from the reduction of pollution effects in four chosen economic areas: materials, crops, health and aquatic ecosystems.

19. All these activities were carried out within the framework of the OECD Air Management Group, which conducted fact-finding activities in relation to problems of transfrontier air pollution of great significance in Europe.

20. In parallel, the OECD Council adopted a number of recommendations on transfrontier pollution in general and on specific aspects of transfrontier air pollution [C(74)16(Final) and C(74)219].ⁱ In particular, OECD recommended to member countries that they use the best available abatement techniques for sulphur oxides and particulate matter and limit the maximum sulphur content of distillate fuels. One of the purposes of these recommendations was to ensure that no significant degradation of the environment should occur, either within or beyond national frontiers [C(79)117].^j

^f Decision of the Council of 18 April 1972 [C(72)13(Final)].

^g *The OECD Programme on Long Range Transport of Air Pollutants. Measurements and Findings* (Paris, 1977).

^h ECE/HLM. 1/2, annex I.

ⁱ See, at the end of the present annex, documents 7 and 8.

^j *Ibid.*, document 9.

21. Although OECD activities were not directly aimed at resolving an important transfrontier pollution issue, they contributed to such solution by providing mutually agreed technical and economic data and by recommending mutually agreed policy options and legal principles which were duly taken into account in the work carried out within ECE, Geneva, both before the signature of the 1979 Convention (see para. 17 above) and subsequently.

(d) CHEMICALS

22. Since the early 1970s, work has been carried out within the framework of the OECD Environment Programme on harmonized approaches to chemicals control. The primary objectives of this work have been:

To protect man and the environment from the potential hazards associated with chemicals:

To promote efficient, cost-effective approaches to chemicals control which minimize economic, administrative and other burdens; and

To avoid non-tariff barriers to trade in chemicals.

23. In developing this work, a number of mechanisms have been or are being developed to promote and facilitate exchange of information on chemicals. These mechanisms serve a variety of co-operative purposes and may serve as models for international co-operation in areas other than chemicals control.

(i) Legislative and administrative information

24. In May 1971, the OECD Council adopted a resolution concerning a procedure for notification and consultation on measures for control of substances affecting man or his environment [C(71)73(Final)]. The purpose of the procedure is to allow member countries to receive, as far as practicable, prior notification of measures pending, and early notification of measures recently taken, in any country in order to protect man or his environment, in instances where such measures are likely to have significant effects on the economy and trade of other countries. The procedure also provides the opportunity for consultation and discussion among member countries on the technical justification for such measures.

25. In July 1977, member countries established a new procedure for the exchange of information on legislative and administrative developments on chemicals control in member countries. The emphasis in this procedure is on a rapid exchange of information, preferably before actions have been taken. Information is exchanged through a network of designated contact points in member countries.

26. As member countries enacted and implemented chemicals control legislation, there was a felt need for a forum in which administrators could exchange experience on matters of common or international interest. The Chemicals Group Forum was established in 1981 to meet this need.

(ii) Data and information on specific chemicals

27. Some 80,000 chemicals are currently on the market and 1,000 to 2,000 new chemicals are introduced each year. A substantial proportion of these are traded internationally or are used in many countries. Significant benefits can be derived by ensuring that data on the health, safety and environmental properties of chemicals are of a sufficiently high quality that they may be relied upon and used internationally. Council decision on mutual acceptance of data [C(81)30(Final)], adopted on 12 May 1981, established conditions which, when met, require that data generated in the testing of chemicals in one OECD country shall be accepted in other member countries for purposes of assessment and other uses relating to the protection of man and the environment.

28. The conditions established for mutual acceptance of data are that the data are generated in accordance with the *OECD Guidelines for Testing of Chemicals* and the OECD principles of good laboratory practice. These tools are the subject of recommendations by the Council in the decision on mutual acceptance of data, and are supported by a further Council recom-

mentation of 26 July 1983 concerning the mutual recognition of compliance with good laboratory practice [C(83)95(Final)].

29. Data on chemicals may have a proprietary value or confidential status. The exchange of information on chemicals can be facilitated by ensuring that any associated proprietary rights or confidential status are protected when exchanged. To this end, the Council adopted three recommendations on 26 July 1983:

Recommendation concerning the protection of proprietary rights to data submitted in notifications of new chemicals [C(83)96(Final)];

Recommendation concerning the exchange of confidential data on chemicals [C(83)97(Final)];

Recommendation concerning the OECD list of non-confidential data on chemicals [C(83)98(Final)].

30. The OECD Council adopted two measures for the control of specific chemicals: a decision dated 13 February 1973 concerning protection of the environment by control of polychlorinated biphenyls [C(73)1(Final)] and a recommendation dated 18 September 1973 on measures to reduce all man-made emissions of mercury to the environment [C(73)172(Final)]. In addition to providing for concerted action by member countries to control these chemicals, these measures also provide for an exchange of statistical data relating to the action taken. Such exchanges establish a quantitative basis for reviewing progress in achieving internationally agreed objectives.

31. Work is currently under way on the development of an international referral system to aid member countries in gaining timely access to unpublished information on specific chemicals, reliably and cheaply, in order to avoid duplication of effort.

(iii) Chemicals in trade

32. Information exchange relating to exports of banned or severely restricted chemicals is under consideration at this time. A mechanism is being examined whereby exporting member countries might provide certain information about exports of chemicals banned or severely restricted in their countries to importing countries, to enable the latter to make timely and informed decisions about such chemicals.

33. A review has been performed on the principle underlying the labelling of chemicals. Work is also under way on the development of guides for manufacturers and traders of chemicals concerning the safe use of chemicals in importing countries.

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DOCUMENTS COMMUNICATED BY OECD

1. First interim report of the Environment Committee on the responsibility and liability of States in relation to transfrontier pollution [C(76)54]
2. Second report of the Environment Committee on international responsibility of States for protecting the environment against transfrontier pollution [C(79)3]
3. Recommendation of the Council on principles concerning transfrontier pollution [C(74)224]
4. Recommendation of the Council on equal right of access in relation to transfrontier pollution [C(76)55(Final)]
5. Recommendation of the Council for the implementation of a régime of equal right of access and non-discrimination in relation to transfrontier pollution [C(77)28(Final)]
6. Recommendation of the Council for strengthening international co-operation on environmental protection in frontier regions [C(78)77(Final)]
7. Recommendation of the Council on guidelines for action to reduce

emissions of sulphur oxides and particulate matter from fuel combustion in stationary sources [C(74)16(Final)]

8. Recommendation of the Council on measures required for further air pollution control [C(74)219]
9. Recommendation of the Council on coal and the environment [C(79)117]
10. Decision of the Council on protection of the environment by control of polychlorinated biphenyls [C(73)1(Final)]
11. Recommendation of the Council on measures to reduce all man-made emissions of mercury to the environment [C(73)172(Final)]
12. Resolution of the Council concerning a procedure for notification and consultation on measures for control of substances affecting man or his environment [C(71)73(Final)]
13. Decision of the Council concerning the mutual acceptance of data in the assessment of chemicals [C(81)30(Final) annexes 1 and 2]
14. Recommendation of the Council concerning the mutual recognition of compliance with good laboratory practice [C(83)95(Final)]
15. Recommendation of the Council concerning the protection of proprietary rights to data submitted in notifications of new chemicals [C(83)96(Final)]
16. Recommendation of the Council concerning the exchange of confidential data on chemicals [C(83)97(Final)]
17. Recommendation of the Council concerning the OECD list of non-confidential data on chemicals [C(83)98(Final)]
18. Decision and recommendation of the Council on transfrontier movements of hazardous waste [C(83)180(Final)]
19. Terms of reference of the Waste Management Policy Group (Environment Committee)
20. OECD, *Legal Aspects of Transfrontier Pollution*, 1977: table of contents
21. *Ibid.*, *Compensation for Pollution Damage*, 1981: table of contents
22. *Combating Oil Spills. Economic Aspects*, 1982: table of contents
23. "Cinq ans d'activités du Groupe l'OCDE sur la pollution transfrontière (1975-1980)", by W. Lang, published in *Environmental Policy and Law* (Bonn), vol. 7, No. 4, 1981
24. "Legal principles adopted by the OECD Council", by H. Smets, *ibid.*, vol. 9, No. 4, 1982
25. "Transfrontier pollution: some problems in the 70s and 80s", by J. W. McNeill, *ibid.*, vol. 8, No. 1, 1982
26. OECD, *Transfrontier Pollution and the Role of States*, 1981: table of contents and text of the report by the Environment Committee on application of information and consultation practices for preventing transfrontier pollution
27. *Ibid.*, *Environmental Protection in Frontier Regions*, 1979: table of contents

ANNEX II

Nuclear Energy Agency

GENERAL COMMENTS

Although it is clear that the scope and purview of the programme of activities of the Nuclear Energy Agency (NEA) are quite unrelated to the question of "liability for physical transboundary harm" which constitutes the topic of this questionnaire, an effort has been made to offer information concerning certain procedures used by NEA which may be useful in the context of the questionnaire.

The primary objectives of NEA are to promote co-operation between its member Governments on the safety and regulatory aspects of nuclear

development and on the assessment of the future role of nuclear energy as a contributor to economic progress.

This is achieved in particular by:

Encouraging harmonization of Governments' regulatory policies and practices in the nuclear field, with particular reference to the safety of nuclear installations, protection of man against ionizing radiation and preservation of the environment, radioactive waste management, and nuclear third party liability and insurance;

Keeping under review the technical and economic characteristics of nuclear power growth and the nuclear fuel cycle, and assessing demand and supply for the different phases of the nuclear fuel cycle and the potential future contribution of nuclear power to overall energy demand;

Developing exchanges of scientific and technical information on nuclear energy, particularly through participation in common services;

Setting up international research and development programmes and undertakings jointly carried out and operated by OECD countries.

REPLIES TO THE QUESTIONNAIRE

Question 1

The Agency's co-operative activities are primarily undertaken with States, and only by special arrangement with international governmental organizations such as IAEA and EEC.

Question 2

Legislative texts defining the mandate of NEA in respect of co-operation:

(a) With States

Statute of the OECD Nuclear Energy Agency (as amended by Council decision of 5 April 1978).

“...
“Article 1

“(b) ... the purpose of the Agency shall be to further the development of the production and uses of nuclear energy ... for peaceful purposes by the participating countries, through co-operation between those countries and a harmonization of measures taken at the national level.

“Article 4

“(a) The Agency shall promote ... studies and undertake consultations on the programmes and projects of participating countries ... in collaboration with other bodies of the Organisation ...

“...
“Article 8

“(a) The Agency shall:

“(i) contribute to the promotion, by the responsible national authorities, of the protection of workers and the public against the hazards of ionizing radiations and of the preservation of the environment;

“...”

(b) With non-State entities

(i) Statute of NEA

“Article 8

“...
“(c) The Agency shall undertake its activities ... as far as possible in collaboration with the International Atomic Energy Agency and the Commission of the European Communities.

“Article 16

“...
“(b) ... the Agency shall establish with the [European Atomic Energy] Community a close collaboration ...”.

- (ii) Agreement between the International Atomic Energy Agency and the Organisation for European Economic Co-operation, approved by the Council of OEEC on 28 July 1960 and by the General Conference of IAEA on 30 September 1960.^a This agreement established close co-operation and consultations between IAEA and NEA in regard to matters of common interest, “with a view to harmonizing their efforts as far as appropriate in the light of their ... responsibilities” (art. 1).

Question 3

The activities normally take place within the territorial jurisdiction of a State. In one exceptional case, that of the Multilateral Consultation and Surveillance Mechanism for Sea Dumping of Radioactive Waste, activities take place on the high seas.

Question 4

The activities, in principle, do not relate to the physical use of the environment. However, they involve the scientific, technical and economic development of nuclear energy.

Question 5

Ordinarily, the Agency's involvement does not begin prior to the initiation of an activity. However, when setting up an international joint undertaking or organizing other forms of international scientific and technical projects, for example in the area of sea disposal of radioactive waste, the activity has been preceded by a series of preparatory studies.

(a) The Agency will assist in examining the impacts of a proposed activity (e.g. sea disposal of radioactive waste) within the area in which it is proposed to conduct it.

(b) The collection of data concerning various activities is carried out by committees or working parties composed of representatives of the member countries involved, assisted by the secretariat of the Agency.

(c) The Agency's involvement in activities is requested by the member countries of the Agency.

(d) The Agency circulates the facts obtained to all its members.

(e) With regard to the sea disposal of radioactive waste, the Agency may suggest modifications in the proposed activity.

Prior to 1977, the operations conducted were subject to *ad hoc* and voluntary arrangements by national authorities. With the decision of the OECD Council of 22 July 1977 establishing a Multilateral Consultation and Surveillance Mechanism for Sea Dumping of Radioactive Waste, a régime for monitoring operations was established. This decision formally commits participating countries to apply the guidelines and procedures adopted and to subject their operations to a system of prior consultation and international surveillance.

(f) The primary criterion affecting decision-making is that of safety.

(g) The decisions made are normally in the form of recommendations.

Question 6

Not applicable.

Question 7

Disputes which the Steering Committee for Nuclear Energy has been unable to settle with regard to the application of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy^b and the 1963

^a United Nations, *Treaty Series*, vol. 396, p. 273.

^b IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 22.

Brussels supplementary Convention^c fall within the jurisdiction of the European Nuclear Energy Tribunal. The competence of this tribunal, originally created for the purposes of the Convention of 20 December 1957 on the Establishment of a Security Control in the Field of Nuclear Energy^d (the application of this security control is at present suspended), was extended by article 17 of the Paris Convention and article 17 of the Brussels supplementary Convention to cover those two Conventions.

Question 8

The Agency is involved in co-operative activities within the framework of its structural, economic and political capabilities.

Question 9

Although this activity does not clearly come within the scope of the questionnaire, OECD is the depositary of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy. The Convention establishes a system of absolute liability for damage caused by a nuclear incident, including transfrontier damage to the environment. In this respect, it may be useful to mention that, to foster the implementation of this system of private international law, the member countries exchange information, consult each other and carry out joint studies in the framework of the Group of Governmental Experts on Nuclear Third Party Liability, with the assistance of the NEA secretariat.

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DOCUMENTS COMMUNICATED BY OECD

1. Statute of the OECD Nuclear Energy Agency (NEA) (1978)
2. Decision of the Council establishing a Multilateral Consultation and Surveillance Mechanism for Sea-Dumping of Radioactive Waste [C(77)115(Final) and Corrigendum]

^c *Ibid.*, p. 43.

^d Council of Europe, *European Yearbook*, vol. V (1957) (The Hague, Martinus Nijhoff, 1959), p. 283.

ANNEX III

International Energy Agency

1. The International Energy Agency (IEA) was established as an autonomous body within the framework of the Organisation by a decision of the OECD Council of 15 November 1974. That decision followed the conclusion, on 6 November 1974, of the Agreement on an International Energy Programme. The Governing Board (composed of all participating countries) was given the power to decide upon and carry out an International Energy Programme for co-operation in the field of energy, the aims of which are set out in article 6 of the Council's decision.
2. The Agency co-operates with other competent bodies of the Organization in areas of common interest. In addition: "In order to achieve the objectives of the Programme, the Agency may establish relationships with countries which are not participating countries, international organizations, whether governmental or non-governmental, other entities and individuals." (Art. 12 of the Council decision.)
3. Some 50 energy research and development agreements governing specific areas of research (for example, coal, energy conservation, fusion, solar power, geothermal power and wind power) have been concluded under the auspices of the Agency among Governments and non-governmental parties designated by Governments.

Each agreement provides that any dispute among the contracting parties concerning the interpretation or the application of the agreement which is not settled by negotiation or other agreed mode of settlement shall

be referred to a tribunal of three arbitrators to be chosen by the contracting parties concerned, who shall also choose the chairman of the tribunal. It is provided, further, that the tribunal shall decide any such dispute by reference to the terms of the agreement and any applicable laws and regulations, and its decision on a question of fact shall be final and binding on the contracting parties.

4. Consultation and reporting procedures exist within the Agency on a number of subjects. Participating countries provide data to the secretariat on a monthly basis concerning the state of the oil market. These data are analysed by the secretariat, which prepares a monthly oil market assessment. The assessment is the subject of discussion and consultation within the IEA bodies.

Another example is the Standing Group on Long-Term Co-operation. Periodic reviews conducted by the Group are carried out within the Agency by participating countries concerning their national programmes and policies relating to the accelerated production of alternative sources of energy. The reviews are discussed by the Group, which reports on their results and conclusions to the Agency's Governing Board.

5. In order to facilitate the proper functioning of the International Energy Programme, the IEA countries have agreed on the need to establish a mechanism for settling disputes which might arise under emergency allocations of oil. Consequently the Governing Board of IEA adopted, on 23 July 1980, the Charter of the International Energy Agency Dispute Centre. Operation of the Centre is assigned to the IEA secretariat. The jurisdiction of arbitration tribunals convened pursuant to the Charter covers any dispute:

Between a seller and a buyer of oil; or

Between the parties to any exchange of oil arising out of an oil supply transaction during implementation of the emergency allocation of oil and under the IEA Programme and as between the parties to a particular supply transaction.

However, jurisdiction does not extend to decisions, rights or obligations of IEA countries under the International Energy Programme, including allocation rights and obligations of IEA countries.

In order that jurisdiction extend to a dispute, three conditions must be met:

- (i) The parties must give consent in writing to arbitration pursuant to the Charter;
- (ii) Consent includes, explicitly or implicitly, agreement of the parties to exclude any other remedy;
- (iii) Consent includes, explicitly or implicitly, agreement of the parties that the award shall be binding and final as between them.

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DOCUMENTS COMMUNICATED BY OECD

1. Decision of the Council of 15 November 1974 establishing an International Energy Agency of the Organisation [C(74)203(Final)]
2. Charter of the International Energy Agency Dispute Settlement Centre, adopted by the Governing Board on 23 July 1980

ANNEX IV

Trade

1. The Trade Committee was established at the inception of OECD (30 September 1961). Among the functions assigned to the Committee is confrontation of the general trade policies and practices at regular intervals, or whenever requested by a member, having in mind the need for maintaining a system of multilateral trade which would enable members to exchange goods and services freely with each other and with other coun-

tries under conditions of reasonable overall equilibrium in the international balance of payments. It was understood that the provisions relating to the Trade Committee (including the one cited above) would enable any member country to obtain prompt consideration and discussion by the Committee of the trade measures of another member which adversely affected its interests with a view to removing or minimizing such adverse effects.

2. Consultation is thus provided for as an essential instrument available to the Committee for the performance of its functions. Over and above this general mandate, which covers all consultation possibilities, a number of particular arrangements were made. They relate, among other things, to the following:

Administrative and technical regulations which hamper the expansion of trade;

Border tax adjustments;

Internal policies and their incidence on international trade;

Prior consultation on changes in trade practices;

Application of the Trade Declarations of 1974 and 1980.

3. Consultation on trade matters falls, in fact, under two headings:

First, consultation in the narrow sense, relating to problems which one or more member countries may have with regard to measures taken or envisaged by another member country;

Secondly, consultation in the broad sense, relating to general problems or developments in the field of trade or trade policy which are not necessarily linked to specific measures.

4. Although the second type of consultation has always been used, sometimes in response to a request for consultation on a measure introduced in a member country, this type of consultation has been increasingly resorted to since the adoption, in 1974, by the Governments of member countries of OECD, of the first Declaration on Co-operation on Issues of General Economic Policy, and particularly since the Declaration on Trade Policy adopted in 1980.

5. The 1980 Declaration required that the Trade Committee be ready to consider without delay any critical situation that might arise. The Committee itself stated its intention to keep watch on developments and to identify incipient trends and problems before they reached a critical level, so that, on the basis of an analysis of all factors, a consensus could be sought on the best way to approach the problems. In that sense, this is a kind of prior consultation. Consultation in the broad sense, however, may also arise in the case of measures already taken, and have a wider scope than consultation in the narrow sense. Provision is made at the meetings of the Committee for informal exchange of views on major developments, and their purpose is precisely to enable the member countries to inform and consult each other and to have discussions on major current problems that may be linked with measures envisaged or already taken, or on problems of more direct concern to certain countries but likely to have a more general impact.

6. Furthermore, again as a result of the adoption of the 1974 Trade Declaration, notifications of measures taken are automatically reviewed by the Trade Committee, sometimes—particularly in the case of measures of more general scope (relating to a substantial part of a country's foreign trade)—under the aegis of the Council. This may be considered to be a new form of consultation.

7. As for its general characteristics, consultation in the trade field is clearly a very free and non-formalized procedure, its whole foundation resting on an open conception of co-operation between the member countries. There are in fact no consultation procedures in the strict sense, that is to say procedures set out in precise terms complete with objectives, criteria and rules. The consultation procedures are essentially based on pragmatism and flexibility.

8. As provided in the mandate of the Trade Committee, "the provisions relating to the Trade Committee . . . would enable any member country to obtain prompt consideration and discussion by the Committee of trade measures by another member which adversely affect its interests, with a view to removing or minimizing such adverse effects". Prior consul-

tations—i.e. on measures that are envisaged—and consultation on the effects of internal policies, however, are more voluntary in nature.

9. Consultation is normally initiated by one or more member countries. Moreover, as a follow-up to the 1980 Trade Declaration, the Secretary-General has been invited, upon request of a member country or upon his own initiative, to organize in an appropriate way such consultations among member countries as may be required.

Participation in consultations is generally open to all member countries. Explicit provision for bilateral consultation between the parties directly concerned, as a first step, is made only in the case of administrative and technical regulations.

ANNEX V

Agriculture

1. OECD, through Council decisions, has elaborated various schemes of a similar nature concerning the certification or control of agricultural products in international trade through which close collaboration among countries is ensured. These schemes are open on a voluntary basis to all member countries of the Organisation as well as to other States Members of the United Nations or members of its specialized agencies. The participating countries are obliged to ensure that the rules of the scheme are strictly respected. The success of the scheme depends on close co-operation between the designated authorities. The implementation of each scheme is under the responsibility of national Governments, which designate authorities for this purpose.

2. OECD is entitled to request the designated authorities to supply samples in order to verify that the scheme is operating satisfactorily. The operation and progress is examined at an annual meeting of representatives of the designated authorities. The schemes are the following:

OECD Scheme for the Varietal Certification of Sugar Beet and Fodder Beet Seed Moving in International Trade;

OECD Scheme for the Control of Vegetable Seed Moving in International Trade;

OECD Scheme for the Varietal Certification of Cereal Seed Moving in International Trade;

OECD Scheme for the Varietal Certification of Herbage and Oil Seed Moving in International Trade.

3. In addition to the usual procedures provided for under these schemes, the OECD Scheme for the Varietal Certification of Seed of Subterranean Clover and Similar Species Moving in International Trade, and the OECD Scheme for the Varietal Certification of Maize Seed Moving in International Trade establish a more detailed mechanism in respect of the duty of States to comply with their obligations. As in the other schemes, they specify that it shall be obligatory for the State to apply the rules and decisions set out in annex I of the scheme, but they also provide that, if a State wants to lodge a protest against the non-execution of an obligation, it may take the matter before the Organisation, where the complaint will be examined by the Committee for Agriculture, which reports to the Council.

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DOCUMENTS COMMUNICATED BY OECD

1. Decision of the Council establishing an OECD Scheme for the Varietal Certification of Seed of Subterranean Clover and Similar Species Moving in International Trade [C(74)171(Final)]
2. Decision of the Council amending the Decision of the Council establishing an OECD Scheme for the Varietal Certification of Sugar Beet and Fodder Beet Seed Moving in International Trade [C(77)120]

ANNEX VI

Restrictive business practices

OECD, through a recommendation of the Council of 3 July 1973, established a consultation and conciliation procedure on restrictive business practices affecting international trade. Under this system, a member country which considers that there exists a practice of this nature should request consultation with other member countries that are engaged in these practices. The member country so addressed should give full consideration to the case, taking remedial action on its own behalf as well as ensuring that the enterprises concerned do the same. Further, the country should notify the Committee of Experts on Restrictive Business Practices of the nature of the remedial measures adopted. If no satisfactory solution has been found, upon agreement of the countries they should submit the case with a view to conciliation to the Committee of Experts, or look for another means of settlement.

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DOCUMENT COMMUNICATED BY OECD

Recommendation of the Council concerning a consultation and conciliation procedure on restrictive business practices affecting international trade [C(73)99(Final)]

ANNEX VII

International investment and multinational enterprises

1. Following extensive preliminary work which had taken place within OECD, the Council of the Organisation decided on 21 January 1975 to establish the Committee for International Investment and Multinational Enterprises. At that stage, the Committee was instructed to "consider with regard to issues pertaining to the activities of multinational enterprises and enterprises engaged in international investment . . . the preparation of action proposals for member Governments aimed at developing:

- "(i) Improved exchange of information,
- "(ii) Improved and harmonized statistics,
- "(iii) Uniform standards of behaviour applicable to the enterprises,
- "(iv) Intergovernmental procedures for dealing with possible complaints."

2. The Committee was also to "consider in connection with a further review of issues pertaining to international investment, the organizing of consultations, in particular regarding:

- "(i) Official investment incentives or disincentives,
- "(ii) National treatment for enterprises under foreign control."

3. Pursuant to its terms of reference, the Committee developed proposals which were adopted on the occasion of the meeting of the OECD Council at ministerial level in June 1976. On 21 June 1976, the Governments of OECD member countries agreed on a Declaration on International Investment and Multinational Enterprises which included a recommendation to multinational enterprises operating in their territories to observe the guidelines annexed thereto, and provisions concerning national treatment, international investment incentives and disincentives, and consultation procedures on these matters.

4. On 22 June 1976, the OECD Council adopted decisions on intergovernmental consultation procedures on the guidelines for multinational enterprises, on national treatment and on international investment incen-

tives and disincentives. Each of these decisions makes provision for the exchange of information and consultation.

5. After three years of experience gained in the operation of the Declaration and of the decisions, the OECD Council meeting at ministerial level on 13 June 1979 reviewed these instruments on the basis of a report prepared by the Committee. On that occasion, the guidelines were amended slightly and the three decisions revised. A further review will take place in 1984. The principle of consultation set forth in the Declaration is implemented differently in each of the decisions, in a manner adapted to the requirements of the particular subject covered.

6. The revised decision on intergovernmental consultation procedures on the guidelines for multinational enterprises provides for exchanges of views within the Committee on matters related to the guidelines and experience gained in their application. These exchanges take place periodically or at the request of a member country. In addition, the Committee periodically invites the Business and Industry Advisory Committee of OECD (BIAC) and the Trade Union Advisory Committee of OECD (TUAC) to express their views on matters related to the guidelines. These advisory bodies may also request that an exchange of views take place. Still further, individual enterprises are given the opportunity, if they so request, to express their views either orally or in writing on issues concerning the guidelines which involve their interests. The Committee may not, however, reach conclusions on the conduct of individual enterprises; it does of course draw on such experience in reaching conclusions and interpretations concerning the guidelines. Finally, member countries may request that consultations be held in the Committee on any problem arising from the fact that multinational enterprises are made subject to conflicting requirements.

7. The revised decision on national treatment provides for notifications to OECD by member countries of existing measures constituting exceptions to "national treatment" and of new exceptions which might be introduced subsequently. The Committee reviews periodically the application of the Declaration with a view to extending its application. BIAC and TUAC may be invited periodically by the Committee to express their views on matters related to national treatment. Finally, the Committee acts as a forum for consultations on national treatment, at the request of a member country, and member countries provide the Committee, if it so requests, with all relevant information concerning measures of application of national treatment and exceptions thereto.

8. The revised decision on international investment incentives and disincentives makes provision for consultation in the Committee at the request of a member country which considers that its interests may be adversely affected by the impact on its flow of international direct investment of measures taken by another member country specifically designed to provide incentives or disincentives for international direct investment. Consultations are aimed at reducing such effects to a minimum. It is specified, in addition, that member countries shall supply, under the consultation procedures, all permissible information relating to any measure under consultation. Finally, BIAC and TUAC may be invited periodically by the Committee to express their views on matters relating to international investment incentives and disincentives.

9. In conclusion, the above procedures provide an effective and workable framework for consultations, including fact-finding in some cases. The procedures are used frequently and have proved in practice to be of very great value.

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DOCUMENT COMMUNICATED BY OECD

OECD, *International Investment and Multinational Enterprises*. Declaration by the Governments of OECD member countries and decisions of the OECD Council on guidelines for multinational enterprises, national treatment, international investment incentives and disincentives, consultation procedures, revised edition, 1979.

ANNEX VIII

Insurance

INSTITUTIONAL CO-OPERATION BETWEEN AUTHORITIES OF MEMBER COUNTRIES RESPONSIBLE FOR THE SUPERVISION OF PRIVATE INSURANCE

Model convention

OECD, in a recommendation of the Council of 29 February 1980, recommended the use of a model convention as a basis for institutional co-operation in the supervision of private insurance. In using this model convention, the administrative authorities of member countries responsible for supervision of private insurance, upon request of another member country, should exchange directly between themselves information of a general character relating to legislative, regulatory and administrative requirements in this field. Articles 2, 3 and 4 deal with the exchange of information, reciprocal assistance, and the rules of secrecy respectively.

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DOCUMENT COMMUNICATED BY OECD

Recommendation of the Council concerning institutional co-operation between authorities of member countries responsible for supervision of private insurance [C(79)195(Final)]

ANNEX IX

Protection of privacy and transborder flows of personal data

1. On 23 September 1980, the OECD Council adopted a recommendation concerning guidelines governing the protection of privacy and transborder flows of personal data. Pursuant thereto it is recommended that:

(1) Member countries take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set forth in the guidelines contained in the annex to this recommendation, which is an integral part thereof;

(2) Member countries endeavour to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder flows of personal data;

(3) Member countries co-operate in the implementation of the guidelines set forth in the annex;

(4) Member countries agree as soon as possible on specific procedures of consultation and co-operation for the application of these guidelines.

2. In addition to the general recommendation concerning consultation and co-operation, the guidelines include a specific section on international co-operation which provides as follows:

"Member countries should, where requested, make known to other member countries details of the observance of the principles set forth in these guidelines. Member countries should also ensure that procedures for transborder flows of personal data and for the protection of privacy and individual liberties are simple and compatible with those of other member countries which comply with these guidelines.

"Member countries should establish procedures to facilitate:

"(i) information exchange related to these guidelines, and

"(ii) mutual assistance in the procedural and investigative matters involved.

"Member countries should work towards the development of prin-

ciples, domestic and international, to govern the applicable law in the case of transborder flows of personal data."

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DOCUMENT COMMUNICATED BY OECD

OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1981), containing the recommendation of the Council, the guidelines and an explanatory memorandum

ANNEX X

Shipbuilding

Three instruments concerning shipbuilding have been elaborated through work undertaken within OECD. In each instance, however, these instruments have been agreed by member countries outside the scope of the Organisation and the OECD Council has then taken note thereof. They all include provisions on the exchange of information and one also includes provisions on consultation. The details are set out hereinafter.

1. GENERAL ARRANGEMENT FOR THE PROGRESSIVE REMOVAL OF OBSTACLES TO NORMAL COMPETITIVE CONDITIONS IN THE SHIPBUILDING INDUSTRY

The Arrangement was first noted by resolution of the OECD Council of 20 and 24 October 1972. Under the original resolution, the Council instructed its Working Party on Shipbuilding to review the Arrangement, to assess progress made and to keep the supply and demand situation under close review and suggest any action required to avoid developments that could lead to strong pressures for reversion to competition-distorting assistance to shipbuilding. The Council also requested that the Secretary-General obtain and circulate information as provided for under the Arrangement.

Pursuant to the Arrangement, any Government participating therein may request information from any other participating Government on the precise situation regarding measures of assistance in force and on progress made in their reduction. Participating Governments must supply such information with all possible speed.

In addition, a participating Government which considers that any measure of assistance applicable to shipbuilding in another country so favours the latter's shipyards in a particular case that, as a result, international competition is significantly distorted, may put forward a substantiated request for detailed information on the measure in question and, after having received a reply to its request, may raise the matter in the Council Working Party on Shipbuilding.

The Arrangement was revised in 1983 and the Council took note thereof in its resolution of 23 February 1983.

2. GENERAL GUIDELINES FOR GOVERNMENT POLICIES IN THE SHIPBUILDING INDUSTRY

Following the instructions given by the OECD Council to its Working Party on Shipbuilding, when it noted the General Arrangement referred to above, to keep the situation under review and suggest any action required to avoid reversion to competition-distorting assistance, the members of the Working Party agreed on general guidelines which might guide government action in the adaptation process of the shipbuilding industry and facilitate subsequent national and international discussion.

The OECD Council noted the general guidelines by its resolution of 4 May 1976. Revised general guidelines were adopted in 1983 and noted by the Council by its resolution of 23 February 1983.

Under the guidelines, member Governments of the Council Working

Party decided to keep each other rapidly informed on their national policies and on new measures in this field. The original guidelines provided for the establishment of a system of reciprocal information concerning the volume of new orders taken by each producing country. This was done without delay. The system has been retained and enlarged under the revised guidelines.

3. UNDERSTANDING ON EXPORT CREDITS FOR SHIPS

The initial Understanding was noted by the OECD Council on 30 May 1969 and was subsequently revised. The latest revision was noted by the OECD Council on 30 July 1981.

The Understanding provides that any participant therein may obtain information from any other participant on the terms of any official support for an export contract in order to ascertain whether the terms contravene

the Understanding. Participants undertake to supply all possible information requested with all possible speed. A participant may request the Secretary-General of OECD to circulate the information obtained to all participants in the Understanding.

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* *

DOCUMENTS COMMUNICATED BY OECD

1. Resolution of the Council concerning a revision of the Understanding on Export Credits for Ships [C(81)103(Final) and Corrigendum 1]
2. Resolution of the Council concerning a revision of the General Arrangement for the Progressive Removal of Obstacles to Normal Competitive Conditions in the Shipbuilding Industry [C(82)194(Final)]

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

[Original: English]
[12 and 19 June 1984]

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
SCOPE AND RELATED PROVISIONS OF THE DRAFT ARTICLES	1-48	155
<i>Section</i>		
I. Proposed articles	1-2	155
<i>Article 1. Scope of the present articles</i>	1	155
<i>Article 2. Use of terms</i>	1	155
<i>Article 3. Relationship between the present articles and other international agreements</i>	1	156
<i>Article 4. Absence of effect upon other rules of international law</i>	1	156
<i>Article 5. Cases not within the scope of the present articles</i>	1	156
II. The regulatory function	3-6	156
III. The transboundary element	7-16	157
IV. The element of a physical consequence	17-21	161
V. The third element: effects upon use or enjoyment	22-34	163
VI. The roles of international organizations	35-38	168
VII. Relationship with other rules of law	39-43	170
VIII. Relationship with other agreements	44-48	172

Scope and related provisions of the draft articles

I. Proposed articles

Article 2. Use of terms

1. The Special Rapporteur proposes the following five draft articles:

In the present articles:

CHAPTER I

1. "Territory or control"

GENERAL PROVISIONS

(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;

Article 1. Scope of the present articles

(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;

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.

(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.

2. The field of application of the present topic was provisionally described in the schematic outline presented in the Special Rapporteur's third report,¹ and reviewed in his fourth report.² The five draft articles set out above corre-

spond to section 1 of the schematic outline, modified in accordance with paragraph 63 of the fourth report. These draft articles are best considered as a group, because together they determine the orientation and essential elements of the topic. They also provide a means of assessing the propositions of principle discussed in the fourth report, and of relating those propositions to a more systematic survey of State practice. A representative range of materials has been cited; but it has seemed useful to take a comprehensive and lightly documented view of the five draft articles, so that questions of architecture are not lost in copious illustration.

II. The regulatory function

3. It has often been noted that the title of the present topic speaks in its French language version of "activities (*activités*) not prohibited by international law" and in its English language version of "acts not prohibited by international law". Although the title is open to question in either formulation, it was certainly not intended that these terms should be used interchangeably. "Acts"—and the companion term "omissions"—refer always to the conduct of the State in reference to its obligations as a subject of international law; "activities"—and the associated term "situations", which will later be explained (paras. 31-32 below)—refer to physical manifestations, occurring within the territory of a State, or elsewhere under its control. Thus the distinction between "acts" and "activities" immediately focuses attention upon some of the hallmarks of this topic. The topic concerns the regulatory duties of the State, which are the counterpart of its sovereignty over its territory and its nationals.³ It therefore makes no fundamental distinction between public activities and private activities, although there may be incidental differences, for example in the way that obligations or procedures are framed.⁴ Equally, the performance of the State's regulatory duties does not necessarily entail the assumption of substantive burdens by the State itself: on the contrary, one object of régime-building within the scope of the present topic may be to ensure that an activity bears the burden of prevention and reparation of transboundary accidents, without financial recourse to the territorial or controlling State.

4. Some of these characteristics can be aptly illustrated by

³ *Ibid.*, p. 203, para. 8 and footnote 22.

⁴ See e.g. the Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) (IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 7), art. VII of which requires the operator of a nuclear installation to maintain insurance or other financial security covering his liability for nuclear damage, but permits a contracting party, or any of its constituent subdivisions, to act as its own insurer in respect of its liability as an operator.

See also the 1973 International Convention for the Prevention of Pollution from Ships (London, 2 November 1973) (IMCO publication, Sales No. 77.14.E), art. 3, para. 3, of which reads as follows:

"3. The present Convention shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service. However, each Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with the present Convention."

¹ *Yearbook* . . . 1982, vol. II (Part One), p. 51, document A/CN.4/360. The text of the schematic outline appears in paragraph 53 of the report.

² *Yearbook* . . . 1983, vol. II (Part One), p. 201, document A/CN.4/373. The text of the schematic outline is annexed to the report.

reference to the multilateral conventions designed to prevent the escape or discharge of oil cargoes from ships in circumstances that cause maritime pollution, and to provide compensation and other remedial measures when such an escape or discharge occurs or is threatened. The 1973 International Convention for the Prevention of Pollution from Ships⁵ and its annex I specify construction standards for new and for existing ships that carry oil cargoes; oblige contracting States to require that ships which fly their flag or sail under their authority comply with these standards; and entitle such States to issue certificates of compliance, which other contracting States are to accept unless there is a manifest discrepancy. The Convention also requires contracting States whose ports are visited to provide facilities for oil reception of specified standards, and to ensure that visiting ships, whether or not from other contracting States, meet the standards of the Convention.⁶

5. The 1969 International Convention on Civil Liability for Oil Pollution Damage⁷ makes the shipowner absolutely liable (with certain exceptions) for an oil spillage affecting the land territory or territorial sea of a contracting State, but permits him to limit his liability for any one spillage occurring without his fault or privity, provided that he has complied with the requirements of the Convention by setting aside—through insurance or otherwise—the full amount of his liability in respect of that spillage.⁸ The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage⁹ reinforces the system by providing, as a charge upon consignees of oil in contracting States, for a central fund that can make good a shortfall in and supplement compensation due under the 1969 Convention. The fund can also partially indemnify shipowners who have complied with the requirements of all relevant international instruments, including those dealing with construction and safety standards.¹⁰

6. In these ways, by agreeing upon the concerted exercise of the individual authority of each State in relation to activities within its territory or under its control, the contracting States have discharged any actual or contingent obligations they may have towards each other in respect of a particular kind of transboundary loss or injury. In doing so, they have in effect made joint policy decisions about the levels of prevention and reparation that they consider optimal, having regard to the cost structure of an essential industry. Within these limits, they have placed the full financial burden on the industry and its customers, realizing that not all escapes and discharges of oil will be avoided, and that compensation, although more readily available, will not always amount to full payment for the loss or injury suffered. It is an element both in prevention

and in reparation that the Conventions provide for their own policing, requiring that departures from construction and safety standards, as well as incidents involving oil pollution, be investigated and reported, and that appropriate corrective and punitive action be taken.¹¹ It is also noteworthy that a régime, once established, provides a laboratory that can generate new initiatives and rising standards.¹²

III. The transboundary element

7. The language of draft article 1, on scope, contains three express limitations. The first is that matters falling within the scope of the topic will always exhibit a transboundary element, that is to say that the topic concerns effects felt within the territory or under the control of a State, but arising as a consequence of an activity or situation occurring, wholly or partly, within the territory or under the control of another State or States. Put more succinctly, this topic deals with the fact or possibility of loss or injury that cannot be avoided or repaired except through a measure of international co-operation. The vocabulary of the topic, set out in draft article 2—“source State”, “affected State”, “transboundary effects” and “transboundary loss or injury”—signifies that every chain of circumstance within the scope of the present topic crosses a boundary between the territory or control of one State and that of another or others. Of course, it does not follow that the world is polarized into source States and affected States. As the example of the conventions dealing with maritime oil pollution has already shown, the States concerned with any particular question of transboundary loss or injury see themselves both as source States and as affected States. The international instruments which regulate such matters usually contain symmetrical statements of reciprocal rights and obligations.¹³

8. It is not necessary, nor would it be appropriate, to include in these draft articles any general definition of State territory, or of matters which are under a State's control, although not within its territory. The exclusive authority of a State in relation to its territory, and to its ships and

⁵ See footnote 4 above, second paragraph.

⁶ See, in particular, art. 4, para. 1; art. 5, paras. 1, 2 and 4; and art. 6; and annex I, regulation 5, regulation 10, para. 7, and regulations 12-19 and 21-25.

⁷ Convention signed at Brussels on 29 November 1969 (United Nations, *Treaty Series*, vol. 973, p. 3).

⁸ See, in particular, arts. II, III and V.

⁹ Convention signed at Brussels on 18 December 1971 (IMCO publication, Sales No. 1972.10.E).

¹⁰ See, in particular, arts. 2, 4, 5 and 10.

¹¹ See art. 5, paras. 2-3, and arts. 6 and 8 of the 1973 International Convention for the Prevention of Pollution from Ships (footnote 4 above, second paragraph).

¹² The 1969 International Convention on Civil Liability for Oil Pollution Damage (see footnote 7 above) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (see footnote 9 above) were revised in 1984. See the fourth report, document A/CN.4/373 (footnote 2 above), paras. 49 and 56 and footnote 103. See also the comments on these two Conventions, para. 16 below.

¹³ Even in the minority of international agreements that relate to a single set of circumstances, there is often a stipulation concerning reciprocity if the interests of the parties should be reversed. See e.g. the Agreement between the Federal Republic of Germany and Austria concerning the Effects on the Territory of the Federal Republic of Germany of Construction and Operation of the Salzburg Airport, (Vienna, 19 December 1967) (United Nations, *Treaty Series*, vol. 945, p. 87), art. 9 of which reads as follows:

“Upon the request of the Federal Republic of Germany, the Republic of Austria shall in accordance with the principle of reciprocity, grant to a German civil airfield whose building protection zone affects Austrian territory, the same treatment, through the conclusion of a corresponding agreement, as is accorded to the Salzburg airport under this Agreement.”

aircraft on or over the high seas, is among the most fundamental and well settled of all the principles and rules that make up the universe of international law. On the other hand, even these principles and rules are susceptible at their fringes to growth and change (see para. 9 below);¹⁴ and, within the context of the present draft articles, the phrase "territory or control" must retain a corresponding element of elasticity. To ascertain the meaning of the phrase therefore entails a *renvoi* to applicable conventions and customary law. There are, however, a few cases in which the complexities of the general law create a need for sign-posting. The three-point partial definition of "territory or control" is designed to meet that need.

9. Long before the 20th century, it was recognized that a coastal State had, as an appurtenance to its land and maritime territory, a limited right of jurisdiction over foreign ships in a contiguous zone of the high seas in respect of a range of matters affecting its security and internal order.¹⁵ In the modern law of the sea, there are many more instances—and most notably those relating to the exclusive economic zone¹⁶—in which a sea area has a territorial impress in respect of some matters, but retains its high seas character in respect of other matters. It is therefore not always enough to describe even a territorial competence by reference to the area in which it subsists: the competence has also to be described by reference to its own limited nature. *A fortiori*, a competence of an extraterritorial kind can never be described in terms of an area alone: it relates always to a particular matter subject to the control of the State, whether it be described by reference to ships, aircraft, space objects or persons belonging to that State; or to the activities in which they engage or wish to engage; or to the situations upon which their use and enjoyment of areas beyond the limits of national jurisdiction may depend.

10. For these reasons, in the proposed partial definition

¹⁴ See also e.g. the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (London, Moscow and Washington, 27 January 1967) (United Nations, *Treaty Series*, vol. 610, p. 205), art. VI of which provides, in part:

"States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. . . ."

See also the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122), which provides in part:

Article 139. Responsibility to ensure compliance and liability for damage

"1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. . . ."

". . ."

¹⁵ See art. 24 of the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) (United Nations, *Treaty Series*, vol. 516, p. 205); and art. 33 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

¹⁶ See part V (arts. 55-75) of the 1982 United Nations Convention on the Law of the Sea (footnote 14 above, second paragraph).

of "territory or control" in article 2, paragraph 1, subparagraphs (a) and (c) deal with the two polarities. Subparagraph (a) refers to the territorial competence of the coastal State, indicating that this is a limited competence in relation to some areas. Subparagraph (c) refers to matters which are not within the territorial competence of any State: it therefore relates the concept of "control", not directly to the areas in which an extraterritorial jurisdiction may be exercised, but to the rights and interests which any State may exercise or assert within those areas. In relation to the high seas, and to other areas beyond the limits of national jurisdiction, every activity, such as fishing, and every situation, such as the existence of a fishing resource, in which the ships or nationals of more than one State participate or have an interest, necessarily involves a trans-boundary element and the possibility that activities under the control of one State will have physical consequences that affect use or enjoyment by the ships or nationals of other States. So, for example, the 1949 International Convention for the Northwest Atlantic Fisheries prescribes as its objective "the investigation, protection and conservation of the fisheries of the Northwest Atlantic Ocean, in order to make possible the maintenance of a maximum sustained catch from those fisheries . . .", and contemplates the possible need for limitations of catch and catching seasons.¹⁷

11. In matters which impinge upon the territory of States, the limitation of scope in terms of "territory or control" must be more finely drawn. The first guideline, demonstrated in subparagraph (a) of the partial definition (art. 2, para. 1), is that there should be no detracting from the legal powers and authority that belong to the State in virtue of its territorial sovereignty. The justification for subparagraph (b) of the partial definition is that customary law itself qualifies the rights that belong to the territorial sovereign by vesting in flag-States the right of innocent passage for their ships.¹⁸ Although the right of overflight has a conventional origin,¹⁹ the practical consequences of the confer-

¹⁷ See the preamble and art. VIII, para. 1, of the Convention (Washington, 8 February 1949) (United Nations, *Treaty Series*, vol. 157, p. 157).

¹⁸ See arts. 5 and 14 of the Convention on the Territorial Sea and the Contiguous Zone (see footnote 15 above), and art. 8, para. 2, and art. 17 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph). The phrase "right of continuous passage" has been used in subparagraph (b) of the proposed partial definition because, in terms of the 1982 United Nations Convention on the Law of the Sea, the expression "right of innocent passage" is most sufficiently comprehensive to cover the various types of passage recognized in that Convention (see arts. 38 and 53).

¹⁹ See art. 5 of the Convention on International Civil Aviation (Chicago, 7 December 1944) (United Nations, *Treaty Series*, vol. 15, p. 295); art. 1, sect. 1, of the International Air Services Transit Agreement (Chicago, 7 December 1944) (*ibid.*, vol. 84, p. 389); art. 1 of the International Air Transport Agreement (Chicago, 7 December 1944) (*ibid.*, vol. 171, p. 387); arts. 38 and 53 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph); and numerous bilateral agreements on air transport.

Although the law relating to the overflight of space objects is less developed, it has seemed desirable to include an express reference to them in subparagraph (b) of the partial definition because the Convention on International Liability for Damage caused by Space Objects (London, Moscow and Washington, 29 March 1972) (United Nations, *Treaty Series*, vol. 961, p. 187) expressly contemplates the presence of space objects within the air space of other States, or in air space beyond the limits of national jurisdiction; see art. II of that Convention. Moreover, manned space objects, in their descent through the atmosphere, now appear to have some of the same properties as aircraft.

ment of that right are comparable with those deriving from the right of innocent passage. In both cases, the law demands and State practice affords a very substantial curtailment of the exercise of the territorial State's authority in relation to the ship or aircraft in continuous passage through its maritime territory or its airspace. In the nature of things, the extent of the territorial State's involvement is ordinarily even less in the case of transiting aircraft than in that of passing ships. Thus subparagraph (b) of the partial definition is, in a way, a mirror image of subparagraph (a). In both cases, there are some circumstances in which a territorial jurisdiction is exercisable, and therefore no transboundary relationship is apparent between the territorial State and the flag-State. There are, however, other circumstances, arising within the same geographical areas, to which the territorial State's jurisdiction does not extend, or—in keeping with the spirit and letter of the law relating to passage and overflight—should not extend. In the latter circumstances, the transboundary element is present.

12. More generally, it is evident that a very clear course of State conduct is required to modify the rule, based upon respect for State sovereignty, that a State in the territory of which an activity or situation occurs is the source State in relation to that activity or situation. In the preceding paragraphs it has been submitted that such a modification is well established in the case of ships and aircraft in passage or overflight. So, for example, the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, using the device of "channelling" all liability to the operator of the aircraft, makes it unnecessary even to inquire through which State's airspace the aircraft was travelling when the incident giving rise to the damage occurred.²⁰ To turn to quite a different kind of case, there would seem no reason to doubt the reception in customary law of the provision of the Convention on International Liability for Damage Caused by Space Objects²¹ that "a State which launches or procures the launching of a space object" (art. I (c)) from the territory of another State shares with that other State the liability for damage caused by the space object launched. In that case there are two source States, whose liability towards third States is joint and several (art. V). The Convention does not regulate the relationship between the source States, but invites them to undertake such regulation for themselves.²²

13. To pursue this line of inquiry much further at the present stage might entail needless and therefore unjustified speculation about the application of rules, yet to be drawn, in relation to particular situations of fact. There are,

however, two pointers that deserve notice. First, the precedent established in relation to the launching of space objects can obviously be applied in other contexts, if States have the will to do so. In the Commission's debates on the present topic, there have been references to the problems that can arise when sophisticated but inherently dangerous industries are "exported" to States which lack the expertise to establish and enforce adequate regulatory standards. Some form of joint undertaking—especially if supported by the technical monitoring that can on occasion be provided by an international organization—might offer a solution to some of these problems. Secondly, the régime established in the 1962 Convention on the Liability of Operators of Nuclear Ships,²³ and in a range of bilateral agreements containing comparable provisions,²⁴ could well be regarded as evidence that the State which registers and licenses a nuclear ship is always a source State in respect of transboundary loss or injury arising from a nuclear incident involving that ship. The 1962 Convention also "channels" to an operator all claims relating to such an incident, and creates an absolute, although limited, liability to pay compensation in respect of loss or injury suffered (see in particular art. II, paras. 1-2, and art. III, para. 1). Claims may be brought, at the claimant's option, in the courts either of the licensing State or of the affected State; nor is it material where the nuclear incident occurred. The operator is required to maintain insurance or other financial security covering his liability to the extent prescribed by the licensing State. It remains an obligation of the licensing State to ensure that the operator complies with the requirements of the Convention; if necessary, the licensing State must itself meet the liability of the operator (see in particular art. III, para. 2, art. X, para. 1, and art. XIII).

14. It may therefore be said that there are some circumstances in which an activity remains under the control of one State even when the activity is physically located within the territory of another State. In those cases, there are two source States in respect of the one activity: in the case of the launching of space objects the obligations are shared between the two source States; but in the case of nuclear ships the State in the territory of which the nuclear incident occurs is fully indemnified pursuant to the obligations of the licensing State. In neither case is the relationship between the two source States a transboundary

²⁰ See, in particular, art. 1, para. 1, art. 2, para. 1, and art. 23 of the Convention (Rome, 7 October 1952) (*ibid.*, vol. 310, p. 181).

²¹ See footnote 19 above, second paragraph.

²² The definition of "launching State" in art. I (c) includes also a "State from whose territory or facility a space object is launched". Art. V, para. 2, provides that "a launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching", and that "the participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable". Damage occurring within a State from whose territory a space object is launched will in general be outside the scope of the Convention. Art. VII provides that the Convention shall not apply to damage caused by a space object of a launching State to nationals of that launching State or to foreign nationals invited to participate in the operation of the space object.

²³ Convention signed at Brussels, 25 May 1962 (IAEA, *op. cit.* (footnote 4 above), p. 34).

²⁴ See e.g. the Treaty between the Federal Republic of Germany and the Republic of Liberia on the Use of Liberian Waters and Ports by the N.S. [nuclear ship] *Otto Hahn* (Bonn, 27 May 1970) (Federal Republic of Germany), *Bundesgesetzblatt* (Bonn), part II, No. 34, 21 July 1971, p. 953; the Agreement between the United States of America and Italy on the Use of Italian Ports by the N.S. *Savannah* (Rome, 23 November 1964) (United Nations, *Treaty Series*, vol. 532, p. 133); the Exchange of notes constituting an Agreement between the United States of America and Italy concerning Liability during Private Operation of the N.S. *Savannah* (Rome, 16 December 1965) (*ibid.*, vol. 574, p. 139); the Exchange of notes constituting an Agreement between the United States of America and Ireland relating to Public Liability for Damage caused by the N.S. *Savannah* (Dublin, 18 June 1964) (*ibid.*, vol. 530, p. 217); the Agreement between the Netherlands and the United States of America on Public Liability for Damage caused by the N.S. *Savannah* (The Hague, 6 February 1963) (*ibid.*, vol. 487, p. 113); the Operational Agreement between the Netherlands and the United States of America on Arrangements for a Visit of the N.S. *Savannah* to the Netherlands (The Hague, 20 May 1963) (*ibid.*, p. 123).

one, except in relation to third States; however, if third States are affected States, they have a right of recourse against both source States. This principle is clearly demonstrated in a bilateral agreement between the Netherlands and the United States of America governing questions of public liability in respect of the visit to Netherlands ports of the United States nuclear ship *Savannah*.²⁵ This agreement indemnifies the Netherlands, in the case of a nuclear incident involving the *Savannah* during her voyage or visit, in respect of claims relating to loss or injury, whether sustained in the Netherlands or across international boundaries in third States or elsewhere.²⁶

15. The pattern that emerges from this examination of State behaviour is a simple and wholesome one. States remain primarily accountable for the things that happen within their own territories, but which produce physical effects beyond their national boundaries. Conversely, States are entitled to expect that other States will observe the same rule. States, in exercise of their territorial sovereignty, have a choice whether to allow the importation of activities that are inherently dangerous; and in a few cases they have made it a condition of importation that the "exporting" State should retain an international liability for the safe conduct of the activity. Of course, as Commission members have pointed out, in the real world economic pressures force the hands of Governments, obliging them to admit activities which produce benefits, even if they cannot curb the injurious side effects, either within their own territories or across international boundaries. Nevertheless, the path to improvement is to strengthen the alliance between legal principle and the enlightened self-interest of both the source State and the international community. In one case only—that of ships in passage—the territorial State has a general obligation to allow foreigners the use of its territory; and, for practical purposes in an interdependent world, the overflight of civil aircraft on scheduled services falls within the same category. In these cases only does international practice at present appear to treat as a transboundary matter the relationship between the territorial State and the State whose ships or aircraft are rightfully within its territory. In this respect, as in others, the possibility of an evolution in the general law remains open.²⁷ Therefore the definition of "territory or control" must be open-ended, and responsive to legal change.

²⁵ Agreement of 6 February 1963, see footnote 24 above.

²⁶ Arts. 1 and 2 of the Agreement provide:

"Article 1

"The United States shall provide compensation for damage which arises out of or results from a nuclear incident in connection with the design, development, construction, operation, repair, maintenance or use of the N.S. *Savannah* provided, and to the extent, that any competent court of the Netherlands or a Commission to be established under Netherlands law, determines the United States to be liable for public liability. The principles of law which shall govern the liability of the United States for any such damage shall be those in existence at the time of the occurrence of the said nuclear incident.

"Article 2

"The United States shall indemnify any person who on account of any act or omission committed on Netherlands territory is held liable for public liability under the law of a country other than the Netherlands for damage as described in article 1."

²⁷ For example, there are tendencies in the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph) to control the extent of the coastal State's involvement with

16. Discussion under this head has been mainly concerned with issues that arise because of the unequal legal relationships between land and sea areas. The sea is servient in varying degrees to land-based jurisdiction, which in its turn gives way to rights of passage. The regulation of maritime activities has special features. Because the ship is a moving object, which places itself physically within the territory of the receiving State, that State, within its own jurisdictional competence, has the means to redress many forms of loss or injury arising from a shipping activity. Therefore the demand for international regulation has stemmed less from a need to avoid and repair transboundary loss or injury than from a need to limit and systematize the controls exercised unilaterally by the receiving State. There are, however, lessons of general application, brought into sharp focus by the régimes relating to the sea carriage of oil (see paras. 4-5 above) and to the visits of nuclear ships (see paras. 13-14 above). In controlling the forces of nature, the need and motivation for international co-operation are not limited to circumstances in which there are, or may be, adverse transboundary effects. In establishing régimes, States will be guided by practical considerations, giving much more weight to natural boundaries than to the precise point at which political boundaries intervene. In doing so, they will often apply their solutions indifferently to circumstances which do or may entail transboundary effects, such as oil escapes from ships on the high seas or in passage, and to similar circumstances which entail no transboundary effects, such as oil escapes from the same ships tied up in foreign ports. Equally, they will choose to treat important questions, such as ship construction standards, as if they could in themselves be productive of adverse transboundary effects. This does not invalidate the transboundary criterion, which lies at the root of the whole topic: it merely shows that it will in practice often be given an enlarged application.

IV. The element of a physical consequence

17. It has already been stressed that the present topic arises from a discrepancy between natural and political boundaries. The first of the express limitations contained in draft article 1, on scope, concerns the political boundary that may divide an activity or situation from places in which its effects are felt. The second of the express limitations concerns the physical link that connects the activity or situation with its effects on the other side of the political boundary. The flow of water follows the law of gravity and ignores the man-made law of separate sovereignties.²⁸ The long-range circulation of air is governed by the prevailing

foreign ships in its ports, and therefore to strengthen the analogy with ships in passage (see, in particular, art. 94, para. 6, and arts. 97, 218, 219, 220 and 223-233). Even so, the differences between the two régimes are more fundamental than the similarities.

²⁸ See e.g. the Convention between Norway and Sweden on Certain Questions relating to the Law on Watercourses (Stockholm, 11 May 1929) (League of Nations, *Treaty Series*, vol. CXX, p. 277), art. 1, para. 1, of which provides:

"1. The present Convention relates to installations or works or other operations on watercourses in one country which are of such a nature as to cause an appreciable change in watercourses in the other country in respect of their depth, position, direction, level or volume of water, or to hinder the movement of fish to the detriment of fishing in the latter country."

westerly winds that circle the earth in both hemispheres.²⁹ Sea and air currents are funnelled in variable, but persistent, patterns by topographical and other local features;³⁰ and any body of air or water distributes the toxic materials released into it.³¹ Light and sound and radio waves have natural conductors.³² Explosive and radioactive forces are

There are comparable provisions in 20 or more other bilateral agreements applying to activities or situations which do or may give rise to a physical change in water conditions in a watercourse constituting or crossing the frontier.

²⁹ See e.g. the definitions of "air pollution" and "long-range transboundary air pollution" in art. 1 of the Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979) (ECE/HLM.1/2, annex I). This Convention is open for signature or accession by the member States of the Economic Commission for Europe, as well as by States having consultative status with the Commission, and regional economic integration organizations with the requisite competence.

³⁰ See e.g. the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil (Bonn, 9 June 1969) (United Nations, *Treaty Series*, vol. 704, p. 3) which, pursuant to art. 1, applies

"whenever the presence or the prospective presence of oil polluting the sea within the North Sea area, as defined in article 2 of this Agreement, presents a grave and imminent danger to the coast or related interests of one or more Contracting Parties".

Art. 6, para. 2, provides:

"2. The Contracting Party within whose zone a situation of the kind described in article 1 occurs, shall make the necessary assessments of the nature and extent of any casualty or, as the case may be, of the type and approximate quantity of oil floating on the sea, and the direction and speed of movement of the oil."

There are comparable, although in some cases less detailed, provisions in other regional treaties for the protection of the marine environment.

Concerning the effect of localized air currents, see the *Trail Smelter* case (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. E.1949.V.2), pp. 1905 *et seq.*), discussed in the Special Rapporteur's second report (*Yearbook . . . 1981*, vol. II (Part One), pp. 108 *et seq.*, document A/CN.4/346 and Add.1 and 2, paras. 22-39). See also the *Poplar River Project* case (*Digest of United States Practice in International Law, 1976* (Washington, D.C., U.S. Government Printing Office, 1977), pp. 590-594; *ibid.*, 1978 (1980), pp. 1116-1121 and 1496-1498), discussed in the fourth report, document A/CN.4/373 (see footnote 2 above), paras. 36 and 69).

³¹ See e.g. the Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976) (to appear in United Nations, *Treaty Series*, No. 16.908), art. 2 (a) of which defines the term "pollution" as follows:

"(a) 'pollution' means the introduction by man, directly or indirectly, of substances or energy into the marine environment resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water, and reduction of amenities."

Definitions of "pollution" in similar terms appear in other regional conventions for the protection of the marine environment. See also art. 1, para. 1, subpara. 4, of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph, and art. 1 (a) of the Convention on Long-range Transboundary Air Pollution (see footnote 29 above).

³² See e.g. the Convention between Denmark, Finland, Norway and Sweden on the Protection of the Environment (Stockholm, 19 February 1974) (*International Legal Materials* (Washington, D.C.), vol. XIII, 1974, p. 591), art. 1 of which defines environmentally harmful activities as including:

"... the use of land, the sea-bed, buildings or installations in any other way which entails or may entail environmental nuisance by water pollution or any other effect on water conditions, sand drift, air pollution, noise, vibration, changes in temperature, ionizing radiation, light, etc."

See also e.g. the International Telecommunication Convention (Malaga—Torremolinos, 25 October 1973) (ITU, *International Telecommunication Convention* (Geneva, 1974)), art. 35, para. 1, of which provides:

"1. All stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other members or of recognized

generated by physical and chemical processes.³³ Fire and disease are fuelled and carried by the natural materials on which they feed.³⁴ Depletion of a renewable natural resource may hinder its regeneration and threaten its survival.³⁵

18. These phenomena account for most of the activities and situations which have so far been found to require international regulation, because they do or may give rise to physical consequences with transboundary effects. This description implies a connection of a specific type—a consequence which does or may arise out of the very nature of the activity or situation in question, in response to a natural law of the kind evoked in the previous paragraph. That is to say, the activities and situations with which the present topic deals must themselves have a physical quality, and the consequence must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity or situation which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure. That was the position taken by France and the Soviet Union in a 1976 Agreement on prevention of accidental or unauthorized use of nuclear weapons.³⁶

private operating agencies, or of other duly authorized operating agencies which carry on private service, and which operate in accordance with the provisions of the Radio Regulations."

³³ See e.g. the definition of "nuclear damage" in art. I, para. 1 (k), of the Vienna Convention on Civil Liability for Nuclear Damage (footnote 4 above), which includes:

"(i) loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation;"

See also, in the Protocol between Belgium, France and Luxembourg to establish a tripartite standing committee on polluted waters (Brussels, 8 April 1950) (United Nations, *Treaty Series*, vol. 66, p. 285), a reference to the fact that the work of a previous tripartite committee had resulted in the conclusion of an arrangement with regard to the problems raised by the installation in the vicinity of the frontier of storage depots of explosive materials for civil use.

³⁴ See e.g. the Treaty between Hungary and Romania concerning the Régime of the Hungarian-Romanian State Frontier and Co-operation in Frontier Matters (Budapest, 13 June 1963) (United Nations, *Treaty Series*, vol. 576, p. 275), art. 28, paras. 2 and 3, of which provides:

"2. If a forest fire breaks out near the frontier, the Party in whose territory the fire began must do everything in its power to contain and extinguish the fire and to prevent it from spreading across the frontier."

"3. If, however, a forest fire threatens to spread across the frontier, the competent authorities of the Contracting Party in whose territory the threat has arisen shall immediately warn the competent authorities of the other Contracting Party so that the necessary measures may be taken to contain the fire at the frontier."

There are comparable provisions in other treaties dealing with frontier régimes.

³⁵ See e.g. the 1949 International Convention for the Northwest Atlantic Fisheries (para. 10 and footnote 17 above) and other regional and bilateral agreements containing provisions concerning the conservation of living resources, as well as the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) (United Nations, *Treaty Series*, vol. 559, p. 285) and many provisions of the 1982 United Nations Convention on the Law of the Sea (footnote 14 above, 2nd para.).

³⁶ Exchange of Notes between France and the Union of Soviet Socialist Republics constituting an Agreement on Prevention of Accidental or

(Continued on next page)

19. Although the direct physical linkage which has just been described is one of the three essential elements that fix the scope of the present topic, this physical linkage is not interrupted by any human or other failing within the conduct of an activity or situation, or by any extraneous circumstance—unless, perhaps, that circumstance is so overwhelming that the original activity or situation has no further relevance. These propositions have the support of common sense; for in some cases—as the 1976 French-Soviet Agreement bears witness³⁷—human error in the handling of dangerous materials, or even sabotage or other unlawful interference, are the risks that loom largest. State practice, although little developed in comparison with the magnitude and variety of the problems, offers some corroboration and no conflicting evidence. For instance, in relation to activities that concern the use and transport of nuclear materials, the device of “channelling” all liability to a designated “operator” ensures that the activity will be accountable for the conduct of all subcontractors and others engaged in the enterprise.³⁸ Under the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the operator’s liability extends to damage caused by nuclear material in carriage to or from the nuclear installation, and even when such material is stolen.³⁹ The liability of the operator is excluded only when a nuclear incident is directly due to an act of armed conflict, hostilities, civil war or insurrection—and, at the option of the host State, if the incident is due to a grave natural disaster.⁴⁰ In relation to the broadly similar provisions of the 1960 Paris Convention on Third-party Liability in the Field of Nuclear Energy, the Federal Republic of Germany and Austria reserved the right to extend the operator’s liability to the excluded areas.⁴¹ Both Conventions are silent as to the residual accountability of the State on the territory of which a nuclear incident causing damage occurs; but any rights

of recourse available under general rules of international law are preserved.⁴²

20. It should again be noted that State practice does not confine itself within the limits of draft article 1, on scope, which aims to describe the circumference of the trunk of the tree, not that of its canopy or root system. Just as régimes may extend to circumstances in which there is no true transboundary element, so also they may transcend the requirement of a physical consequence. This can happen for the simple reason that States find it convenient to treat a problem requiring international co-operation as if that problem gave rise to a transboundary consequence. For instance, neither the cultivation of the opium poppy, nor the entry of opiates into commerce, in itself entails a physical consequence with transboundary effects; but international measures to reduce cultivation and regulate commerce may be more successful than the efforts of individual States to control at their borders an illicit traffic in narcotic drugs. On the other hand, it will sometimes be found that the only efficient method of controlling an activity that falls within the scope of the present topic is to extend the control to a related-activity, not in itself within the scope of the topic. For example, the manufacture and sale of household detergents would seem at first sight at least as innocent of transboundary implications as the manufacture and sale of opiates. Yet when household detergents are sold over the counter and used in household cleaning they inevitably contaminate waste water; and if this waste water flows into an international watercourse—or even into a confined sea—there is a physical consequence with pronounced transboundary effects. To meet this danger, the 1968 European Agreement on the Restriction of the Use of Certain Detergents in Washing and Cleaning Products requires contracting States to prevent the marketing of washing or cleaning products containing synthetic detergents which are less than 80 per cent biologically degradable.⁴³

21. The last example prompts a more general reflection. Although draft article 1, on scope, which follows in this respect the pattern most common in international legislation,⁴⁴ suggests a sequence of criteria, beginning with an

(Footnote 36 continued)

Unauthorized Use of Nuclear Weapons (Moscow, 16 July 1976) (*Journal Officiel de la République française, Lois et décrets* (Paris), 108th year, No. 251, 25-26 October 1976, p. 6231).

³⁷ The French-Soviet Agreement (see footnote 36 above) provides:

“Having regard to the views exchanged concerning measures to avoid any risk of such accidental or unauthorized use, it was agreed that the following provisions should be adopted:

“1. Each Party undertakes to maintain and possibly to improve, as it deems necessary, its existing organizational and technical arrangements to prevent the accidental or unauthorized use of nuclear weapons under its control.

“2. The two Parties undertake to notify each other immediately of any accidental occurrence or any other unexplained incident that could lead to the explosion of one of their nuclear weapons and could be construed as likely to have harmful effects on the other Party.”

³⁸ See the definitions contained in the following provisions: art. 1, para. (a) (i) (“A nuclear incident”) and arts. 3-6 of the Convention on Third-party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) (IAEA, *op. cit.* (footnote 4 above), p. 22); art. 1, para. (k) (“Nuclear damage”) and para. (l) (“Nuclear incident”), and art. II, of the Vienna Convention on Civil Liability for Nuclear Damage (footnote 4 above); art. 1, para. 7 (“Nuclear damage”) and para. 8 (“Nuclear incident”), and art. II of the Convention on the Liability of Operators of Nuclear Ships (footnote 23 above).

³⁹ See art. II and art. VI, para. 2, of the 1963 Vienna Convention (see footnote 4 above); see also art. 4 and art. 8, para. (b), of the 1960 Paris Convention (footnote 38 above).

⁴⁰ Article IV, para. 3, of the 1963 Vienna Convention (see footnote 4 above); see also art. 9 of the 1960 Paris Convention (footnote 38 above).

⁴¹ Reservation to art. 9 (see IAEA, *op. cit.* (footnote 4 above), p. 32).

⁴² Art. XVIII of the 1963 Vienna Convention (see footnote 4 above); and annex II of the 1960 Paris Convention (see footnote 38 above).

⁴³ Art. 1 of the Agreement (Strasbourg, 16 September 1968) (United Nations, *Treaty Series*, vol. 788, p. 181).

⁴⁴ See e.g. the typical definition of “pollution” quoted in footnote 31 above. See also, as an example typical of bilateral treaties relating to watercourses, the General Convention between Romania and Yugoslavia (Belgrade, 14 December 1931) (League of Nations, *Treaty Series*, vol. CXXXV, p. 33), art. 1 of which reads in part:

“... ”

“In the absence of any previous agreement between them, the two States will abstain from any alteration of the existing installations and works, and from any measures or operations which might modify the hydraulic system in the territory of the neighbouring State and thus affect its interests or acquired rights.”

Again, art. 7 of the Agreement between Mexico and the United States of America to Co-operate in the Solution of Environmental Problems in the Border Area (La Paz, Baja California (Mexico), 14 August 1983) (*International Legal Materials* (Washington, D.C.), vol. XXII, No. 5, 1983, p. 1025) provides:

“The Parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environmental effects.”

activity or situation and continuing through a physical consequence to transboundary effects, the method of constructing a régime very often begins at the other end. The fact that effects are experienced or apprehended, and are traceable to causes not wholly within the territory or under the control of the affected State, creates a demand for action by source States to curb a physical consequence or to reduce its transboundary effects, if necessary by modifying the activity or situation from which it arises. The draft convention prepared by UNEP for the protection of the ozone layer (of the earth's upper troposphere and stratosphere) provides a good example of suspected physical consequences in search of their generating activities. In one alternative version, article 2 of the draft convention requires the contracting parties to "take appropriate measures . . . to protect human health and the environment against adverse effects resulting from human activities, should it be found that these activities have or are likely to have adverse effects by reason of their modification of the ozone layer".⁴⁵ A less speculative example is provided by the Conventions on civil liability relating respectively to the sea carriage of oil (see paras. 4-5 above) and to the use of nuclear materials (see para. 19 above), which bring together every phase of activity that may contribute to an oil spillage or a nuclear incident through the device of "channelling" liability to a designated operator. In short, the physical consequence, actual or potential, is the central element of every problem, in relation to which the values of freedom to undertake activities, and of freedom from transboundary interference, may need to be brought into balance.

V. The third element: effects upon use or enjoyment

22. The distinction between a physical consequence, actual or potential, and its transboundary effects upon use or enjoyment is clearly enunciated in the award of the *Lake Lanoux* tribunal, dealing with the fact that France proposed to draw off, within its own territory, water that would have flowed to Spain, substituting water of equivalent quantity and quality, so that the flow reaching the Spanish border would not have been substantially affected:

. . . The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life. Water, which is by nature a fungible thing, may be restored without alteration of its qualities from the viewpoint of human needs. A withdrawal with return, as contemplated in the French project, does not alter a state of affairs established in response to the demands of life in society.⁴⁶

One reason that this and other well-known passages of the *Lake Lanoux* award have a lasting importance is that they do not encourage a divergence of legal and social principles. If it is recalled that Spain had hoped to gain an additional advantage as the price of its agreement to the technicality that water had been exchanged, it should also be recalled that France had earlier proposed to offer Spain no more than monetary compensation for water to be

⁴⁵ Second revised draft convention for the protection of the ozone layer, prepared by the UNEP secretariat (UNEP/WG.93/3).

⁴⁶ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 304, para. 8; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 196, document A/5409, para. 1064.

drawn off and not returned.⁴⁷ Upon a different view of the course of legal development, it might well have been judged that the only key to the fortress of another State's sovereign self-interest was an equally impervious technical argument, and that the only way of investing the fortress was to insist upon the right to veto decisions with which one did not agree.

23. Although the existence of the physical consequence is a prerequisite, the tenor of State practice—especially in regard to the construction of régimes—is to give a good deal of weight to an affected State's appraisal of the "realities of life" and of tendencies inconsistent with "a state of affairs established in response to the demands of life in society". It is of course true that the distinction between a physical consequence and its effect is most easily seen when the extent of the physical consequence can be monitored and controlled. This is well illustrated in treaties, old and new, relating to the régime of boundary waters. The 1909 Boundary Waters Treaty between Great Britain and the United States of America,⁴⁸ concerning the Great Lakes and other waterways of the Canadian-United States border, established a threefold priority of uses (for domestic and sanitary purposes, for navigation, and for power and irrigation), allowing no substantial conflict of any use with one to which a higher priority had been given (art. VIII). The International Joint Commission was created to survey these and other requirements of the Treaty (art. VII). In other provisions a cautious balance was struck, for example in regard to the rights of each party, and of its constituent States and provinces, to use and divert waters within its own territory, provided that there was no material injury to navigation, that—in certain circumstances—the use and diversion had been examined by the International Joint Commission, and that any use or diversion "resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs" (art. II).⁴⁹ In its long life, the Boundary Waters Treaty and its guardian Commission have known popularity and relative neglect; but there can be no mistaking the quiet influence of the Treaty on the conduct of United States-Canadian transboundary relations and the force of its example in other parts of the world.

24. The Finnish-Soviet Agreement of 1964 concerning Frontier Watercourses⁵⁰ was a sequel to another treaty between the two countries, concerning the régime of the frontier and providing for the settlement of frontier inci-

⁴⁷ United Nations, *Reports of International Arbitral Awards . . .*, p. 292 and p. 316, para. 24.

⁴⁸ Signed at Washington, 11 January 1909 (United States of America, *Treaty Series*, No. 548 (Washington, D.C., 1924)).

⁴⁹ A recent example of North American initiatives aimed at permitting a person in one State who suffers or is threatened with injury by pollution in another State to bring an action there, on the same basis as if the injury or threatened injury had occurred in that State, is the legislation on access to the courts, on a uniform and reciprocal basis, in cases of transboundary pollution, already enacted in the States of Montana and New Jersey, introduced in the legislature of the Canadian Province of Ontario, and understood to be under active consideration in the States of Colorado and New York.

⁵⁰ Signed at Helsinki, 24 April 1964 (United Nations, *Treaty Series*, vol. 537, p. 231).

dents.⁵¹ The régime established is of more than average interest because this frontier is a *mélange* of land and lake and waterway, blended with the economic and social life of small communities. Thus the Agreement provides:

Article 2

No measures may be taken, in disregard of the procedure laid down in chapter II of this Agreement,⁵² in frontier watercourses or on the banks thereof which might so alter the position, depth, level or free flow of watercourses in the territory of the other Contracting Party as to cause damage or harm to the water area, to fisheries, to land or to structures or other property; which might create a danger of flooding, cause a significant loss of water, alter the main fairway or interfere with the use of the common fairway for transport or timber-floating; or which might in some other like manner be prejudicial to the public interest. . . . The Contracting Parties shall ensure that frontier watercourses and structures situated therein are maintained in such a state that the damage or harm referred to in this article does not ensue.

There follow provisions to ensure the free flow of water, with special regard to transport, timber floating and the passage of fish (art. 3). In regard to pollution: "The Contracting Parties shall, to the extent required, jointly decide upon the standards of quality to be set for water in each frontier watercourse or part thereof . . .", and jointly observe and take measures to maintain the established standards (art. 4). There is to be reparation for damage caused by one contracting party in the territory of the other; and this reparation may by agreement take the form of compensating privileges in the watercourses of the other party (art. 5).

25. The two bilateral treaties just considered—although made on different continents and half a century apart—treat the question of boundary waters in a similar way. In their provisions can be seen the kinds of effects on use or enjoyment which States typically foresee and wish to avoid. They are concerned that transboundary consequences may interfere with other uses and activities; and they therefore make stipulations as to the priorities of uses. They are concerned to preserve the physical characteristics of the waterways, although they do not rule out the possibilities of agreement to change. Damage to property is to be avoided and, if not avoided, repaired. In the older treaty, pollution, defined simply in terms of injury to health or property, is prohibited.⁵³ In the more recent treaty, the modern awareness of the complexities of pollution problems calls for a more sophisticated approach: the potential effects of pollution are recorded, and are as far as possible to be avoided; but the obligations are framed in terms that recognize the impossibility of dealing in absolutes. Standards of quality are to be set by mutual agreement in regard to particular watercourses; and the accommodation of

⁵¹ Treaty of 23 June 1960 (*ibid.*, vol. 379, p. 277).

⁵² Chapter II establishes a joint commission with immediate responsibility for matters relating to the utilization of frontier watercourses.

⁵³ The 1909 Boundary Waters Treaty between Great Britain and the United States of America (see footnote 48 above) provides as follows in art. IV:

"It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

some potentially polluting uses is contemplated.⁵⁴ In each treaty—and in large numbers of other comparable treaties—there are many indications of the relative values which the parties attach to the effects of an actual or prospective physical consequence. The treaties also tend to show that States attach equal significance to their freedom to undertake activities and to their freedom from transboundary interference.

26. However, it is just as important to stress that these treaties do not, in general, provide rules of thumb that can in themselves resolve future issues. More usually, they are concerned to provide criteria by which such issues can either be avoided or, if the occasion arises, be resolved by the methods indicated. These methods range from the application of national standards of treatment in matters affecting the other party or its citizens, to reference of issues to the decision of a joint boundary commission or to the ultimate decision of the parties themselves.⁵⁵ Conversely, because these treaties provide for continuing evaluation, the parties can and do reserve to themselves the right to add criteria to those which the treaty indicates. In the case of the 1909 Boundary Waters Treaty between Great Britain and the United States of America, for example, the brief reference to pollution already cited⁵⁶ does little more than establish a frame of reference for an inquiry whether any particular kind and quantity of adulteration constitutes or may constitute pollution "to the injury of health or property". There are similarly wide elements of appreciation in the more elaborate provisions relating to pollution in the 1964 Finnish-Soviet Agreement, article 4 of which, after references to various other possible consequences or effects, concludes by mentioning pollution which might cause "substantial scenic deterioration or might endanger public health or have similar harmful consequences for the

⁵⁴ The 1964 Finnish-Soviet Agreement, concerning frontier watercourses (see footnote 50 above) provides:

Article 4

"The Contracting Parties shall take measures to ensure that frontier watercourses are not polluted by untreated industrial effluents and sewage, by waste materials from timber-floating or wastes from ships or by other substances which, immediately or in course of time, might cause shoaling of the watercourses, harmful changes in the composition of the water, damage to the fish-stock or substantial scenic deterioration or might endanger public health or have similar harmful consequences for the population and the economy.

"The Contracting Parties shall, to the extent required, jointly decide upon the standards of quality to be set for the water in each frontier watercourse or part thereof and shall, in accordance with the procedure laid down in chapter II, co-operate in keeping the quality of the water in frontier watercourses under observation and in taking measures to increase the self-cleansing capacity of the said watercourses.

"Where certain measures might cause pollution of a watercourse or part thereof and reduce the self-cleansing capacity of the water in the territory of the other Contracting Party, such measures may only be carried out subject to the conditions specified in chapter II of this Agreement."

⁵⁵ See the 1909 Boundary Waters Treaty between Great Britain and the United States of America (footnote 48 above), art. II (para. 23 above) and arts. IV, VIII, IX and X; and the 1964 Finnish-Soviet Agreement concerning Frontier Watercourses (footnote 50 above), arts. 8-11. Art. 10 provides in part:

"Save as otherwise provided in this Agreement, the provisions of the law in force in each country shall be taken into account in any decision [of the Joint Finnish-Soviet Commission on the Utilization of Frontier Watercourses]."

⁵⁶ See footnote 53 above.

population and the economy".⁵⁷ In the case of the 1909 Boundary Waters Treaty between Great Britain and the United States of America, either party has the right unilaterally to refer to the International Joint Commission, for examination and report, "any other questions or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along the common frontier . . ." (art. IX).⁵⁸

27. To keep a perspective, it is necessary to consider why boundary waters treaties⁵⁹ of the kind discussed in the four preceding paragraphs present such good demonstration material regarding the relationship between physical consequences and their effects. Boundary waters treaties are not uncommon; but, as a class of treaties relating to transboundary effects, they present unusual features. It is in the very nature of waters lying along a boundary that they can be of little advantage to either riparian unless there is a high level of co-operation between them. More clearly, perhaps, than in any other class of case, national self-interest is identified with the common interest; and these treaties are therefore at one end of a sliding scale. The waters which divide and join the riparians are like a knot tied by nature itself, and the fortunes of each depend upon the other. In situations that are less geographically concentrated there will in all probability be some matters that are just as vital to life in both the neighbouring States; but it is much less likely that these vital matters will be all-embracing.

28. At one end of the scale, represented by the boundary waters treaties, a display of criteria—assigning priorities to certain uses, and describing the limits and conditions that govern a residual right of unilateral action—give each party a degree of assurance that decisions that have to be taken jointly will conform to established guidelines. Towards the other end of the scale, these guidelines may serve exactly the opposite purpose, offering the parties the advance assurances they need, and reducing to a minimum the condition of prior agreement as a fetter upon each State's freedom.⁶⁰ In either case, the criteria stated, and the procedural contexts in which they appear, are indications of

the value that the parties attach to avoiding, minimizing or repairing physical consequences that affect the other party's use or enjoyment of its own territory. Often the consequences to be avoided are those that would change a situation upon which the parties have come to rely.⁶¹ Frequently, as in article 2 of the 1964 Finnish-Soviet Agreement on boundary waters (see para. 24 above), it will be left to one party to make the initial judgement that a prospective course of action may create a danger; but the same article goes on to state another case in which each party reserves to itself the right to form an initial opinion about the possible harmfulness of the course of action proposed.⁶² In régime building, it is for the parties, taking into account the applicable principles and factors, to determine

document A/CN.4/274, para. 121), the parties define "pollution" as the direct or indirect introduction by man into the aquatic environment of matter or energy which may cause noxious effects (art. 47), and pledge themselves, within a framework of mutual co-operation (art. 52), to apply preventive measures conforming to international standards (arts. 48-49), with provision for exchanging information concerning the proposed national norms (art. 50) and for reparation of detriment suffered as a consequence of pollution caused by operations within their territory or under their control (art. 51).

Occupying a position midway along the scale, the 1974 Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (see footnote 32 above) defines "environmentally harmful activities" by reference to criteria or physical consequences and their transboundary effects (art. 1). Art. 2 provides:

"In considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out."

Although the Convention provides for consultations between the States concerned as to the permissibility of activities that entail or may entail "considerable nuisance", and for submission of that question to an inter-governmental commission for an opinion, the final decision is to be taken by the appropriate court or administrative authority in the source State (see arts. 3, 11 and 12).

⁶¹ The Agreement between Poland and the German Democratic Republic concerning Navigation in Frontier Waters and the Use and Maintenance of Frontier Waters (Berlin, 6 February 1952) (United Nations, *Treaty Series*, vol. 304, p. 131) contains a typical provision in this respect:

"Article 18

"Existing water engineering works, bridges, dams, sluices, embankments, etc. on frontier watercourses shall be preserved. If they are in use, each of the two Contracting Parties shall at its own expense keep them in good condition and in repair up to the frontier line unless the two Contracting Parties conclude a separate agreement on the subject.

"If need arises to reconstruct or remove any of the objects referred to in the first paragraph and such reconstruction or removal may cause a change in the water level in the territory of the other Party or impair the navigability of the river, the other Party's consent to the execution of the necessary works must be obtained.

"Such consent shall likewise be required for the construction of new bridges, dams, sluices, embankments, etc.

"If the projected works may serve common purposes, the competent authorities shall agree upon the general and detailed plans thereof, the construction costs, the apportionment of costs and the acceptance.

"The use, operation and repair of existing power installations, the restoration of destroyed power installations and the construction of new power installations on frontier waters shall be regulated by agreement between the competent authorities of the two Parties."

⁶² The provisions of art. 2 apply also to "measures which alter or block the fairway or change the course thereof, even where such measures would not have the aforementioned consequences".

See also the Convention between Hungary and Czechoslovakia relating to the Settlement of Questions arising out of the Delimitation of the Frontier between the two Countries (Frontier Statute), signed at Prague, 14 Novem-

⁵⁷ See footnote 54 above.

See also art. IV, para. 10, of the 1960 Indus Water Treaty (Karachi, 19 September 1960) (United Nations, *Treaty Series*, vol. 419, p. 125), which provides an important but different example of the need to strike a balance between the interests of source States and those of affected States in dealing with the pollution of watercourses:

"10. Each Party declares its intention to prevent, as far as practicable, undue pollution of the waters of the rivers which might affect adversely uses similar in nature to those to which the waters were put on the effective date, and agrees to take all reasonable measures to ensure that, before any sewage or industrial waste is allowed to flow into the rivers, it will be treated, where necessary, in such manner as not materially to affect those uses: provided that the criterion of reasonableness shall be the customary practice in similar situations on the rivers."

⁵⁸ See footnote 48 above.

⁵⁹ "Boundary waters" treaties are those that primarily concern lakes, rivers or estuaries forming a boundary, rather than rivers which simply cross a political boundary.

⁶⁰ See e.g. art. IV, para. 10, of the 1960 Indus Waters Treaty (footnote 57, 2nd para.).

Similarly, in chap. IX of the Treaty of La Plata River and its Maritime Limits between Argentina and Uruguay (Montevideo, 19 November 1973) *International Legal Materials*, (Washington, D.C.), vol. XIII, No. 2, March 1974, p. 225; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 299,

what significance they attach to avoiding, minimizing and repairing physical consequences with transboundary effects. If there is no applicable régime, and agreement upon such a régime is not within reach, it is for the source State to make the initial decisions; but it should equip itself unilaterally with a régime that takes due account, and makes appropriate provision, to avoid and repair "a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State". The phrasology of draft article 1, on scope, quoted in the preceding sentence, is designed to cover all the possible circumstances and, in so doing, to preserve a perfect neutrality.

29. One other facet of the present topic can be well illustrated in almost any range of treaty practice. In human affairs there is of necessity a starting point, by reference to which both change and continuity are measured. So, in the boundary waters treaties that have been considered, the measurement of effects is very largely in terms of protection of the existing situation: there is to be no avoidable interference with established uses; and the physical characteristics of the waterways are not to be changed, except by agreement (see paras. 23-24 above). Sometimes, as in the case of damage caused by space objects, regulation can precede the development of the activity to which it relates. Another example of timely regulation is provided by the 1975 Agreement between Canada and the United States of America relating to the Exchange of Information on Weather Modification Activities.⁶³ Very often, however, regulation begins when uses and abuses are already well established. Such a case is the 1979 Convention on Long-range Transboundary Air Pollution,⁶⁴ dealing with existing situations that have assumed a sinister aspect, both because the emissions of air pollutants have cumulative effects and because the harmful nature of these effects is better understood. In such a context it is most clearly seen that the need for change must be evaluated both in terms of the benefits promised and of the costs entailed;⁶⁵ and it

(Footnote 62 continued)

ber 1928 (League of Nations, *Treaty Series*, vol. CX, p. 425), art. 26, para. 2 (c), of which contains a comparable provision:

"The Contracting Parties shall not allow any works calculated to disturb the flow of the water or the regularization of frontier watercourses. If works contemplated are likely to have a desirable effect on the bed of frontier watercourses, the competent technical department of the other Party must be consulted."

⁶³ Signed at Washington, 26 March 1975 (United Nations, *Treaty Series*, vol. 977, p. 385).

⁶⁴ See footnote 29 above.

⁶⁵ Under the heading "Fundamental principles", art. 2 of the 1979 Convention provides:

"The Contracting Parties, taking due account of the facts and problems involved, are determined to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution."

In arts. 3 and 4, the Convention provides for a concerted international effort towards the development of policies and strategies to combat the discharge of air pollutants, and, in art. 5, for consultations, upon request, between source States and affected States. Under the heading "Air quality management", art. 6 continues:

"Taking into account articles 2 to 5, the ongoing research, exchange of information and monitoring and the results thereof, the cost and effectiveness of local and other remedies and, in order to combat air pollution, in particular that originating from new or rebuilt installations, each Contracting Party undertakes to develop the best policies and strategies including air quality management systems and, as part of them, control measures compatible with balanced development, in particular by using the best available technology which is economically feasible and low- and non-waste technology."

becomes the essence of régime-building to arrive at a fair distribution of costs and benefits.

30. In short, the values of use or enjoyment are seldom measured in terms of absolutes. Freedom from pollution is ordinarily established in any given context at levels that are technically and economically attainable, and that are judged sufficient to meet the needs of the activities which depend upon them, as well as the requirements of the human situation. Activities involving a relatively small, but ineradicable, element of risk are not on that account proscribed; but, as in the case of the launching of space objects—or the realignment of a flood embankment in boundary waters—the governing régime should make provision for reparation, if the measures taken to avoid transboundary effects upon use or enjoyment do not succeed in their objective. And, while established uses and amenities have usually a preferred position, neither a treaty régime nor an unregulated situation of long standing can constitute a barrier to economic, social, technological or legal change. A new norm of customary law—perhaps facilitated in its development by the patterns of régimes established pursuant to the themes of the present topic—may require such a change. This change may also be required by the obligation to co-operate, on the basis of a fair distribution of costs and benefits.

31. Facets of the duty of co-operation have also seemed to require the inclusion in draft article 1, on scope, of a reference to situations, in the phrase "activities and situations". The present topic is concerned almost exclusively with obligations arising from human activities; and activities entail initiatives within the territory or control of the source State taken in pursuance of its own rights of use or enjoyment, but with a proper regard for their transboundary implications. Sometimes, however, it is not so much an identified activity as the existence of a state of affairs, within the territory or control of the source State, which gives rise or may give rise to physical consequences with transboundary effects. The affected State may then expect or call upon the source State to take account of the situation, to make at least a limited response, and perhaps to consider in good faith the case for a more sustained response. In the last-named case, the investigation may lead to the identification of activities that should be regulated, or to some limited measures that should be taken for the affected State's benefit, with an equitable allocation of costs. The main classes of cases falling within this general description can now be illustrated.

32. First, there are cases in which a source State has a duty to give a warning of immediate danger, whether arising from an activity or from a natural cause. The warning may relate, for example, to the approach of an oil slick,⁶⁶ or

⁶⁶ See e.g. the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait, 24 April 1978) (*International Legal Materials* (Washington, D.C.), vol. XVII, No. 3, 1978, p. 501) provides in art. IX, para. (b):

"(b) Any Contracting State which becomes aware of any pollution emergency in the Sea Area shall, without delay, notify the Organization referred to under article XVI and, through the secretariat, any Contracting State likely to be affected by such emergency."

There are similar provisions in other regional agreements for the protection of the marine environment, and also in art. 198 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

to danger from floods or drifting ice,⁶⁷ or to risks arising from an outbreak of fire or pests or disease;⁶⁸ and the source State may have a related duty to take any measures within its power to contain the danger.⁶⁹ Secondly—and this case involves a more intricate relationship with activities—the affected State may be dependent upon the maintenance of a state of affairs from which it benefits, within the territory or control of the source State; or, conversely, may wish to seek the co-operation of the source State in ending a state of affairs by which it is continually troubled. Thus, it may require the bed of a river to be kept in its present course,⁷⁰ or desire the maintenance and continued operation of river installations,⁷¹ which may or may not be the product of a past activity falling within the scope of the

⁶⁷ See e.g. the Agreement between Bulgaria and Turkey concerning Co-operation in the Use of the Waters of Rivers flowing through the Territory of both Countries (Istanbul, 23 October 1968) (United Nations, *Treaty Series*, vol. 807, p. 117), art. 3 of which reads in part:

“The two Contracting Parties agree to exchange information concerning floods and floating ice by the most expeditious means possible.”

Other treaties dealing with watercourses which intersect or form a frontier contain similar provisions.

⁶⁸ See e.g. art. 28, paras. 2 and 3, of the Treaty between Hungary and Romania concerning the Régime of the Hungarian-Romanian State Frontier (footnote 34 above); art. 28, para. 5, provides:

“5. If it is reported that pests harmful to forest vegetation have appeared near the frontier and are showing a tendency to spread, the Parties shall exchange information and shall take the necessary preventive measures or joint control measures.”

Arts. 3 and 4 of the 1969 *International Health Regulations* require that WHO be notified immediately when it is discovered that certain diseases or organisms are present in the territory of a member State.

⁶⁹ See footnote 34 above; see also art. IX, para. (a), of the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (footnote 66 above).

“(a) The Contracting States shall, individually and/or jointly, take all necessary measures, including those to ensure that adequate equipment and qualified personnel are readily available, to deal with pollution emergencies in the Sea Area, whatever the cause of such emergencies, and to reduce or eliminate damage resulting therefrom;”

Comparable provisions appear in other regional agreements for the protection of the marine environment and in art. 199 of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

⁷⁰ See e.g. the Treaty between Hungary and Romania concerning the Régime of the Hungarian-Romanian State frontier (footnote 34 above):

“Article 16

“1. The Contracting Parties shall ensure that frontier waters are kept in good condition and shall take steps to prevent wilful damage to their banks.

“2. The position and direction of frontier watercourses must, in so far as possible, be preserved unchanged. To this end the two Parties shall, by agreement, take the necessary steps to remove any obstacles which may cause displacement of the beds of frontier rivers or streams or a change in the position of canals or which obstruct the natural flow of water.

“3. In order to prevent displacement of the beds of frontier rivers, streams or canals, their banks must be strengthened wherever this is found, by agreement, to be necessary. Such works shall be executed and their cost defrayed by the Party to which the bank belongs.

“4. Should a frontier river, stream or canal shift its bed spontaneously or as a result of some natural phenomenon, the Contracting Parties must, jointly and on the basis of equality, undertake the work of correcting the bed if that is found necessary.

“5. The manner of executing the work referred to in this article and other hydraulic works as well as the manner of apportioning the resulting costs shall be determined in conformity with special regulations drawn up by agreement between the two Parties.”

⁷¹ See footnote 61 above.

present topic. To take a different example, the affected State may be unable, without the active co-operation of the source State, to combat a danger of flood⁷² or disease,⁷³ to protect a migratory living resource,⁷⁴ or to conserve a high seas fish stock.⁷⁵ In most of these cases, a past activity may have contributed to the problem, or a present activity may have to be accommodated; but the dynamic element is supplied by the need of the affected State, rather than the interest of the source State.

33. This rather long section of the report has been primarily concerned with the essential distinction between physical consequences—which are unevaluated facts, actual or prospective—and their effects upon use or enjoyment. The illustrative materials have been drawn largely from bilateral treaties, which often separate the two elements, leaving substantial discretion for subsequent exercise by the parties, but assembling some criteria by which effects are to be measured. In the case of multilateral régimes establishing a limited liability or setting safety standards, the work of assessing the risk of physical consequences, and of evaluating their possible effects, often finds no more than fleeting reference in a preambular paragraph. In these cases, the physical consequences and their effects have been evaluated before the treaty was drafted: the evaluation stands like the answer to a mathematical problem and does not show the working upon which the answer was based. Yet even in these cases the separate elements of consequence and effects are lurking, and occasionally attract attention. Thus, in the dispute between

⁷² See e.g. the Agreement between Yugoslavia and Romania concerning Questions of Water Control Systems and Watercourses on or intersected by the State Frontier, together with the Statute of the Yugoslav-Romanian Water Control Commission (Bucharest, 7 April 1955) (see United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation* (Sales No. 63.V.4), p. 928), art. 2, paras. 2 and 3, of which provides:

“2. . . .

“With a view to improving the existing situation as regards the discharge of internal waters in the frontier district, the Mixed Commission shall examine and propose to the Governments of the Contracting States the amplification of existing water control systems and the erection of new installations and structures on water control systems and watercourses and in valleys and depressions on or intersected by the State frontier.

“The Mixed Commission shall also examine the possibilities and propose the measures required for draining of internal waters by pumping or otherwise.

“3. Where it is found necessary, in order to achieve the objects prescribed by this Agreement, that joint works should be carried out by the two Contracting States, the said States undertake, on the proposal of the Mixed Commission, to bear the expenses involved, the apportionment of which shall be determined by agreement between the Governments of the two Contracting States. The Governments of the two Contracting States shall also determine, on the proposal of the Mixed Commission, the method of carrying out the works and the method of payment.”

⁷³ Through a series of arrangements initiated by the Government of the United States of America in 1947, provision was made, in conjunction with the Government of Mexico, for a joint campaign against foot and mouth disease in Mexico, and for the expenditure of funds provided by the two Governments for this purpose. See M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1968), vol. 6, pp. 266-267.

⁷⁴ See e.g. the Agreement between Canada, Denmark, Norway, the USSR and the United States of America on the Conservation of Polar Bears (Oslo, 15 November 1973) (*United States Treaties and Other International Agreements, 1976* (Washington, D.C.), vol. 27, part 4, p. 3918).

⁷⁵ See footnote 35 above.

Canada and the Soviet Union relating to the *Cosmos 954* satellite—a Soviet space object which had crash-landed in Canada—one question at issue was whether liability under the 1972 Convention on International Liability for Damage caused by Space Objects extended to the repayment of substantial costs incurred by Canada in investigating the crash-landing.⁷⁶ The answer to that question depends upon the meaning placed on “damage” as defined in article I, paragraph (a) of the Convention,⁷⁷ and that definition in turn reflects the way in which the drafters of the Convention measured the range of effects upon use or enjoyment of the physical consequence of a crash-landing.

34. There is, however, a different trend in multilateral instruments, which are venturing into new areas, rather than merely responding to the circumstances in which transboundary damage is most likely to give rise to individual claims or angry remonstrances from an affected State. These instruments often display a particular concern either with circumstances in which damage affects the areas of the biosphere not within the limits of national jurisdiction,⁷⁸ or with circumstances in which damage suffered within national territory cannot be traced to particular transboundary sources.⁷⁹ Such instruments as these—including especially, but by no means exceptionally,⁸⁰ part XII of the 1982 United Nations Convention on the Law of the Sea,⁸¹ dealing with the protection and preservation of the marine environment—are rich in their expression of the criteria of evaluation; and it is a large part of their purpose to increase knowledge and heighten awareness of the gravity of the damage caused by activities giving rise to physical consequences with harmful transboundary effects. In the international legislation adopted since the enunciation of these themes in Principles 21 and 22 of the United Nations Declaration on the Human Environment

(Stockholm Declaration), adopted in 1972,⁸² it has become common to place emphasis upon the obligations that States have as the counterpart of their rights, and upon the need for the development of the law.⁸³

VI. The roles of international organizations

35. It is convenient to consider in reverse order the issues raised by draft articles 3, 4 and 5. The point covered in draft article 5, relating to matters not within the scope of the present articles, is a narrow one. Following the Commission's usual practice, draft article 1, on scope, deals only with relations between States; and there is little war-

82

“Principle 21

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

“Principle 22

“States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”

(*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), part one, chap. I).

⁸³ See e.g. arts. 4 and 12 of the Convention for the Protection of the Mediterranean Sea against Pollution (footnote 31 above); arts. III and XIII of the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (footnote 66 above); arts. 3 and 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (footnote 80 above); arts. 4 and 14 of the Convention for the Protection and Development of the Wider Caribbean Region (footnote 80 above); and the following provisions, in particular, of the 1982 United Nations Convention on the Law of the Sea (footnote 14 above, second paragraph):

“Article 208. Pollution from sea-bed activities subject to national jurisdiction

“... .

“5. States, acting especially through competent international organizations or diplomatic conference, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph 1. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.”

“Article 235. Responsibility and liability

“1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

“2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

“3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

“Article 304. Responsibility and liability for damage

“The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.”

⁷⁶ See Canada, Department of External Affairs, Note No. FLA-268 of 23 January 1979, annex A (*International Legal Materials* (Washington D.C.), vol. XVIII, 1979, p. 902).

⁷⁷ See footnote 19 above, second paragraph.

⁷⁸ See e.g. the second revised draft convention for the protection of the ozone layer (footnote 45 above). See also art. IX of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (footnote 14 above); and art. 7, para. 1 of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 109).

⁷⁹ See e.g. the Convention on Long-range Transboundary Air Pollution (footnote 29 above), in which “long-range transboundary air pollution” is defined as follows:

“Article 1

“... .

“(b) ‘Long-range transboundary air pollution means air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.’”

⁸⁰ See also e.g. the Convention for the Protection of the Mediterranean Sea against Pollution (footnote 31 above); the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (footnote 66 above); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974) (*International Legal Materials* (Washington, D.C.), vol. XIII, No. 3, 1979, p. 546); the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena, Colombia, 24 March 1983) (*ibid.*, vol. XXII, No. 2, 1983, p. 227).

⁸¹ See footnote 14 above, second paragraph.

rant for departing from that practice in the case of the present topic. Nevertheless, some existing treaties envisage that activities with transboundary effects may be conducted under the control either of States or of international organizations. The most notable of these are treaties which relate to activities in outer space or in the marine environment. In reference to such cases, draft article 5 would show that the relationships between States remain within the scope of the present articles, even though an international organization may also be involved. Furthermore, draft article 5 would negate any presumption that the relationships between States and international organizations are governed by rules in substance different from those applying in relations between States. The draft article may be compared with similar articles included in the 1969 Vienna Convention on the Law of Treaties (art. 3),⁸⁴ and in the 1978 Vienna Convention on Succession of States in respect of Treaties (art. 3).⁸⁵

36. It may be useful to detail the course of development in the treaties dealing with outer space and with the law of the sea, not so much as a vindication of the need for draft article 5, but in order to shed some light on the increasingly rich and varied role of international organizations in the practice connected with the present topic. The 1967 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space⁸⁶ reveals, in its article XIII, a characteristic progression. It begins with the notion that States may conduct activities jointly, and may do so within the framework of an appropriate international organization; and this leads to the consequence that other parties may address themselves either to the organization or to the States which have conducted their activities within its framework. In the 1972 Convention on International Liability for Damage caused by Space Objects,⁸⁷ eligible international organizations which declare their acceptance of the Convention are installed as potential partners of States in relation to the launching of space objects; and States parties to the Convention, which are also members of an international organization which has accepted the Convention, share jointly and severally any liability incurred by that organization (art. XXII). The State or organization which launches a space object or causes a space object to be launched shares liability for any damage caused by that object with the State from whose territory or facility the space object is launched (arts. V and XII). The 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies contains comparable provisions (art. 16).⁸⁸

37. The 1958 Geneva Convention on the High Seas,⁸⁹ after stating the general legal position that ships have the right to fly the flag of their State of registration, and are required to sail under that flag only, leaves open the possibility "of ships employed on the official service of an

intergovernmental organization flying the flag of that organization" (art. 7). The 1982 United Nations Convention on the Law of the Sea⁹⁰ retains this provision in slightly modified form (art. 93). More importantly, however, the latter Convention includes a number of provisions comparable in structure with those of the 1972 Convention on International Liability for Damage caused by Space Objects, referred to in the preceding paragraph. Under these provisions, States are encouraged to work "through competent international organizations"—for example—to achieve the legislative and scientific goals of the Convention in relation to marine scientific research, to the development and transfer of marine technology, and to the protection and preservation of the marine environment.⁹¹ As a consequence, article 263 of the Convention, dealing with "responsibility and liability" arising out of marine scientific research, applies equally to States and to international organizations; and it extends to such organizations similar obligations to those that article 235 of the Convention places on States in respect of damage caused by pollution of the marine environment.⁹² As an entirely separate matter—not connected in any way with the earlier references in this paragraph to "competent international organizations"—it should be noted that the United Nations Convention on the Law of the Sea is open for signature by an international organization "constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters" (art. 305, para. 1 (f), and annex IX).

38. In short, the circumstances that draft article 5 is designed to cover have their own importance; but they are only byproducts of larger and more significant themes. The first replies to the questionnaire, prepared by the Special Rapporteur with the help of the Secretariat and addressed to selected international organizations,⁹³ will serve as an index to the various ways in which States work "through competent international organizations" or "within the framework of an appropriate international organization". First—and here one harks back to the earliest themes of the present report—adverse transboundary effects can by definition be resolved only through international co-operation; and whether a problem falls strictly within the scope of the present topic, or is one that States choose to treat as if it fell within the scope of the topic, international organizations are essential catalysts.⁹⁴ Secondly, they are also the main centres for data collection and dissemination.⁹⁵

⁹⁰ See footnote 14 above, second paragraph.

⁹¹ See, in particular, arts. 197, 199, 200, 203-206, 207 (para. 4), 208 (para. 5), 210 (para. 4), 211 (paras. 1, 5 and 6 (a) and (b)), 212 (para. 3), 217 (paras. 1 and 7), 220 (para. 7), 239, 242 (para. 1), 243, 244, 251, 266, 271, 272, 273 and 278.

⁹² See footnote 83 above.

⁹³ See p. 129 above, document A/CN.4/378.

⁹⁴ See e.g. the contribution of the International Narcotics Control Board to the action to ensure the availability of drugs exclusively for legitimate uses (*ibid.*, sect. I, p. 132); the work of WHO to ensure that international transport facilities do not pose risks to health, and to promote the necessary co-ordination between neighbouring countries in efforts to eradicate insect-borne disease (*ibid.*, sect. II, B, p. 136); and the work of OECD, acting through its Environment Committee, on problems of transboundary water and air pollution (*ibid.*, sect. III, annex I, p. 145).

⁹⁵ See e.g. the mandate given to FAO to collect, analyse, interpret and disseminate information relating to nutrition, food and agriculture (*ibid.*,

(Continued on next page)

⁸⁴ Signed at Vienna, 23 May 1969 (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140).

⁸⁵ Signed at Vienna, 23 August 1978 (*ibid.* 1978 (Sales No. E.80.V.1), p. 106).

⁸⁶ See footnote 14 above.

⁸⁷ *Ibid.*, footnote 19, second paragraph.

⁸⁸ *Ibid.*, footnote 78.

⁸⁹ Signed at Geneva, 29 April 1958 (United Nations, *Treaty Series*, vol. 450, p. 11).

Thirdly, they provide the usual means for setting international standards, and monitoring compliance with those standards;⁹⁶ and often norms thus established have as much influence upon the conduct of States as the most authoritative codification of a rule of customary law. Fourthly, the technical assistance that international organizations can provide, especially in relation to impact assessment, is often the key to the avoidance or resolution of disputes, by reducing areas of disputed fact and suggesting ways of reconciling uses.⁹⁷ Fifthly, international organizations have often a statutory obligation to assess dangers and give warnings of them; and they may also give guidance as to remedial measures.⁹⁸ Finally—and, within the context of the present topic, this is a feature of the greatest importance—international organizations are frequently the means through which States rise above a preoccupation with immediate irritations and work together for the common interest in protecting the oceans and air space, and all the other interests that cannot be reduced to a finite equation between a given activity and a quantified and localized transboundary effect.⁹⁹

VII. Relationship with other rules of law

39. Before leaving the treaties relating to outer space and to the marine environment, discussed under the previous heading, it is necessary to consider the frequent and con-

(Footnote 95 continued)

sect. II, A, p. 133); the work of IAEA in fostering the exchange of scientific information in nuclear science and technology (*ibid.*, sect. II, C, p. 141); and the work of OECD in providing mutually agreed technical and economic data and in recommending mutually agreed policy options and legal principles, which were duly taken into account in the formulation and implementation of the Convention on Long-range Transboundary Air Pollution (*ibid.*, sect. III, annex I, p. 145).

⁹⁶ See e.g. the measures that may be taken by the International Narcotics Control Board, pursuant to art. 14 of the Single Convention on Narcotic Drugs, 1961, as amended, to ensure the execution of the provisions of the Convention, (*ibid.*, sect. I, p. 132); the work of IAEA in developing various safety standards for nuclear activities or installations and, more specifically, an internationally recognized minimum value of radiation detriment (*ibid.*, sect. II, C, p. 141); and the work of the Nuclear Energy Agency of OECD in encouraging the harmonization of the regulatory policies and practices of Governments in the nuclear field, with particular reference to the safety of nuclear installations, protection of man against ionizing radiation, preservation of the environment, radioactive waste management, and nuclear third party liability and insurance (*ibid.*, sect. III, annex II, p. 148).

⁹⁷ See e.g. the work of FAO in conducting research on the impact on the environment, within or outside the limits of national jurisdiction, of irrigation, of tropical forest exploitation, of pest management, of trypanosomiasis control, of pesticide use, of the pulp and paper industry, and of the hides, skins and leather industry (*ibid.*, sect. II, A, p. 133); and the work of IAEA in providing assistance in data collection, studies and assessments at the request of a member State that considers undertaking a project (*ibid.*, sect. II, C, p. 141).

⁹⁸ See e.g. the role of WHO as the channel through which a warning is to be given to the international community of the outbreak of certain infectious diseases (*ibid.*, sect. II, B, p. 136). See also the work of IAEA in facilitating co-operation among member States for preventing and limiting injurious effects in cases where a nuclear accident may have significant radiological impact in other States (*ibid.*, sect. II, C, p. 141).

⁹⁹ See e.g. the work of FAO in regard to research, data collection and the compilation of statistics on fisheries in the high seas and in the Antarctic, and on remote sensing technology (*ibid.*, sect. II, A, p. 133); and the duty of IAEA under the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, and under the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, to define high-level radioactive wastes and other such matter

sistent usage in these treaties of the terms “responsibility”¹⁰⁰ and “liability”¹⁰¹ which, in the 1982 United Nations Convention on the Law of the Sea, are even juxtaposed as section and article headings.¹⁰² At first glance, it might be presumed that “responsibility” would have the same meaning as the expression “State responsibility”, that is, a responsibility arising from a wrongful act or omission of the State. The texts, however, make it clear that the term “responsibility” has in these treaties quite a different meaning. It refers to the content of a primary obligation, not to its breach; thus the 1982 United Nations Convention on the Law of the Sea provides:

Article 235. Responsibility and liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

...

This provision may still leave a doubt about the relationship between “responsibility” and “liability”; but article 232 of the Convention sheds some light upon the meaning of “liability”:

Article 232. Liability of States arising from enforcement measures

States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6¹⁰³ when such measures are unlawful or exceed those reasonably required in the light of available information. . . .

It is therefore quite clear that “liability” may arise whether or not there has been a breach of an international obligation. “Liability”, no less than “responsibility”, refers in

unsuitable for dumping at sea, and to make recommendations to be fully taken into account by the contracting parties in issuing permits for the dumping at sea of radioactive matter not prohibited under the relevant Convention (*ibid.*, sect. II, C, p. 141).

¹⁰⁰ Art. VI of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (see footnote 14 above); art. 14, para. 1, of the Agreement governing the Activities of States on the Moon and Other Celestial Bodies (see footnote 78 above); art. 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (see footnote 80 above); art. 139, para. 1, and arts. 235, 263 and 304; annex III, art. 4, para. 4, and art. 22; annex IX, art. 6, of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

¹⁰¹ Art. VII of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (see footnote 14 above); the title, preamble and art. 2 of the Convention on International Responsibility for Damage caused by Space Objects (see footnote 19 above, second paragraph); art. 14, para. 2, of the Agreement governing the Activities of States on the Moon and Other Celestial Bodies (see footnote 78 above); art. 12 of the Convention for the Protection of the Mediterranean Sea against Pollution (see footnote 31 above); art. XIII of the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (see footnote 66 above); art. 17 of the Convention on the Protection of the Baltic Sea Area (see footnote 80 above); art. 14 of the Convention for the Protection and Development of the Wider Caribbean Region (see footnote 80 above); art. 139, para. 2, and arts. 232, 235, 263, 304; annex III, art. 4, para. 4, and art. 22; annex IV, art. 2, para. 3, and art. 3; annex IX, art. 6, of the 1982 United Nations Convention on the Law of the Sea (see footnote 14 above, second paragraph).

¹⁰² Part XII, sect. 9 and art. 235; part XIII, sect. 5 and art. 263; see also arts. 139 and 304.

¹⁰³ Section 6 of part XII of the Convention deals with enforcement measures relating to the protection and preservation of the marine environment.

this Convention to the content of a primary obligation; and that obligation is to regulate activities within the territory or under the control of the State, so as to avoid or repair transboundary loss or injury:

Article 235. Responsibility and liability

...

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

...

40. The phrase "responsibility and liability", as used in the United Nations Convention on the Law of the Sea, therefore corresponds closely to the twin themes of prevention and reparation, which form the basis of the present topic. To illustrate this, it is not necessary to resort to a close textual analysis of provisions that were hammered out on the anvil of consensus. In the earliest of these treaties—the 1967 Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,¹⁰⁴ the usage is already crystal clear:

Article VI

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. . . .

Article VII

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object

Equally, the United Nations Convention on the Law of the Sea—especially in the provisions dealing with research and with the protection and preservation of the marine environment—does not content itself with a statement of what is forbidden. Its emphasis, in article after article, is upon prescribing a course of conduct which, if followed in good faith, will ensure that transboundary loss or injury is avoided or repaired.¹⁰⁵ In these provisions, the Convention leaves multiple elements to the discretion of States, but furnishes them with guidelines and enjoins their co-operation. Unless a State's whole course of action is refractory, the application of these provisions may not disclose a point of intersection of harm and wrong.¹⁰⁶ If there is a modicum of co-operation, the duties of prevention and reparation can be discharged, without establishing the exact location of that much disputed point.

41. If the principles of the present topic could be reduced to a mathematical formula, "x" would always represent the

¹⁰⁴ See footnote 14 above.

¹⁰⁵ See in particular arts. 194-197, 204, 206-212, 234, 240, 242, 246 and 249.

¹⁰⁶ See the Special Rapporteur's second report, *Yearbook . . . 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, para. 59.

unascertained point of intersection of harm and wrong. Sometimes the point can be precisely ascertained, because transboundary loss or injury has arisen from a wrongful act of the source State—for example, from a frontier transgression that constitutes a violation of sovereignty, or from the breach of a rule contained in a treaty régime, made in pursuance of the present topic. Often, however, "x" remains at large, because it is the product of complex variables, and because the parties do not agree whether the conduct giving rise to transboundary loss or injury has passed the point of wrongfulness. It is then that the rules and guidelines of the present topic are set in motion, not to decide whether the loss or injury arose from a wrongful act of the source State, but to articulate the duties of prevention and reparation. Draft article 4, as proposed by the Special Rapporteur, is therefore much more than a drafting precaution: it adverts to an essential relationship, which cannot be reduced to a fixed measurement, between the duty to prevent and repair transboundary loss or injury and the unresolved question whether the loss or injury arose from a wrongful act of the source State. Conversely, in making a régime or settling a claim pursuant to the present topic, States will give great weight to their own perceptions as to where the extreme limits of lawfulness may lie.

42. Some of the imponderables described in the preceding paragraph loom darkly in the 1954 Convention between Yugoslavia and Austria concerning Water Economy Questions relating to the Drava.¹⁰⁷ Both parties used their national sections of the river for the generation of electric power. Austria's use had resulted in a decreased minimum flow of water to Yugoslavia, while Yugoslavia's damming of the river had caused a back-up of water in Austrian territory (arts. 1 and 3). As is so often the case, the solution to the problem took into account interests other than those initially involved. Austria agreed, *inter alia*, to restrict the use of its power stations to ensure the maintenance of a minimum flow, to press no claims in respect of the existing back-up of water into its territory, and to purchase surplus summer power from Yugoslavia. Yugoslavia undertook not to increase the water back-up in Austrian territory, and to accept Austrian power-station equipment in payment for Austria's purchase of summer power (arts. 1, 2 and 3).¹⁰⁸ There would be consultation before Yugoslavia took any step to add to power development on its section of the river, and before Austria acted upon any plan to divert more water from the Drava basin. A Joint Drava Commission was established to ensure consultation and exchange of information (art. 1 (c) and arts. 4-5). The parties also agreed that, as long as the conventional régime was observed, they would not press their respective claims for interference with the flow of the river or for the backing-up of water (art. 3). The Convention gives no indication whether those claims, if revived, would allege wrongfulness, or would be formulated as claims to reparation within the rubric of the present topic.

43. There is of course an extreme disparity between the tolerance that States are apt to demand of each other in relation to exposure to transboundary effects and their

¹⁰⁷ Signed at Geneva, 25 May 1954 (United Nations, *Treaty Series*, vol. 227, p. 111).

¹⁰⁸ There is perhaps an element of reparation in some of these provisions.

meticulous respect in other contexts for the rights of territorial sovereignty. For example, in the Drava Convention, Austria and Yugoslavia avoided the need to characterize the conduct of the source State in matters as serious as the flooding of an area of national territory, and diversion of the flow of a much utilized river. By contrast, the building of the Salzburg airport, on Austria's frontier with the Federal Republic of Germany, would not have been conceivable without the Federal Republic's full and prior agreement to establish the required safety zone on German territory, although at Austria's expense.¹⁰⁹ The latter case might therefore be regarded as barely falling within the scope of the present topic, because the true transboundary effects were limited to increased noise levels and other minor consequences of the positioning of the flight path. Yet it is appropriate to emphasize that the solutions to many problems involving prospective transboundary loss or injury entail changes in a boundary régime. Just as there is certainly no right to subject neighbouring territory to unlimited adverse transboundary effects, so there may be a duty to accept, on equitable terms, some encroachments upon the use or enjoyment of territory.

VIII. Relationship with other agreements

44. The ostensible contrast between rules made pursuant to the present topic, and those that "specify circumstances in which the occurrence of transboundary loss or injury arises from a wrongful act or omission", has been considered under the previous heading. It can be seen that the two kinds of rules are mutually supporting. If States have not settled for themselves the points at which harm and wrong intersect, and if no general rule of law has settled the matter for them, their usual and preferred course of action will be to develop a new context, in which the boundary line between what is permitted and what is forbidden can be drawn more or less to the satisfaction of all interests. The stimulus to agreement may be mutual advantage—in terms either of the particular subject-matter or of the more generalized benefits that flow from good neighbourliness;¹¹⁰ and there may be willingness to modify rights as a means of achieving a balance of interests. In the worst circumstance, when mutuality of interest and goodwill are lacking, the principles that underlie the present topic are still a spur to the taking of initiatives and the making of concessions in a search for agreement. Except as has been

¹⁰⁹ Arts. 1, 4 and 5 of the Agreement between the Federal Republic of Germany and Austria concerning the Effects on the Territory of the Federal Republic of Germany of Construction and Operation of the Salzburg Airport (see footnote 13 above).

¹¹⁰ See e.g. some of the considerations that weighed with the parties to the Treaty of La Plata River and its Maritime Limits (footnote 60 above, second paragraph).

"The Governments of the Republic of Argentina and the Republic of Uruguay, . . . motivated by a common goal for the elimination of potential difficulties that may arise out of a legally undefined situation relevant to the exercise of equal rights in the La Plata River, and out of the lack of any delimitation of a boundary between their respective maritime jurisdictions; . . . have resolved to conclude a Treaty that will envisage a final solution to such problems, consistent with the special characteristics of the involved fluvial and maritime territories and the technical requirements for their overall utilization and exploitation, all within a framework of respect for sovereignty and for the respective rights and interests of the two States."

otherwise agreed, the onus must remain with the source State to show that it has taken every reasonable step to save others from exposure to adverse transboundary effects, and to provide for reparation should such effects occur.

45. There are two main ways in which rules and guidelines, developed in pursuance of the present topic, can help source States and affected States to reach agreements that strike a proper balance between freedom of activity and freedom from adverse transboundary effects. One way is by developing a pattern of procedures to facilitate fact-finding and negotiation, as indicated in sections 2, 3 and 4 of the schematic outline. The other way is by consolidating applicable principles and methods, as foreshadowed in sections 5, 6 and 7 of the schematic outline. In both these respects, State practice can provide a revolving fund. Agreements made within the context of the present topic will furnish the parties to those agreements with more definite rules to regulate particular kinds of transboundary danger, or with more precise criteria for future decision-making in relation to such dangers. And, in so far as these new agreements reveal consistent patterns of State practice, they in turn will contribute to the development of customary law, and will augment the reservoir of applicable principles and factors. Therefore draft article 3, dealing with the relationship between the present draft articles and other international agreements, subordinates the present articles to all international agreements, present or future, to the extent that they deal with the same subject-matter. It remains to assess this rule of self-effacement, and its relationship to draft article 1, on scope.

46. The strength of the proposed articles lies, first, in their affirmation that a source State is never without a legal responsibility in relation to things done, within its territory or under its control, which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas beyond the limits of that State's jurisdiction. Secondly, subject to any rules of prohibition of customary law—which lie outside the scope of the present articles—the normal way for the source State to discharge its responsibility is by reaching agreement with affected States upon measures to prevent, or minimize and repair, the actual or prospective adverse transboundary effects. Failing the possibility of such agreement, the source State remains accountable for the adequacy of its own efforts to take and implement measures which pay due regard to the interests of other States. Thirdly, these rules are supported by the whole range of treaty and claims practice examined in the Secretariat's extremely valuable analytical study.¹¹¹ That practice also provides rich precedents on which the present draft articles could draw in elaborating the procedures for fact-finding and negotiation, and in assembling the principles and factors which are the building-blocks of treaty régimes. Finally, against the background of rules and precepts already mentioned, there is enormous strength in the theme of voluntarism. The compulsion to regulate dangers is provided by facts, not by law. If law seeks to assert a compulsion of its own, divorced from fact, the impetus to legal development is lost in empty disputation whether States act freely in their own domain, or are constrained by need for prior agreement.

47. A commitment to voluntarism cannot be half-

¹¹¹ ST/LEG/15.

hearted. The first requirement is to provide conditions that encourage communication between interested parties, leading them to pursue the promise of a fair solution, and not to fear entrapment. It is for this reason that the schematic outline attaches no dire legal consequence to a failure to engage in fact-finding, or to a refusal to establish a régime of prevention and reparation. The sanction is inherent in the circumstances of the source State: it must bear its own unliquidated liability, until there can be a fair distribution of costs and benefits, negotiated freely with affected States—which may themselves also be source States. It is for the same reason that the proposed scope article is widely drawn, speaking of “effects”, not “adverse effects”, and referring to “situations”, as well as to “activities”. An affected State is entitled to be the judge of its own interests, and its evaluation of effects upon use or enjoyment will not always coincide with that of the source State. Similarly, if these articles provide no formal sanction to compel the source State to provide information or to undertake negotiation, they must, as far as possible, place the affected State in an equally advantageous position: the affected State may take the initiative by requesting information, and by seeking an abatement, in relation to any actual or suspected source of transboundary damage, without the need to establish a connection with an activity (see paras. 31-32 above). As the rules progress, their focus should narrow and deepen: “effects” will reduce to “adverse effects”, and ultimately to “loss or injury”; and “activities and situations” will become “activities” alone. Moreover, the shades of qualification which are, and should be, absent from draft article 1, on scope, will begin

to make their appearance in the following sections: for instance, in section 2, reasonable limits, supported by State practice, must be set for the duty to notify affected States of their actual or possible exposure to physical consequences with transboundary effects.

48. It would, finally, be a mistake to assume too readily that the proposed draft articles will be drained of content in relation to every activity and situation to which other international agreements apply. The multilateral treaties which contain the most copious indications of criteria and procedures for evaluating transboundary effects are also those which call for the development of international law—or which assert the absence of rules as to liability and, as it were, reserve a place for them.¹¹² In bilateral negotiations, States make even more use of their right to tailor their agreements to immediate requirements, leaving it to the general law to fill in gaps. Articles developed in pursuance of the present topic cannot take the place of the more specific agreements which it is their main objective to promote. They can, however, offer a wealth of precedent to facilitate the conclusion of such agreements, and testimony that the duty to avoid and repair adverse transboundary effects is a principle of general application.

¹¹² See para. 34 and footnote 83 above. See also the Convention on Long-range Transboundary Air Pollution (footnote 29 above), art. 8 (*f*) of which provides for the exchange of information among the contracting parties on, *inter alia*, “the extent of the damage which . . . can be attributed to long-range transboundary air pollution”. A footnote to the word “damage” states: “The present Convention does not contain a rule on State liability as to damage.”

CHECK-LIST OF DOCUMENTS OF THE THIRTY-SIXTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/375	Provisional agenda	Mimeographed. For the agenda as adopted, see <i>Yearbook . . . 1984</i> , vol. II (Part Two), chap. I, para. 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 the present volume (p. 5).
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	<i>Ibid.</i> (p. 89).
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	<i>Ibid.</i> (p. 129).
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	<i>Ibid.</i> (p. 59).
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	<i>Ibid.</i> (p. 1).
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	<i>Ibid.</i> (p. 101).
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	<i>Ibid.</i> (p. 72).
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	<i>Ibid.</i> (p. 155).
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 <i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10)</i> . The final text appears in <i>Yearbook . . . 1984</i> , vol. II (Part Two).
A/CN.4/L.371 and Add.1	<i>Idem</i> : chapter II (Draft Code of Offences against the Peace and Security of Mankind)	<i>Idem</i> .
A/CN.4/L.372 and Add.1	<i>Idem</i> : chapter III (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i> .
A/CN.4/L.373 [and Add.1 and 2 Corr.1]	<i>Idem</i> : chapter IV (Jurisdictional immunities of States and their property)	<i>Idem</i> .
A/CN.4/L.374 and Add.1	<i>Idem</i> : chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.375 and Add.1 [and Add.1/Corr.1] and Add.2	<i>Idem</i> : chapter VI (The law of the non-navigational uses of international watercourses)	<i>Idem</i> .
A/CN.4/L.376 and Add.1	<i>Idem</i> : chapter VII (State responsibility)	<i>Idem</i> .
A/CN.4/L.377	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
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 <i>Yearbook . . . 1984</i> , vol. I, summary records of the 1862nd and 1864th meetings.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
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	<i>Idem</i> , 1868th and 1869th meetings.
A/CN.4/L.380	<i>Idem</i> , revised text of article 19 proposed by the Special Rapporteur	Mimeographed.
A/CN.4/L.381	<i>Idem</i> , text of paragraph 2 of article 11 proposed by the Special Rapporteur	<i>Idem</i> .
A/CN.4/SR.1814- A/CN.4/SR.1874	Provisional summary records of the 1814th to 1874th meetings of the International Law Commission	<i>Idem</i> . The final text appears in <i>Yearbook . . . 1984</i> , vol. I.

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