REPORT OF THE INTERNATIONAL LAW COMMISSION

on the work of its thirty-eighth session

5 May-11 July 1986

GENERAL ASSEMBLY

OFFICIAL RECORDS: FORTY-FIRST SESSION

SUPPLEMENT No. 10 (A/41/10)

UNITED NATIONS

180 p.

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

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook... 19..*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 1986*.

[Original: Arabic/Chinese/English/
French/Russian/Spanish]

[20 August 1986]

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CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-eighth session at its permanent seat at the United Nations Office at Geneva, from 5 May to 11 July 1986. The session was opened by the Chairman of the thirty-seventh session, Mr. Satya Pal Jagota.

2. The work of the Commission during this session is described in the present report. Chapter II of the report relates to the topic 'Jurisdictional immunities of States and their property" and contains the full set of the 28 draft articles provisionally adopted as a whole by the Commission on first reading, and commentaries on the 14 draft articles or parts thereof which were provisionally adopted, on first reading, at the present session. Chapter III relates to the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and contains the full set of the 33 draft articles provisionally adopted as a whole by the Commission on first reading, and commentaries on the six draft articles which were provisionally adopted, on first reading, at the present session. Chapter IV relates to the topic "State responsibility". Chapter V relates to the topic "Draft Code of Offences against the Peace and Security of Mankind". Chapter VI relates to the topic "International liability for injurious consequences arising out of acts not prohibited by international law". Chapter VII relates to the topic "The law of the non-navigational uses of international watercourses". Chapter VIII of the report concerns the topic "Relations between States and international organizations (second part of the topic)" and the programme and methods of work of the Commission, and also considers certain administrative and other matters.

A. Membership

3. The Commission consists of the following members:

Chief Richard Osuolale A. AKINJIDE (Nigeria)

Mr. Riyadh AL-QAYSI (Iraq)

Mr. Gaetano ARANGIO-RUIZ (Italy)

Mr. Mikuin Leliel BALANDA (Zaire)

Mr. Julio BARBOZA (Argentina)

Mr. Boutros BOUTROS-GHALI (Egypt)

Mr. Carlos CALERO-RODRIGUES (Brazil)

Mr. Jorge CASTAÑEDA (Mexico)

Mr. Leonardo DIAZ-GONZALEZ (Venezuela)

Mr. Khalafalla EL RASHEED MOHAMED-AHMED (Sudan)

Mr. Constantin FLITAN (Romania)

Mr. Laurel B. FRANCIS (Jamaica)

Mr. Jiahua HUANG (China)

Mr. Jorge E. ILLUECA (Panama)

Mr. Andreas J. JACOVIDES (Cyprus)

Mr. Satya Pal JAGOTA (India)

Mr. Abdul G. KOROMA (Sierra Leone)

Mr. José M. LACLETA MUÑOZ (Spain)

Mr. Ahmed MAHIOU (Algeria)

Mr. Chafic MALEK (Lebanon)

Mr. Stephen C. McCAFFREY (United States of America)

Mr. Frank X. NJENGA (Kenya)

Mr. Motoo OGISO (Japan)

Mr. Syed Sharifuddin PIRZADA (Pakistan)

Mr. Edilbert RAZAFINDRALAMBO (Madagascar)

Mr. Paul REUTER (France)

Mr. Willem RIPHAGEN (Netherlands)

Mr. Emmanuel J. ROUKOUNAS (Greece)

Sir Ian SINCLAIR (United Kingdom of Great Britain and Northern Ireland)

Mr. Sompong SUCHARITKUL (Thailand)

Mr. Doudou THIAM (Senegal)

Mr. Christian TOMUSCHAT (Federal Republic of Germany)

Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics)

Mr. Alexander YANKOV (Bulgaria)

B. Officers

4. At its 1941st meeting on 6 May 1986, the Commission elected the following officers:

Chairman: Mr. Doudou Thiam

First Vice-Chairman: Mr. Julio Barboza

Second Vice-Chairman: Mr. Alexander Yankov

Chairman of the Drafting Committee: Mr. Willem Riphagen

Rapporteur: Mr. Motoo Ogiso

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as chairmen of the Commission, and the Special Rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 1945th meeting on 14 May 1986, set up for the present session a Planning Group to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Julio Barboza (Chairman), Mr. Riyadh Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Leonardo Díaz-González, Mr. Khalafalla El Rasheed Mohamed-Ahmed, Mr. Constantin Flitan, Mr. Laurel B. Francis, Mr. Satya Pal Jagota, Mr. Andreas J. Jacovides, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Motoo Ogiso, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Sir Ian Sinclair and Mr. Christian Tomuschat. The Group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

6. At its 1941st meeting, on 6 May 1986, the Commission appointed a Drafting Committee. It was composed of the following members: Mr. Willem Riphagen (Chairman), Chief Richard Osuolale A. Akinjide, Mr. Mikuin Leliel Balanda, Mr. Carlos Calero-Rodrigues, Mr. Leonardo Díaz-González, Mr. Jiahua Huang, Mr. José M. Lacleta Muñoz, Mr. Ahmed Mahiou, Mr. Stephen C. McCaffrey, Mr. Edilbert Razafindralambo, Mr. Paul Reuter, Sir Ian Sinclair, Mr. Nikolai A. Ushakov and Mr. Alexander Yankov. Mr. Motoo Ogiso also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Secretariat

7. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General.
Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and in the absence of the Legal Counsel represented the Secretary-General. Mr. John De Saram, Deputy Director of the Codification Division of the Office of Legal Affairs,

acted as Deputy Secretary to the Commission. Mr. Larry D. Johnson, Senior Legal Officer, served as Senior Assistant Secretary to the Commission and Ms. Mahnoush H. Arsanjani, Mr. Manuel Rama-Montaldo and Mr. Mpazi Sinjela, Legal Officers, served as Assistant Secretaries to the Commission.

E. Agenda

8. At its 1941st meeting, on 6 May 1986, the Commission adopted an agenda for its thirty-eighth session, consisting of the following items:

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

9. The Commission considered all the items on its agenda except for item 8, "Relations between States and international organizations (second part of the topic)", to which reference is made in section A of Chapter VIII of this report, but as explained in paragraph 244 of Chapter VIII of this report, it was unable to give adequate consideration to several topics due to lack of time. The Commission held 49 public meetings (1940th to 1989th) and, in addition, the Drafting Committee of the Commission held 36 meetings, the Enlarged Bureau of the Commission held four meetings and the Planning Group of the Enlarged Bureau held three meetings.

CHAPTER II

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

10. The Commission at its thirtieth session, in 1978, included the topic "Jurisdictional immunities of States and their property" in its programme of work in response to a recommendation made by the General Assembly in resolution 32/151 of 19 December 1977.

11. The Commission, at its thirty-first session, in 1979, received the first, and preliminary, report 1/ of the Special Rapporteur, Mr. Sompong Sucharitkul. The Commission decided at the same session that a questionnaire should be circulated to States Members of the United Nations to obtain further information and the views of Governments. The materials received in response to the questionnaire were submitted to the Commission at its thirty-third session, in 1981. These materials, together with certain further materials prepared by the Secretariat, were later published in a volume of the United Nations Legislative Series. 2/

12. The Commission, from its thirty-first to its thirty-seventh session in 1985, received six further reports from the Special Rapporteur, which contained proposals on draft articles, arranged as follows: Part I (Introduction); Part II (General principles); Part III (Exceptions to State immunity); Part IV (State immunity in respect of property from attachment and execution) and Part V (Miscellaneous provisions). 3/

1/ Yearbook ... 1979, vol. II (Part One), p. 227, document A/CN.4/323.

2/ Materials on Jurisdictional immunities of States and their property (United Nations publication, Sales No. E/F.81.V.10).

3/ For the reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 199, document A/CN.4/33[illegible] and Add. 1; Yearbook ... 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add. 1; Yearbook ... 1982, vol. II (Part One), p. 199, document A/CN.4/357; Yearbook ... 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add. 1; Yearbook ... 1984, vol. II (Part One), p. 5, document A/CN.4/376 and Add. 1 and 2; and, for 1985, document A/CN.4/388 and Corr. 1 (English only) and Corr. 2 (French only)

13. As of the conclusion of its thirty-seventh session, in 1985, the Commission had reached the following stage in its work on the preparation of draft articles on the topic. The Commission had provisionally adopted, on first reading, the following draft articles or parts thereof: Part I (Introduction). draft article 1 (Scope of the present articles); draft article 2 (Use of terms), paragraph 1; draft article 3 (Interpretative provisions), paragraph 2; Part II (General principles). draft article 7 (Modalities for giving effect to State immunity); draft article 8 (Express consent to exercise of jurisdiction); draft article 9 (Effect of participation in a proceeding before a court); draft article 10 (Counter-claim); Part III [Exceptions to State immunity]. draft article 12 (Commercial contracts); draft article 13 (Contracts of employment); draft article 14 (Personal injuries and damage to property); draft article 15 (Ownership, possession and use of property); draft article 16 (Patents, trade marks and intellectual or industrial property); draft article 17 (Fiscal matters); draft article 18 (Participation in companies or other collective bodies); draft article 19 (State-owned or State-operated ships engaged in commercial service); draft article 20 (Effect of an arbitration agreement).

14. The Commission had also referred the following draft articles to the Drafting Committee, and these draft articles were still under consideration in the Drafting Committee: Part II (General principles). draft article 6 (State immunity); Part III (Exceptions to State immunity). draft article 11 (Scope of the present Part); Part IV (State immunity in respect of property from enforcement measures). draft article 21 (Scope of the present Part); draft article 22 (State immunity from enforcement measures); draft article 23 (Effect of express consent to enforcement measures); draft article 24 (Types of property generally immune from enforcement measures). 4/

B. Consideration of the topic at the present session

15. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/396 and Corr.1) which, among other matters, set out, or proposed certain changes in, the draft articles that were still

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4/ For a fuller statement of the historical background of this topic, see Official Records of the General Assembly, fortieth session, Supplement No. 10, document A/40/10, paras. 205-247.

under consideration in the Commission in plenary and which had not as yet been referred to the Drafting Committee, namely: Part I (Introduction), draft article 2 (Use of terms), paragraph 2; draft article 3 (Interpretative provisions), paragraph 1; draft article 4 (Jurisdictional immunities not within the scope of the present articles); and draft article 5 (Non-retroactivity of the present articles); and Part V (Miscellaneous provisions), draft article 25 (Immunities of personal sovereigns and other heads of State); draft article 26 (Service of process and judgment in default of appearance); draft article 27 (Procedural privileges); and draft article 28 (Restriction and extension of immunities and privileges). 5/

16. The eighth report of the Special Rapporteur also contained proposals for draft articles on a Part VI (Settlement of disputes) and a Part VII (Final provisions) for future consideration by the Commission in finalizing the draft articles.

17. At its 1968th, 1969th, 1971st and 1972nd meetings, the Commission, having considered the report of the Drafting Committee with respect to the draft articles referred to the Drafting Committee, provisionally adopted on first reading the following: draft article 2 (Use of terms), paragraph 2; draft article 3 (Interpretative provisions), paragraph 1; draft article 4 (Privileges and immunities not affected by the present articles); draft article 5 (Non-retroactivity of the present articles); draft article 6 (State immunity); Part III ([Limitations on] [Exceptions to] State immunity); draft article 20 (Cases of nationalization); Part IV (State immunity in respect of property from measures of constraint); draft article 21 (State immunity from measures of constraint); draft article 22 (Consent to measures of constraint); draft article 23 (Specific categories of property); Part V (Miscellaneous provisions); draft article 24 (Service of process); draft article 25 (Default judgment); draft article 26 (Immunity from measures of coercion); draft article 27 (Procedural immunities); and draft article 28 (Non-discrimination).

18. The Commission, made certain drafting and editorial adjustments to previously adopted draft articles, for purposes of ensuring consistency

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5/ The texts of these draft articles are set out in the Special Rapporteur's eighth report (A/CN.4/396 and Corr. 1).

in terminology and substance, correspondence between the draft articles, and conformity in language versions. For example, the introductory phrase, "Unless otherwise agreed between the States concerned" which appeared in a number of draft articles of Part III, was also inserted in paragraph 1 of draft article 14. The formulation "the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to" was included in draft articles 13 and 17 in order to align them with other draft articles in Part III. Draft article 16 was adjusted to include the phrase "which is otherwise competent" also used in other draft articles of Part III. The French version of paragraph 1 of draft article 17 was adjusted.

19. The Commission re-numbered draft articles 12 to 20 adopted at previous sessions of the Commission (see paragraph 13 above), as draft articles 11 to 19.

20. The Commission, thereafter, at its 1972nd meeting on 20 June 1986, adopted on first reading the draft articles on the topic as a whole. The draft articles are set out below in section D (1) of this chapter.

21. The Commission, at its 1972nd meeting on 20 June 1986, decided that in accordance with articles 16 and 21 of the Statute of the Commission the draft articles, set out in section D (1) of his chapter, should be transmitted through the Secretary-General to Governments for comments and observations; and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1988.

C. Tribute to the Special Rapporteur, Mr. Sompong Sucharitkul

22. The Commission, at its 1972nd meeting, on 20 June 1986, adopted by acclamation the following resolution:

> "The International Law Commission,
>
> Having adopted provisionally the draft articles on Jurisdictional Immunities of States and their Property,
>
> Desires to express to the Special Rapporteur, Mr. Sompong Sucharitkul, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on Jurisdictional Immunities of States and their Property."

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

1. Text of the draft articles provisionally adopted by the Commission on first reading

PART I

INTRODUCTION

Article 1

Scope of the present articles 6/

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

Article 2

Use of terms 7/

1. For the purposes of the present articles:

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

(b) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods of the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction,

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6/ The Commission provisionally adopted this article at its thirty-fourth session. For the commentary thereto, see Yearbook ... 1982, vol. II (Part Two), pp. 99-100, document A/37/10, chap. V.B.

7/ The Commission provisionally adopted subparagraph 1 (a) at its thirty-fourth session in the course of its discussion of article 7, dealing with the modalities for giving effect to State immunity. For the commentary to that text, see ibid., p. 100. The Commission provisionally adopted subparagraph (b) at its thirty-fifth session in the course of its discussion of article 11, (then article 12), dealing with commercial contracts. For the commentary thereto, see Yearbook ... 1983, vol. II, (Part Two), document A/38/10, chap. III.B.2. The Commission provisionally adopted paragraph 2 of this article at its thirty-eighth session. For the commentary thereto, see below section 2 of the present chapter of this report.

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 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 in the internal law of any State.

Article 3

Interpretative provisions 8/

1. The expression "State" as used in the present articles is to be understood as comprehending:

(a) the State and its various organs of government;

(b) political sub-divisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(d) representatives of the State acting in that capacity.

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.

8/ The Commission provisionally adopted paragraph 1 of this article at its thirty-eighth session. For the commentary thereto, see below section 2 of the present chapter of this report. The Commission provisionally adopted paragraph 2 of this article during its thirty-fifth session in the course of its discussion of article 11 (then article 12), dealing with commercial contracts. For the commentary thereto, see Yearbook ... 1983, vol. II (Part Two), document A/38/10, chap. III.B.2.

Article 4

Privileges and immunities not affected by the present articles 9/

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State ratione personae.

Article 5

Non-retroactivity of the present articles 10/

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

PART II

GENERAL PRINCIPLES

Article 6

State immunity 11/

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law].

9/ The Commission provisionally adopted this article at its thirty-eighth session. For the commentary thereto, see below section 2 of the present chapter of this report.

10/ Ibid.

11/ Ibid.

Article 7

Modalities for giving effect to State immunity 12/

1. A State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the Court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political sub-divisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8

Express consent to exercise of jurisdiction 13/

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court in a specific case.

12/ The Commission provisionally adopted this article at its thirty-fourth session. For the commentary thereto, see Yearbook ... 1982, vol. II (Part Two), pp. 100-107, document A/37/10, chap. V.B.

13/ Ibid., pp. 107-109.

Article 9

Effect of participation in a proceeding before a court 14/

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has,

(a) itself instituted that proceeding; or

(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10

Counter-claims 15/

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

14/ Ibid., pp. 109-111. A suggestion was made that the word "sole" in paragraph 2 might be deleted. However, in the practice of some States, steps taken in the merits of the case would be considered as a waiver of immunity. Thus, the Commission decided to keep the word "sole" which could be re-examined at the second reading.

15/ The Commission provisionally adopted this article at its thirty-fifth session. For the commentary thereto, see Yearbook ... 1983, vol. II (Part Two), document A/38/10, chap. III.B.2.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III

[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY 16/

Article 11

Commercial contracts 17/

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply.

16/ The Commission provisionally adopted the title of this Part at its thirty-eighth session. For the commentary thereto, see below section 2 of the present chapter of this report.

17/ The Commission provisionally adopted this article (then article 12) at its thirty-fifth session. For the commentary thereto, see Yearbook ... 1983, vol. II, (Part Two), document A/38/10, chap. III.B.2.

A suggestion was made in the course of the debate in the Sixth Committee that in order to exercise jurisdiction a link should be established under article 11 between the State of the forum and the State against which a proceeding is instituted, such as the existence in the territory of the State of the forum of an office or bureau to conduct the business or commercial transactions on behalf of the foreign State concerned. Reference to the applicable rules of private international law regulating the question of jurisdiction of the courts of the territorial State has been regarded generally as providing adequate assurance of an existing connection which could be territorial or else jurisdiction could be established by mutual consent of the parties to the contract. Another view has since been expressed to the effect that apart from consent in the case of forum prorogatum, there should also be a genuine territorial connection to enable the court to exercise jurisdiction in regard to the commercial contract in question. The possibility of further improvement of the text of article 11 will be re-examined on second reading. See topical summary of the discussion held in the Sixth Committee of the General Assembly during its thirty-eighth session prepared by the Secretariat, document A/CN.4/L.369, paras. 200-201.

(a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

Article 12

Contracts of employment 18/

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority;

(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time the proceeding is instituted;

18/ The Commission provisionally adopted this article (then article 13) at its thirty-sixth session. For the commentary thereto, see Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), chap. IV.B.2. In the course of the debate in the Sixth Committee, a suggestion was made with gathering support from developing countries that the requirement in paragraph 1 that the employee is "covered by the social security provisions which may be in force in that other State" is not necessary. It might unduly discriminate between countries with social security systems and those which have no such systems. The wording may be altered so as to provide an additional indication of the intention or consent of the State which has employed a local staff abroad in a particular case not to invoke its immunity in respect of that contract of employment. See topical summary or the discussion held in the Sixth Committee of the General Assembly during its fortieth session, prepared by the Secretariat, document A/CN.4/L.398, para. 381.

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 13

Personal injuries and damage to property 19/

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 14

Ownserhip, possession and use of property 20/

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdction in a proceeding which relates to the determination of:

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

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19/ Ibid. This article was originally adopted as article 14.

20/ The Commission provisionally adopted this article (then article 15) at its thirty-fifth session. For the commentary thereto, see Yearbook ... 1983, vol. II (Part Two), document A/38/10, chap. III.B.2.

Paragraph 3 of the article when originally adopted appeared necessary and useful to ensure the integrity of State immunities in respect of the "premises of a diplomatic or special or other official mission or consular premises" as well as "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". These provisions are no longer necessary in view of the adoption of articles 21 and 22 and particularly of article 4, paragraph 1, which reserves in fact the applicability of existing régimes under the various conventions currently in force, especially article 31(1) (a) of the Vienna Convention on Diplomatic Relations, 1961.

(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.

Article 15

Patents, trade marks and intellectual or industrial property 21/

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

21/ The Commission provisionally adopted this article (then article 16) at its thirty-sixth session. For the commentary thereto, see Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), chap. IV.B.2.

Article 16

Fiscal matters 22/

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 17

Participation in companies or other collective bodies 23/

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has particpants other than States or international organizations, and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Article 18

State-owned or State-operated ships engaged in commercial service 24/

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State

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22/ Ibid. This article was originally adopted as article 17.

23/ Ibid. This article was originally adopted as article 18.

24/ The Commission provisionally adopted this article (then article 19) at its thirty-seventh session. For the commentary thereto, see Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), chap. V.B.2.

which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, inter alia, any proceeding involving the determination of:

(a) a claim in respect of collision or other accidents of navigation;

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability, which are available to private ships and cargoes and their owners.

7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 19

Effect of an arbitration agreement 25/

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure;

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 20

Cases of nationalization 26/

The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21

State immunity from measures of constraint 27/

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measures of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the

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25/ Ibid. This article was originally adopted as article 20.

26/ The Commission provisionally adopted this article at its thirty-eighth session. For the commentary thereto see below section 2 of the present chapter of this report.

27/ Ibid.

object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22

Consent to measures of constraint 28/

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdcition under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which a separate consent shall be necessary.

Article 23

Specific categories of property 29/

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under paragraph (a) of article 21:

(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

28/ Ibid.

29/ Ibid.

(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of paragraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

PART V

MISCELLANEOUS PROVISIONS

Article 24

Service of process 30/

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) In accordance with any special arrangement for service between the claimant and the State concerned; or

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(d) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

30/ Ibid.

2. Service of process by the means referred to in paragraphs 1 (c) and (d) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 25

Default judgement 31/

1. No default judgement shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgement set aside, which shall be not less than three months from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Article 26

Immunity from measures of coercion 32/

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

31/ Ibid.

32/ Ibid.

Article 27

Procedural immunities 33/

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Article 28

Non-discrimination 34/

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States parties thereto.

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

(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

33/ Ibid.

34/ Ibid.

2. Text of draft articles 2 (paragraph 2), 3 (paragraph 1), 4 to 6 and 20 to 28, with commentaries thereto, provisionally adopted adopted by the Commission at its thirty-eighth session

PART I

INTRODUCTION

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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;

(b) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 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 in the internal law of any State.

Commentary

Subparagraph 1 (a)

(1) The commentary to this subparagraph, adopted at the thirty-fourth session of the Commission, is contained in the report of the Commission on the work of that session (Yearbook ... 1982, vol. II (Part Two), p. 99, document A/37/10, chap. V.B.2).

(2) In addition, it should be noted that with regard to the term "judicial functions" such functions vary under different constitutional and legal systems. Judicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the

development of a legal proceeding, or at the final stage of enforcement of judgements. Such judicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to a legal proceeding. Although judicial functions are determined by the internal organizational structure of each State, the term does not, for the purposes of the present articles, cover the administration of justice in all its aspects which, at least under certain legal systems, might include other functions related to the appointment of judges.

Subparagraph 1 (b)

(3) The commentary to this subparagraph, adopted at the thirty-fifth session of the Commission, is contained in the report of the Commission on the work of that session (Yearbook ... 1983, vol. II (Part Two), p. 34, document A/38/10, chap. III.B.2).

Other definitions

(4) No other definitions are proposed for inclusion in article 2, earlier proposals by the Special Rapporteur having been withdrawn because they were considered to be superfluous.

Paragraph 2

(5) Paragraph 2 is designed to confine the use of terms in paragraph 1, namely "court" and "commercial contracts" to the context of jurisdictional immunities of States and their property. Clearly, these terms may have different meanings in other international instruments such as multilateral conventions or bilateral agreements or in the internal law of any State in respect of other legal relationships. It is thus a signal to States which ratify, accede or adhere to the present articles, that they may do so without having to amend their internal law regarding other matters, because the two terms used have been given specific meaning in the current context only. They are without prejudice to other meanings already given or to be given to these terms in the internal law or in other international instruments. It should be observed nevertheless that for the States parties to the present articles, the

meanings ascribed to those terms by article 2 (1) would have to be followed in all questions relating to jurisdictional immunities of States and their property.

(6) Although paragraph 2 confines itself to the terms defined in paragraph 1, it applies also to other expressions used in the present articles but which are not specifically defined. This understanding is necessary in order to maintain the autonomous character of the articles.

Article 3

Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

(a) the State and its various organs of government;

(b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(d) representatives of the State acting in that capacity.

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.

Commentary

Paragraph 1

(1) This is an interpretative provision as distinct from a definitional or use of term provision as in article 2. There was no need to define, as such, the term "State", but in view of different jurisprudential approaches to the meaning of "State" for the purposes of jurisdictional immunities, it was considered useful to spell out the special understanding of what this expression comprehends for the purposes of the present articles. The general terms used in describing "State" should not imply that the provision is an open-ended formula. The interpretative provision of "State" should be understood in the light of its object and purposes, namely to identify those

entities or persons entitled to invoke the immunity of the State where a State can claim immunity and also to identify certain instrumentalities and subdivisions of a State that are entitled to invoke immunity when performing acts in the exercise of sovereign authority. Accordingly, in the context of the present articles, the expression "State" should be understood as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity.

(2) The first category includes the State itself, acting in its own name and through its various organs of government, however designated, such as the sovereign or head of State, the head of government, the central government, the various ministries and departments of government, ministerial or sub-ministerial departments, offices or bureaux, as well as subordinate organs and missions representing the State, including diplomatic missions and consular posts, permanent missions and delegations. 35/ The use of the expression "various organs of government" is intended to include all branches of government and is not limited to the executive branch only.

(3) The second category covers the political subdivisions of a federal State or of a State with autonomous regions which are entitled to perform acts in the exercise of the sovereign authority of the State. As has been seen in the commentary to article 7, paragraph 3, not every political subdivision of a State enjoys the immunity of the State, especially if it does not perform acts in the exercise of "sovereign authority" which seems to be the nearest equivalent to the French expression "prérogatives de la puissance publique". 36/ State immunity is recognized for such political subdivisions as may be endowed with international legal personality or capacity to perform acts of sovereign authority in the name or on behalf of the State. The case law has not been uniform on the extent of the immunity granted, nor on the circumstances in which immunity is recognized or the types of political subdivisions which enjoy some measure of State immunity. It is relatively clear, however, that subdivisions of State at the administrative level of

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35/ See Yearbook ... 1982, vol. II (Part Two), Commentary to article 7 and authorities cited therein, pp. 100-107, document A/37/10, chap. V.B.2.

36/ See ibid. for the jurisprudence cited.

local or municipal authorities do not normally perform acts in the exercise of the sovereign authority of the State, and as such do not enjoy State immunity. 37/

(4) The third category embraces the agencies and instrumentalities of the State but only in so far as they are entitled to perform acts in the exercise of "prérogatives de la puissance publique". Beyond or outside the sphere of acts performed by them in the exercise of the sovereign authority of the State, they do not enjoy any jurisdictional immunity. As for the meaning of "instrumentality", see the commentary to article 7, paragraph 3. 38/

(5) The fourth and last category of beneficiaries of State immunity encompasses all the natural persons who are authorized to represent the State in all its manifestations, as comprehended in the first three categories mentioned in subparagraphs 1 (a), (b) and (c). Thus, sovereigns and heads of States in their public capacity would be included under this category as well as in the first category, being in the broader sense organs of the government of the State. Other representatives include, heads of government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity. 39/ In actual practice, proceedings may be instituted not only against the government departments or offices concerned but also against their directors or permanent representatives in their official capacities. 40/

37/ See ibid. for the decisions cited.

38/ See ibid., p. 104, and the illustrations given.

39/ See commentary to article 7, paragraph 3, ibid., pp. 102, 105.

40/ See ibid., pp. 105 and 106 e.g. the case of Thai-Europe Tapioca Service v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies [1975] Weekly Law Reports, vol. 1, p. 1485.

(6) As a consequence to the adoption of paragraph 1, paragraph 3 of article 7 was slightly adjusted so as to include references to "political subdivisions" and "sovereign authority". Finally, paragraph 1 must, of course, be read together with article 4 below, concerning privileges and immunities not affected by the present articles.

Paragraph 2

(7) The commentary to this paragraph is contained in the report of the Commission on the work of its thirty-fifth session (Yearbook ... 1983, vol. II (Part Two), p. 34, document A/38/10, chap. III.B.2). The expression "that State" in this paragraph refers exclusively to the State claiming immunity and not to the State of the forum. This article was provisionally adopted during the thirty-fifth session of the Commission in the course of its discussion of article 12 (now renumbered article 11), dealing with commercial contracts.

Article 4

Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State ratione personae.

Commentary

(1) Article 4 was originally conceived as a signpost to preclude the possibility of overlapping between the present articles and certain existing conventions dealing with the status, privileges, immunities and facilities of specific categories of representatives of governments. It was drafted as a one paragraph article concerning existing régimes of diplomatic and consular immunities which should continue to apply unaffected by the present articles. Historically diplomatic immunities under customary international law were the first to be considered ripe for codification, as indeed they have been in the

Vienna Convention on Diplomatic Relations, 1961. 41/ Another classic example of immunities enjoyed under customary international law is furnished by the immunity of sovereigns or other heads of State. Such a provision was earlier included in a draft article proposed by the Special Rapporteur and now appears as paragraph 2 of article 4. Both paragraphs are intended to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the present articles.

Paragraph 1

(2) Paragraph 1, in its original version, contained specific reference to the various international instruments with varying degrees of adherence and ratification. Mention was made of the following missions and persons representing States:

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961, 42/

(ii) consular missions under the Vienna Convention on Consular Relations of 1963, 43/

(iii) special missions under the Convention on Special Missions of 1969, 44/

(iv) representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975, 45/

41/ United Nations, Treaty Series, vol. 500, p. 95.

42/ Ibid., see also the various bilateral consular agreements.

43/ Ibid., vol. 596, p. 261.

44/ General Assembly resolution 2530 (XXIV) of 8 December 1969, Annex.

45/ Document A/CONF.67/16.

(v) permanent missions or delegations and observer delegations of States to international organizations or their organs in general, 46/

(vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973. 47/

(3) Article 4 has since been revised and is now appropriately entitled, "Privileges and immunities not affected by the present articles". A general reference is preferred without any specific enumeration of missions governed by existing international instruments whose status in multilateral relations is far from uniform. Paragraph 1 deals with two categories:

(i) diplomatic, consular or special missions as well as missions to international organizations or delegations to organs of international organizations or to international conferences, and

(ii) persons connected with such missions.

The extent of privileges and immunities enjoyed by a State in relation to the exercise of the functions of the entities referred to in subparagraph 1 (a) is determined by the provisions of the relevant international conventions referred to in paragraph (2) above, where applicable, or by general international law. The expression "persons connected with them [missions]" is to be construed similarly.

(4) The expressions "missions" and "delegations" also include permanent observer missions and observer delegations within the meaning of the Vienna Convention on Representation of States in Their Relations with International Organizations of a Universal Character of 1975.

(5) The article is intended to leave existing special régimes unaffected, especially with regard to persons connected with the missions listed. Their immunities may also be regarded, in the ultimate analysis, as State immunity, since the immunities enjoyed by them belong to the State and can be waived at any time by the State or States concerned.

46/ See, e.g. the Convention on the Privileges and Immunities of the United Nations, 1946, United Nations, Treaty Series, vol. 1, p. 15, and the Convention on the Privileges and Immunities of the Specialized Agencies, ibid., vol. 33, p. 261 and other regional conventions.

47/ See ibid., vol. 1035, p. 167.

Paragraph 2

(6) Paragraph 2 is designed to include an express reference to the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, ratione personae. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with under article 3. Article 3, subparagraph 1 (a) and (d) covers the various organs of the government of a State and State representatives, including heads of State irrespective of the systems of government. The reservation of article 4, paragraph 2 therefore refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States, without any suggestion that their status should in any way be affected by the present articles. The existing customary law is left untouched. 48/

(7) The present articles do not prejudge the extent of immunities granted by States to foreign sovereigns or other heads of State, their families or household staff which may also, in practice, cover other members of their entourage.

Article 5

Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

Commentary

(1) Under article 28 of the Vienna Convention on the Law of Treaties non-retroactivity is the rule in the absence of any provision in the articles to the contrary. The question arises nevertheless as regards the nature and extent of the non-retroactive effect of the application of the present articles. It is necessary to determine a precise point in time at which the

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48/ For the case law in this connection, see the seventh report of the Special Rapporteur, A/CN.4/388, paras. 119-125.

articles would apply as between the States which have accepted their provisions. The Commission has decided to select a time which is relatively precise, namely that the principle of non-retroactivity applies to proceedings instituted prior to the entry into force of the said articles as between the States concerned.

(2) Thus, as between the States concerned, the articles are applicable in respect of proceedings instituted after their entry into force. They are also without prejudice to the application of other rules to which jurisdictional immunities of States and their property are subject under international law independently of the present articles. The articles are not intended to entail any freezing effect on current or future developments of international law in the practice of States, which are not prejudiced by the present articles, nor are they intended to affect other related areas not covered by the present articles.

PART II

GENERAL PRINCIPLES

Article 6

State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law].

Commentary

(1) Article 6 as provisionally adopted at the thirty-second session of the Commission contained a commentary with an extensive survey of State judicial, executive and legislative practice. 49/ The original commentary to old article 6 is still generally applicable except for the passages dealing with the formula adopted then and the two-pronged approach to the formulation of immunity as a right and also as imposing a duty. The second prong is now fully covered in article 7 on "modalities for giving effect to State immunity".

49/ See Yearbook ... 1980, vol. II (Part Two), pp. 142-157, document A/35/10, chap. IV.B.

(2) The formulation of article 6, which is meant to state the main principle of State immunity, has been difficult as it is a delicate matter. Legal theories abound as to the exact nature and basis of immunity. There is common agreement that for acts performed in the exercise of the "prérogatives de la puissance publique" or "sovereign authority of the State", there is undisputed immunity. Beyond or around the hard core of immunity, there appears to be a grey zone in which opinions and existing case law and indeed legislation still varies. Some think that immunity constitutes an exception to the principle of territorial sovereignty of the State of the forum and as such should be substantiated in each case. Others refer to State immunity as a general rule or general principle of international law. This rule is not absolute in any event since even the most unqualified of all the theories of immunity admits one important exception, namely, consent which also forms the basis for other principles of international law. Others still adhere to the theory that the rule of state immunity is a unitary rule and is inherently subject to existing limitations. Both immunity and non-immunity are part of the same rule. In other words, immunity exists together with its innate qualifications and limitations.

(3) In formulating the text of article 6, the Commission has considered all the relevant doctrinal and other views, and was able to adopt a compromise formula stating a basic principal of immunity qualified by the provisions of the present articles incorporating the limitations on, or exceptions to the basic principle. Some members of the Commission felt that there should be explicit language in the text of the article indicating that the rule of immunity should also be subject to the future development of international law and proposed the inclusion "and [subject to] the relevant rules of general international law". The expression "general international law" is used to comprehend also customary rules of international law, based on the judicial, executive and legislative practice of States. It was deemed essential that the future development of State practice be left unfrozen and undeterred by the present articles. The addition of this phrase was thought unnecessary but tolerable by some and absolutely essential by some others. However, some members of the Commission were of the opinion that reference to general international law regarding exceptions to the principle of immunity renders the entire draft articles useless and inadmissible in the absence of precise

exceptions valid for eventual parties to these articles. Finally, in a spirit of compromise, the Commission decided to put this phrase in square brackets in order to draw the attention of Governments to this point, with a view to eliciting their comments thereon.

PART III

[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Commentary to Part III

The Commission could not agree on whether "Limitations on State immunity" or "Exceptions to State immunity" was more appropriate as the title of Part III. It finally decided to place both "Limitations" and "Exceptions" in square brackets and to consider the matter further on second reading in the light of comments and observations of Governments. Some members of the Commission were, however, of the view that whatever title was eventually adopted, "limitations on" or "exceptions to" State immunity constituted an integral feature of a unitary principle of State immunity rather than a rule or series of rules independent from the principle. Other members took a different view. Like article 6, the title of Part III does not intend to express any preference on the divergent doctrinal interpretations of immunities of States.

Article 20

Cases of nationalization

> The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

Commentary

This is a general reservation provision, applicable to any question regarding possible extraterritorial effects of any measure of nationalization taken by a State affecting property, movable or immovable, industrial or non-industrial. It is generally understood that nationalization, within the context of this article, is a measure taken by a State in the exercise of its sovereign authority.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Commentary to Part IV

(1) Part IV is concerned with State immunity in respect of property from measures of constraint upon the use of property, including attachment, arrest and execution, in connection with a proceeding before a court of another State. The expression "measures of constraint" has been chosen as a generic term, not a technical one in use in any particular internal law. Measures of constraint known in the practice of States vary considerably and, as such, it would be difficult, if not, indeed, impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems. Suffice it, therefore, to mention by way of example more notable and readily understood measures such as attachment, arrest and execution. The problem of finding readily translatable terms in the official languages is indubitably multiplied by the diversity of State practice in the realm of procedures and measures of constraint.

(2) Part IV is of special significance in that it relates to a second phase of the proceedings in cases of measures of execution, as well as covering interlocutary measures or measures of pre-trial or prejudgment attachment or seizure of property ad fundandam jurisdictionem. Part IV provides in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of the use of property, or property in its possession or control.

(3) Having completed the first three parts dealing with "Introduction", "General Principles" and "[Limitations on] [Exceptions to] State Immunity", the present articles should also contain a fourth part concerning the property owned, possessed or used by States. Immunity in respect of property in this context is all the more meaningful for States in view of the recent growing practice for private litigants including multinational corporations seeking relief through attachment of property owned, possessed or used by developing countries, such as embassy bank accounts, funds of the central bank or other monetary authority, in proceedings before the courts of industrially advanced countries. Some members believed that the problem was not due to suits by multinational corporations.

Article 21

State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed, or

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Commentary

(1) Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. This article clearly defines the rule of State immunity in its second phase concerning property, particularly measures of execution as a separate procedure from the original proceeding.

(2) The practice of States has evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from jurisdiction. 50/ Whatever the theories, the fact remains that the question of execution does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgement in favour of the plaintiff. Immunity from execution may be viewed therefore as the last fortress, the last bastion of State immunity. If it is admitted that "no sovereign State can exercise its sovereign power over another equally sovereign State" (par in parem imperium non habet), it follows a fortiori that no measures of constraint by way of execution or coercion can

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50/ See the jurisprudence cited in the seventh report of the Special Rapporteur, A/CN.4/388, paras. 73, et seq.

be exercised by the authority of one State against another State and its property. Such possibility does not exist even in international litigation, whether by judicial settlement or arbitration. 51/

(3) The measures of constraint mentioned in this article are not confined to execution but cover also attachment and arrest, as well as other forms of saisie, saisie-arrêt, and saisie-exécution, including sequestration, interim, interlocutory and all other prejudgement conservatory measures, intended sometimes merely to freeze assets in the hands of the dependant. The rule formulated in Part IV is stated in this article as a general rule of immunity from all measures of constraint at any stage or phase of the proceedings.

(4) The property protected by immunity under this article is defined, not as State property nor indeed as property belonging to a State, but as comprehending property owned by the State or property in its possession or control. The clause "or property in which it has a legally protected interest" is within square brackets. The interest of the State may be so marginal as to be unaffected by any measure of constraint, or by nature the interest of the State, whether an equity of redemption or reversionary interest, may remain intact irrespective of the measure of constraint placed upon the use of the property. Thus, an easement or servitude in favour of a State could continue to subsist and remain exerciseable by the State, despite transfer of ownership or a change of hands in the possession or control of the property. Some members thought that there was room for maintaining this phrase while others thought that to do so would unduly widen the scope of State immunity from execution. The Commission awaits reactions from governments on this point to which it will return on second reading.

(5) The word State in the phrase "proceeding before a court of another State" refers to the State where the property is located regardless of where the substantive proceeding is taking place. Thus before any measures of constraint are implemented, a proceeding to that effect should be instituted before a court of the State where the property is located. Of course, in some

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51/ See e.g., the Socobelge case, arbitral awards of 3 January 1936 and 25 July 1936, [1939] P.C.I.J. Series A/B No. 78, p. 128; and Clunet vol. 79 (1952), pp. 244 et seq., judgement of 30 April 1951, cf. Seventh Report by the Special Rapporteur, document A/CN.4/388, pp. 37-38, notes 89-91.

special circumstances such as under a treaty obligation there may be no further court proceeding required for execution once there is a final judgement by a court of another State party to the treaty.

(6) The principle of immunity here is subject to two conditions which, if either is met, would result in non-immunity: (a) property specifically in use or intended for use by the State for commercial [non-governmental] purposes; or (b) property allocated or earmarked by the State for the satisfaction of a claim. In subparagraph (a), the property must have a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed.

(7) The use of the word "is" in subparagraph (a) indicates that the property should be specifically in use or intended for use by the State for commercial [non-governmental] purposes at the time the proceeding for attachment or execution is instituted. To fix an early time could unduly fetter the States' freedom to dispose of its property, it is the understanding of the Commission that States would not encourage and permit abuses of this provision, for example, by changing the status of their property in order to avoid attachment or execution.

(8) The word "non-governmental" is in square brackets, as the views of members of the Commission are still divergent. Some insist on the word being added to be acceptable, while others have been equally insistent on its deletion. This position is a repetition of a similar situation in connection with ships in article 18. (See A/40/10, chap. V.B.2 commentary to article then 19).

(9) In subparagraph (b) the property can be subject to measures of constraint only if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding. This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability. 52/

52/ For the case law, international opinions, treaties and national legislation dealing with immunity from measures of constraint see the Seventh Report by the Special Rapporteur, A/CN.4/388, pp. 20-44.

(10) Understandably the question of whether a particular property has or has not been allocated for satisfaction of a claim may remain in some situations ambiguous and should be resolved by the court.

Article 22

Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which a separate consent shall be necessary.

Commentary

Paragraph 1

(1) Article 22 is designed to provide a parallel to article 8 dealing with express consent to exercise of jurisdiction. Paragraph 1 relates to immunity from measures of constraint. It refers to the same kind of property as is mentioned in article 21, which is either owned by a State or is in its possession or control, or, indeed, as appears in the square brackets, in which a State has a legally protected interest. Consent to the taking of such measures of constraint e.g. attachment, arrest and execution may be made by any one of the three means, viz., by international agreement, in a written contract, or by a declaration before the court in a specific case.

(2) The last phrase in the chapeau "taking of such measures in respect of that property as indicated:" refers back to both the measures of constraint and the property. Thus express consent can be given generally with regard to measures of constraint or property, or given for particular measures or particular property or, indeed, given for both measures and property.

(3) Once consent has been given under subparagraphs 1 (a) and (b) then any withdrawal of that consent may only be made under the terms of the international agreement (subparagraph (a)) or under the terms of the contract (subparagraph 1 (b)). However, once a declaration of consent has been given before a court, it cannot be withdrawn. In general, once a proceeding before a court has begun, consent cannot be withdrawn.

Paragraph 2

(4) Paragraph 2 makes more explicit the requirement of a separate consent which is needed for the taking of measures of constraint under Part IV. Consent under article 8 in Part II does not cover any measures of constraint but is confined exclusively to immunity from the jurisdiction of a court of a State in a proceeding against another State. 53/

Article 23

Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under paragraph (a) of article 21,

(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

53/ For a more detailed reference to the judicial and treaty practice of States and government contracts, see the Seventh Report by the Special Rapporteur, A/CN.4/388, pp. 44-53. In some jurisdictions, such as Switzerland, execution is based on the existence of a sufficient connection with Swiss territory (Binnenbeziehung). See, e.g., Hellenische Republik v. Walder, Annual Digest, vol. 5 (1929-1930), Case No. 78, p. 121; and Lalive, in Netherlands Yearbook of International Law, vol. 10, p. 160; and Sir Ian Sinclair, in Recueil des cours, vol. 167, p. 236; see also Lord Dennings' remarks in Thai-Europe case [1975] in Weekly Law Reports, vol. 1, p. 1492. For the requirement of a separate or second consent to execution, see C.A. Aix in Englander c. Statai Banka Zeskoslovenska (1966), International Law Reports, vol. 47, p. 157, see, however, c.c. in Ibid., vol. 52, p. 335, and Clerget c. Représentation commerciale de la République démocratique du Vietnam (1920), Annuaire français de droit international, vol. XVI, pp. 931-935.

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of paragraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

Commentary

Paragraph 1

(1) Article 23 is designed to provide some protection for certain specific categories of property by excluding them from any presumption or implication of consent to measures of constraint. Thus, paragraph 1 seeks to prevent any interpretation to the effect that property classified as belonging to any one of the categories specified is in fact property specifically in use or intended for use by the State for a commercial [non-governmental] purpose under paragraph (a) of article 21. The commentary applicable to the expression "non-governmental" in article 21 is also applicable to article 23.

(2) This protection is deemed necessary and timely in view of the alarming trend in certain jurisdictions to attach or freeze assets of foreign States,

especially bank accounts, 54/ assets of the central bank 55/ or other instrumenta legati 56/ and specific categories of property which equally deserve like protection. Each of these specific categories cannot be presumed to be in use or intended for use for commercial [non-governmental] purposes, as by its very nature such property must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations.

(3) Properties listed in subparagraph 1 (a) are intended to be limited to those in use or intended to be used for the "purposes" of the States' diplomatic functions. This obviously excludes those properties, for example, bank accounts maintained by embassies for commercial purposes. It also excludes those properties which may have been, but are no longer in use or intended for use for diplomatic or cognate purposes. The expressions "missions" and "delegations" also include permanent observer missions and observer delegations within the meaning of the Vienna Convention on Representation of States in Their Relations with International Organizations of a Universal Character of 1975. 57/

(4) The word "military" within the context of subparagraph 1 (b) includes navy, air force and army.

54/ See e.g. Brick Shipping Corp. v. Embassy of Tanzania, Federal Supplement, vol. 507, pp. 373-374; the decision of the Federal Constitution Court of 13 December 1977, the Philippine Embassy case, Materials on Jurisdictional Immunities, p. 297; and Alcom Ltd. v. Colombia, C.A., International Legal Materials, vol. 22, p. 1807 and H.L. 12 April 1984, in ibid., vol. 23, p. 719.

55/ See e.g., Hispano American Mercantil S.A. v. Central Bank of Nigeria, 1979, Materials on Jurisdictional Immunities, p. 449; Royal Bank of Canada and Corriveau et al., 1980, in Dominion Law Reports, 3rd series, vol. 112, p. 199 (1980); Libra Bank Ltd. v. Banco Nacional de Costa Rica, Federal Second, vol. 676, p. 47; and Trendtex case, All England Law Reports (1977), vol. I, p. 881.

56/ See e.g., Romanian Legation Case, Revue Hellénique, 1950, p. 331, and Jean Monnin, Note à l'arrêt de la Cour Civile du Tribunal Fédéral du 22 mai 1984, dans l'affaire S. contre Etat Indien, in Annuaire suisse de droit international, vol. XII, 1985, pp. 238, concerning a contract of employment of Embassy personnel.

57/ Document A/CONF.67/16.

(5) The purpose of subparagraph 1 (d) is to protect only property characterized as forming part of the cultural heritage or archives of the State which is owned by the State. Such property benefits from protection under the present articles when it is in the territory of another State and is not placed or intended to be placed on sale.

(6) Subparagraph 1 (e) extends such protection to property forming part of an exhibition of objects of scientific or historic interest belonging to the State and in the territory of another State. State-owned exhibits for industrial or commercial purposes is not covered by this subparagraph.

Paragraph 2

(7) Paragraph 2 reinforces the protection of these specific categories of property by requiring a stricter and more explicit waiver of immunity. To be effective in respect of any property belonging to one of the specific categories listed, or any part of such categories, the State concerned must have either allocated or earmarked the property within the meaning of article 21 (b) or specifically consented to the taking of measures of constraint in respect of that category of its property, or that part thereof, under article 22. A general waiver or waiver in respect of all property situated in the territory of the State of the forum without mention of any of the specific categories would not be sufficient to allow measures of constraint against property in the categories listed in paragraph 1.

PART V

MISCELLANEOUS PROVISIONS

Article 24

Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any special arrangement for service between the claimant and the State concerned; or

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(d) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraphs 1 (c) and (d) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Commentary

(1) It should be noted that the English expression "service of process" is rendered in French by "assignation ou notification". This is an approximate equivalent rather than a literal translation.

(2) This article, to a large extent, relates to the domestic rules of civil procedure of States. It takes into account the difficulties involved if States are called upon to modify their domestic rules of civil procedure. At the same time, it does not provide too liberal or generous a régime of service of process which could result in an excessive number of judgements in default of appearance by the defendant State. Therefore, the article proposes a middle ground so as to protect the interests of the defendant State and those of the individual plaintiff.

Paragraph 1

(3) Paragraph 1 is designed to indicate the normal ways in which service of process can be effected when a proceeding is instituted against a State. A hierarchy of means is proposed to give priority to certain means, taking into account the element of reliability of the means. The parties to the proceeding can make special arrangements, or in the absence of such

arrangements, a binding international convention can be followed, failing which diplomatic channels can afford a possible solution. Failing the foregoing, transmission by registered mail or other means can be adopted, provided that such means are permissible under the law of the State of the forum as well as the law of the State in whose territory service of process is to be effected. The variety of means available ensures the widest possible flexibility, while protecting the interests of the parties concerned.

Paragraphs 2 and 3

(4) Since the time of service of process is decisive for practical purposes, it is further provided in paragraph 2 that in the case of transmission through diplomatic channels or by registered mail, service of process is deemed to have been effected on the day of receipt of the documents by the Ministry of Foreign Affairs. Paragraph 3 further requires the documents to be accompanied, if necessary, by a translation into the official language or one of the official languages, of the State concerned.

Paragraph 4

(5) Paragraph 4 provides that a State which has entered an appearance on the merits, that is to say, without contesting any question of jurisdiction or procedure, cannot subsequently be heard to raise any objection based on non-compliance with the service of process provisions of paragraphs 1 and 3. The reason for the rule is self-evident. By entering or appearing on the merits, the defendant State effectively concedes that it has had timely notice of the proceeding instituted against it. The defendant State is of course entitled at the outset to enter a conditional appearance or to raise a plea as to jurisdiction.

Article 25

Default judgement

1. No default judgement shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be

transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgement set aside, which shall be not less than three months from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Commentary

Paragraph 1

(1) A proper service of process is a pre-condition for making application for a default judgement to be given against a State. Under paragraph 1, even if the defendant State does not appear before a court, the judge still has to be satisfied that the service of process was properly made in accordance with paragraphs 1, 2 and 3 of article 24. This paragraph gives an added protection to States by requiring the lapse of not less than three months from the date of service of process. The judge, of course, always has the discretion to extend the minimum period of three months, if the domestic law so permits.

Paragraph 2

(2) Paragraph 2 is designed to ensure effective communication with the State concerned and to allow adequate opportunities to the defendant State to apply to have a default judgement set aside, whether by way of appeal or otherwise. If any time-limit is to be set for applying to have a default judgement set aside, at least another period of no less than three months must have elapsed before any further measure can be taken in pursuance of a judgement.

Article 26

Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Commentary

This article relates to measures of coercion requiring a State to perform or refrain from performing a specific act on pain of suffering a monetary penalty, known in some legal systems under the name of "astreinte". It includes immunity from a court order for specific performance which carries

with it the coercive measure of a pecuniary penalty for non-performance of the order. The word "coercion" is chosen for its broad sense which includes all kinds of injunctions.

Article 27

Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Commentary

(1) Sometimes States, for reasons of security or their own domestic law, may be prevented from submitting certain documents or disclosing certain information to a court of another State. Therefore, States should not be subject to penalties for protecting their national security or for complying with their domestic law. At the same time, the legitimate interests of the private litigant should not be overlooked.

Paragraph 1

(2) Paragraph 1 speaks of "no consequences" being entailed by the conduct in question, although it specifies that the consequences which might ordinarily result from such conduct in relation to the merits of the case would still obtain. This reserves the applicability of any relevant rules of the internal law of the State of the forum, without requiring another State to give evidence or to produce a document.

(3) Courts are bound by their own domestic rules of procedure. In domestic rules of procedure of many States, the refusal, for any reason, to submit evidence by a litigant, would allow or even require the judge to draw certain inferences which may affect the merits of the case. Such inferences by a judge under the domestic rules of procedure of the State of the forum, when permitted, are not considered a penalty. The final sentence specifies that no fine or pecuniary penalty shall be imposed.

Paragraph 2

(4) Under paragraph 2, the procedural immunities provided therein apply to both a plaintiff State and a defendant State. Some reservations were made regarding the application of those procedural immunities in the event of the State being plaintiff in a proceeding before a court of another State. In some systems, however, security for cost is required only of plaintiffs and not defendants.

Article 28

Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States parties thereto.

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

(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the presen articles.

Commentary

(1) After prolonged discussion, the Commission agreed to adopt article 28 based on the analogy of article 47 of the Vienna Convention on Diplomatic Relations f 1961 and other Corresponding Conventions. 58/ A certain degree of flexibility was considered desirable for those marginal instances where a restrictive application of the present articles might be applied by the State of the forum in respect of another State, because that other State has adopted the same restrictive application of the articles to the State of the forum.

58/ United Nations, Treaty Series, vol. 500, p. 95.

This reciprocal treatment resulting in restrictive application of the articles is not to be taken as a discriminatory measure against the other State adopting the same restrictive application.

(2) Another area of flexibility was also maintained by recognition of more limited international agreements applicable between States in various regions which, with regard to immunities, may have adopted or may adopt treatment different from that provided in the present articles. Different but concurrent régimes are possible within the limits of the law of treaties.

CHAPTER III

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

A. Introduction

23. The Commission at its twenty-ninth session, in 1977, began its consideration of the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier", pursuant to General Assembly resolution 31/76 of 13 December 1976.

24. The Commission at its thirtieth session, in 1978, considered the report of a Working Group on the topic, established by the Commission under the chairmanship of Mr. Abdullah El-Erian. The results of the study undertaken by the Working Group were submitted by the Commission in its report to the General Assembly, at its thirty-third session in 1978. The General Assembly, in its resolution 33/139 of 19 December 1978, recommended that the Commission should continue the study concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; and, in resolution 33/140 of 19 December 1978, decided that it would give further consideration to this question when the Commission submits to the General Assembly the results of its work on the possible elaboration of an appropriate legal instrument on the topic.

25. The Commission at its thirty-first session, in 1979, appointed Mr. Alexander Yankov, Special Rapporteur for the topic, for the purpose of the preparation of a set of draft articles for an appropriate legal instrument.

26. As between its thirty-second session, in 1980, and its thirty-seventh session, in 1985, the Commission received and considered six reports from the Special Rapporteur which contained, among other matters, proposals for texts of draft articles on the topic. 59/

59/ For the six reports of the Special Rapporteur, see:
Yearbook ... 1980, vol. II (Part One), p. 231, document A/CN.4/335;
Yearbook ... 1981, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2;
Yearbook ... 1982, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1;
Yearbook ... 1983, vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4;
Yearbook ... 1984, vol. II (Part One), p. 72, document A/CN.4/382 and document A/CN.4/390 and Corr.1.

27. As of the conclusion of its thirty-seventh session, in 1985, the Commission had reached the following stage in its work on the preparation of draft articles.

(a) The Commission, on the basis of draft articles 1 to 35 proposed by the Special Rapporteur and following discussions in plenary and in Drafting Committee, had provisionally adopted draft articles 1 to 27 on first reading, namely, draft article 1 (Scope of the present articles), draft article 2 (Couriers and bags not within the scope of the present articles), draft article 3 (Use of terms), draft article 4 (Freedom of official communications), draft article 5 (Duty to respect the laws and regulations of the receiving State and the transit State), draft article 6 (Non-discrimination and reciprocity), draft article 7 (Documentation of the diplomatic courier), draft article 8 (Appointment of the diplomatic courier), draft article 9 (Nationality of the diplomatic courier), article 10 (Functions of the diplomatic courier), draft article 11 (End of the functions of the diplomatic courier), draft article 12 (The diplomatic courier declared persona non grata or not acceptable), draft article 13 (Facilities), draft article 14 (Entry into the territory of the receiving State or the transit State), draft article 15 (Freedom of movement), draft article 16 (Personal protection and inviolability), draft article 17 (Inviolability of temporary accommodation), draft article 18 (Immunity from jurisdiction), draft article 19 (Exemption from personal examination, customs duties and inspection), draft article 20 (Exemption from dues and taxes), draft article 21 (Duration of privileges and immunities), draft article 22 (Waiver of immunities), draft article 23 (Status of the captain of a ship or aircraft entrusted with the diplomatic bag), draft article 24 (Identification of the diplomatic bag), draft article 25 (Content of the diplomatic bag), draft article 26 (Transmission of the diplomatic bag by postal service or by any mode of transport), draft article 27 (Facilities accorded to the diplomatic bag),

(b) The Commission had referred draft articles 36 to 43, as proposed by the Special Rapporteur, to its Drafting Committee. As of the conclusion of

the thirty-seventh session of the Commission, the Drafting Committee, because of pressure of work, had not been able to give consideration to these draft articles. 60/

B. Consideration of the topic at the present session

28. At its thirty-eighth session the Commission had before it the seventh report submitted by the Special Rapporteur (A/CN.4/400). The seventh report contained proposed revised texts of and explanations to draft articles 36, 37, 41, 42 and 43, entitled "Inviolability of the diplomatic bag" (article 36); "Exemptions from customs duties, dues and taxes" (article 37); "Non-recognition of States or Government or absence of diplomatic or consular relations" (article 41); "Relation to other conventions and international agreements" (article 42) and "Optional declaration of exceptions to applicability in regard to designated types of couriers and bags" (article 43). The seventh report also included the text of and explanations concerning a new draft article 39 entitled "Protective measures in case of force majeure", combining and replacing former draft article 39 ("Protective measures in circumstances preventing the delivery of the diplomatic bag") and draft article 40 61/ ("Obligations of the transit State in case of force majeure or fortuituous event"). 62/

29. The Commission considered the Special Rapporteur's seventh report at its 1948th to 1951st meetings. After hearing the introduction of the Special Rapporteur, the Commission discussed the revised texts of draft articles 36, 37, 41, 42 and 43 as well as the text of new draft article 39 and decided to refer them to the Drafting Committee.

60/ For a fuller statement of the historical background of this topic, see Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), paras. 164-175.

61/ For the text of former draft articles 39 and 40 as submitted by the Special Rapporteur in his sixth report (A/CN.4/390 and Corr.1), see Official Records of the General Assembly, Thirty-fourth Session, Supplement No.10 (A/40/10), footnotes 111 and 112.

62/ The revised texts of draft articles 36, 37 and 41 to 43 and the text of new draft article 39, are set out in the Special Rapporteur's seventh report (A/CN.4/400).

30. At its 1980th meeting on 2 July 1986, the Commission considered the report of the Drafting Committee introduced by its Chairman. After discussing the report, the Commission provisionally adopted draft articles 28 to 33 and commentaries thereto. The Commission decided to align the language in article 3, paragraph 1, subparagraph (2), provisionally adopted at its thirty-fifth session and dealing with the definition of the diplomatic bag, with the language of article 25 adopted at its thirty-seventh session. The relevant passage of article 3, paragraph 1 (2) therefore reads: "official correspondence and documents or articles intended exclusively for official use". It was decided to reverse the numbering of articles 7 and 8 provisionally adopted at the thirty-fifth session so that the article on "appointment of the diplomatic courier" becomes article 7 and the article on "documentation of the diplomatic courier" becomes article 8. The title to article 13 provisionally adopted at the thirty-sixth session, was modified to read "Facilities accorded to the diplomatic courier" to align that title with the title to article 27 provisionally adopted at the thirty-seventh session, which reads "Facilities accorded to the diplomatic bag". The Commission also decided to divide the draft into four sections as follows: I. General Provisions (articles 1 to 6); II. Status of the diplomatic courier and the captain of a ship or aircraft entrused with the diplomatic bag (articles 7 to 23); III. Status of the diplomatic bag (articles 24 to 29); IV. Miscellaneous Provisions (articles 30 to 33).

31. The Commission, thereafter, at its 1980th meeting on 2 July 1986, adopted on first reading the draft articles on the topic as a whole. The draft articles are set out below in Section D.1 of this chapter of the report.

32. The Commission, at its 1980th meeting on 2 July 1986, decided that in accordance with articles 16 and 21 of the Statute of the Commission, the draft articles set out in Section D.1 of this chapter, should be transmitted through the Secretary-General to Governments for comments and observations, and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1988.

C. Tribute to the Special Rapporteur, Mr. Alexander Yankov

33. The Commission, at its 1980th meeting on 2 July 1986, adopted by acclamation the following resolution:

"The International Law Commission,

Having adopted provisionally the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

Desires to express to the Special Raporteur, Mr. Alexander Yankov, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

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

1. Text of the draft articles provisionally adopted by the Commission on first reading 63/

PART I

GENERAL PROVISIONS

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.

63/ For the commentaries to articles 1 to 7, provisionally adopted by the Commission at its thirty-fifth session, see the report of the International Law Commission on the work of its thirty-fifth session. Official Records of the General Assembly, Thirty-eighth session, Supplement No.10 (A/38/10), chap. V. section C. For the commentary to article 8, provisionally adopted at the thirty-fifth and thirty-sixth sessions, as well as the commentaries to articles 9 to 17, 19 and 20, provisionally dopted at the thirty-sixth session, see the report of the International Law Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No.10 (A/39/10), chap.III. section C.2. For the commentary to paragraph 2 of article 12, from

Article 2

Couriers and bags not within the scope of the present articles

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

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

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

Article 3

Use of terms

1. For the purposes of the present articles:

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

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

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

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

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

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

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which paragraph the Commission at its thirty-seventh session decided to remove the brackets which had appeared in the text as provisionally adopted at its thirty-sixth session, as well as for the commentary to articles 18 and 21 to 27, see report of the International Law Commission on the work of its thirty-seventh session, Official Records of the General Assembly, Fortieth session, Supplement No.10 (A/40/10), Chapter IV, section C.2.

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

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

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

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

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

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

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

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

(6) "mission" means:

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

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

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

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

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

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

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

Article 4

Freedom of official communications

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

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

Article 5

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

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

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

Article 6

Non-discrimination and reciprocity

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

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

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

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

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

Article 7

Appointment of the diplomatic courier

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

Article 8

Documentation of the diplomatic courier

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

Article 9

Nationality of the diplomatic courier

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

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

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

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

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

Article 10

Functions of the diplomatic courier

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

Article 11

End of the functions of the diplomatic courier

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

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

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

Article 12

The diplomatic courier declared persona non grata or not acceptable

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

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

Article 13

Facilities accorded to the diplomatic courier

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

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

Article 14

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

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

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

Article 15

Freedom of movement

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

Article 16

Personal protection and inviolability

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

Article 17

Inviolability of temporary accommodation

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

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

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

Article 18

Immunity from jurisdiction

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

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

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

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

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

Article 19

Exemption from personal examination, customs duties and inspection

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

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit

entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

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

Article 20

Exemption from dues and taxes

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

Article 21

Duration of privileges and immunities

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

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

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

Article 22

Waiver of immunities

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

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

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

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

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

Article 23

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

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

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

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

PART III

STATUS OF THE DIPLOMATIC BAG

Article 24

Identification of the diplomatic bag

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

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

Article 25

Content of the diplomatic bag

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

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

Article 26

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

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

Article 27

Facilities accorded to the diplomatic bag

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

Article 28

Protection of the diplomatic bag

1. The diplomatic bag shall [be inviolable wherever it may be; it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or the transit] State may require that the bag be returned to its place of origin.

Article 29

Exemption from customs duties, dues and taxes

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

PART IV

MISCELLANEOUS PROVISIONS

Article 30

Protective measures in case of force majeure or other circumstances

1. In the event that, due to force majeure or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take re-possession of it.

2. In the event that, due to force majeure, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

Article 31

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

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations.

Article 32

Relationship between the present articles and existing bilateral and regional agreements

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

Article 33

Optional declaration

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraphs 1 and 2 of article 3, to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary who shall circulate copies thereof to the parties and to the States entitled to become parties to the present articles. Any such declaration made by a contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another party which has accepted the applicability of those provisions to that category of courier and bag.

2. Text of draft articles 28 to 33, with commentaries thereto, provisionally adopted by the Commission at its thirty-eighth session

Article 28

Protection of the diplomatic bag

1. The diplomatic bag shall [be inviolable wherever it may be, it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or the transit] State may require that the bag be returned to its place of origin.

Commentary

(1) The text of draft article 28, which has been considered as a key provision within the set of draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier has given rise to lengthy discussion and differing points of view. Although several areas of disagreement, which are reflected by the bracketed portions of the draft article, still remain unresolved, the Commission has decided to adopt the text of draft article 28 in its present form, as the observations and suggestions to be made by Governments may, at the time of the second reading of the draft articles, help bridge the gap between present conflicting positions.

Paragraph 1

(2) The unbracketed portion of paragraph 1, namely, "the diplomatic bag shall not be opened or detained", is a reproduction of the relevant provisions contained in the four multilateral conventions on diplomatic and consular law, namely, article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 3, first sentence of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 4, of the 1969 Convention on Special Missions; article 27, paragraph 3, and article 57, paragraph 4 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

(3) The principle that the diplomatic bag shall not be opened or detained constitutes the most important aspect of this means of communication and has been upheld as a rule with wide-standing recognition. The immunity from the search of the bag has been considered as the reflection of the basic principle of the inviolability of the archives and documents of the mission generally recognized by customary international law.

(4) The first substantive element of the rule is that the bag cannot be opened without the consent of the sending State. This duty of abstention on the part of the receiving or transit State constitutes an essential component for the protection of the bag and the respect for the confidential nature of its content, which derives from the principle of confidentiality of diplomatic correspondence.

(5) The other substantive element of the rule is related to the obligation of the receiving or, as the case may be, the transit State, not to detain the

diplomatic bag while on its territory. The detention of the bag constitutes an infringement of the freedom of communication by means of diplomatic correspondence. Furthermore, the detention of the bag would mean that for certain periods of time it would find itself under the direct control of the authorities of the transit or the receiving State. This may give rise to a suspicion that within this period the bag has undergone an unauthorized examination incompatible with the requirements for the observance of its confidential character. It is obvious that any detention of the bag may upset the initial time-schedule for its transportation, thus delaying its delivery. Finally, the detention of the bag may compromise its safety as the receiving or the transit State might not be at all times in a position to ensure its integrity and guarantee the continuation of its journey.

(6) There was a discussion in the Commission as to whether the obligations not to open or detain the bag should be categorized as "inviolability of the diplomatic bag". Some members felt that this was the correct concept to designate legal protection of the bag all the more so as the latter derived from the principle of inviolability of the archives and documents of the mission and of diplomatic correspondence. Other members did not think that this concept was really necessary; it had not been used in connection with the bag in any of the above-mentioned multilateral conventions on diplomatic and consular law and might introduce confusion with regard to other parts of the draft article. Furthermore, the concept of inviolability was not consistent with a fair balance between the interest of the sending State in ensuring the confidentiality of its bags and the security interests of the receiving and the transit States. As a result of this conflict of opinions in the Commission, the words "be inviolable wherever it may be" appear between brackets.

(7) The other bracketed element in paragraph 1 is the phrase "and shall be exempt from examination directly or through electronic or other technical devices". Some members of the Commission felt that the inclusion of this phrase was necessary as the evolution of technology had created very sophisticated means of examination which may result in the violation of the confidentiality of the bag, means which were only at the disposal of the most developed States. Other members of the Commission, invoking security interests of the receiving or transit States, and certain characteristics of

today's international relations felt that the possibility, in exceptional cases, of subjecting the bag to security checks by means of scanning through electronic or other technical devices was of fundamental importance to ensure the safety of international communications and to prevent abuses regarding the contents of diplomatic bags. In the view of those members the inclusion of the phrase was incompatible with the balanced solution that paragraph 2 was intended to achieve. The point was also made that bags and other luggage which were not scanned would not be accepted by many airlines.

Paragraph 2

(8) The unbracketed portion of paragraph 2 has as source the second sentence of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. The paragraph intends to introduce a balance between the interests of the sending State in ensuring the protection, safety and confidentiality of the contents of its diplomatic bag and the security interests of the receiving State. In this connection, contemporary international practice has witnessed cases of the diplomatic bag being used or attempted to be used for the illicit import or export of foreign currency, narcotic drugs, arms or other items and even for the transport of human beings which have violated the established rules regarding the admissible contents of the bag and have adversely affected the legitimate interests of the receiving States. Although the protection of the diplomatic bag should be considered as a fundamental principle for the normal functioning of official communications between States, the implementation of that principle should not provide an opportunity for abuse affecting the interests of the receiving State. This is why the draft paragraph provides that if the competent authorities of the receiving State have serious grounds to believe that the bag contains something other than its permissible content (draft article 25) 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 competent authorities of the receiving State may require that the bag be returned to its place of origin.

(9) Some members felt that a provision of this nature might give rise to disputes as sending States may, in their turn, claim that requests for opening the diplomatic bag on presumption of unlawful content of the bag might be motivated by an attempt to breach the confidentiality of the bag's contents.

Other members felt that the principle of reciprocity would act as an effective barrier against possible abuse of the receiving State in requesting the opening of the bag.

(10) The word "consular" appears between brackets because there was no agreement in the Commission as to whether the provision should apply to all bags or only in the case of consular bags. Some members found unacceptable the intended extension of the régime of the consular bags to other types of bags. Other members indicated that, since the purpose of the draft articles was the uniformization of rules on couriers and bags, it was unacceptable to confine paragraph 2 to the consular bag. Paragraph 2, applying to all bags, was a basic component of the acceptability of paragraph 1.

(11) The word "transit" also appears in brackets because some members of the Commission could not accept the extension to the transit State of the rights accorded by the draft paragraph to the receiving State.

(12) There is a third bracketed portion in paragraph 2, namely, the words "that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request". The inclusion of this bracketed portion of the draft paragraph responds to the feeling of some members of the Commission that an intermediate step should be created giving an additional option to the receiving State rather than request from the outset the opening of the bag. It was made clear that it constituted an option for the receiving State and not a necessary step before requesting the opening of the bag, since the receiving State may request from the outset that the bag be opened without using the intermediate step. Some members found this proposal illogical and contrary to existing law, and questionable in so far as it would involve a multiplicity of controls and make satisfaction of the receiving State dependent on subjective criteria, and would, moreover, not require automatic release of the bag for lack of evidence. One member of the Commission was of the opinion that this provision was illogical and absurd as it did not in fact provide for an option for the receiving State but rather for the exercise by that State of two measures of control one after another.

Article 29

Exemption from customs duties, dues and taxes

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

Commentary

(1) There is no specific provision in the codification conventions on diplomatic and consular law concerning the exemption from customs duties, dues and taxes of the diplomatic bag. The present provision is based on the consideration that the bag and its contents are "articles for official use" of missions, consular posts and delegations since, according to the definition provided in draft article 25, the diplomatic bag may contain only official correspondence and documents or articles intended exclusively for official use. Taking the foregoing into account, the sources for this provision are article 36 of the 1961 Vienna Convention on Diplomatic Relations, article 50 of the 1963 Vienna Convention on Consular Relations, article 35 of the 1969 Convention on Special Missions and articles 35 and 65 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

(2) The obligation for States to permit the entry, transit or departure of the diplomatic bag has been well-established in international law and State practice, and constitutes an essential element of the principle of freedom of communication enshrined in draft article 4, by making possible the safe, unimpeded and expeditious delivery of the diplomatic message. It is also a corollary of the official character of the correspondence, documents or articles contained in the diplomatic bag. The rules and regulations of the receiving or transit State may set principles of orderly administration stipulating, for instance, regular points of entry or exit.

(3) As to the exemptions provided for in the draft article, they cover customs and other fiscal dues and taxes levied by the transit or the receiving State on the import or export of goods. The exemptions concern also related charges for customs clearance or other formalities such as those necessary in some States to assure the free exempt status of a given object or article.

The exemptions are granted in accordance with the laws and regulations of the States concerned. They may refer to national, regional or municipal dues and taxes, as provided for in the domestic rules and regulations of the receiving or the transit State. However, the exemptions from customs duties and related charges, as well as other dues and taxes levied by the transit or the receiving State, do not include the charges for storage, cartage, transportation, postage or similar services rendered in connection with the transmission or delivery of the diplomatic bag. Some of these charges for services, such as postage or transportation, could be waived but only on the basis of reciprocal arrangements between the sending and the receiving or the transit State.

Article 30

Protective measures in case of force majeure or other circumstances

1. In the event that, due to force majeure or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take re-possession of it.

2. In the event that, due to force majeure, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

Commentary

(1) The present draft article deals with certain obligations on the part of the receiving or transit States, when force majeure or other circumstances: (a) prevent the diplomatic courier or any person to whom the diplomatic bag has been entrusted, under draft article 23, including any member of the crew of a ship or aircraft in commercial service, from maintaining custody of the bag; or (b) involve a diversion of the courier or the diplomatic bag from their scheduled itinerary into the territory of an unforeseen transit State.

Paragraph 1

(2) Paragraph 1 refers to the case where force majeure or other circumstances, such as death, serious illness, or an accident, prevent the

courier, the captain of a ship or aircraft in commercial service to whom the bag has been entrusted, or any other member of the crew from maintaining custody of the diplomatic bag. The exceptional character of the circumstances involved and the significance of the protected interests warrant the adoption on the part of the receiving or transit State of special measures of protection of the safety of the diplomatic bag. This obligation must be considered as an expression of international co-operation and solidarity of States in the promotion of diplomatic communications and it derives from the general principle of the freedom of communication contemplated in draft article 4. It was made clear in the Commission that the paragraph was not intended to cover the case of loss of or mishaps to the diplomatic bag transmitted by postal service or by any mode of transport (draft article 26) as in such cases it was for the relevant service charged with the transmission to assume responsibility under the special circumstances contemplated in the present paragraph.

(3) The actions to be undertaken by the receiving or the transit State in these special circumstances include the adoption of appropriate measures to protect the safety of the bag and its integrity. This requires the provision of the necessary conditions for the proper storage or custody of the bag. The transit State or the receiving State must also inform the competent authorities of the sending State that the bag dispatched by that State happens to be in their custody, due to special circumstances. When the sending State has its diplomatic mission or consular post in the receiving or the transit State this notification should be addressed to them. In the absence of such a mission or consular post on their territory, the authorities of the receiving or the transit State where the diplomatic bag was found, must notify either the Ministry for Foreign Affairs of the sending State or the mission of another State on its territory which is in charge of the protection of the interests of the sending State.

(4) Two clarifications were made in the Commission with regard to the conditions under which the above described obligations may arise for the receiving and the transit State. Firstly, it is understood that such obligations can only arise when the receiving or the transit State has knowledge of the existence of the special circumstances referred to in the paragraph. Secondly, in the case of a bag entrusted to the captain of a ship

or aircraft, the obligation would only arise for the receiving or the transit State when there is no one in the line of command, or no other member of the crew, in a position to maintain custody of the bag.

Paragraph 2

(5) The source of the provision contained in paragraph 2 is to be found in article 40, paragraph 4 of the 1961 Vienna Convention on Diplomatic Relations, article 54, paragraph 4 of the 1963 Vienna Convention on Consular Relations, article 42, paragraph 5 of the 1969 Convention on Special Missions and article 81, paragraph 5 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

(6) As a rule, and in normal circumstances, the transit States through which a diplomatic courier or an unaccompanied bag will pass on their way to their final destination are well known in advance. However, there may be cases in which the diplomatic courier or the unaccompanied bag are compelled to enter into or stay for some time in the territory of a State which had not been foreseen as part of the normal itinerary of the courier or bag. This may happen in the occurrence of force majeure such as adverse weather conditions, the forced landing of an aircraft, the breakdown of the means of transport, a natural disaster or other events, beyond the control of the courier or the carrier of the bag. Unlike the transit State known in advance, and which has granted a transit visa, if so required, the State through which a bag transits due to force majeure cannot be anticipated. It comes into the picture only in extraordinary situations. This is precisely the situation contemplated in paragraph 2 of the present draft article.

(7) The Vienna Convention on Diplomatic Relations was the first multilateral treaty that established the rule of transit passage of the members of the diplomatic mission and their families, as well as the diplomatic courier and the diplomatic bag whose presence in the territory of the transit State is due to force majeure (article 40, paragraph 4). By analogy with this provision the unforeseen transit State is under an obligation to accord to the diplomatic courier and the diplomatic bag in transit, the same inviolability and protection as are accorded by the receiving State. Similar rules are contained in the other conventions on diplomatic and consular law, listed in paragraph (5) of the present commentary.

(8) The obligations arising for an unforeseen transit State in a case of force majeure fall into two main categories. First, and foremost, there is the duty of protection, so as to ensure the inviolability of the courier and the safety and confidentiality of the bag. Secondly, the unforeseen transit State should accord the courier or the bag all the facilities necessary "to allow them to leave the territory". It was made clear in the Commission that this expression should be understood as giving the transit State the option to allow the courier or bag to continue their journey to their destination or to facilitate their return to the sending State. In this connection, the extent of the facilities to be accorded should be dictated by the underlying purpose of the provision, namely the protection of unimpeded communications between States and the principle of good faith in the fulfilment of international obligations and in the conduct of international relations.

Article 31

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

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations.

Commentary

(1) Except for some drafting adjustments the most direct source of the present provision is article 82, paragraph 1, of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The last part of the draft article regarding the non-existence of diplomatic or consular relations also has as indirect sources article 45 of the 1961 Vienna Convention on Diplomatic Relations, article 2, paragraph 3 of the 1963 Vienna Convention on Consular Relations and article 7 of the 1969 Convention on Special Missions.

(2) The rules relating to the legal effect of the non-recognition of a State or Government or the absence or severance of diplomatic or consular relations contained in the above-mentioned codification conventions adopted under the auspices of the United Nations are applicable to the status of the diplomatic courier and the diplomatic bag. The importance and significance of the functions of the courier and the purpose of the bag as practical means for the

operation of official communications of States deserve special protection and treatment irrespective of problems of recognition of States or Governments or of the existence or absence of diplomatic or consular relations. The proper functioning of official communications is in the interest of the maintenance of international co-operation and understanding and should, therefore, be facilitated even in the exceptional circumstances contemplated in the draft article. The draft article refers both to "non-recognition" and to the "non-existence of diplomatic or consular relations" because recognition, whether of States or Governments, does not necessarily imply the establishment of diplomatic or consular relations. 64/

(3) The wording of the draft article speaks of "non-recognition of the sending State" although it does not spell out by whom, and it refers to "the non-existence of diplomatic or consular relations" without specifying between whom. Several alternative formulations were considered in the Commission, which, briefly stated, connected the two above-mentioned expressions to a relationship between sending State and "receiving State", or between sending State and "host State", or between sending State and both "receiving State and host State". The question of the relationship between sending State and transit State was also considered. In the end, for reasons related both to the need to obtain a consensus on the formulation and to achieve economy of drafting and consistency throughout the draft, the Commission opted for the wording contained in the draft article with the proviso that the commentary thereto would elaborate on its actual scope.

(4) Firstly, the draft article refers to the non-recognition of the sending State by the State in whose territory an international conference is held or the headquarters of an international organization is established, and to the non-existence (absence, suspension or interruption) of relations between them. It is thus designed to provide for the legal protection of the diplomatic courier and the diplomatic bag in official communications between the sending State and its permanent missions or observer missions to international organizations and its delegations to international meetings,

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64/ See Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vol. II, p. 52. Commentary to draft article 79, paragraph (7).

whether conferences or organs of international organizations. Secondly, the draft article also covers the protection of couriers and bags between the sending State and a special mission it may send to another State with the purpose of establishing diplomatic or consular relations. Several members of the Commission were of the view that the draft article also purports to afford protection to couriers and bags passing through a transit State which does not recognize a sending State or its Government or which does not maintain diplomatic or consular relations with the sending State. Some members of the Commission, however, had reservations about extending the scope of the draft article to the transit State when the latter did not recognize the sending State or its Government.

(5) Some members of the Commission felt strongly that the draft article, as presently worded, might provoke doubts as to its real scope and might convey the wrong impression that, even in the absence of recognition or the non-existence of diplomatic or consular relations between two States, the latter were still bound to accept the sending of couriers and bags in the co of their bilateral relations. It might also give the impression that it was referring to the de facto effects of the non-recognition or absence of diplomatic or consular relations, which was not the case. It was felt by these members that the explanatory remarks contained in the preceding paragraphs of the present commentary, which remarks confine the scope of the provision and express the real intentions of the Commission, should have found their way into the text of the draft article itself. It was hoped by these members that re-examination during the second reading of the draft articles might lead to a wording better reflecting the intentions of the Commission.

(6) The Commission was unanimously of the view that the granting of facilities, privileges and immunities referred to in the present draft article did not by itself imply recognition of the sending State or of its Government by the States granting them. A fortiori, it did not imply either recognition by the sending State of the States granting those facilities, privileges and immunities.

Article 32

Relationship between the present articles and existing bilateral and regional agreements

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

Commentary

(1) The most immediate precedent for a provision of this nature may be found in article 71, paragraph 1 of the 1963 Convention on Consular Relations and article 4, paragraph (a) of the 1975 Convention on the Representation of States in the Their Relations with International Organizations of a Universal Character.

(2) The purpose of the present provision is to reserve the position of existing bilateral or regional agreements regulating the same subject matter as the draft articles and should be interpreted in the light of article 30, paragraph 2 of the 1969 Vienna Convention on the Law of Treaties. By means of this legal connection a safeguard clause is established in respect of the rights and obligations of States, deriving from those agreements. It was made clear in the Commission that the word "regional" should not be understood in a purely geographical sense, and was really intended to denote any non-bilateral treaty on the same subject matter other than the four multilateral conventions on diplomatic and consular law adopted under the aegis of the United Nations.

(3) As to the relationship of the present draft articles to the above-mentioned four multilateral conventions, it should be noted that the main purpose of the elaboration of the present draft articles has been the establishment of a coherent and uniform régime governing the status of the courier and the bag. Therefore, the present draft articles shall complement the provisions on the courier and the bag contained in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Vienna Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The desired harmonization and uniformity of the rules governing the legal régime of official communications through diplomatic courier and diplomatic bag is sought by means of the codification and progressive development of additional specific provisions further regulating the matter. The present draft articles

do not purport to codify or amend the above-mentioned multilateral conventions. But at least in the view of some members of the Commission the application of some of the provisions of those conventions may be affected by virtue of the complementary character of the present draft articles, which harmonize and develop the rules dealing with the legal régime of couriers and bags.

(4) One member of the Commission stated that the wording of the draft article was unacceptable for two reasons: (a) it gave to the words "regional agreements" a connotation beyond its natural interpretation; and (b) it might be construed as meaning that the text of the four multilateral conventions on diplomatic and consular law was being affected or modified by the draft articles.

(5) There was a consensus in the Commission to the effect that the provision contained in draft article 6, paragraph 2 (b) of the present draft articles made it possible to dispense with the adoption of an additional paragraph to cover the relationship between the present draft articles and future agreements relating to the same subject matter, particularly if account was taken of article 41 of the 1969 Vienna Convention on the Law of Treaties. It should, therefore, be understood that in accordance with draft article 6, paragraph 2 (b), nothing in the present draft articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag, confirming or supplementing or extending or amplifying the provisions thereof provided that such new provisions are not incompatible with the object and purpose of the present articles and do not affect the enjoyment of the rights or the performance of the obligations of third States.

Article 33

Optional declaration

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraphs 1 and 2 of article 3, to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary who shall circulate copies thereof to the parties and to the States entitled to become parties to the present

articles. Any such declaration made by a contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another party which has accepted the applicability of those provisions to that category of courier and bag.

Commentary

(1) Notwithstanding the main purpose of the elaboration of the present draft articles pointed out in paragraph (3) of the commentary to draft article 32 above, namely, the establishment of a coherent and uniform régime governing the status of the courier and the bag, a number of views expressed by members of the Commission and delegations in the Sixth Committee led the Commission to introduce some flexibility in the draft which would permit States to designate the categories of couriers and bags to which they do not intend the articles to apply. As already indicated in paragraphs 3 and 9 of the commentary to draft article 3, the detailed listing of the different kinds of couriers and bags covered by the concepts of 'diplomatic courier" and "diplomatic bag" defined in draft article 3, purported to show clearly that a State, through an appropriate declaration could reduce the extent of the obligation it assumes by limiting the sphere of application of the draft articles to only certain categories of couriers and bags. It was felt that States should be given a clear choice to apply the future articles to those categories of couriers and corresponding bags they deemed appropriate. Furthermore, as pointed out in paragraph 2 of the commentary to draft article 1, many States are not parties to all four of the multilateral conventions on diplomatic and consular law adopted under the auspices of the United Nations and one of the conventions has not yet entered into force, namely the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The foregoing reasons have led the Commission to include the present article in the draft articles, on the lines of article 298

of the United Nations Convention on the Law of the Sea. It is hoped that the inclusion of this provision would later facilitate the acceptance of the draft articles on the part of States.

(2) It was made clear in the Commission that the optional declaration referred to in the draft article did not constitute a reservation, but was the implementation of an agreed option, with respect to the various provisions, at the disposal of States parties, or wishing to become parties, to the draft articles. One member raised the question whether such a provision detracted from the effort to harmonize the law in this area.

(3) One member of the Commission considered that the introduction of draft article 33 could open the way to States to modify in a unilateral manner the legal régimes established by the four diplomatic conventions to which they were parties.

Paragraph 1

(4) Paragraph 1 deals with the form of the declaration, the time at which it may be made and the object of such declaration. As to the timing, the declaration may be made (a) at the time of a State expressing its consent to be bound by the articles, or (b) at any time thereafter. The phrase under (a) above is used within the meaning of article 11, and the following articles of the 1969 Convention on the Law of Treaties (namely, signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed, as regulated by the relevant articles of the 1969 Convention). The further option under (b) above, namely "at any time thereafter" has been provided so as to facilitate the decision of States wishing to become parties to the draft articles. States may find it easier to express their initial consent if given the chance to reduce the scope of their obligations under the articles at a later stage. The distinction under (a) and (b) above is of the greatest importance with respect to the entry into force of the optional declaration under paragraph 2 of the draft article.

(5) The form of a declaration made under paragraph 1 should be in writing and it may refer to "any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraphs 1 and 2 of article 3". The foregoing sets a double limitation as to the object of the declaration. On the one

hand, the categories of couriers and bags referred to in the paragraph may not be arbitrarily created by the State formulating the declaration. Those categories refer only to couriers and bags within the meaning of each of the multilateral conventions on diplomatic and consular law adopted under the aegis of the United Nations, namely, the 1961 Vienna Convention on Diplomatic Relations; the 1963 Vienna Convention on Consular Relations; the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. On the other hand, the declaration may refer to a category of courier and to the "corresponding" category of bag. This prevents the splitting up of legal régimes; precluding, for instance, declarations which might intend to make the present articles applicable to a consular courier but not to the consular bag or vice versa. Thus, the categories of couriers and bags chosen for non-applicability of the present articles must correspond with each other.

Paragraph 2

(6) Paragraph 2 of the draft article deals with the publicity and with the entry into force of the optional declaration. The publicity of the declaration is ensured by means of its communication to the depositary of the articles that will act in accordance with article 77, paragraph 1 (e) of the 1969 Vienna Convention on the Law of Treaties. Therefore, copies of the declaration will be circulated not only to parties to the treaty but also to "States entitled to become parties to the draft articles". The above procedure also follows along the lines of paragraph 4 of article 7 of the 1978 Vienna Convention on Succession of States in Respect of Treaties concerning declarations on temporal application of the Convention.

(7) As to the entry into force of the declaration, two situations may arise. If the declaration is made at the time of expressing the consent to be bound by the articles it will come into force at that moment or at the time of entry into force of the articles, whichever is later. The second sentence of the paragraph expresses this concept by means of the expression "Contracting State" which, under article 2, paragraph 1 (f) of the 1969 Vienna Convention on the Law of Treaties means "a State which has consented to be bound by the

treaty, whether or not the treaty has entered into force". Therefore a declaration made by a State, after the articles have entered into force, but simultaneously with the expression of its consent to be bound by the articles, will take effect for that State at the same time as the articles themselves. If the articles had not yet entered into force, the declaration will come into effect at the time of entry into force of the articles. Any other declaration shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of the declaration. The second sentence of the paragraph refers to any other declaration as "any such declaration made by a party". The word "party" has been taken within the meaning of article 2, paragraph 1 (g) of the 1969 Vienna Convention on the Law of Treaties which defines it as "a State which has consented to be bound by the treaty and for which the treaty is in force". It was felt in the Commission that a period of three months was a reasonable time to be accorded for the smooth functioning of the articles and to avoid affecting situations of couriers and bags whose mission or itinerary might be in progress at the time of the declaration.

Paragraph 3

(8) Paragraph 3 of the draft article contemplates the withdrawal of a declaration made under paragraphs 1 and 2, by means of a notification in writing addressed to the depositary of the articles. This may be done at any time. Although informing the parties and the States entitled to become parties to the article of such a notification is well within the functions of a depositary in accordance with article 77, paragraph 1 (e) of the 1969 Vienna Convention on the Law of Treaties, a withdrawal takes effect immediately upon notification in writing, independently of its later circulation and without any notice period being established. The Commission was of the view that, since a withdrawal represents a return to the goal of uniformization and systematization of the rules governing couriers and bags pursued by the draft articles, there was an overriding interest in facilitating its coming into effect.

Paragraph 4

(9) Paragraph 4 seeks to establish a fair balance in the interplay of rights and obligations arising from States parties from the joint application of the provisions of the articles and the restrictions contained in the eventual declarations to be made. Its legal foundation is reciprocity, as, under the paragraph, no State can invoke against another State an obligation relating to some category of courier and bag which the invoking State is not prepared to assume *vis-à-vis* the other States parties.

CHAPTER IV

STATE RESPONSIBILITY

A. Introduction

34. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic: "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation (mise en oeuvre) of international responsibility. 65/

35. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 66/

36. The Commission, at its thirty-second session, also began the consideration of Part Two of the draft articles on "the content, forms and degrees of international responsibility".

37. The Commission, from its thirty-second to its thirty-seventh session in 1985, received six reports from the Special Rapporteur, Mr. Willem Riphagen, 67/ with reference to Part Two of the draft articles.

65/ Yearbook ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

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

67/ For the six reports of the Special Rapporteur, See Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330; Yearbook ... 1981, vol. II (Part One), p. 79, document A/CN.4/334; Yearbook ... 1982, vol. II (Part One), p. 22, document A/CN.4/354; Yearbook ... 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1; Yearbook ... 1984, vol. II (Part One), p. 1, document A/CN.4/380; and, for 1985, document A/CN.4/389 and Corr.1 and 2 (French only).

38. As of the conclusion of its thirty-seventh session, in 1985, the Commission had reached the following stage in its work on the preparation of Part Two of the draft articles. The Commission had: provisionally adopted draft articles 1 to 5 on first reading; 68/ referred draft articles 6 to 13 to the Drafting Committee; and referred draft articles 14 to 16 to the Drafting Committee on the understanding that any comments the Drafting Committee might wish to make on draft articles 14 to 16 should be taken into consideration by the Special Rapporteur in preparing his future reports to the Commission. As of the conclusion of the thirty-seventh session of the Commission, the Drafting Committee because of pressure of work had not been able to give consideration to draft articles 6 to 16. 69/

39. The Commission, further, at its thirty-seventh session in 1985, on the basis of the sixth report of the Special Rapporteur, began, with a preliminary exchange of views, its consideration of Part Three of the draft articles concerning "the implementation (mise en oeuvre) of international responsibility and the settlement of disputes". The sixth report of the Special Rapporteur to the thirty-seventh session of the Commission proposed a general plan for Part Three of the draft articles. 70/

B. Consideration of the topic at the present session

40. At its present session the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/397 and Corr.1 (English and Spanish only), Corr.2 and Corr.3 (Arabic, Chinese, French and Russian only) and Add.1 and

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68/ The draft articles 1 to 5 (provisionally adopted by the Commission on first reading) are set out below in section C of this chapter of the report.

69/ The draft articles 6 to 16 referred by the Commission to the Drafting Committee are set out in the report of the Commission on its thirty-seventh session (Official Records of the General Assembly, document A/40/10, pp. 39-42; note 54).

70/ For a fuller statement of the historical background of this topic, see Official Records of the General Assembly, Fortieth session, Supplement No. 10, document A/40/10, paras. 102-163.

Corr.1). The report contained two parts: the draft articles, with commentaries, of Part Three of the topic, 71/ and the first section (which was

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71/ These draft articles read as follows:

Article 1

A State which wishes to invoke article 6 of Part Two of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Article 2

1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in a ticle 1, the claimant State wishes to invoke article 8 or article 9 of Part Two of the present articles, it must notify the State alleged to have committed the internationally wrongful act, of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations, the performance of which is to be suspended, are stipulated in a multilateral treaty, the notification, prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1, shall not prevent it from making the notification, prescribed in the present article in answer to another State claiming performance of the obligations covered by that notification.

Article 3

1. If objection has been raised against measures taken or intended to be taken, under article 8 or article 9 of Part Two of the present articles, by the State alleged to have committed the internationally wrongful act, or by another State claiming to be an injured State in respect of the suspens of the performance of the relevant obligations, the States concerned sha seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Article 4

If under paragraph 1 of article 3, no solution has been reached

neither introduced nor discussed at the present session) of the preparation

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within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (b) of Part Two of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(b) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of Part Two of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(c) Any one of the parties to a dispute concerning the application or the interpretation of articles 8 to 13 of Part Two of the present articles, may set in motion the procedure specified in the annex to Part Three of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Article 5

No reservations are allowed to the provisions of Part Three of the present articles, except a reservation excluding the application of article 4 (c) to disputes concerning measures taken or intended to be taken under article 9 of Part Two of the present articles by an alleged injured State, where the right allegedly infringed by such measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

Annex

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (c) of Part Three of the present articles, the Secretary-General

for the second reading of Part One of the draft articles, concerning the written comments of governments on ten of the draft articles of Part One.

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shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a conciliation commission acting under this annex has competence shall be decided by the commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may

41. In presenting the first part of his seventh report, the Special Rapporteur, referring in general to his sixth report, stressed the interrelationship between the three Parts of the draft articles on State responsibility, and, moreover, the interrelationship between (1) the source and content of the "primary" rules, (2) the "secondary" rules of State responsibility, (3) the machinery for implementation, and (4) the actual "force" of the machinery, as elements of one "system" of law.

42. The Special Rapporteur also emphasized the residual character of the draft articles on State responsibility. In his view, States remain free to establish "soft law" between them, just as the international community of States as a whole remains free to establish jus cogens. This was already reflected in draft articles 2 and 4, of the draft articles of Part Two, provisionally adopted by the Commission on first reading.

43. Draft articles 6 to 16, of the draft articles of Part Two, which had been referred to the Drafting Committee, enumerated a number of unilateral reactions to an internationally wrongful act alleged to have been committed. These unilateral reactions ranged from a demand for reparation lato sensu

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invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

(draft articles 6 and 7), through measures by way of reciprocity (draft article 8) and measures by way of reprisal (draft article 9), to "additional rights and obligations" (draft articles 14 and 15). Such unilateral reactions could involve an increasing number of States. The reactions were all "disruptive" in the sense that, in themselves, they tended to involve intervention in the internal and external affairs of the other State, to deviate from the rule of pacta sunt servanda, and to set aside other rules of friendly relations and co-operation between States. Their justification lay in the veracity of the allegation that an internationally wrongful act had been committed, and the degree to which such an act was itself "disruptive" in respect of the system involved.

44. Part Two also contained provisions limiting such unilateral reactions both by substantive rules (such as draft articles 9 (2), 11 (1) and 12) and by procedural provisions (such as draft articles 10, 11 (2) and 14 (3)). The procedural limitations presuppose the existence of a machinery for implementation relating to the obligations alleged to have been breached. The substantive limitations were centred around the concept of "proportionality".

45. If such machinery for implementation does not exist (or is not applied) and if the substantive limitation of "proportionality" is subject to divergent interpretations (or is perhaps not even strictly applicable), and in particular if the allegation of an internationally wrongful act having been committed is itself disputed, the first unilateral reaction could in turn lead to a counter-reaction, thereby entailing a danger of escalation.

46. In order to limit that danger Part Three proposed a minimum of organizational arrangements in connection with the substantive rules of State responsibility. The draft articles 1 to 5 and the Annex in Part Three closely followed the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

47. The Commission considered the Special Rapporteur's proposals for Part Three of the draft articles at its 1952nd to 1956th meetings.

48. Some members of the Commission were of the view that it was not certain that providing for obligatory reference of the dispute to the International Court of Justice, even in the particular cases referred to in draft article 4,

subparagraphs (a) and (b), of Part III, was acceptable. In this connection, it was recalled that a certain number of States had not accepted as obligatory the jurisdiction of the International Court of Justice. These members referred to the principle of the freedom of choice by the parties of the means of settlement of their dispute.

49. Other members pointed out that the draft articles proposed by the Special Rapporteur for Part Three had a limited scope; compulsory conciliation was only provided for in the situation in which countermeasures had been taken and thus the danger of escalation arose; the compulsory jurisdiction of the International Court of Justice was limited to cases in which a State alleged that a measure of reciprocity or reprisal over-stepped the limits posed by a rule of jus cogens, and cases in which "additional rights and obligations" entailed by the alleged commitment of an international crime were invoked. Those members considered the compulsory character of the dispute settlement procedures in these limited cases a necessary corollary of Part Two, providing for unilateral reactions, and anticipated that most States would be willing to accept such procedures as part of a convention on State responsibility.

50. Still other members preferred a wider scope for the provisions on compulsory conciliation so as to cover cases of dispute with respect to all the legal consequences of an (alleged) internationally wrongful act, including cases in which no resort to countermeasures was intended. It was pointed out, however, that such a scope would in fact meant that all international obligations would be provided with a compulsory means of settlement in case of disputes relating to their interpretation and application.

51. As regards the specific draft articles and the Annex of Part Three, some members stated that it should be made clear that draft articles 1 and 2 did not exclude other communications between States in respect of an alleged or threatening breach of an international obligation, prior to the notifications mentioned in these draft articles.

52. Some members doubted the necessity of two separate notifications, as provided for in draft article 1 and draft article 2 (1). Other members pointed out that the alleged author State should be put on notice as regards the measures required of it by the injured State, since draft article 6 of

Part Two, as proposed, envisaged several measures. It was also pointed out that in particular "in cases of special urgency", the two notifications could be embodied in one and the same communication to the alleged author State.

53. In the same connection some members thought it useful that some indication should be given as to what would constitute "cases of special urgency".

54. Several members preferred to replace the word "wishes", in draft article 1 and draft article 2 (1), by some stronger expression such as "decides" or "intends".

55. As regards draft article 3 (1), it was observed that the obligation to settle a dispute through the peaceful means indicated in Article 33 of the Charter of the United Nations obviously would arise before any countermeasures were considered or notified. On the other hand, this obligation did not suspend the right of the injured State to take countermeasures, subject to draft article 10 of Part Two.

56. Some members suggested that the draft articles of Part Three should deal with the question of "prescription" of the rights of the injured State, as indicated in paragraph 101 of the preliminary report submitted by the Special Rapporteur to the thirty-second session of the Commission. 72/ One member voiced the opposing view.

57. As regards draft article 3 (2) the view was expressed that it could be clarified, so as to exclude resort to the procedures envisaged in draft article 4 in case the dispute as a whole, including the interpretation and application of the "primary" rules involved could, "under any provisions in force" (e.g. on the basis of a mutually binding optional clause declaration) be submitted to the International Court of Justice.

58. As to the introductory words of draft article 4, it was observed that, if the "solution", referred to therein covered a "solution" consisting of an agreement between the States concerned to apply a particular means of peaceful settlement, the period of 12 months would seem too long. If, however, the final solution of the dispute itself was meant, the period could well be too short.

72/ Yearbook ... 1980, vol. II (Part One), p. 107, document A/CN.4/330.

59. It was generally recognized that in the course of any dispute settlement procedure under draft article 4 the "third party" would have to deal not only with the question of interpretation and application of the particular articles, of Part Two, mentioned in draft article 4, but also with "incidental" questions necessarily arising in such procedures with respect to other articles of Part Two, the articles of Part One, the application or the interpretation of the "primary" rules involved, and indeed, questions of fact. Some members suggested that this should be clarified in the text itself of draft article 4.

60. Several members drew attention to the necessity, at some stage, of harmonizing the envisaged dispute settlement procedures with the implementation procedures, to be adopted within the framework of the two related topics, namely the "Draft Code of Offences against the peace and security of Mankind", and "International liability for injurious consequences arising out of acts not prohibited by international law".

61. Some members preferred the wording of article 66 of the 1969 Vienna Convention on the Law of Treaties to be followed more closely in Part Three; particularly by inserting in the introductory words of draft article 4 the words "unless the parties by common consent agree to submit the dispute to arbitration", and in the Annex. It was pointed out that the possibility of arbitration by common agreement was always present, if only by application of draft article 3 and that the deviations in the Annex were inspired by the relevant Annex to the 1982 United Nations Convention on the Law of the Sea.

62. As regards draft article 5 one member considered the exception to the non-admissibility of reservations too broadly worded. Some other members considered the text acceptable and even necessary while still other members preferred the questions of admissibility or non-admissibility of reservations to be left to an eventual diplomatic conference on the draft articles.

63. The Commission, at the conclusion of its discussion, decided to refer draft articles 1 to 5 of Part Three and its annex to the Drafting Committee.

64. However, due to the exceptional shortening of the session of the Commission, the Drafting Committee was not able to give consideration to the draft articles 1 to 5 of Part III and its Annex.

65. At the 1980th meeting of the Commission, on 2 July 1986, the Chairman of the Drafting Committee reported to the Commission on the progress of work in

the Drafting Committee on the draft articles on State responsibility. The Drafting Committee had devoted five meetings at the present session to draft article 6 of Part Two of the draft articles, but, for lack of sufficient time, it was not possible for the Drafting Committee to successfully conclude its work on that draft article. 73/

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

Text of the draft articles provisionally adopted so far by the Commission 74/

Article 1

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

73/ However, progress had been made in the Drafting Committee's consideration of draft article 6 (for the text of article 6, see report of the Commission on its thirty-seventh session (Official Records of the General Assembly, document A/40/10, pp. 39-42, footnote 54)). Consensus had been reached on the introductory words of paragraph 1 of draft article 6 ("The injured State is entitled to require the State which has committed an [internationally wrongful act] [international delict] to ..."), on the opening words of subparagraph (a) ("discontinue the act ..."), and a large measure of consensus had been reached on a revised version of subparagraphs (c) ("Subject to paragraph 2 [and to article 7], re-establish the situation as it existed before the act") and (d) ("take appropriate measures designed to avoid repetition of the act"). There had been no consensus, however, on a revised version for subparagraph (b) ("take appropriate measures of a disciplinary or penal character against the persons who have perpetrated the act, as provided for in its internal law"); nor on a revised version for the concluding words of subparagraph (a) ("adopt appropriate measures in order to reduce the continuing effects of the act"). There had been a large measure of consensus with respect to paragraph 2 of the draft article.

74/ As a result of the provisional adoption of draft article 5 at the thirty-seventh session, the Commission adopted consequential modifications to certain draft articles provisionally adopted at its thirty-fifth session (see Report of the International Law Commission on the work of its thirty-seventh session, Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), Chapter III, Section A.1, para. 106). Those modifications were as follows: in draft articles 2 and 3, the references to "articles [4] and 5" were changed to "articles 4 and [12]"; and draft article "5" was re-numbered draft article "4".

Article 2

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

Article 3

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

Article 4

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

Article 5

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

2. In particular, "injured State" means

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

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

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

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

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

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

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

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

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

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

CHAPTER V

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

66. The General Assembly in resolution 177 (II) of 21 November 1947 directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session, in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

67. On the basis of the reports of the Special Rapporteur, the Commission, (a) at its second session in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session in 1954, submitted a draft Code of Offences against the Peace and Security of Mankind, with commentaries, to the General Assembly. 75/

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

69. The General Assembly in resolution 3314 (XXIX) of 14 December 1974 adopted by consensus the Definition of Aggression.

70. On 10 December 1981, the General Assembly in resolution 36/106 invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind, and to examine it with

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75/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Report of the International Law Commission on the work of its thirty-seventh session, Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), chapter II, paras. 18 and 45.

the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.

71. The Commission, at its thirty-fourth session in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. The Commission, from its thirty-fifth session in 1983 to its thirty-seventh session in 1985, received three reports from the Special Rapporteur. 76/

72. The stage reached by the Commission in its work on the topic by the end of its thirty-seventh session, in 1985, was as follows. The Commission was of the opinion that the draft Code should cover only the most serious international offences. These offences would be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject. As to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on that point, because of the political nature of the problem, of the international criminal responsibility of States. As to the implementation of the Code, since some members considered that a Code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requested the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals. 77/ The General Assembly was requested to indicate whether such jurisdiction should be competent with respect to States. 78/

76/ Documents A/CN.4/364, A/CN.4/377 and Corr.1, A/CN.4/378 and Corr.1 and 2 (Spanish only).

77/ On the question of an international criminal jurisdiction, see Report of the International Law Commission on the work of its thirty-seventh session, Official Records of the General Assembly, Fortieth Session, Supplement No.10 (A/40/10), para. 19 and notes 15 and 16.

78/ Report of the International Law Commission on the work of its thirty-fifth session, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10 (A/38/10, para. 69)

73. Moreover, the Commission had stated that it was its intention that the content ratione personae of the draft Code should be limited at that stage to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. As to the first stage of the Commission's work on the draft Code, and in the light of General Assembly resolution 38/132 of 19 December 1983, the Commission intended to begin by drawing up a provisional list of offences, while bearing in mind the drafting of an introduction summarizing the general principles of international criminal law relating to offences against the peace and security of mankind.

74. As regards the content ratione materiae of the draft Code, the Commission intended to include the offences covered by the 1954 draft Code, with appropriate modifications of form and substance to be considered by the Commission at a later stage. As of the thirty-sixth session of the Commission, in 1984, a general trend had emerged in the Commission in favour of including, in the draft Code, colonialism, apartheid, and, possibly, serious damage to the human environment and economic aggression, if appropriate legal formulations could be found. The notion of economic aggression had been further discussed at the thirty-seventh session of the Commission, in 1985, but no definite conclusions were reached. As regards the use of atomic weapons, the Commission had discussed the problem at length, but intended to examine the matter in greater depth in the light of any views expressed in the General Assembly. With regard to mercenarism, the Commission considered that, in so far as the practice was used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constituted an offence against the peace and security of mankind. The Commission considered, however, that it would be desirable to take account of the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. As regards the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc. and the hijacking of aircraft, the Commission considered that these practices had aspects which could be regarded as relating to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission

recognized it as an international crime under customary international law. It none the less doubted whether, in the present international community, the offence could be such as to constitute a threat to the peace and security of mankind. 79/

75. At its thirty-seventh session, in 1985, the Commission considered the Special Rapporteur's third report, which specified the category of individuals to be covered by the draft Code and defined an offence against the peace and security of mankind. The report examinded the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft Code and possible additions to those paragraphs. The report also proposed a number of draft articles: namely, "Scope of the present articles" (article 1); "Persons covered by the present articles" (article 2); "Definition of an offence against the peace and security of mankind" (article 3); and "Acts constituting an offence against the peace and security of mankind" (article 4). 80/

76. The Commission, at its thirty-seventh session, referred draft article 1, draft article 2 (first alternative) and draft article 3 (both alternatives) to the Drafting Committee. It also referred section A of draft article 4 (both alternatives), entitled "The commission [by the authorities of a State] of an act of aggression" to the Drafting Committee, on the understanding that the Drafting Committee would consider it only if time permitted and that, if the Drafting Committee agreed on a text for draft article 4, section A, it would be for the purpose of assisting the Special Rapporteur in the preparation of

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79/ Report of the International Law Commission on the work of its thirty-sixth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), para. 65.

80/ For the text, see the Report of the International Law Commission on the work of its thirty-seventh session, Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), notes 28, 34 and 35.

his fourth report. 81/ Owing to lack of time, the Drafting Committee was not able to take up the draft articles referred to it by the Commission. 82/

B. Consideration of the topic at the present session

77. At the present session, the Commission had before it the Special Rapporteur's fourth report on the topic (A/CN.4/398 and Corr.1-3). The Special Rapporteur divided his fourth report into five parts, namely, I. Crimes against humanity, II. War crimes, III. Other offences (related offences), IV. General principles, and V. Draft articles.

78. The Commission considered the topic at its 1957th to 1969th meetings and discussed the first four parts of the Special Rapporteur's report. The result of the discussion is reflected at the end of this chapter under the heading "Conclusions".

79. The set of draft articles submitted by the Special Rapporteur in part V of the report contains a recasting of draft articles submitted at the thirty-seventh session of the Commission 83/ and a number of new draft articles. 84/ The Commission decided to postpone detailed consideration of the draft articles to its next session.

81/ Ibid., paras. 34-41.

82/ For a fuller statement of the historical background of this topic, see Official Records of the General Assembly, Fortieth Session, Supplement No.10 (A/40/10) paras. 11 to 101.

83/ See note 80 above.

84/ The set of draft articles submitted by the Special Rapporteur read as follows:

CHAPTER I

INTRODUCTION

Part I - Definition and characterization

Article 1 - Definition

The crimes under international law defined in this draft code constitute offences against the peace and security of mankind.

Article 2 - Characterization

The characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the

internal order. The fact that an action or ...sion is or is not prosecuted under internal law does not affe... ...s characterization.

Part II - General principles

Article 3 - Responsibility and penalty

Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

Article 4 - Universal offence

1. An offence against the peace and security of mankind is a universal offence. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudge the question of the existence of an international criminal jurisdiction.

Article 5 - Non-applicability of statutory limitations

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

Article 6 - Jurisdictional guarantees

Any person charged with an offence against the peace and security of mankind is entitled to the guarantees extended to all human beings and particularly to a fair trail on the law and facts.

Article 7 - Non-retroactivity

1. No person shall be convicted of an action or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. The above provision does not, however, preclude the trial or punishment of a person guilty of an action or omission which, at the time of commission, was criminal according to the general principles of international law.

Article 8 - Exceptions to the principle of responsibility

1. Apart from self-defence in cases of aggression, no exception may in

principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:

(a) The official position of the perpetrator, and particularly the fact that he is a Head of State or Government, does not relieve him of criminal responsibility;

(b) Coercion, state of necessity or force majeure do not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(c) The order of a Government or of a superior does not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(d) An error of law or of fact does not relieve the perpetrator of criminal responsibility unless, in the circumstances in which it was committed, it was unavoidable for him;

(e) In any case, none of the exceptions in subparagraphs (b), (c) and (d) eliminates the offence if;

(i) The fact invoked in his defence by the perpetrator is a breach of a peremptory rule of international law;

(ii) The fact invoked in his defence by the perpetrator originated in a fault on his part;

(iii) The interest sacrificed is higher than the interest protected.

Article 9 - Responsibility of the superior

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

CHAPTER II

OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 10 - Categories of offences against the peace and security of mankind

Offences against the peace and security of mankind comprise three

categories, crimes against peace, crimes against humanity and war crimes or [crimes committed on the occasion of an armed conflict].

Part I - Crimes against peace

Article 11 - Acts constituting crimes against peace

The following constitute crimes against peace:

1. The commission by the authorities of a State of an act of aggression.

(a) Definition of aggression

(i) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition;

(ii) Explanatory note - In this definition, the term "State":

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

(b) Includes the concept of "group of States" where appropriate.

(b) Acts constituting aggression

Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression, without this enumeration being exhaustive:

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

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

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

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

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

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

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

(c) Scope of this definition

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

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

2. Recourse by the authorities of a State to the threat of aggression against another State.

3. Interference by the authorities of a State in the internal or external affairs of another State, including:

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

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

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

(a) Definition of terrorist acts

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

(b) Terrorist acts

The following constitute terrorist acts:

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

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

(iii) Any act calculated to endanger the lives of members of the public through fear of a common danger, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against perosns who enjoy international protection or diplomatic immunity;

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

5. A breach of obligations incumbent on a State under a treaty which is designed to ensure international peace and security, particularly by means of:

(i) Prohibition of armaments, disarmament, restrictions or limitations on armaments;

(ii) Restrictions on military preparations or on strategic structures or any other restrictions of the same kind.

6. A breach of obligations incumbent on a State under a treaty prohibiting the deployment or testing of weapons, particularly nuclear weapons, in certain territories or in space.

7. The forcible establishment or maintenance of colonial domination.

8. The recruitment, organization, equipment and training of mercenaries or the provision to them of means of undermining the independence or security of States or of obstructing national liberation struggles.

A mercenary is any person who:

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

(ii) Does, in fact, take a direct part in the hostilities;

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

(iv) Is neither a national or a party to the conflict nor a resident of territory controlled by a party to the conflict;

(v) Is not a member of the armed forces of a party to the conflict;

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

Part II - Crimes against humanity

Article 12 - Acts constituting crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act 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 from one group to another group.

2. First alternative

Apartheid, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2. Second alternative

Apartheid, which includes similar policies and practices of racial segregation and discriminatin as practised in southern Africa, shall apply to the following inhuman act committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

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

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right

to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

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

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

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

3. Inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds.

4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

Part III - War Crimes

Article 13 - Definition of war crimes

First alternative

(a) Any serious violation of the laws or customs of war constitutes a war crime.

(b) Within the meaning of the present draft Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 10 June 1977 to those Conventions.

Second alternative

(a) Definition of war crimes

Any serious violation of the conventions, rules and customs

applicable to international or non-international armed conflicts constitutes a war crime.

(b) Acts constituting war crimes

The following acts, in particular, constitute war crimes:

(i) Serious attacks on persons and property, including intentional homicide, torture, inhuman treatment, including biological experiments, the intentional infliction of great suffering orof serious harm to physical integrity or health, the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;

(ii) The unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction (in particular first use of atomic weapons).

Part IV - Other offences

Article 14

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

A. First alternative

Conspiracy [complot] to commit an offence against the peace and security of mankind.

A. Second alternative

Participation in an agreement with a view to the commission of an offence against the peace and security of mankind.

B. (a) Complicity in the commission of an offence against the peace and security of mankind.

(b) Complicity means any act of participation prior or subsequent to the offence, intended either to provoke or facilitate it or to obstruct the prosecution of the perpetrators.

C. Attempts to commit any of the offences defined in the present Code.

80. The paragraphs that follow contain, first, the main observations and conclusions submitted by the Special Rapporteur in his fourth report in connection with the points discussed in each of the first four parts of the report, and second, the main trends of opinion expressed in the Commission on those points.

I. Crimes against humanity

81. In his report, the Special Rapporteur examined the concept of a crime against humanity before the 1954 draft Code was elaborated, and then as the concept was viewed in the 1954 draft. He also went on to consider other offences not covered by the 1954 draft.

1. Definition of a crime against humanity and the 1954 draft Code: genocide and inhuman acts

82. In his report the Special Rapporteur first sought to define or clarify certain concepts.

83. The Special Rapporteur considered that the term "humanity" could be viewed from three different perspectives: that of culture by reference to humanism, that of philanthropy and beneficence, and that of human dignity. The Special Rapporteur's opinion is that none of these elements can be excluded from the content of crimes against humanity. The destruction of human culture, cruelty directed against human existence, the degradation of human dignity are various aspects of one and the same offence: a crime against humanity. The Special Rapporteur also considered whether a crime against humanity should include a mass element or whether, on the other hand, any grave attack directed at one single individual is a crime against humanity. He pointed out that the mass element seemed to be the one selected most often. Nevertheless, for some offences, it was not the mass element but rather the perpetrator's special intention that had to be borne in mind. For example, in the case of the crime of genocide, any act committed against an individual for the purpose of destroying an ethnic group, in whole or in part, constitutes that crime. Generally speaking, however some mass element was required for an offence to be characterized as a crime against humanity.

84. In connection with the meaning of the word "crime", the Special Rapporteur pointed to an evolution in the substance of the term in the expression "crime against humanity". In the Charter of the Nürnberg Tribunal,

for example it had not necessarily covered the most serious acts. It had been a general expression covering all categories of criminal acts and had been synonymous with an offence. In most cases the acts had been crimes, but sometimes the term had covered lesser offences or even petty offences. For example, Law No. 10 of the Allied Control Council (article II (1) (c)) had defined crimes against humanity as being atrocities and offences. From this standpoint, the draft Code submitted by the Special Rapporteur narrows the scope of the Code by covering solely the most serious offences, those found at the top of the scale.

85. With reference to the meaning and content of the expression "crime against humanity", the Special Rapporteur took the view that none of the definitions was sufficiently comprehensive to cover the entire content of the expression. Some definitions emphasized the character of the crime (barbarity, atrocity, cruelty); others emphasized its humiliating or degrading aspect, namely the outrage upon personal dignity; others stressed the infringement of a right (fundamental rights); yet others stressed its mass nature (extermination, enslavement, and so on). Lastly, others emphasized the legal personality of the perpetrator, a crime against humanity being an act of State sovereignty whereby a State attacks the sovereignty of a State, the personality of a people, and so on.

86. In the Special Rapporteur's view, the only element which seems to be unanimously accepted is motive. All writers, all resolutions, all judicial decisions agree that what characterizes a crime against humanity is the motive, that is, the intention to harm a person or group of persons because of race, nationality, religion or political opinions. The Charter of the Nürnberg Tribunal, the Charter of the International Military Tribunal for the Far East and Law No. 10 of the Allied Control Council all emphasize this aspect.

87. The Special Rapporteur then went on to consider the content of a crime against humanity in the 1954 draft. He pointed out that there were two characteristics in the case of the 1954 draft: it rendered the concept of a crime against humanity autonomous by detaching it from the concept of belligerence. Next, it was possible to distinguish two categories: genocide (article 2 (10)) and other "inhuman acts" (article 2 (11)). Whereas a crime

against humanity under the Charter of the Nürnberg Tribunal could be committed only on the occasion of an armed conflict, the 1954 draft Code, by eliminating the element of belligerence, had considerably broadened the scope of the concept of a crime against humanity. The second characteristic might seem questionable, since genocide formed part of "inhuman acts" and it could well be asked why it should be assigned a separate place. The Special Rapporteur's view was that the authors of the 1954 draft Code had wished to emphasize the special intention underlying this crime. The approach seemed to be well founded and the Special Rapporteur therefore proposed that the 1954 text should be retained.

88. The definition of a crime against humanity and the constituent elements of the crime were considered by the Commission. Several members were of the opinion that an effort should be made to distinguish this category of crimes from certain common crimes that could resemble it. The fact that a heinous crime, however inhuman, was directed against an individual or a number of individuals, was not enough to characterize it as a crime against humanity. It should, in addition, form part of a systematic plan to perpetrate acts directed against a human group or a people on grounds of, for instance, racial or religious hatred. It followed that motive was essential for the characterization of the act as a crime against humanity.

89. Other members of the Commission expressed reservations about including the "systematic design" element or the "mass" element in the definition of a crime against humanity. They thought that the inclusion of this type of element could be detrimental to the effectiveness of the draft Code and that some flexibility should be maintained so that certain acts committed against individuals could also be covered.

90. Although they agreed, generally speaking, on the distinction between "genocide" and "inhuman acts", some members of the Commission were of the view that it would be better to speak of "other inhuman acts" and place this category at the end of the enumeration of crimes against humanity.

91. Some members of the Commission argued that crimes against humanity should not be confined solely to those based on ethnic, racial, religious or political considerations; other considerations could also be involved, including private gain. Many crimes committed by private individuals were

based on private gain and groups of individuals, particularly if such groups were powerful in terms of numbers or means, could commit criminal acts of such a character that the acts could be ranked as crimes against humanity.

92. Some members doubted whether "interference by the authorities of a State in the internal or external affiars of another State" constituted in all cases a crime against humanity.

2. Crimes against humanity not covered by the 1954 draft Code: apartheid; serious damage to the environment; other crimes

93. In his report, the Special Rapporteur proposed that, since the various international instruments declaring apartheid to be an offence had already been listed in an earlier report, 85/ apartheid should be expressly referred to in the draft Code. The Special Rapporteur's view was that apartheid's specific aspects, the particular form it took and the fact that it was based on a constitution and a system of government made it a crime which had particular features and should be dealt with as such in the draft Code. The definition of apartheid proposed by the Special Rapporteur consisted of two alternatives: one merely referred to article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the other fully reproduced the provisions of that article.

94. Different views were expressed in the Commission on the inclusion of apartheid in the draft Code. Although the condemnation of that practice does not give rise to any reservations and was generally endorsed by the Commission, some members expressed doubts with respect to the way in which the definition of that crime should be formulated. Some members who were not in favour of a definition containing a mere renvoi said that the body of the article should, in so far as possible, include the definitions contained in the relevant conventions and provisions. Other members did not regard conventions to which there had been few accessions as an acceptable basis, stating that the Commission had to draft an instrument on which broader agreement could be reached. It was also maintained that, even though certain

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85/ Second report by the Special Rapporteur (A/CN.4/377 and Corr.1) and Report of the International Law Commision on the work of its thirty-sixth session, Official Records of the General Assmebly, Thirty-ninth Session, Supplement No. 10 (A/39/10), para. 50 (14) and footnotes 36 and 37.

acts committed in pursuance of the policy of apartheid were inhuman enough to be referred to in the draft Code, there might be some overlapping with genocide and inhuman acts. It would therefore be necessary to identify the acts committed in pursuance of the policy of apartheid which were specific to that policy and which were not already included in the category of inhuman acts. Some members of the Commission took the view that the provision on apartheid had to be worded in such a way as to refer only to the country which instigated that policy, while other members thought that the wording should be general enough to refer to such an institution wherever it existed. One member of the Commission suggested that the accomplices of the crime of apartheid should include the authorities of a foreign State who, on the grounds of economic interests, supported the State which practised it.

95. In his report, the Special Rapporteur suggested that crimes against humanity should include any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

96. The comments made in the Commission in that regard stressed the fact that account had to be taken of the seriousness of damage to the environment and of the element of intent. It was pointed out that any provision relating to such an offence had to be extremely precise because less serious damage to the environment was not necessarily a crime against humanity. Some members were of the opinion that the draft Code should refer only to serious damage to the environment resulting from a breach of the relevant treaties and conventions. Other members expressed doubts about the criminal nature of damage to the environment.

97. During the Commission's discussions, reference was made to the place to be assigned to certain offences in the draft Code.

98. In that connection, some members of the Commission pointed out that terrorism was a typical example of an offence belonging to two categories of crimes. It had to be regarded as a crime against peace when it was instigated and perpetrated by a State against another State, but it could and should be regarded as a crime against humanity when terrorist acts were committed by private individuals on their own behalf, even if their purpose was political.

99. Some members expressed reservations with respect to the qualification of terrorism as a crime against humanity.

100. A few members of the Commission were also of the view that drug trafficking should be regarded as a crime against humanity, while others considered that that would constitute an unwarranted extension of the concept of a "crime against humanity". According to the latter drug trafficking was, of course, an international crime, but it was not, for all that, an offence against the peace and security of mankind.

101. Some members of the Commission indicated that the draft Code should expressly and specifically condemn, as a crime against humanity, any acts committed, with or without support from abroad, in order to subject a people to a régime not in keeping with the right of peoples to self-determination and to deprive such people of human rights and fundamental freedoms.

102. Some members proposed the inclusion, in the Draft Code, of trafficking in children and women, and slavery, as offences.

II. War crimes

103. In his report, the Special Rapporteur set forth the problems raised by the concept of war crimes and divided them into the three categories: terminology problems; substantive problems and problems of methodology. Reference was made to that division during the Commission's discussions.

1. Terminology problems

104. The Special Rapporteur said that problems arose primarily in connection with the term "laws and customs of war". War is no longer lawful. Reference, thus, could not be made to the "laws and customs of war" or to "war crimes", for war itself was a crime. In the traditional sense, war pitted State against State. It was an act of State sovereignty. At present it could pit State entities against non-State entities, such as national liberation movements. In view of that aspect of the problem, draft article 13 as proposed by the Special Rapporteur consisted of two alternatives: one used the word "war", but gave a new definition of that term; and the other replaced the word "war" by the words "international or non-international armed conflict", as defined by the 1949 Geneva Conventions and the Additional Protocols of 1977 thereto.

105. Several members of the Commission took the view that the traditional terms "war crimes" and "violation of the laws and customs of war" should be retained even if war had become a wrongful act under international law. They were commonly used terms, and wars continued to exist even though they were

prohibited. Furthermore, they pointed out that not all the laws and customs of war had been codified. Hence the need for a law relating to war and to the problems it still involved.

106. Other members of the Commission said that they were in favour of using the term "armed conflict" in order to refer to cases which were not covered by the concept of war stricto sensu.

107. Still other members said that, while they were in favour of the traditional terminology, they supported the idea of a new definition of the concept of war, which would be synonymous with any armed conflict, not only with an armed conflict between States.

2. Substantive problems

108. Under this heading, the Special Rapporteur indicated that it was not always easy to draw a distinction between a war crime and a crime against humanity, since there was no clear-cut dividing line between the two concepts. The same act could, at the same time, constitute a war crime and a crime against humanity. Voluntary homicide and murder committed in time of peace could constitute a crime against humanity if they came within the definition of that crime. If they were committed in time of war, they could also constitute a war crime. The Special Rapporteur pointed out that the advantage of that dual characterization was that it had in fact been possible to punish acts that might otherwise have gone unpunished during the Second World War. He also pointed out that concurrent offences were, moreover, not a phenomenon characteristic only of the topic under consideration, but also existed in internal law, although that did not prevent those offences from being classified in separate categories.

109. As stated above, the Commission generally agreed that the overlapping of concepts was fairly common both in internal law and in international law.

3. Problems of methodology

110. With regard to the problems dealt with under this heading, the Special Rapporteur raised the question whether the definition of war crimes should be of a general nature, such as that used in the 1954 draft Code, which referred to "acts in violation of the laws and customs of war", whether there should be an enumeration, which might be incomplete, or whether use should be made of an intermediate method consisting of a general definition illustrated by a non-exhaustive enumeration. In the Special Rapporteur's view, any one of

those methods was possible, but the last two raised a problem because the law of war was based not only on existing conventions, but also on "the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience". This was the wording of article 1, paragraph 2 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, and it was only a reformulation of the Martens Provision contained in the preamble to the 1907 Hague Convention and stating that the law of war is not confined to written law, but is also based on principles, customs and considerations of humanity.

111. In the opinion of some members of the Commission, the definition of war crimes should list all the grave breaches referred to in the 1949 Geneva Conventions and reproduce the relevant provisions thereof.

112. Other members expressed reservations about a definition which would be too enumerative and which might freeze international law and hamper the codification of new rules and new offences. In their view, a more general or combined definition would be preferable.

113. The question of nuclear weapons was raised in that context. According to some members of the Commission, the use of nuclear weapons had to be banned, even in the absence of any convention, because it was contrary to "the principles of humanity" and to the "dictates of public conscience". As far as the protection of mankind was concerned, no treaty obligation of a State could take precedence over a peremptory norm of international law. Other members of the Commission, nevertheless, took the view that the deterrent nature of such weapons should be taken into account because they had spared mankind a new world war. In the view of still other members, what should be outlawed was not the first use, but, rather, any use at all of nuclear weapons, as well as their manufacture and possession. Those members stated that the prohibition of first use would be meaningless because that hypothesis was already covered by aggression. Even from the standpoint of self-defence, moreover, second use would be difficult to assess in terms of the time when it took place, the effects it would have and the question of the very existence of self-defence in the circumstances of the particular case. In addition, there was no difference between first use and second use as far as their harmful and destructive effects on all of mankind were concerned.

114. Lastly, other members of the Commission took the view that the question of nuclear weapons was one to be left to the political bodies now discussing it and that its inclusion in the draft Code at the current stage might be counter-productive in terms of the acceptability of the draft.

III. Other offences against the peace and security of mankind

115. Having considered the main acts constituting offences against the peace and security of mankind, the Special Rapporteur then went on, in his report, to study acts, such as complicity, conspiracy and attempt, which may, in some circumstances, become offences against the peace and security of mankind because of possible links with such offences.

1. Complicity

116. The Special Rapporteur stressed that the problem arising in international law in connection with the concept of complicity was that of its content, which was not necessarily the same as in internal law. The report therefore dealt with the following two aspects:

(a) Complicity in internal law, and

(b) Complicity in international law.

117. (a) Complicity in internal law. The Special Rapporteur noted that, in internal laws of countries, the content of complicity varied in scope. The laws of some countries limited complicity to acts committed prior to or concomitantly with the principal act, whereas the laws of other countries extended complicity to include acts committed after the principal act (concealment of the perpetrator or of property, non-denunciation, concealment of evidence, etc.).

118. (b) Complicity in international law. The Special Rapporteur also pointed out that complicity could have a limited or an extended meaning in international law as well. Examples of extended complicity included concealment and the responsibility of military leaders. The Special Rapporteur drew attention to cases such as: the Funk Trial 86/ in

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86/ H. Meyrowitz, La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle, thesis, Paris, Librairie générale de droit et de jurisprudence, 1960, p. 377.

which the accused was Minister of Economic Affairs and President of the Reichsbank, which received deposits consisting of valuables removed from prisoners and victims. The Tribunal stated that Funk "either had knowledge of what the Reichsbank received or deliberately closed his eyes to what was happening". In the Pohl case, 87/, moreover, the Tribunal stated that "The fact that Pohl himself did not actually transport the stolen goods to the Reich ... does not exculpate him. This was a broad criminal programme requiring the co-operation of many persons ... Having knowledge of the illegal purposes of the 'Action' and of the crimes which accompanied it, his active participation even in the after phases of the 'Action' make him particeps criminis in the whole affair".

119. The Special Rapporteur noted that the complicity of military leaders was also referred to in the Yamashita case. 88/ According to the United States Supreme Court, "The question ... is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take measures when violations result". The answer to that question was affirmative. The Tokyo Tribunal delivered a similar judgment. 89/ "It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment". Furthermore, in the Hostages case, 90/ it was stated that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about".

87/ H. Meyrowitz, op.cit., pp. 377 and 378.

88/ Law Reports of Trials of War Criminals, Vol. II, p. 70.

89/ Ibid., Vol. XV, pp. 72 and 73.

90/ Ibid., p. 70.

120. In the light of those judicial decisions, complicity could, in the view of the Special Rapporteur, be extended to include concealment, as well as acts for which a superior in rank could be held responsible for failing to exercise supervision and control. The Special Rapporteur nevertheless pointed out that, although complicity might have an extended content, it also had to have limits and, accordingly, the Charters of the International Military Tribunals distinguished between the following separate offences: (a) participation in a common plan or enterprise involving the commission of an offence against the peace and security of mankind; (b) membership of any organization or group connected with the commission of an offence; and (c) with reference to crimes against peace, the fact of holding a high political, civil or military position or a high position in financial, industrial or economic life. The Special Rapporteur then questioned whether those hypotheses should be covered by the general theory of complicity or whether, as stated above, they should be treated as separate offences, as was the case in the Charters of the International Tribunals mentioned above.

121. Complicity of the superior was included as a separate offence in article 9 of the draft articles contained in the Special Rapporteur's report.

122. Different opinions were expressed in the Commission on the problem of complicity. Some members of the Commission stated that account should be taken of the extended content of complicity in international law and that the concept should include concealment, as well as membership of an organization and participation in a common plan. Other members of the Commission drew attention to possible elements that might characterize complicity, including instigation, aiding, abetting, ordering and taking a consenting part. Although those members were prepared to accept the idea of extended complicity in international law, they had difficulty in agreeing that complicity could include acts committed after the principal act. Some members of the Commission said that they objected to any automatic extension of complicity to a superior in rank on the basis of a mere presumption. In order to determine whether a superior in rank was responsible, it first had to be decided whether he had knowledge of the criminal acts committed by his subordinates and if so, whether he was in a position to prevent such acts or to use his authority for that purpose.

2. Complot and conspiracy

123. In his report, the Special Rapporteur explained that complot could have two meanings. On the one hand, it could be limited, as in some internal laws, to acts affecting the authority of the State or the integrity of national territory (article 87 of the French Penal Code, for example) and, on the other, it could also mean any common plan against individuals or groups of individuals and could imply the idea of collective responsibility, as in the case of "conspiracy", according to which any act committed by a participant in a complot is attributable to all the others, quite apart from the responsibility of each one for his own acts.

124. With regard to the question whether the concept of complot should apply only to crimes against the State or also to crimes against other entities, some members of the Commisison were in favour of extending that concept to crimes against ethnic groups and peoples as such.

125. As to the question whether the concept of complot could entail collective responsibility - something that would bring it close to the concept of conspiracy - the Special Rapporteur pointed out in his report that the specific nature of the offences in question might warrant a special régime outside the usual rules of law, particularly since the enforcement of penalties would thus be more effective. The offences in question were not ordinary ones and such a special régime was already applied in cases such as that of the rule of imprescriptibility. The Special Rapporteur also noted that collective responsibility for such offences, which nearly always involved collective participation or a group phenomenon, offered the advantage of making penalties more effective. The Nürnberg Tribunal restricted the application of collective responsibility to crimes against peace and rejected it for war crimes and crimes against humanity.

126. On the basis of that distinction, some members of the Commission took the view that the concepts of complicity and conspiracy in the broad sense should apply only to crimes against peace and, possibly, to crimes against humanity (depending on the list of crimes that would be drawn up for those two categories), but not necessarily to war crimes, for which there must, in principle, be a more restrictive concept.

127. Other members of the Commission expressed serious misgivings with respect to the idea of collective responsibility, even if it were restricted only to crimes against peace, such as aggression. They were of the opinion that each member of a government was responsible only for his own acts.

3. Attempt

128. In his report, the Special Rapporteur also dealt with problems relating to the content of attempt and, in particular, with the question whether that concept should include preparatory acts or whether it was linked only to the commencement of execution. Some members of the Commission expressed the view that it was difficult to characterize preparation for aggression because preparation was an ambiguous concept which could be interpreted either as preparation for an attack or as the organization of a defence. If preparation was not to be regarded as an element of aggression, attempted aggression could also not involve preparatory acts.

129. Other members of the Commission took a more general approach to the problem and also referred to offences other than aggression. Their view was that the concept of attempt had to be interpreted as the commencement of the execution of an act defined as an offence by the draft Code, the act itself having been prevented as a result of circumstances beyond the perpetrator's control. According to those members, mere preparation should not be regarded as a criminal act.

130. Members of the Commission also made general comments on the other offences referred to by the Special Rapporteur in his report.

131. Some members supported the Special Rapporteur's approach that conspiracy, complicity and attempt should be included as separate offences in the draft Code.

132. Other members were of the opinion that these concepts should be included in the part of the draft Code relating to general principles.

IV. General principles

133. After the overall account of acts which may constitute offences against the peace and security of mankind, the Special Rapporteur took up the general principles. He pointed out that it is not evident, at first sight, that all the principles apply with equal force to all the cases, and that that could be

verified by a study of the general principles. The Special Rapporteur believed that the principles could be divided into several categories according to whether they relate to

- The juridical nature of the offence;
- The official position of the offender;
- The application of the criminal law in time;
- The application of the criminal law in space;
- The determination and extent of responsibility; 91/
- Exceptions to criminal responsibility.

1. Principles relating to the juridical nature of the offence

134. In his report, the Special Rapporteur pointed out that since an offence against the peace and security of mankind was a crime under international law, it was conceptually autonomous and had its own régime, and that the characterization of a wrongful act as an offence against the peace and security of mankind was independent of the internal order. This principle had already been enunciated by the Charter of the Nürnberg Tribunal and by the General Assembly and the Special Rapporteur embodied it in article 2 of his draft articles.

135. Although they were in general agreement with that principle, some members of the Commission emphasized that it was important not to confuse crimes under internal law with offences under the Code and that an individual must not be exposed to the risk of being prosecuted twice for the same act (non bis in idem).

136. With regard to the definition of an offence against the peace and security of mankind, some members observed that it should contain a reference to the element of seriousness, which has already been adopted by the Commission.

91/ Although the question of exculpatory pleas and extenuating circumstances, which is inextricably linked to the determination and extent of responsibility and at the same time to exceptions to criminal responsibility, was referred to in the fourth report by the Special Rapporteur under this heading (paras. 177 to 184), it was not discussed in detail within the Commission. Those observations made by members of the Commission on this aspect are summarized in paragraph 182 of this report. The Special Rapporteur and the Commission will revert to the question of exculpatory pleas and extenuating circumstances at a later stage in their work on this topic.

2. Principles relating to the official position of the offender

137. The Special Rapporteur pointed out that the principles coming under this heading are, first, the principle of criminal responsibility, that is to say the attributability of a criminal act to a particular individual considered to be its author (embodied in article 3 of the draft articles); next, since the offender is also a human being, the principle relating to the jurisdictional guarantees to which he has a right when answering before any court for the acts of which he is accused (article 6 of the draft articles).

138. Several members of the Commission maintained that it was necessary to specify the jurisdictional guarantees in greater detail. Article 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights were mentioned as examples to be followed in the draft Code.

3. Principles relating to the application of the criminal law in time

139. The Special Rapporteur examined successively, in his report, the rule of non-retroactivity and the rule of prescription.

140. Referring to the non-retroactivity of criminal law, the Special Rapporteur dealt with the scope of the rule nullum crimen sine lege in international law. He pointed out that according to one view, that rule is not applicable in international law, but according to another it is. The Special Rapporteur observed that the controversy between commentators on the law of Nürnberg has now died down. Article 11, paragraph 2 of the Universal Declaration of Human Rights provides that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed". Furthermore, the European Convention on Human Rights, which reproduces approximately the same formulation, adds (article 7, paragraph 2) that "This Article shall not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of the law ...". The Special Rapporteur therefore believes that the rule nullum crimen sine lege is now accepted in international law and applies to both treaty law and general international law. It is the subject of article 7 of his draft articles.

141. Some members of the Commission supported the considerations put forward by the Special Rapporteur concerning the principle of non-retroactivity.

142. Other members expressed some reservations with respect to introducing the notion of "general principles of international law" or "established customs" as sources of international criminal law. In their opinion positive law should be the basis for characterizing an act as an international crime.

143. With regard to imprescriptibility, the Special Rapporteur, after pointing out that prescription was neither a general nor an absolute rule in internal law, traced the history of the rule of imprescriptibility of offences against the peace and security of mankind, which is the subject of article 5 of his draft articles.

144. Several members of the Commission expressed their support for the rule. Some members were also in favour of including a provision specifying that the offences in question are not political crimes for the purposes of extradition and right of asylum.

145. Other members expressed doubt about the general applicability of the rule. Their doubts were based, among other considerations, on the small number of accessions to the Convention on the Non-Applicability of Statutory Limitations, and on the difficulty of obtaining evidence many years after an alleged offence has been committed.

4. Principles relating to the application of the criminal law in space

146. Referring to the principles relating to the application of the criminal law in space, the Special Rapporteur described the different systems known in internal law: the system of territoriality of the criminal law, which gives jurisdiction to the courts of the place of the crimes; the system of personality of the criminal law, which is based on nationality rather than the place of the crime; the universal system, which gives jurisdiction to the court of any place where the offender is arrested; and finally, the system of international riminal jurisdiction. The draft article 4 submitted by the Special Rapporteur opts for universal jurisdiction in the absence of an international criminal jurisdiction, but reserves the possibility of establishing an international criminal jurisdiction.

147. Some members of the Commission expressed reservations regarding the system of universal jurisdiction. It was pointed out that territoriality was the rule and universality the exception. According to one member of the Commission the scope of the provisions of the Conventions on genocide and apartheid was limited to those crimes alone. Among the members doubting the

general applicability of universal jurisdiction, some emphasized the difficulties connected with extradition, means of obtaining evidence, contradictory judgements, etc. Other members who expressed doubts concerning that system spoke in favour of the establishment of an international criminal jurisdiction as the most appropriate and most coherent system of implementing the draft Code.

148. Other members of the Commission spoke in favour of the system of universal jurisdiction, as things stand at present. They considered that genocide and apartheid are crimes against humanity like other such crimes, and that nothing would justify an exceptional régime for them; consequently, the application to them of the principle of universality proves that that principle should be the ordinary law for offences against the peace and security of mankind. They also invoked practical reasons in favour of that principle, adding that it is not necessarily in opposition to the establishment of an international criminal jurisdiction.

5. Principles relating to exceptions to criminal responsibility

149. The Special Rapporteur also referred to the scope of criminal responsibility. He pointed out that though every wrongful act engaged the criminal responsibility of its author in principle, there could be exceptions to this rule. There are circumstances which relieve an act of its character as a criminal offence. These are circumstances which, in certain legal systems, are known as "justifying facts".

150. The Special Rapporteur explained that in some legal systems the exceptions to criminal responsibility could have two sources: a legal source and a source in judicial practice. A distinction was made between justifying facts based on law and causes of non-attributability deriving from judicial decisions. Since the rule was that there must be a legal basis for every offence, by virtue of the principle nullum crimen sine lege, any exception to this rule must likewise have a legal basis. In those systems which depend on written law, the rigidity of the rule led legal writers and judicial organs to go beyond the narrow confines thus defined, and seek solutions better suited to the complex realities of criminal responsibility. There were situations for which the law made no provision, in which convicting a person would be an injustice, even if such conviction appeared irreproachable in the strictly legal sense. Consequently, legal writers and judicial organs had elaborated,

within these legal systems, a whole theory of penal justification, invoking the concepts of will, good faith and the legal capacity of the author.

151. The Special Rapporteur indicated that in other legal systems less attached to written law, that distinction was not of great importance, since the legal element in the definition of an offence was not necessarily based on written law. Written law did not play a preponderant part and the judge, having more freedom of action, himself creates the law according to the circumstances and the needs of society. In the Special Rapporteur's opinion these systems come close, in their method, to the process of developing international law, in which written law does not predominate. Moreover, the exceptions to criminal responsibility in international law had a purely jurisprudential origin. These exceptions were as follows:

- Coercion, state of necessity and force majeure;
- Error;
- Superior order;
- Official position of the perpetrator of the offence;
- Self-defence and reprisals.

152. (a) Coercion, state of necessity and force majeure. The Special Rapporteur explained in his report that these concepts had differences and points in common in internal law. Under certain systems, the distinction between coercion and state of necessity depended on the fact that necessity, unlike coercion, gave the author of the act, which constituted a crime, a choice. He was not inexorably bound to commit the act, and he committed the act to avoid committing another act, which he considered more dangerous or more harmful to himself or others.

153. As to force majeure, it was closer to coercion, in that it consisted in the intervention of a force external to the author of the act, from which he could only escape by committing the act. In both cases - force majeure and coercion - the author had no other choice, whereas, as had been pointed out, the state of necessity did leave him a choice.

154. The Special Rapporteur added, however, that these distinctions were not recognized in other legal systems. Moreover, whatever the conceptual differences between these notions may be, they were subject to the same basic conditions. According to the Special Rapporteur there must be:

(1) A grave and imminent peril from which the author could only escape by committing the act which constituted the crime;

(2) No act attributable to the author which contributed to the emergence of this peril;

(3) No disproportion between the interest sacrificed and the interest protected.

155. After stating these conditions, the Special Rapporteur referred to the following judicial decisions on which they were based. The Einsatzgruppen case. 92/ According to the judgement "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns ... No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever". In other words, as the Special Rapporteur pointed out, coercion can be accepted if there is a grave and imminent peril for life or physical integrity.

The I.G. Farben case. 93/ In this case it was stated that "The excuse of necessity cannot be admitted when the accused who invokes it has himself been responsible for the existence or the execution of an order or decree, or when his participation has exceeded that which was required of him or was the result of his own initiative".

156. Similarly, defendants who had not only obeyed instructions, but who, on their own initiative, had requested an abnormal increase in the number of workers assigned to them were found guilty. 94/

157. The Special Rapporteur concluded that fault on the part of the defendant thus removed all justification.

158. Referring to the condition of proportionality, the Special Rapporteur observed that it had been formulated in the Krupp case: 95/ "... in all

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92/ Law Reports of Trials of War Criminals, vol. VIII, p. 91.

93/ American Military Tribunals, Case VI, vol. VIII, p. 1179, quoted in Meyrowitz, op. cit., p. 404.

94/ Ibid., Case V, vol. VI, p. 1200, et seq., quoted ibid.

95/ Ibid., Case X, vol. IX, pp. 1439 et seq., quoted ibid., pp. 404-405.

fairness it must be said that on any view of the evidence the defendants, in a concentration camp, would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death, great bodily harm from starvation, and the relentless air raids upon the armament plants; to say nothing of involuntary servitude and the other indignities which they suffered. The disparity in the number of the actual and potential victims is also thought provoking".

159. Some members of the Commission were in general agreement with the distinction drawn above by the Special Rapporteur. One member suggested that in the context of coercion it should be specified that the author of the crime must have had no other means of escaping from the peril in question. Some members established and analysed relations between coercion and superior order.

160. In regard to force majeure, another member thought that that exception had no place in the draft Code. An individual cannot be charged under criminal law with the consequences of a case of force majeure.

161. (b) Error. The Special Rapporteur then raised the question whether error could be included in the category of justifying facts. He pointed out that there could be two kinds of error: error of law, which consisted in misrepresentation of a rule of law; and error of fact, which consisted in misrepresentation of a material fact.

162. The Special Rapporteur considered that error based on misrepresentation of a rule of law would be difficult to reject in international law, owing to the nature of the rules of international law and their sources. In the High Command Case, 96/ it was said that a "military commander may not be considered to be criminally responsible as a result of a simple error of judgement regarding controversial legal problems". And in the I.G. Farben case 97/ the Tribunal stated that: "As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles ...".

96/ The Law Reports of Trials of War Criminals, vol. I, p. 70.

97/ Ibid., vol. XV, p. 185.

163. One member of the Commission considered that error should not even be included in the case of war crimes, since the Code was intended to punish the most serious offences. Another member thought that error of law remained admissible, especially in customary international law, which was not precisely codified, that should also be the case for jus cogens which applied to inter-State relations and could not be invoked in criminal law. Another member considered that in many cases error of fact removed the seriousness of an offence.

164. (c) Superior order. The Special Rapporteur then raised the question whether superior order constituted an autonomous justifying fact. He noted that superior order sometimes merged with coercion, in which case it was not the order but the coercion accompanying it which constituted the justifying fact, and sometimes compliance with the order merged with complicity if the order was manifestly illegal. Finally, an order might be obeyed in good faith because its wrongfulness was not manifest. In the last case the justifying fact was not the order itself, but error.

165. The Special Rapporteur added that in regard to relations between superior order and coercion, the Nürnberg Tribunal had stated that "The criterion for criminal responsibility, as found in one form or another in the criminal law of most countries, bears no relation to the order which has been received. It lies in moral freedom, in the perpetrator's ability to choose with respect to the act of which he is accused."

166. The relationship between the order and error was evoked in the Field-Marshall List Case: 98/ "Whoever transmits, gives or executes a criminal order becomes a criminal if he has recognized, or should have recognized, the criminal nature of the order".

167. Similarly, in the Field-Marshall Von Leeb Case: 99/ it was stated that "It is necessary to determine not only whether the order in question was, in itself, criminal, but also whether its criminal nature was evident".

98/ American military tribunals, case VII, vol. XI, p. 1271 quoted in Meyrowitz op.cit, p. 398.

99/ Ibid., Case XII, vol. XI, p. 512, quoted Ibid., pp. 398-399.

168. The Special Rapporteur concluded from these findings that superior order is not in itself a justifying fact. Compliance with a wrongful order can only eliminate responsibility if it is due to error or coercion.

169. Some members of the Commission stressed the difficulty of establishing the moment when compliance with an order given by a superior ceased to be lawful. This is a very delicate question because disobedience is itself an offence under military law. Nevertheless, they agreed that compliance with a manifestly wrongful order can engage criminal responsibility. One member wondered whether the threat of a grave, imminent and irremediable peril deriving from the order received did not vary according to whether the traditional discipline in the environment considered was more or less rigorous. In the case of a junior officer, freedom of choice would be extremely limited and the rigidity of discipline could be an extenuating circumstance.

170. (d) The official position of the perpetrator. In his report, the Special Rapporteur emphasized that this exception is not accepted and need not commented on at length. He pointed out that the Charter of the Nürnberg Tribunal had already rejected the official position of the perpetrator of an offence against the peace and security of mankind, not only as a justifying fact, but even as an exculpatory plea or extenuating circumstance. In some respects it should even be an aggravating circumstance, in so far as it could be regarded as an abuse of power.

171. (e) Self-defence. In the Special Rapporteur's view, this exception, provided for in Article 51 of the Charter of the United Nations, applied only in the case of aggression. Its sphere was jus ad bellum. In jus in bello, attack was as legitimate as defence, provided the conditions of the law of war were respected.

172. With reference to self-defence, several members of the Commission emphasized that a careful distinction should be drawn between self-defence by the State and self-defence by the individual. In the opinion of some members, the only self-defence applicable could be self-defence by the individual, since the subjects of the draft Code were individuals. Other members pointed out that self-defence in the case of aggression did not always constitute an exception to the principle of the criminal responsibility of individuals. An

individual, whether a military serviceman or a civilian, could quite easily violate the laws of war or commit inhuman acts even though the State was acting in accordance with its right of self-defence.

173. For his part, the Special Rapporteur pointed out that, in the case of aggression, the responsibility of the State did not preclude the criminal responsibility of individuals acting in the name or on behalf of the State, and such responsibility could be ruled out only in a case of properly established self-defence.

174. (f) Means of defence based on reprisals. In the Special Rapporteur's opinion, reprisals may take place in peacetime or in wartime. In peacetime, defence based on armed reprisals is not admissible. In wartime, defence based on reprisals is not admissible if the reprisals are carried out in violation of the laws and customs of war.

175. These cases of inadmissibility resulted from the fact that reprisals merged sometimes with aggression if they were carried out in peacetime, and sometimes with a war crime if they took place in the course of an armed conflict and were carried out in violation of the laws and customs of war.

176. In short, the Special Rapporteur's view was that the prohibition of reprisals, since it was not general in jus in bello, meant that reprisals could be justified in all instances in which they are not prohibited. Yet the prohibition of reprisals, in the framework of Additional Protocol I of 1977, is only sectoral in nature; it applies solely to reprisals directed against the sick and the wounded, civilian populations, prisoners of war, and civilian or cultural objects.

177. One member of the Commission thought that the draft Code should expressly stipulate that armed reprisals are contrary to international law.

178. Summarizing his statement on the scope of justifying facts, the Special Rapporteur came to the conclusion that they were not all the same in scope. In his view, the scope varied, depending on the nature of the offence in question. Accordingly:

(1) Self-defence could be invoked only in the case of aggression;

(2) No justifying fact seemed to be admissible with regard to crimes against humanity, because of the motives which inspired such crimes and from which they were inseparable (racial, ethnic, national, religious or political motives). In addition, the requirement of proportionality between the act

committed and the situation which the perpetrator was seeking to escape from, was difficult to fulfil in the case of a crime against humanity, in view of the mass nature of such crimes, their systematic character, their repetitiveness or their continuity;

(3) Justifying acts could be invoked with respect to a war crime, provided, of course, that the war crime in question does not at the same time constitute a crime against humanity.

179. The comments of the members of the Commission have been set out under each exception considered. With regard to the formulation of these exceptions in the Draft Code, some members emphasized that the relevant provision should be drafted positively and clearly indicate the circumstances in which the exception applies.

180. As to the responsibility of a superior, a few members of the Commission were of the opinion that the question could be settled by applying the concept of complicity and a separate article was not required.

181. Other members, however, thought that the question of the responsibility of a superior could not be assimilated to that of complicity. They failed to see how complicity could be applied to acts by a superior, particularly when it was the conduct of organs of the State that was involved.

182. One member of the Commission would have liked the draft Code to deal also with concurrent offences, extenuating circumstances and exculpatory pleas. Lastly, other members wondered whether mental disorder or minority could not also constitute justifying facts. In regard to extenuating circumstances and exculpatory pleas, one member of the Commission shared the Special Rapporteur's view that, since the criminal consequences of a crime against peace had not yet been considered, the time had not yet come to deal with such questions. In addition, he had doubts regarding the applicability of internal criminal laws to offences under international law.

V. Draft articles

183. The Special Rapporteur, in introducing his report, stated that the draft articles covered the whole of the topic and draft articles 1, 2 and 3, submitted at the previous session, had been reworded to take account of the comments thereon. He also stated that a definition was no longer proposed for an offence against the peace and security of mankind, in view of the controversy to which the definition had given rise. Only an enumeration of

the acts constituting such an offence was given. The new draft article 1, therefore, was based on that method. Similarly, any reference to political organs and any element that would encroach on the domain of the judge had been removed from the definition of aggression proposed in the first draft. In addition, the definitions of offences were, as far as possible, established on the basis of existing conventions, the texts of which were sometimes reproduced in full. A more general alternative was also proposed, however, so as to enable the Commission to choose between or combine provisions. The general principles had emerged either from existing instruments (Universal Declaration of Human Rights, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nürnberg Principles, etc.) or from the judicial precedents of international courts. Some principles applied to some offences more than to others, but they were none the less formulated in a quite general fashion in the report.

184. Some general opinions were expressed on the draft articles in the course of the discussion in the Commission. Certain specific suggestions regarding the draft articles were also provisionally made. Some members were of the view that the title of the topic, in the English version, should speak of "crimes" instead of "offences", as do the French and Spanish versions. The tripartite division into crimes against peace, crimes against humanity and war crimes was supported by most members, for historical reasons, even though, in some instances, overlapping between the three categories was possible. It was emphasized that, as far as possible, the draft Code should be very precise, particularly with regard to the characterization of the offences.

Conclusions

185. The Commission, after engaging in an in-depth general discussion of parts I to IV of the Special Rapporteur's fourth report, concerning the offences and the general principles, decided to defer consideration of the draft articles to future sessions. Meanwhile, the Special Rapporteur could recast the draft articles in the light of the opinions expressed and the proposals made this year by the members of the Commission, reflected in the summary records of the present session, and the views that would be expressed in the Sixth Committee of the General Assembly at its forty-first session. The Commission discussed, again, the problem of the implementation of the Code, when it considered the principles relating to the application of

criminal law in space. It would examine carefully any guidance that may be furnished on the various options set out in paragraphs 146-148 of this report. In this regard, it would remind the General Assembly of the conclusions contained in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session, in 1983 (A/38/10). 100/

100/ Paragraph 69 (c) (i) of the Commission's report on its thirty-fifth session, in 1983, read as follows:

"(c) With regard to the implementation of the Code:

(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission asks the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;".

CHAPTER VI

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

A. Introduction

186. The Commission, at its thirtieth session in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.

187. The Commission, from its thirty-second to its thirty-sixth session in 1984, received and considered five reports from the Special Rapporteur. 101/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

188. The Commission, at its thirty-sixth session, in 1984, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline (A/CN.4/378), 102/ and a study prepared by the Secretariat namely "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law" (ST/LEG/15). 103/

101/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A.CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

102/ Reproduced in Yearbook ... 1984, vol. II (Part One), p. 129.

103/ Later issued as document A/CN.4/384.

189. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur following the death of Mr. Quentin-Baxter. The Commission received a preliminary report from the Special Rapporteur (A/CN.4/394), but was unable to discuss the report at its thirty-seventh session. 104/ The Commission expressed the hope that the Special Rapporteur might wish to present a new report to the Commission at its thirty-eighth session, to be discussed together with his preliminary report. 105/

B. Consideration of the topic at the present session

190. The Commission had before it the preliminary report (A/CN.4/394) and the second report (A/CN.4/402 and Corr.1, Corr.2 (English only), Corr.3 (Spanish only) and Corr.4) of the Special Rapporteur. The two reports were introduced together, since the Special Rapporteur was unable to introduce his preliminary report at the thirty-seventh session of the Commission in 1985, and were considered by the Commission at its 1972nd, 1973rd, 1974th, 1975th and 1976th meetings. As the preliminary report was intended only to analyse what had been done prior to its submission, in 1985, and to explain what the Special Rapporteur intended to do in his second report to the Commission, discussion at the present session of the Commission focused almost exclusively on the second report of the Special Rapporteur.

191. The Special Rapporteur had indicated his intention of taking the schematic outline, 106/ together with the amendments introduced in the fourth report 107/ by Mr. Quentin-Baxter, as the raw material for his work, since the outline had met with sufficiently broad acceptance both in the Commission and in the General Assembly. However, owing to the shortening of its present session, the Commission was able to allocate only a few meetings

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104/ Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), paras. 291 and 292.

105/ For a fuller statement of the historical background of this topic, see Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10), pp. 215-257.

106/ Yearbook ... 1982, vol. II (Part Two), p. 83.

107/ Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373.

to consideration of the topic; and many members were unable to make statements, so that the opinions expressed are only a partial reflection of the Commission's views.

192. The Special Rapporteur was of the opinion that a number of points needed to be reconsidered in order to remove some of the ambiguities of the topic and lay the foundations for its uninterrupted development. These points were referred to in the second report of the Special Rapporteur, which contained a review and critical analysis of the schematic outline and, in particular, of its dynamics. In his second report, the Special Rapporteur also tried to find answers to the questions arising out of such ambiguities as well as to some of his other concerns.

193. The first question related to the unity of the topic, which, because it had two components, namely, prevention and reparation, appeared to be two separate topics. The reports preceding those of the present Special Rapporteur, attempted to establish the unity of the topic by linking prevention and reparation, which constituted a "continuum". From a formal standpoint, it was thus emphasized that both aspects of the topic fell within the domain of primary rules. Although the second report did not rule out that idea, it found that the concept of "injury in the sense of material harm constituted the cement of that "continuum" - injury in this sense, whether as injury which had already occurred or as potential injury, which was the equivalent of risk, was the focus of the entire topic.

194. In order to counteract the idea that prevention had nothing to do with liability and did not really form part of the topic, the Special Rapporteur had, on the basis of the discussion of the meaning of the English terms "responsibility" and "liability", reached the conclusion that, since the Spanish term "responsabilidad" and the French term "responsabilité", meant the same thing as the two English terms, they could be used to refer to the duties incumbent on any person living in society. He therefore, concluded that these terms refer not only to the secondary obligation arising out of a breach of a primary obligation, but also to the latter obligation itself, with the result that obligations of prevention would be within the scope of the topic.

195. Another concern of the Special Rapporteur in his second report was to define the scope of the topic, even provisionally. The point of departure of the Special Rapporteur was that the topic related primarily to the duties of

the source State to avoid, minimize or repair any appreciable or tangible physical transboundary loss or injury caused by an activity involving risk. The Special Rapporteur did not rule out the possibility that changes could, if necessary, be made in the scope of the topic.

196. It was observed in the second report that obligations were an important element of the dynamics of the schematic outline. In that connection, a critical analysis was made to identify all the interrelated obligations referred to in the schematic outline. It had then to be determined whether those obligations, or some of them, were, in nature, part of what was known as "soft law", or whether they were imperfect merely because, according to the schematic outline, they did not give rise to any right of action. The analysis drew attention to "combined" obligations which would lead to the establishment of a régime and contribute to prevention, to obligations which would lead to reparation, as well as to a pure obligation of prevention (section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline).

197. In the view of the Special Rapporteur, it was also necessary to consider the operation of the obligation of reparation and its basis in international law. The investigation inevitably led to liability for risk, known in English as "strict liability". From what the present Special Rapporteur had been able to gather from earlier work, the basis for the obligation of reparation was multifaceted: on the one hand, it had the same basis as obligations of prevention, since considerable efforts had been made to define both concepts; on the other, further efforts had been made, perhaps without actually saying so, to base it on the quasi-contractual and quasi-customary aspects of shared expectations. But ultimately, in the view of the Special Rapporteur, it could not be denied that its main basis was simply "strict" liability. The operation of the obligation of reparation was subject to two conditions: the existence of shared expectations, which indicated its derivation; and negotiation, which involved a number of factors leading to a balancing of interests, including the reasonable nature of the conduct of the source State, the means available to it to prevent injury, the expenses incurred for that purpose and the usefulness of the activity in question to the affected State. The amount payable by way of compensation might thus be smaller than that paid in similar circumstances as a result of the commission of a wrongful act.

That was, moreover, in keeping with international practice, which often set a limit on amounts payable in such circumstances, and also with what was provided in internal law in such cases.

198. Still with regard to the operation of the obligation of reparation, the present Special Rapporteur had found that the idea of bringing into play factors mitigating the automatic operation of strict liability was basically correct, since the aim was to establish a general régime. He had proposed changes in respect of "shared expectations" in order to retain some of the objective elements of their definition and thus avoid the problems to which their characterization would give rise. He had, also, suggested that other mitigating factors, such as a régime of exceptions, might be included in the system.

199. As to the basis for the obligation, the Special Rapporteur considered that a clarification should be made: it was not logical to base the obligation of reparation both on its identity with prevention and on strict liability. Although there had been objections to strict liability, it had been stated in support of it that it was not a monolithic concept, since it involved different degrees of strictness, and, when combined with the above-mentioned mitigating factors, become a sufficiently flexible instrument, and that it was not certain that it did not have a basis in international law. Failure to provide compensation for transboundary injury caused by a hazardous activity in the territory of a State could be based only on a theory of sovereignty which did not take account of the interdependence that was becoming more and more characteristic of international life and which would be contrary to the principle of the sovereign equality of States because it would overlook the other aspect of State sovereignty, namely, that every State was entitled to use its own territory without any outside interference.

200. The Special Rapporteur considered that the most important principle contained in the schematic outline was that enunciated in section 5, paragraph 1, which was based on principle 21 of the Declaration of the United Nations Conference on the Human Environment and was intended to ensure that all activities in the territory of a State are conducted with as much freedom as was compatible with the interests of other States. Two equally

important principles, which were closely associated with the first, were that of prevention (section 5, paragraph 2) and that of reparation (section 5, paragraph 3).

201. In his second report, the Special Rapporteur set a limit: he would work only on the basis of the amended version of the schematic outline contained in Mr. Quentin-Baxter's fourth report. This meant that none of the innovations contained in the five articles submitted in Mr. Quentin-Baxter's fifth report would be considered at the present session and the dicussion thus would not deal with such important questions as whether the topic covered "situations" as well as "activities". It also meant that the arguments put forward were necessarily of a very general nature.

202. The discussion of the above-mentioned points in the Commission can be summarized as follows.

203. With regard to the unity of the topic, there was some express acceptance of, and no formal objection to, the view expressed in the second report of the Special Rapporteur that injury in the sense of material harm is the topic's real unifying link. Some members regarded prevention as an essential part of the topic and as being even more important than reparation itself.

204. The discussion appeared to lend support to the idea that the focus of the topic should be activities involving risk. Some members suggested that a decision should be taken on the activities to be referred to in the future draft articles. The view was expressed that the topic should be confined to ultrahazardous activities (low probability of an accident that might cause catastrophic damage), but that view was not shared by other members, one of whom said that it was difficult to define such activities, that it was not clear what distinguished them from other activities involving risk and that activities which were regarded as ultrahazardous at an early stage of their development - as had been initially the case with the driving of automobiles on the public highway - might cease to become so and vice versa. The Special Rapporteur sees no convincing reason to make principles as important as those on which the topic is based, such as the principle that an innocent victim should not be left to bear his loss or injury, applicable exclusively to activities that are as uncertain as "ultrahazardous" activities.

205. One member of the Commission, who would prefer that the topic concentrate on such activities, specifically suggested that account should not be taken of

many activities, such as those giving rise to pollution, in particular where the source State is aware, or should be aware, of the nature of such activities and of means of preventing their harmful effects. Allowing such activities to cause injury in or to other States would be directly wrongful and would thus fall within the topic of State responsibility. Since that idea did not attract much support, the Special Rapporteur pointed out that he would continue to work on the basis that the topic should cover all activities involving risk.

206. Some members of the Commission suggested that the topic should be extended to include injury caused in areas beyond national jurisdiction, mentioning the pollution of outer space, which some consider to be part of the natural human environment. Another speaker referred, in this context, to areas forming part of the common heritage of mankind according to contemporary international law. As regards the scope of the topic, and the obligations to inform and negotiate, it was found necessary to explain that in the opinion of the Special Rapporteur the term "transboundary" did not refer only to injury caused in neighbouring countries, but also covered any injury caused beyond national frontiers, whether the source State and the affected State were contiguous or not.

207. Referring to the obligations to inform and to negotiate, the question was raised by one member as to who should be informed by a State in whose territory an ultrahazardous activity was beginning - such activities being the only ones he considered worth taking into account, since they could affect all mankind. With whom should the State negotiate in such circumstances? And where the activities of ships under the control of a certain State were concerned, who should be informed of the risks they might entail. What should be negotiated with whom? The Special Rapporteur pointed out that such cases are, in reality, infrequent and marginal. The countries that might be affected would not be very difficult to identify; they would be those in the same region as the source State. Depending on the nature of the activity concerned, a State might sometimes relieve itself of the obligation to inform and negotiate by convening an international conference or by taking very general measures, although a source State might perhaps not be relieved of its obligations to neighbouring States, since the measures usually adopted by such conferences are simply basic measures. The situation would be rather like

that in internal law where dangerous activities by an industrial plant, for example, may require an operating licence, which is granted only if certain precautions are taken, but that does not preclude liability if injury is caused.

208. Moreover, in the view of the Special Rapporteur, the location of the activity in question is bound to be of decisive importance. If it is near the frontier of another country, there is no doubt that the source State should inform that country of its intention to begin the activity in question and negotiate, with such country, everything concerning a régime of prevention and possibly of reparation. The Special Rapporteur drew attention to three cases cited in footnote 31 to his second report: a nuclear plant for the generation of electricity in Dukovany (Czechoslovakia) situated 35 km from the Austrian border; a plant of the same type in Ruthi in the upper Rhine valley, (Switzerland) near the Austrian border; and a refinery in Belgium near the Netherlands border. In all three cases there had been negotiations regarding the safety of those plants, and in the case of Belgium and the Netherlands it was mentioned that it was an accepted principle in Europe that before initiating any activity which might cause injury to neighbouring States, the source State must negotiate with them.

209. As regards ships, the Special Rapporteur was of the view that the countries which may be affected by their operation must be informed and the corresponding régimes must be negotiated with them. There were many examples. The nuclear-powered vessels Savannah and Otto Hahn had been the source of many bilateral agreements between, on the one hand, the United States and the Federal Republic of Germany, and on the other hand, the countries whose ports the vessels required to enter. The major conventions on the marine transport of oil and on liability for objects launched into space are also good examples. Lastly, when certain States made nuclear tests in the atmosphere, they gave public warning of the risks involved, established safety zones, warned shipping and, in one case, the United States had made an ex gratia payment where injuries had been sustained by the crew of the Fukuriu Maru. The relevant agreement finally put an end to these tests by prohibiting them, so that in the end the source States provided information and negotiated a régime of prohibition.

210. As regards the obligation to negotiate, which in the schematic outline did not give rise to any right of action when breached, the solution proposed by the Special Rapporteur was simply to delete the relevant provision, so that the possible consequences of a breach would be subject to the provisions of general international law. A few speakers said they would prefer that obligation not be made into "strict" obligation. Others, on the other hand, were in favour of providing sanctions in the corresponding articles. Since, as explained in paragraph 191, above, the opinions expressed are only a partial reflection of the Commission's view, the matter should be further considered.

211. Various members referred to the role of international organizations in the co-operation necessary for the mechanisms proposed in the schematic outline. A few members even believed that the role of international organizations should not only be examined from this point of view but also in light of the fact that they might become subject to rights and obligations. The Special Rapporteur agreed to continue this line of investigation, which had been deliberately held over for later stages of the work. The Commission decided that the questionnaire sent to certain intergovernmental organizations should be reviewed to see whether it was necessary to bring it up to date and send it out again to the same organizations and to a selection of others.

212. A few members drew attention to the fact that some States, particularly among the developing countries, are not in a position to know everything that is going on in their territories, which are sometimes enormous, and suggested that the Commission should therefore reconsider the question of assigning liability to such States for the activities of individuals of which they may be unaware. It was asked, in that connection, whether it would not be appropriate to revert to the concept of the "acting State" instead of the "source State". It was stated that to provide exceptions to the obligation to make reparation was inappropriate because, in the schematic outline, that obligation was already subject to too many conditions. Furthermore, it was suggested that the apportionment of the costs of prevention was unfair because the affected State gained nothing but rather lost through the activities with which the topic is concerned.

213. A number of speakers asked that in the future elaboration of the topic special account should be taken of the needs of the developing countries and

what suited them. It was said that they were sometimes unable to control the activities of powerful foreign companies established in their territory and that consequently, so long as power was in the hands of such entities, it would be dangerous to assign responsibility for transboundry injury to those States. It was also said that a study should be made of the liability of countries exporting activities involving a high degree of technology to countries of the third world, whose internal law often does not impose the necessary measures and precautions or the responsibilities inherent in the handling of dangerous things and in injury caused by such things.

214. One speaker suggested preparing a new draft containing mandatory provisions on fact-finding machinery and the settlement of disputes. Another expressed opposition to the idea put forward in the second report that compensation should depend on the existence of a principle of compensation in the internal law of both countries - the source country and the affected country - because many developing countries did not have such principles in their national legislation. He thought it would be sufficient for the principle to be contained in the law of the source State, even if it was not to be found in that of the affected State.

215. The Special Rapporteur, without expressing any opinion on the specific solutions suggested, noted that they coincided with the common concern of the speakers: namely, that very special account should be taken of the needs of the developing countries and what would suit them, and of the fact that they ran the greatest risk of being affected by technological innovations, which were an element of danger in many modern activities. Moreover, that was the view expressed by the Special Rapporteur in his preliminary report and he is still of that view.

216. A number of speakers supported the Special Rapporteur's proposal that at some stage in the study of the topic it should be suggested to the General Assembly that the word "acts", in the title of the topic, should be replaced by "activities", so that all the language versions would be aligned with the French version; there was no opposition to this proposal or to the basic reasoning by which the Special Rapporteur justified the change.

217. With regard to the obligation to make reparation and the basis for it, there were various expressions of support. One member expressed opposition to the idea of an obligation to make reparation based upon strict liability.

Another member referring to the very extensive and catastrophic damage that could be caused by certain activities which in his opinion might affect the whole of mankind, appeared to take the view that such difficult cases belong rather to the sphere of co-operation between the States as members of the international community than to that of liability, so that the obligation to make reparation might be set aside.

218. In summing up the discussion, the Special Rapporteur noted one aspect to which he attached the greatest importance, namely, that the objections raised by some members to the solutions proposed in the second report, especially those relating to the obligations to provide information and to negotiate, were not directed against the underlying principles, but related to the accompanying procedural difficulties.

219. Finally, although the short time assigned to the topic was not sufficient for a full debate, it was considered appropriate to begin, in the next report, the drafting of articles developing the ideas put forward.

CHAPTER VII

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction

220. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report on legal problems relating to the non-navigational uses of international watercourses prepared by the Secretariat. 108/ At that session, the Commission set up a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, which submitted a report proposing the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee during the same session and appointed Mr. Richard D. Kearney as Special Rapporteur for the topic.

221. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States 109/ to the questionnaire 110/ which had been circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur. 111/ The Commission's consideration of the topic at that

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108/ Yearbook ... 1974, vol. II (Part Two), p. 265, document A/CN.4/274.

109/ Yearbook ... 1976, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1. At subsequent sessions, the Commission had before it replies submitted from the Governments of an additional 11 Member States, Yearbook ... 1978, vol. II (Part One), p. 253, document A/CN.4/314, Yearbook ... 1979, vol. II (Part One), p. 178, document A/CN.4/324, Yearbook ... 1980, vol II (Part One), p. 153, document A/CN.4/329 and Add.1, and Yearbook ... 1982, vol. II (Part One), p. 192, document A/CN.4/352 and Add.1.

110/ The final text of the questionnaire as communicated to Member States, is set forth in Yearbook ... 1976, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

111/ Ibid., p. 184, document A/CN.4/295.

session led to general agreement that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. 112/

222. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission. The Special Rapporteur, Mr. Schwebel, made a statement to the Commission in 1978 and at the thirty-first session of the Commission in 1979 presented his first report. 113/

223. The Special Rapporteur submitted a second report containing six draft articles at the Commission's thirty-second session in 1980. 114/ At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted draft articles 1 to 5 and article X, which read as follows:

Article 1

Scope of the present articles

1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.

Article 2

System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

112/ Ibid., vol. II (Part Two), p. 162, document A/31/10, para. 164.

113/ Yearbook ... 1979, vol. II (Part One), p. 143, document A/CN.4/320.

114/ Yearbook ... 1980, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

Article 3

System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Article 4

Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extant by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Article 5

Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

...

Article X

Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present article do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

224. As further recommended by the Drafting Committee, the Commission, at its thirty-second session in 1980, accepted a provisional working hypothesis as to what was meant by the term "international watercourse system". The hypothesis was contained in a note which read as follows:

> "A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.
>
> An 'international watercourse system' is a watercourse system, components of which are situated in two or more States.
>
> To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse."

225. The Commission did not consider the topic at its thirty-third session in 1981 due to the resignation from the Commission of Mr. Schwebel as Special Rapporteur upon his election to the International Court of Justice. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic. Also at that session the third report 115/ of the former Special Rapporteur, Mr. Schwebel, was circulated.

226. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by the Special Rapporteur, Mr. Evensen. 116/ It contained a tentative draft convention, the purpose of which was to serve as a

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115/ Yearbook ... 1982, vol. II (Part One), p. 65, document A/CN.4/348.

116/ Yearbook ... 1983, vol. II (Part One), p. 155, document A/CN.4/367.

basis of discussion, consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the term "international watercourse system" and that of an international watercourse system as a shared natural resource.

227. At the thirty-sixth session, in 1984, the Commission had before it the second report submitted by the Special Rapporteur. 117/ It contained a revised draft of a convention, on the law of the non-navigational uses of international watercourses, consisting of 41 draft articles arranged in six chapters. The Commission focused its discussion on draft articles 1 to 9 118/ and questions related thereto. The Commission decided to refer to the Drafting Committee draft articles 1 to 9, for consideration in the light of the debate. 119/ Due to lack of time, the Drafting Committee was unable to consider those articles at the 1984 session.

228. At the thirty-seventh session, in 1985, the Commission appointed Mr. Stephen C. McCaffrey as Special Rapporteur for the topic, following the resignation from the Commission of Mr. Evensen upon his election to the International Court of Justice. The Commission requested the Special Rapporteur to prepare a preliminary report indicating the status of the topic to date and lines of further action.

117/ Yearbook ... 1984, vol. II (Part One), p. 101, document A/CN.4/381.

118/ Articles 1 to 9 were entitled as follows: Chapter I. Introductory articles: article 1: Explanation (definition) of the term "international watercourse" as applied by the present (draft) convention; article 2: Scope of the present articles; article 3: Watercourse States; article 4: Watercourse agreements; article 5: Parties to the negotiation and conclusion of watercourse agreements; Chapter II. General principles, rights and duties of watercourse States: article 6: General principles concerning the sharing of the waters of an international watercourse; article 7: Equitable sharing in the uses of the waters of an international watercourse; article 8: Determination of reasonable and equitable use; article 9: Prohibition against activities with regard to an international watercourse causing appreciable harm to other watercourse States. Ibid.

119/ It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its 1980 session (see para. 224, above), the text of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see para. 223, above) as well as the text of articles 1 to 9 proposed by the Special Rapporteur in his first report.

229. The Special Rapporteur accordingly submitted a preliminary report to the Commission, at its thirty-seventh session, (A/CN.4/393) which reviewed the Commission's work on the topic to date and indicated his preliminary views as to the general lines along which the Commission's work on the topic could proceed. The Special Rapporteur's recommendations in relation to further work on the topic were: first, that draft articles 1 to 9 which had been referred to the Drafting Committee in 1984, and which the Drafting Committee had been unable to consider at the 1985 session, be taken up by that Committee at the 1986 session and not be subjected to another general debate in plenary session; and second that the Special Rapporteur follow the general organizational structure provided by the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic.

230. The Commission considered the preliminary report of the Special Rapporteur at its thirty-seventh session. There was general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed. Emphasis was placed on the importance of continuing with the work on the topic with minimum loss of momentum, in light of the need to complete the work on the topic in the shortest time possible. It was recognized that the Commission must make every effort to reach acceptable solutions, especially in view of the urgency of the problems of fresh water, which were among the most serious confronting mankind. At the same time, it was recognized that the subject was a difficult and sensitive one and that the Commission's task was to find solutions that were fair to all interests and thus generally acceptable. Attention was drawn to the fact that no consensus had been reached in 1984 on some of the major issues raised by articles 1 to 9 which had been referred to the Drafting Committee in that year and that further discussion on them was needed. In that connection it was noted that the Special Rapporteur had indicated his intention to provide, in his next report, a concise statement of his views on the major issues raised by articles 1 to 9, and that members of the Commission would, of course, be free to comment on those views. 120/

120/ For a fuller statement of the historical background of this topic, see Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10), paras. 268-290.

B. Consideration of the topic at the present session

231. At the present session the Commission had before it the second report on the topic submitted by the Special Rapporteur (A/CN.4/399 and Adds. 1 and 2).

232. In his second report the Special Rapporteur, after reviewing the status of the Commission's work on the topic, provided a statement of his views on articles 1 to 9 as proposed by the previous Special Rapporteur 121/ and presently before the Drafting Committee, 122/ as well as a review of the legal authority supporting those views. The report also contained a set of five draft articles concerning procedural rules applicable in cases involving proposed new uses. 123/

233. The Commission, at its present session, considered the second report of the Special Rapporteur at its 1976th to 1980th meetings.

234. In presenting his second report to the Commission, the Special Rapporteur drew attention to four points concerning articles 1 to 9 that he had raised in the report, and on which he considered the Commission could profitably focus during the limited time it had at its disposal for the consideration of the topic. These four points were as follows: whether the Commission could, for the time being at least, defer the matter of attempting to define the term "international watercourse" and base its work on the provisional working hypothesis accepted by the Commission in 1980 (see paragraph 224 above); whether the term "shared natural resources" should be employed in the text of the draft articles; whether an article concerning the determination of reasonable and equitable use should contain a list of factors, or whether the factors to be taken into account in making such a determination should be referred to in the commentary; and whether the relationship between the obligation to refrain

from causing appreciable harm to other States using the international

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121/ See note 118, above.

122/ At the present session, there was insufficient time for the Drafting Committee to take up these articles.

123/ Those five articles were entitled as follows: article 10 (Notification concerning proposed uses); article 11 (Period for reply to notification); article 12 (Reply to notification, consultation and negotiation concerning proposed uses); article 13 (Effect of failure to comply with articles 10 to 12); article 14 (Proposed uses of utmost urgency).

watercourse, on the one hand, and the principle of equitable utilization, on the other, should be made clear in the text of an article. In addition, the Special Rapporteur invited the Commission's general comments on the draft articles contained in his second report, recognizing that there was insufficient time for them to be given thorough consideration at the present session.

235. Due to lack of time not all members of the Commission were able to comment on the second report of the Special Rapporteur.

236. With regard to the question of defining the term "international watercourse", most members who addressed the issue favoured deferring such a definition until a later stage of the work on the topic. Some of these members expressed a specific preference for the "system" approach or indicated that the possibility of using such an approach should not be excluded at this stage of the work on the topic, while other members were of the view that the concept of "international watercourses" would be satisfactory. Some members pointed out that the working hypothesis adopted by the Commission in 1980 was based on acceptance of the system concept proposed by Mr. Schwebel and that, if the hypothesis was now accepted as valid for the purpose of guiding work on the topic, it signified acceptance of the hypothesis as a whole and with the same content as was given to it in 1980. Some members stated that they were not in favour of the "system" approach. The Special Rapporteur concluded that the Commission should, for the time being, defer the matter of defining the term "international watercourse".

237. Members of the Commission who addressed the issue were divided on whether the term "shared natural resource" should be utilized in the text of the draft articles. Some members were of the view that it was a progressive concept that aptly described hydrologic reality and the legal implications to be derived therefrom, and that it should be included in the text, while others believed that the term had become too controversial to be a constructive and generally acceptable component of the draft. Many members on both sides of the issue recognized, however, that effect could be given to the legal principles underlying the concept without using the term itself in the text of the draft articles. The Special Rapporteur expressed the view that, in the light of the discussion of the issue, the latter might prove to be the wisest course for the Commission to follow.

238. There was also a division of views on the question of whether there should be set forth, in the text of a draft article, a list of factors to be taken into consideration in determining what amounts to a reasonable and equitable use of an international watercourse. Some members were of the view that the obligation to utilize the waters of an international watercourse in a reasonable and equitable manner would be devoid of content without an indication of its meaning in the form of an indicative list of factors. Other members believed that the factors did not reflect legal rules and therefore should not have a place in the text of a draft article. Still other members considered that if the factors were to be included, they should be arranged in order of priority or that an indication should be provided as to how to resolve conflicts between them.

239. The Special Rapporteur concluded that this question would have to be given careful consideration but supported the suggestions of some members that the Commission should strive for a flexible solution, which might take the form of confining the factors to a limited, indicative, list of more general criteria.

240. The final point on which the Special Rapporteur particularly solicited the views of the Commission concerned the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other. According to the Special Rapporteur, as explained in his second report, the problem here was that an equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", in the sense of unmet needs, in respect of one or more States using the watercourse, but not entail a legal "injury" or be otherwise wrongful. This was due to the fact that an international watercourse might not always be capable of satisfying fully the competing claims of all of the States concerned. The object of an equitable allocation was to maximize the benefits, while minimizing the harm, to the States concerned. Thus, where there was, e.g., insufficient water in a watercourse to satisfy the expressed needs or claims of the concerned States, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In this sense, they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse that was, in fact, equitable.

241. Members of the Commission who addressed this point recognized the relationship between the two principles in question, but were divided on how to express it in the draft articles. Some members preferred a simple reference to the obligation not to cause appreciable harm while others supported a formulation which would provide that such harm may not be caused unless it is allowable pursuant to the equitable utilization of the watercourse in question. Still others preferred to use the term "harm" without qualification. The Special Rapporteur concluded that, as the Commission seemed to be in basic agreement on the manner in which the two principles were interrelated, the task of the Drafting Committee would be to find an appropriate and generally acceptable means of expressing that interrelationship.

242. In the course of their comments on the Special Rapporteur's report, some members of the Commission expressed views concerning the form which the Commission's work on the topic was to take. With the exception of one member, who doubted the utility of the Commission's present approach to the topic, those members who addressed this subject supported the "framework agreement" approach that had previously been endorsed both by the Commission and in the Sixth Committee. The thrust of this approach is to elaborate draft articles setting forth the general principles and rules governing the non-navigational uses of international watercourses, in the absence of agreement among the States concerned, and to provide guidelines for the management of international watercourses and for the negotiation of future agreements. The Special Rapporteur indicated that, in his view, it would be appropriate to proceed first with the formulation of draft articles setting forth legal principles and rules; the Commission could turn next to the consideration of a possible set of guidelines concerning institutional mechanisms and other aspects of international watercourse management that are not strictly required by international law, but which are highly desirable components of an overall régime governing the non-navigational uses of international watercourses.

243. Finally, those members of the Commission who spoke on the topic commented generally on the five draft articles contained in the report of the

Special Rapporteur. These draft articles contained rules applicable in cases in which a State contemplates a new use, incl' ing an addition to or alterations of an existing use, of an intern l watercourse, where such new use may cause appreciable harm to other States using the watercourse. The Special Rapporteur indicated his intention to give the articles further consideration in the light of the constructive comments made by members of the Commission.

CHAPTER VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Relations between States and international organizations (second part of the topic)

244. The Special Rapporteur, Mr. Leonardo Díaz-González, submitted his third report on the topic: "Relations between States and international organizations (second part of the topic)" to the Commission (A/CN.4/401). The Commission, however, was unfortunately unable, because of lack of time, to give any consideration to the topic at the present session.

B. Programme and methods of work of the Commission

245. The Planning Group of the Enlarged Bureau of the Commission was established by the Commission at its 1945th meeting on 14 May 1986, to review the programme and methods of work of the Commission.

246. The Planning Group was composed of Mr. Julio Barboza (Chairman), Mr. Riyadh Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Leonardo Díaz-González, Mr. Khalafalla El Rasheed Mohamed-Ahmed, Mr. Constantin Flitan, Mr. Laurel B. Francis, Mr. Satya Pal Jagota, Mr. Andreas J. Jacovides, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Motoo Ogiso, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Sir Ian Sinclair and Mr. Christian Tomuschat. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

247. The Planning Group held three meetings on 15 May, 20 June and 2 July 1986 and considered questions relating to the organization of the work of the session of the Commission, the Drafting Committee, documentation and other matters.

248. The Enlarged Bureau considered the report of the Planning Group on 3 July 1986. On the basis of the proposals made by the Planning Group, the Enlarged Bureau recommended to the Commission that paragraphs 249 to 261 below be included in the report of the Commission to the General Assembly. This recommendation was adopted by the Commission at its 1982nd meeting on 7 July 1986.

249. Organization of work. The Commission, at the beginning of its present session, noting the recommendations of the General Assembly in paragraph 3 of its resolution 40/75 of 11 December 1985, organized its work in such a manner

as to allow for the completion on first reading of the draft articles on the two topics: "Jurisdictional immunities of States and their property" and "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

250. The Commission recognizes that, at its thirty-ninth session, in 1987 - the first session within the term of office of the members of the Commission elected by the General Assembly at its forty-first session, in 1986 - the Commission will undoubtedly consider the question of the organization of its work for the coming sessions, in the light of general objectives and priorities at that time, taking into account relevant General Assembly resolutions. In particular, it may be anticipated that at its thirty-ninth session, in 1987, the Commission will deal with the matter of how available time could best be allocated as between the topics on its current programme of work, with a view to concentrating its attention on those topics on which most progress could be achieved before the conclusion of the term of office of the members of the Commission.

251. The Commission also felt that it would be useful if it were to reaffirm its decision, recorded in its earlier reports, that a Special Rapporteur of a topic who is re-elected a member of the Commission by the General Assembly should continue as Special Rapporteur of the topic unless and until the Commission, as newly constituted, should decide otherwise.

252. Duration of the session. While fully recognizing the serious financial circumstances which led to the usual 12-week session of the Commission being reduced, this year, to a 10-week session, the Commission felt that it should emphasize that the nature of its work, in the codification and progressive development of international law as envisaged in the Charter, as well as the magnitude and complexity of the subjects on its agenda, made it essential that its annual sessions be of, at least, the usual 12-week duration. It was not possible for the Commission at its present session, due to lack of time, to make significant progress on the topic "State responsibility" nor to give adequate consideration to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", nor to the topic "The law of the non-navigational uses of international watercourses". Furthermore, it was not possible for the Commission to give any consideration to the topic "Relations between States and international

organizations (second part of the topic)". Also, due to lack of time, several members of the Commission who wished to address the topics that were in fact discussed by the Commission, had to renounce the floor and were, thus, unable to make their comments with a view to assisting the Special Rapporteurs in their work. Finally, the Commission faced serious difficulty in examination of draft articles. The Commission was not in a position fully to examine the substance of draft articles proposed by a Special Rapporteur, prior to their transmission to the Drafting Committee; nor was the Commission in a position fully to examine draft articles reported back by the Drafting Committee to the Commission. In view of these time constraints, the Commission is fearful that in the future, unless the full duration of the session of the Commission is restored, significant headway will only be made if some concentration of its efforts takes place. This could entail the consequence that not every one of the topics on the agenda of the Commission would be considered at any one session.

253. Summary records. The Commission wishes to reaffirm the fundamental importance of the continuance of the present system of summary records, which constitutes an essential requirement for the procedures and methods of work of the Commission and for the process of codification and progressive development of international law. The work performed by the Commission consists essentially in elaborating drafts of international legal norms on various topics of international law, which often serve as the basis for the preparation of international conventions at international conferences of plenipotentiaries convened by the General Assembly. The formulation of such drafts is, in most cases, the result of detailed, thorough and analytical discussions in the Commission. It is often only after studying the discussions in the Commission, which as a whole represents the principal legal systems of the world, that a particular formulation can be properly understood or interpreted, its origin traced and its interrelationship with other rules of international law ascertained. From this follows the importance of continuing the present system of summary records. It is not without significance that the summary records of each session of the Commission are eventually published in the edited form in the Yearbook of the Commission, thus comprising an integral part of the documentation of the Commission. The records of the Commission constitute the travaux préparatoires of the relevant

provisions of a convention, the basic proposal for which was prepared by the Commission. The summary records of the Commission have also their utility for international adjudications and settlement. The International Court of Justice has, in fact, referred to them on a number of occasions, while applying and interpreting international conventions concluded on the basis of draft articles prepared by the Commission.

254. Drafting Committee. At this session the Drafting Committee was established, and held its first meeting as early as the second day of the session. The Committee held a total of 36 meetings, a record number considering the two week reduction in the length of the session. This made it possible for the Commission to complete its first reading of the two topics: "Jurisdictional immunities of States and their property" and "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". The Commission felt, as it did last year, that it would be useful to reaffirm the desirability of the establishment and meeting of the Drafting Committee as early as possible at each session, to enable the Drafting Committee to deal with draft articles referred to it at the particular session as well as any others left pending.

255. Documentation. While appreciating the efforts made by the Special Rapporteurs to complete their reports to the Commission as early as possible, and the efforts made by the Secretariat to have these reports distributed in time, the Commission wished to reiterate the continuing importance of the early submission of the reports of the Special Rapporteurs and the distribution of all pre-session documentation as far in advance of the beginning of each session as possible.

256. The Commission noted with satisfaction that, due to the diligence of the Secretariat, including in particular the Department of Conference Services, the summary records of discussions in the Sixth Committee of the General Assembly in 1985 relating to the report of the Commission had been issued as early as possible. This had enabled the Codification Division of the Office of Legal Affairs to prepare and make available to members of the Commission the topical summary of such discussions at an early date. The Commission wishes to emphasize the importance of such a practice being maintained in the future, both with a view to facilitating the work of the Special Rapporteurs as well as from the point of view of enabling all members

of the Commission to undertake necessary studies prior to the convening of a session of the Commission.

257. The Commission expressed its appreciation to the Secretariat, and in particular to the Department of Conference Services, for the efforts made to expedite publication of the Yearbook of the International Law Commission. As noted in earlier reports of the Commission, the timely and regular publication of the Yearbook was of importance, particularly as the summary records of annual sessions of the Commission, the reports of the Special Rapporteurs, and studies prepared by the Secretariat, appear in final form in the Yearbook. The Commission welcomed the assurance of the Secretariat that it would make every effort to ensure that a satisfactory schedule of publication for the Yearbook would be achieved and maintained in future years.

258. The Commission requested the Secretariat to ensure that the new, and fourth, edition of the publication The Work of the International Law Commission, at present being prepared by the Secretariat, would be published in 1987. The up-dated publication, which would contain brief histories of the topics considered by the Commission, the texts of drafts prepared by the Commission, and of conventions adopted on the basis of drafts prepared by the Commission (including the recent Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983) and the more recent Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986)) would be of great value. The publication is extensively used in the diplomatic and academic fields as a basic work of reference.

259. Other matters. The Commission took note of, and requested the Chairman of the Commission to reply in an appropriate manner to, a communication from the Under-Secretary-General for Political and Security Council Affairs drawing the attention of the Commission to General Assembly resolutions 40/3 and 40/10 of 30 October and 18 November 1985, entitled, respectively, "International Year of Peace" and "Programme of the International Year of Peace".

260. The Commission also took note of, and requested the Chairman of the Commission to reply in an appropriate manner to, a communication dated 24 January 1986 from the Secretary-General of the United Nations seeking reductions in conference expenditures wherever possible and prudent, and a communication dated 28 February 1986 from the Chairman of the Committee on

Conferences on necessary economies in documentation. The Commission is mindful of the importance of utilizing the conference time and servi made available to the Commission as economically and as fully as possible, and has put into effect certain measures of economy, inter alia, a reduction in the length of the Commission's annual report, and certain changes in its times of meetings to accommodate present limitations in available conference services. The Commission has always in the past endeavoured to make maximum use of the conference time and services made available, and at present its session virtually achieved this goal.

261. The Commission agreed that it should continue at future sessions to keep on its agenda the review of the status of its programme and methods of work.

C. Co-operation with other bodies

262. The Commission was represented at the December 1985 session of the European Committee on Legal Co-operation, in Strasbourg, by Sir Ian Sinclair, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission.

263. The Commission was represented at the January 1986 session of the Inter-American Juridical Committee, in Rio de Janeiro, by Mr. Satya Pal Jagota, as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Dr. Seymour J. Rubin. Dr. Rubin addressed the Commission at its 1980th meeting on 2 July 1986 and his statement is recorded in the summary record of that meeting.

264. The Commission was represented at the February 1986 session of the Asian-African Legal Consultative Committee, in Arusha, by Mr. El Rasheed Mohamed-Ahmed, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. B. Sen. Mr. Sen addressed the Commission at its 1956th meeting on 3 June 1986 and his statement is recorded in the summary record of that meeting.

D. Date and place of the thirty-ninth session

265. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 4 May and conclude on 24 July 1987.

E. Representation at the forty-first session of the General Assembly

266. The Commission decided that it should be represented at the forty-first session of the General Assembly by its Chairman, Mr. Doudou Thiam.

F. International Law Seminar

267. Pursuant to General Assembly resolution 40/75 of 11 December 1985, the United Nations Office at Geneva organized the twenty-second session of the International Law Seminar during the present session of the Commission. The Seminar is intended for advanced students of international law and junior professors or government officials who normally deal with questions of international law in the course of their work. Twenty-four candidates of different nationalities and mostly from developing countries, selected by a committee under the chairmanship of Mr. José M. Lacleta Muñoz, as well as three observers participated in this session of the Seminar.

268. The session of the Seminar was held at the Palais des Nations, from 20 May to 6 June 1986, under the direction of Mr. Philippe Giblain.

269. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission. In addition, a number of lectures were given at the Seminar. Some of the lectures were delivered by members of the International Law Commission, namely: Chief Akinjide: "Mercenarism and international law"; Mr. Francis: "Enhancing the effectiveness of the principle of non-use of force in international relations"; Mr. Jagota: "The work of the International Law Commission"; Mr. Koroma: "Legal aspects of the Lomé III Convention"; Mr. Riphagen: "State responsibility"; Mr. Roukounas: "International treaties whose entry into force and termination are uncertain"; Mr. Sucharitkul: "Jurisdictional immunities of States and their property"; Mr. Tomuschat: "The Human Rights Committee"; Mr. Yankov: "The status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

270. The participants in the Seminar were also received at the headquarters of the International Committee of the Red Cross, following a lecture on international humanitarian law and public international law.

271. At the end of the session of the Seminar, Mr. Doudou Thiam, Chairman of the International Law Commission, gave participants a certificate testifying to participation in the twenty-second session of the Seminar.

272. None of the costs of the Seminar were borne by the United Nations, which is not asked to contribute to the travel or living expenses of the participants. The Commission noted with appreciation that the Governments of Austria, Denmark, Finland and the Federal Republic of Germany made fellowships available to participants from developing countries. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would have otherwise been prevented from participating in the session. This year, fellowships were awarded to 10 participants. Of the 495 participants, representing 115 nationalities, who have participated in the Seminar since it began in 1964, fellowships have been awarded to 240.

273. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable young lawyers and especially those from developing countries to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission wishes to draw attention to the fact that, due to a shortage of funds, if adequate contributions are not forthcoming, the holding of the twenty-third session of the International Law Seminar in 1987 may be in doubt. The Commission, therefore, appeals to all States to contribute, in order that the holding of the Seminar may continue.

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