

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1985

*Volume II*  
*Part Two*

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

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UNITED NATIONS





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UNITED NATIONS  
New York, 1986



## NOTE

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

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

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

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

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

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

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## DOCUMENT A/40/10\*

### Report of the International Law Commission on the work of its thirty-seventh session (6 May-26 July 1985)

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ABBREVIATIONS

IAEA	International Atomic Energy Agency
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
World Bank	International Bank for Reconstruction and Development

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*P.C.I.J., Series A/B*      PCIJ, *Judgments, Orders and Advisory Opinions* (beginning in 1931)



## Chapter I

### ORGANIZATION OF THE SESSION

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

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

#### A. Membership

3. The Commission consists of the following members:

Chief Richard Osuolale A. AKINJIDE (Nigeria)  
Mr. Riyadh Mahmoud Sami AL-QAYSI (Iraq)  
Mr. 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 DÍAZ GONZÁLEZ (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)

4. At its 1878th meeting, on 8 May 1985, the Commission elected Mr. Gaetano Arangio-Ruiz (Italy), Mr. Jiahua Huang (China), Mr. Emmanuel J. Roukounas (Greece) and Mr. Christian Tomuschat (Federal Republic of Germany) to fill the four casual vacancies in the Commission caused by the election of Mr. Jens Evensen and Mr. Zhengyu Ni to the International Court of Justice and by the death of Mr. Robert Q. Quentin-Baxter and Mr. Constantin A. Stavropoulos.

#### B. Officers

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

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

6. The Enlarged Bureau of the Commission was composed of the officers of the present session, former chairmen of the Commission and the special rapporteurs. It was presided over by the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 1893rd meeting, on 4 June 1985, set up for the present session a Planning Group to consider mat-

ters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Khalafalla El Rasheed Mohamed Ahmed (Chairman), Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Jiahua Huang, Mr. Andreas J. Jacovides, Mr. Abdul G. Koroma, Mr. Chafic Malek, Mr. Frank X. Njenga, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Nikolai A. Ushakov. The Group was open-ended and other members of the Commission were welcome to attend its meetings.

### C. Drafting Committee

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

### D. Secretariat

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

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

### E. Agenda

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

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

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

## Chapter II

### DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

#### A. Introduction

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

(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and

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

12. At its first session, in 1949, the Commission considered the matters referred to in resolution 177 (II) and appointed Mr. Jean Spiropoulos Special Rapporteur to continue the work on : (a) the formulation of the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal ; (b) the preparation of a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission also decided to circulate a questionnaire to Governments inquiring what offences, apart from those defined in the Charter and Judgment of the Nürnberg Tribunal, should in their view be comprehended in the draft code envisaged in resolution 177 (II).<sup>2</sup>

13. On the basis of a report submitted by the Special Rapporteur on the formulation of the Nürnberg Principles,<sup>3</sup> the Commission adopted at its second session, in accordance with paragraph (a) of resolution 177 (II), a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment

of the Tribunal and submitted them, with commentaries, to the General Assembly.<sup>4</sup> As to the matter referred to in paragraph (b) of resolution 177 (II), the Commission discussed the topic on the basis of the report of the Special Rapporteur on the draft code of offences against the peace and security of mankind<sup>5</sup> and of replies received from Governments to the questionnaire which it had sent to them.<sup>6</sup> In the light of the deliberations on the matter in the Commission, a Drafting Sub-Committee prepared a provisional draft code which was referred to the Special Rapporteur, who was requested to submit a further report.<sup>7</sup>

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

15. The Special Rapporteur submitted his second report<sup>8</sup> to the Commission at its third session, in 1951. It contained a revised draft code as well as a digest of observations made on the Commission's formulation of the Nürnberg Principles at the fifth session of the General Assembly. The Commission also had before it observations received from Governments on that formulation,<sup>9</sup> as well as a memorandum concerning the draft code prepared by Professor Vespasien V. Pella.<sup>10</sup> At that session, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind, consisting of five articles with commentaries, and submitted it to the General Assembly.<sup>11</sup>

<sup>1</sup> It may be of interest to note that, even prior to the establishment of the Commission, the General Assembly, at its first session, in resolution 95 (I) of 11 December 1946, had affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal and directed the Committee on the codification of international law established by resolution 94 (I) of the same date "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized" in that Charter and Judgment. It was that Committee (sometimes referred to as the "Committee of Seventeen") which had recommended to the General Assembly the establishment of an international law commission and set forth provisions designed to serve as the basis for its statute. See *Official Records of the General Assembly, Second Session, Sixth Committee, Annex No. 1*, document A/331.

<sup>2</sup> *Yearbook . . . 1949*, p. 283, document A/925, paras. 30-31.

<sup>3</sup> *Yearbook . . . 1950*, vol. II, p. 181, document A/CN.4/22.

<sup>4</sup> *Ibid.*, pp. 374-378, document A/1316, paras. 95-127

<sup>5</sup> *Ibid.*, p. 253, document A/CN.4/25.

<sup>6</sup> *Ibid.*, p. 249, document A/CN.4/19, part II, and A/CN.4/19/Add.1 and 2

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

<sup>8</sup> *Yearbook . . . 1951*, vol. II, p. 43, document A/CN.4/44

<sup>9</sup> *Ibid.*, p. 104, document A/CN.4/45 and Add.1 and 2.

<sup>10</sup> *Yearbook . . . 1950*, vol. II, p. 278, document A/CN.4/39.

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

16. In 1951, at its sixth session, the General Assembly postponed consideration of the question of the draft code until its seventh session. It drew the attention of Governments of Member States to the draft code prepared in 1951 by the Commission and invited them to submit their comments and observations thereon. While the comments and observations thus received were circulated at the seventh session of the General Assembly in 1952,<sup>12</sup> the question of the draft code was not placed on the agenda of that session, on the understanding that the matter would continue to be considered by the Commission. At the Commission's fifth session, in 1953, the Special Rapporteur was requested to undertake a further study of the question.<sup>13</sup>

17. In his third report,<sup>14</sup> the Special Rapporteur discussed the observations received from Governments and, in the light of those observations, proposed certain changes in the draft code adopted by the Commission in 1951. The Commission considered that report at its sixth session, in 1954, made some changes in the text previously adopted, and transmitted to the General Assembly a revised version of the draft code, consisting of four articles with commentaries thereto.<sup>15</sup>

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

#### Article 1

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

#### Article 2

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

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

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

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

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

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

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

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

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

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

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

(i) Killing members of the group ;

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

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

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

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

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

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

(13) Acts which constitute :

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

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

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

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

#### Article 3

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

#### Article 4

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

19. By its resolution 897 (IX) of 4 December 1954, the General Assembly, considering that the draft code formulated by the Commission at its sixth session raised problems closely related to that of the definition of aggression and that it had entrusted to a special committee the task of preparing a report on a draft definition of aggression, decided to postpone further consideration of the draft code until the Special Committee on the Question of Defining Aggression had submitted its report.<sup>16</sup> The As-

<sup>12</sup> *Official Records of the General Assembly, Seventh Session, Annexes*, vol. II, agenda item 54, document A/2162 and Add. I.

<sup>13</sup> *Yearbook . . . 1953*, vol. II, p. 231, document A/2456, paras. 167-169.

<sup>14</sup> *Yearbook . . . 1954*, vol. II, p. 112, document A/CN.4/85.

<sup>15</sup> *Ibid.*, pp. 150-152, document A/2693, paras. 49-54.

<sup>16</sup> In addition, by its resolution 898 (IX) of 14 December 1954, the General Assembly, considering, *inter alia*, the connection between the question of defining aggression, the draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction, decided to postpone consideration of the report of the 1953 Committee on International Criminal Jurisdiction (*Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*) until it had taken up the report of the Special Committee on the Question of Defining Aggression and had taken up

sembly was of a similar opinion in 1957, although it transmitted the text of the draft code to Member States for comment; replies were to be submitted to the Assembly at such time as the item might be placed on its provisional agenda.<sup>17</sup> In 1968, the Assembly again decided not to include in its agenda the item concerning the draft code and the item "international criminal jurisdiction" until a later session, when further progress had been made in arriving at a generally agreed definition of aggression.

20. On 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression.<sup>18</sup> In allocating the item on the question of defining aggression to the Sixth Committee, the General Assembly commented that it had decided, *inter alia*, to consider whether it should take up the question of the draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction, as envisaged in previous Assembly resolutions and decisions.<sup>19</sup>

21. In its report on the work of its twenty-ninth session, in 1977, the Commission referred to the possibility of the General Assembly giving consideration to the draft code, including its review by the Commission if the Assembly so wished, having regard to the fact that the Definition of Aggression had been approved by the General Assembly.<sup>20</sup>

22. Although the item was included in the agenda of the thirty-second session of the General Assembly, in 1977, its consideration was postponed until the thirty-third session, in 1978. By resolution 33/97 of 16 December 1978, the General Assembly invited Member States and relevant international intergovernmental organizations to submit their comments and observations on the draft code, including comments on the procedure to be adopted. The comments received were circulated at the Assembly's next session.<sup>21</sup> At its thirty-fifth session, in 1980, by its resolution 35/49 of 4 December 1980, the General Assembly reiterated the invitation for the submission of comments and observations made in resolution 33/97, adding that such replies should indicate views on the procedure to be followed in the future consideration of the item, including

the suggestion that the item be referred to the Commission. Those comments were subsequently circulated.<sup>22</sup>

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

*The General Assembly,*

*Mindful of Article 13, paragraph 1a, of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,*

*Recalling its resolution 177 (II) of 21 November 1947, by which it directed the International Law Commission to prepare a draft code of offences against the peace and security of mankind,*

*Having considered the draft Code of Offences against the Peace and Security of Mankind prepared by the International Law Commission and submitted to the General Assembly in 1954,*

*Recalling its belief that the elaboration of a code of offences against the peace and security of mankind could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations,*

*Bearing in mind its resolution 33/97 of 16 December 1978, by which it decided to accord priority and the fullest consideration to the item entitled "Draft Code of Offences against the Peace and Security of Mankind",*

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

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

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

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

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

1. *Invites* the International Law Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law;

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

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

4. *Requests* the Secretary-General to submit to the International Law Commission all the necessary documentation, comments and

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

<sup>17</sup> General Assembly resolution 1186 (XII) of 11 December 1957; however, by its resolution 1187 (XII) of the same day, the General Assembly also decided once again to defer consideration of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression and the question of the draft Code of Offences against the Peace and Security of Mankind.

<sup>18</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>19</sup> See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 86, document A/9890, para. 2. As of July 1985, the General Assembly has not taken up the question of an international criminal jurisdiction.

<sup>20</sup> *Yearbook . . . 1977*, vol. II (Part Two), p. 130, para. 111.

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

<sup>22</sup> A/36/416. In addition, the Secretary-General, pursuant to General Assembly resolution 35/49, prepared an analytical paper (A/36/535) on the basis of replies received and statements made during the debate on the item at the thirty-third and thirty-fifth sessions of the Assembly.

observations presented by Member States and relevant international intergovernmental organizations on the item entitled "Draft Code of Offences against the Peace and Security of Mankind";

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

24. Accordingly, at its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic "Draft Code of Offences against the Peace and Security of Mankind" and established a Working Group on the topic, chaired by the Special Rapporteur.<sup>23</sup> On the recommendation of the Working Group, the Commission decided to accord the necessary priority to the topic within its five-year programme and indicated its intention to proceed during its thirty-fifth session to a general debate in plenary on the basis of a first report to be submitted by the Special Rapporteur. The Commission further indicated that it would present to the General Assembly at its thirty-eighth session the conclusions of that debate.<sup>24</sup>

25. Also on the recommendation of the Working Group, the Commission requested the Secretariat to give the Special Rapporteur the assistance that might be required and to submit to the Commission all necessary source materials, including in particular a compendium of relevant international instruments and an updated version of the analytical paper prepared pursuant to General Assembly resolution 35/49.<sup>25</sup> The Commission had before it the comments and observations received from Governments pursuant to the request contained in paragraph 4 of General Assembly resolution 36/106.<sup>26</sup>

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

27. At its thirty-fifth session, the Commission had before it the first report on the topic submitted by the Special Rapporteur,<sup>27</sup> as well as a compendium of relevant inter-

national instruments<sup>28</sup> and an analytical paper,<sup>29</sup> both prepared by the Secretariat pursuant to the Commission's requests made at the thirty-fourth session (see paragraph 25 above). It also had before it replies received from Governments<sup>30</sup> in response to the invitation contained in General Assembly resolution 37/102. The Commission proceeded to a general debate in plenary on the topic on the basis of the first report submitted by the Special Rapporteur, which related to three questions: (a) scope of the draft codification; (b) methodology of codification; (c) implementation of the code.

28. In its report to the General Assembly on the work of its thirty-fifth session,<sup>31</sup> the Commission expressed the opinion that the draft code should cover only the most serious international offences. Those offences would be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject. With regard to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on that point, because of the political nature of the problem. With regard to the implementation of the code, and given the fact that some members considered that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission asked the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals. Furthermore, in view of the prevailing opinion within the Commission, which endorsed the principle of criminal responsibility in the case of States, the Commission stated that the General Assembly should indicate whether such jurisdiction should also be competent with respect to States.

29. By resolution 38/138 of 19 December 1983, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the Commission should continue its work on all the topics in its current programme. Furthermore, by its resolution 38/132 of 19 December 1983, the Assembly invited the Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating, as a first step, an introduction in conformity with paragraph 67 of its report on the work of its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report. It also requested the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the questions raised in paragraph 69 of the Commission's report and to include them in a report to be submitted to the General Assembly at its thirty-ninth session with a view to the adoption at the appropriate time, of the necessary decision thereon.

30. At its thirty-sixth session, in 1984, the Commission had before it the second report submitted by the Special Rapporteur.<sup>32</sup> The Commission proceeded to a general

<sup>23</sup> *Yearbook . . . 1982*, vol. II (Part Two), p. 121, para. 252. The Working Group was composed of the following members: Mr. Doudou Thiam (Chairman), Mr. Mikain Leliel Balanda, Mr. Boutros Boutros Ghali, Mr. Jens Evensen, Mr. Laurel B. Francis, Mr. Jorge E. Ilueca, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Frank X. Njenga, Mr. Motoo Ogiso, Mr. Syed Sharifuddin Pirzada, Mr. Willem Riphagen and Mr. Alexander Yankov (*ibid.*, p. 8, para. 8).

<sup>24</sup> *Ibid.*, p. 121, para. 255.

<sup>25</sup> A/CN.4/535 (see footnote 22 above).

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

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

<sup>28</sup> A/CN.4/368 and Add.1.

<sup>29</sup> A/CN.4/365.

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

<sup>31</sup> *Yearbook . . . 1983*, vol. II (Part Two), p. 16, para. 69.

<sup>32</sup> A/CN.4/377, reproduced in *Yearbook . . . 1984*, vol. II (Part One), p. 89.



debate on the topic on the basis of that second report, which dealt with two questions, namely offences covered by the 1954 draft code and offences classified since 1954.

31. In its report to the General Assembly on the work of its thirty-sixth session, the Commission stated,<sup>33</sup> with regard to the content *ratione personae* of the draft code, its intention that it should be limited at that stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. With regard to the first stage of the Commission's work on the draft code, and in the light of General Assembly resolution 38/132, the Commission intended, for the reasons given in paragraphs 33 to 40 of its report, to begin by drawing up a provisional list of offences, while bearing in mind the drafting of an introduction summarizing the general principles of international criminal law relating to offences against the peace and security of mankind. With regard to the content *ratione materiae* of the draft code, the Commission intended to include the offences covered in the 1954 code, with appropriate modifications of form and substance which it would consider at a later stage. There had been a general trend in the Commission in favour of including colonialism, *apartheid*, and possibly serious damage to the human environment and economic aggression in the draft code, if appropriate legal formulations could be found. With regard to the use of nuclear weapons, the Commission discussed the problem at length but, for the reasons given in paragraphs 55 to 57 of its report, it 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. With regard to the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc., and the hijacking of aircraft, the Commission considered that those practices had aspects that could be regarded as related to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission recognized that it was an international crime under customary international law. It doubted, however, whether, in the present international community, the offence could be such as to constitute a threat to the peace and security of mankind.

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

33. By its resolution 39/80 of 13 December 1984, the General Assembly requested the Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating

an introduction as well as a list of the offences, taking into account the progress made at its thirty-sixth session as well as the views expressed during the thirty-ninth session of the General Assembly. It also requested the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the conclusions contained in paragraph 65 of the report of the Commission on the work of its thirty-sixth session and to include them in a report to be submitted to the General Assembly at its fortieth session with a view to the adoption at the appropriate time, of the necessary decision thereon.

#### B. Consideration of the topic at the present session

34. At its present session, the Commission had before it the third report on the topic submitted by the Special Rapporteur (A/CN.4/387)<sup>34</sup> and views received from Member States and intergovernmental organizations (A/CN.4/392 and Add.1 and 2).<sup>35</sup>

35. In his third report, the Special Rapporteur presented to the Commission a possible outline of the future code, and indicated his intention to follow the Commission's decision at its thirty-sixth session that the draft code should be limited at that stage to offences committed by individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility in the light of the opinions expressed by Governments, and to include the offences covered by the 1954 code with appropriate modifications of form and substance. The outline would consist of two parts. The first part would deal with: (a) scope of the draft articles; (b) definition of an offence against the peace and security of mankind; (c) general principles governing the subject. The second part would deal with acts constituting an offence against the peace and security of mankind. In that context, the Special Rapporteur intended to review the traditional division of such offences into crimes against peace, war crimes and crimes against humanity.

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

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

38. Finally, the Special Rapporteur proposed four draft articles relating to those offences, namely: "Scope of the present articles" (article 1); "Persons covered by the present articles" (article 2); "Definition of an offence against the peace and security of mankind" (article 3); and "Acts constituting an offence against the peace and security of mankind" (article 4).<sup>36</sup>

39. The Commission considered the third report submitted by the Special Rapporteur at its 1879th to 1889th meetings, from 9 to 28 May 1985.

<sup>34</sup> Reproduced in *Yearbook . . . 1985*, vol. 11 (Part One).

<sup>35</sup> *Ibid.*

<sup>36</sup> For the texts of those draft articles, see footnotes 40, 46 to 50, 52 and 53 below.

<sup>33</sup> *Yearbook . . . 1984*, vol. 11 (Part Two), p. 17, para. 65.

40. At its 1889th meeting, on 28 May 1985, the Commission referred to the Drafting Committee draft article 1, the first alternative of draft article 2, and both alternatives of draft article 3. With regard to draft article 4, the Commission also referred to the Drafting Committee the two alternatives of section A of that article, concerning acts of aggression, on the understanding, on the one hand, that the Committee would consider them only if time permitted and, on the other hand, that, if the Committee agreed upon a text for section A of draft article 4, it would be for the purpose of assisting the Special Rapporteur in the preparation of his fourth report.

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

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

### I. OUTLINE OF THE FUTURE CODE

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

A *part I* relating to:

The scope of the draft articles:

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

The general principles governing the subject; and

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

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

45. With regard to the third heading in part I, namely the general principles governing the subject, the Special Rapporteur referred to the conclusions reached by the Commission as reflected in paragraph 33 of its report on its thirty-sixth session,<sup>37</sup> and confined himself, at that stage, to drawing attention to those formulated by the Commission at its second session, in 1950, in the context of its work on the Nürnberg Principles,<sup>38</sup> namely:

#### *Principle I*

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

#### *Principle II*

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

#### *Principle III*

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

#### *Principle IV*

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

#### *Principle V*

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

...<sup>39</sup>

#### *Principle VII*

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

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

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

48. Again, once a criminal act had been defined and characterized, the responsibility of its perpetrator and the

<sup>39</sup> Principle VI is not strictly speaking a principle, but a list of the acts referred to in the Charter of the Nürnberg Tribunal as offences against the peace and security of mankind. It reads:

#### *"Principle VI*

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

"(a) Crimes against peace:

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

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

"(b) War crimes:

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

"(c) Crimes against humanity:

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

<sup>37</sup> *Yearbook* . . . 1984, vol. II (Part Two), p. 11.

<sup>38</sup> *Yearbook* . . . 1950 vol. II, pp. 374-378, document A/1316, paras. 95-127.

extent of that responsibility brought into play a number of moral and subjective elements, such as intention, degree of awareness and motive, which did not necessarily form part of every offence, but only of some.

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

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

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

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

## 2. DELIMITATION OF THE SCOPE OF THE TOPIC *RATIONE MATERIAE*

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

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

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

56. For the time being, the question that was discussed at length, was the following: even if the draft code applied only to individuals, it would have to be determined ex-

actly which individuals were to be covered. There were two categories of individuals: private individuals and agents of a State. A private individual was a physical person who had no official authority, who acted strictly in his private capacity and therefore had none of the power or, *a fortiori*, the means inherent in the exercise of governmental authority. An individual might also, however, be acting as an agent of a State, exercising power in the name and on behalf of that State. Such an agent was also called an "authority", in order to make it quite clear that his functions involved a power of command.

57. That question arose because the 1954 draft code drew a distinction between individuals acting as "the authorities of a State" (art. 2, paras. (1) to (9)) and individuals acting as "private individuals" (art. 2, paras. (10) and (11)). It was not clear whether that distinction served any purpose. *A priori*, it did not really seem to be necessary, since private individuals acting as the "authorities of a State" were still individuals or, in other words, physical persons who were, in principle, all liable to the same punishment for the commission of a particular offence. The problem that arose in that connection, and on which it was impossible to remain silent, since the distinction was drawn in the 1954 draft, was whether private individuals could commit offences against the peace and security of mankind.

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

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

60. Accordingly, the Special Rapporteur proposed in his third report a draft article 2 with two alternatives designed to take account of both those approaches. The first alternative, which was broader, stated that the code applied to offences committed by individuals and made no distinction between the "authorities of a State" and "private individuals". The second alternative made the code applicable only to acts committed by the authorities of a State, thereby linking an offence against the peace and security of

mankind to the exercise of power.<sup>40</sup> After a thorough discussion that reflected the two approaches described above, the Commission decided to refer the first alternative of draft article 2 to the Drafting Committee.

### 3. DEFINITION OF AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

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

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

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

63. The preparatory work showed that the term "offence against the peace and security of mankind" had originated with Justice Francis Biddle, who had been one of the judges at the Nürnberg Tribunal and who, in attempting to characterize the crimes established by the Charter of the Nürnberg Tribunal, as adopted by the London Agreement of 1945,<sup>41</sup> had referred to them, in a letter to President Truman dated 9 November 1946, as "offences against the peace and security of mankind."<sup>42</sup> The term was a generic one and, although it referred to two distinct types of acts, it denoted an indivisible concept because such acts were a threat or a danger to, or an attack on, the peace and security of mankind.

64. A large majority of the authors who had dealt with the matter were of the opinion that the term in question expressed one single idea.<sup>43</sup> Just as the word "crime" in internal law referred to such different acts as arson, armed robbery, murder, assassination, etc., the term "offence

against the peace and security of mankind" referred, despite its unity, to such different acts as aggression, terrorism, genocide, etc.

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

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

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

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

68. In that connection, article 19 of part I of the draft articles on State responsibility defined an international crime as a breach of an international obligation so essential for the protection of fundamental interests of the international community that such a breach was recognized as a crime by that community as a whole.<sup>44</sup> Article 19 thus introduced an objective element into the definition of an international crime, which was the obligation breached. The more important the subject-matter of the obligation, the more serious its breach.

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

70. In the commentary to article 19, the Commission had also stated that

... The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community are to a large extent those which give rise to the obligations comprised within the four main categories mentioned.<sup>45</sup>

<sup>40</sup> The two alternatives of draft article 2 submitted by the Special Rapporteur read:

#### "PART II. PERSONS COVERED BY THE PRESENT ARTICLES

##### "Article 2

###### "First alternative

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

###### "Second alternative

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

<sup>41</sup> Agreement of 8 August 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>42</sup> United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XV (No. 386), 24 November 1946, pp. 956-957; see also the first report of the Special Rapporteur, J. Spiropoulos, on the draft Code of Offences against the Peace and Security of Mankind (*Yearbook . . . 1950*, vol. II, p. 255, document A/CN.4/25, para. 9).

<sup>43</sup> *Yearbook . . . 1950*, vol. II, p. 258, document A/CN.4/25, para. 34.

<sup>44</sup> *Yearbook . . . 1976*, vol. II (Part Two), pp. 95-96.

<sup>45</sup> *Ibid.*, p. 121, para. (67) of the commentary.

71. In his third report, the Special Rapporteur submitted a draft article 3 defining an offence against the peace and security of mankind, the first alternative of which was based on the four fundamental criteria just listed. The second alternative of the article was much briefer and stressed the fact that a wrongful act had to be recognized as an offence against the peace and security of mankind by the international community as a whole.<sup>46</sup>

72. The first alternative of draft article 3, which was closely linked to article 19 of part I of the draft articles on State responsibility, was criticized by some members of the Commission, who stated that article 19 related to the international responsibility of States and could not be used as a basis for a draft dealing with the criminal responsibility of individuals. They thus stated their preference for the second alternative of the article.

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

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

#### 4. ACTS CONSTITUTING AN OFFENCE AGAINST INTERNATIONAL PEACE AND SECURITY

75. The third report of the Special Rapporteur also contained a discussion of acts constituting an offence against the sovereignty and territorial integrity of a State termed "offences against international peace and security"; to

<sup>46</sup> Draft article 1 and the two alternatives of draft article 3 submitted by the Special Rapporteur read:

##### "PART I. SCOPE OF THE PRESENT ARTICLES

###### "Article 1

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

...

##### "PART III. DEFINITION OF AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

###### "Article 3

###### "First alternative

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

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

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

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

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

###### "Second alternative

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

that category belonged the acts contemplated in article 2, paragraphs (1) to (9), of the 1954 draft code.

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

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

78. The notion of "peace and security of mankind" went beyond relations between States. It addressed relations of a broader kind involving not only States but also ethnic groups, populations, ideologies, beliefs and so on. The notion incorporated values which made international law increasingly humanistic. That second aspect of the subject would be examined in the next report, when the Commission had studied crimes against humanity.

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

80. The offences against international peace and security which the Special Rapporteur examined in his third report, and which were dealt with in draft article 4 submitted to the Commission, included the acts contemplated in article 2, paragraphs (1) to (9), of the 1954 draft code as well as other acts not mentioned in that draft code. The following paragraphs of this chapter set forth the proposals made by the Special Rapporteur on each of those acts and dwell briefly on some aspects of the discussion to which the acts in question gave rise.

#### (a) *Aggression (article 2, paragraph (1), of the 1954 draft code)*

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

82. In this third report, the Special Rapporteur offered both choices, in the form of two alternatives of section A of draft article 4.<sup>47</sup>

<sup>47</sup> The two alternatives of section A of draft article 4 submitted by the Special Rapporteur read:

83. With regard to the first alternative, some members of the Commission pointed out that the Definition of Aggression adopted by the General Assembly in 1974 was intended for a political organ (the Security Council) not a judicial one. Certain provisions of the Definition were significant in that respect, particularly those giving the Security Council power to determine that acts other than those enumerated in the Definition constituted aggression or that acts enumerated in it did not do so. Those members added that the provisions of the Definition relating to evidence of aggression would be out of place in a definition *stricto sensu*.

(Footnote 47 continued)

“PART V. ACTS CONSTITUTING AN OFFENCE AGAINST  
THE PEACE AND SECURITY OF MANKIND

“Article 4

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

“A (FIRST ALTERNATIVE). The commission [by the authorities of a State] of an act of aggression.

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

“Explanatory note. In this definition, the term ‘State’

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

“(ii) includes the concept of a “group of States”, where appropriate.

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

“The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

“(c) Acts constituting aggression

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

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

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

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

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

“(v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any 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 ;

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

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

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

(b) *The threat of aggression (article 2, paragraph (2), of the 1954 draft code)*

86. In his third report, the Special Rapporteur formulated a provision on the threat of aggression.<sup>48</sup> A discussion took place in the Commission as to whether the threat of aggression was an offence which should be included in the draft code. In 1954, the Commission had taken the view that the threat of aggression, like aggression

“(d) *Consequences of aggression*

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

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

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

“(e) *Scope of this definition*

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

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

“(f) *Interpretation of the present articles*

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

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

<sup>48</sup> Section B of draft article 4 submitted by the Special Rapporteur read :

“Article 4

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

itself, was an offence against the peace and security of mankind. At the present session some members considered that the threat of aggression should be excluded, particularly since it was difficult in some cases to ascertain whether it existed, or how serious it was. A number of other members expressed support for including the act in question in the draft code.

(c) *The preparation of aggression*  
(article 2, paragraph (3), of the 1954 draft code)

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

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

88. In his third report, the Special Rapporteur submitted a provision on intervention in the internal or external affairs of another State,<sup>49</sup> which constituted a synthesis of article 2, paragraphs (5) and (9), of the 1954 draft code and brought together under the heading of intervention a range of offences, such as fomenting civil strife in another State or exerting pressure of various kinds on another State.

89. A number of members had no hesitation in supporting the inclusion of the notion of intervention among the acts contemplated in the future draft code. They pointed out, however, that it was not always easy to distinguish internal intervention from external intervention and that

nowadays the distinction was blurred in many cases and devoid of practical consequences.

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

(e) *Terrorism* (article 2, paragraph (6), of the 1954 draft code)

91. The phenomenon of terrorism is a particularly pressing one today. Having examined its various forms (internal, international), its motives (ideological, political, vicious, etc.) and the methods it employs (violence, intimidation, fear, etc.), the Commission, for the purposes of the draft code, settled on its international content, i.e. terrorism which affected the security and stability of another State, as well as the security of its inhabitants and their property. The provision submitted by the Special Rapporteur<sup>50</sup> is based to a considerable extent on the 1937 Convention for the Prevention and Punishment of Terrorism.<sup>51</sup> This convention has been updated to take account of new forms of modern terrorism, including seizure of aircraft and violence directed against persons enjoying

<sup>50</sup> Section D of article 4 submitted by the Special Rapporteur read:

"Article 4

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

"...

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

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

"(b) The following constitute terrorist acts:

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

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

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

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

<sup>51</sup> League of Nations, document C.546.M.383.1937.V.

". . .

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

<sup>49</sup> Section C of draft article 4 submitted by the Special Rapporteur read:

"Article 4

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

"...

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

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

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

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



special protection, especially diplomatic or consular protection.

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

92. The provision submitted by the Special Rapporteur on this subject<sup>52</sup> reproduced almost word for word the provision on the matter appearing in the 1954 draft code. It should be noted, however, that the term "fortifications" appearing in that text was considered obsolete and was replaced by the term "strategic structures".

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

(g) *Forcible establishment or maintenance of colonial domination*

94. This subject, which was not provided for in the 1954 draft code, was dealt with in a provision in the Special Rapporteur's third report.<sup>53</sup>

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

<sup>52</sup> Section E of draft article 4 submitted by the Special Rapporteur read :

*"Article 4*

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

"...

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

<sup>53</sup> Section F of draft article 4 submitted by the Special Rapporteur read :

*"Article 4*

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

"...

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

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

(h) *Mercenarism*

97. The question of mercenarism was not dealt with in the 1954 draft code. Although that offence was already mentioned in the Definition of Aggression, several members considered that it should be the subject of a separate provision in the future code because of its special character.

(i) *Economic aggression*

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

## 5. CONCLUSIONS

99. Following its discussion on the topic, the Commission decided to refer to the Drafting Committee the following articles submitted by the Special Rapporteur : article 1 (Scope of the present articles) ; the first alternative of article 2 (Persons covered by the present articles) ; the two alternatives of article 3 (Definition of an offence against the peace and security of mankind) ; both alternatives of section A of draft article 4, relating to acts of aggression.

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

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



## Chapter III

### STATE RESPONSIBILITY

#### A. Introduction

##### 1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

102. At its thirty-second session, in 1980, the Commission provisionally adopted on first reading part 1 of the draft articles on State responsibility.<sup>54</sup> Part 1 was composed of 35 draft articles in five chapters and, under the general plan adopted by the Commission<sup>55</sup> for the structure of the draft articles on the topic, concerned “the origin of international responsibility”. The comments and observations of Member States on the provisions of part 1 were requested. The replies received from Governments of Member States since the thirty-second session have been issued as documents of the Commission.<sup>56</sup> It is hoped that more comments will be received before the Commission begins its second reading of part 1.

103. At its thirty-second session, the Commission began its consideration of part 2 of the draft articles. Under the general plan adopted by the Commission for the structure of the draft articles on the topic, part 2 concerns “the content, forms and degrees of international responsibility”, namely, the consequences which an internationally wrongful act of a State may have under international law in different cases, for example reparative and punitive consequences, the relationship between those two types of consequences, material forms which reparation and sanction may take, etc. The Commission had before it the preliminary report<sup>57</sup> submitted by the Special Rapporteur, Mr. Willem Riphagen. That report analysed in a general manner the various possible new legal relationships (i.e. new rights and corresponding obligations) which would arise from an internationally wrongful act of a State as determined by part 1 of the draft articles. The Special Rapporteur proposed three parameters for the considera-

tion of such relationships : the new obligations of the State whose act was internationally wrongful ; the new rights of the “injured” State ; and the position of “third” States with respect to the situation created by the internationally wrongful act.<sup>58</sup>

104. At its thirty-third session, in 1981,<sup>59</sup> the Commission had before it the second report<sup>60</sup> of the Special Rapporteur. The report proposed five draft articles for inclusion in part 2 of the draft, as follows : chapter I, “General principles” (arts. 1 to 3) and chapter II, “Obligations of the State which has committed an internationally wrongful act” (arts. 4 and 5). The Commission decided to refer the draft articles to its Drafting Committee.<sup>61</sup> The Drafting Committee was, however, unable to consider the draft articles at the thirty-third session.

105. At its thirty-fourth session, in 1982, the Commission had before it the third report<sup>62</sup> of the Special Rapporteur. The report proposed six draft articles (arts. 1 to 6) for inclusion in part 2 of the draft articles on the topic. The Commission decided to refer the draft articles to the Drafting Committee. It also confirmed<sup>63</sup> the referral to the Drafting Committee of articles 1 to 3 as proposed in the second report of the Special Rapporteur in 1981, on the understanding that the Drafting Committee would prepare framework provisions and consider whether an article along the lines of the new article 6 should have a place in those provisions. The Drafting Committee was unable, however, to consider the draft articles at its thirty-fourth session.

<sup>54</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 26-62.

<sup>55</sup> The general plan for the draft articles on the topic adopted by the Commission at its twenty-seventh session, in 1975, envisaged the structure of the draft as follows : part 1 would concern the origin of international responsibility ; part 2 would concern the content, forms and degrees of international responsibility ; and a possible part 3, which the Commission might decide to include, could concern the question of the settlement of disputes and the “implementation” (*mise en œuvre*) of international responsibility. (*Yearbook . . . 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.)

<sup>56</sup> See *Yearbook . . . 1980*, vol. II (Part One), p. 87, document A/CN.4/328 and Add.1-4 ; *Yearbook . . . 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add.1-4 ; *Yearbook . . . 1982*, vol. II (Part One), p. 15, document A/CN.4/351 and Add.1-3 ; *Yearbook . . . 1983*, vol. II (Part One), p. 1, document A/CN.4/362.

<sup>57</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

<sup>58</sup> For the views expressed in the Commission, see *Yearbook . . . 1980*, vol. I, pp. 73-98, 1597th to 1601st meetings.

<sup>59</sup> The General Assembly, in its resolution 35/163 of 15 December 1980, had recommended, *inter alia*, that, taking into account the written comments of Governments and views expressed in debates in the General Assembly, the Commission should continue its work on State responsibility with the aim of beginning the preparation of part 2 of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles, constituting part 1 of the draft. A similar recommendation was made by the General Assembly in its resolution 36/114 of 10 December 1981, which was repeated, in general terms, in its resolutions 37/111 of 16 December 1982, 38/138 of 19 December 1983 and 39/85 of 13 December 1984.

<sup>60</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 79, document A/CN.4/344.

<sup>61</sup> For the views expressed in the Commission, see *Yearbook . . . 1981*, vol. I, pp. 126-144, 1666th to 1670th meetings, and pp. 206-217, 1682nd to 1684th meetings.

<sup>62</sup> *Yearbook . . . 1982*, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2.

<sup>63</sup> For the views expressed in the Commission, see *Yearbook . . . 1982*, vol. I, pp. 199-224, 1731st to 1734th meetings, and pp. 230-242, 1736th to 1738th meetings.

106. At its thirty-fifth session, in 1983, the Commission had before it and considered the fourth report<sup>64</sup> of the Special Rapporteur. On the recommendation of the Drafting Committee, the Commission provisionally adopted, for inclusion in part 2 of the draft articles on the topic, articles 1, 2, 3 and 5, as follows:

*Article 1*

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

*Article 2*

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

*Article 3*

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

*Article 5*

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

107. At its thirty-sixth session, in 1984, the Commission had before it the fifth report<sup>65</sup> of the Special Rapporteur. Twelve draft articles (arts. 5 to 16)<sup>66</sup> were submitted in that report for inclusion in part 2 of the draft articles on the topic, to follow the four draft articles already provisionally adopted by the Commission at its thirty-fifth ses-

<sup>64</sup> *Yearbook* . . . 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1.

<sup>65</sup> *Yearbook* . . . 1984, vol. II (Part One), p. 1, document A/CN.4/380.

<sup>66</sup> The articles read:

*Article 5*

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

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

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

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

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

"(i) the obligation was stipulated in its favour; or

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

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

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

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

sion (provisionally adopted article 5 becoming article 4). The Commission decided to refer draft articles 5 and 6 to the Drafting Committee, on the understanding that members who had been unable to comment on those two articles at the thirty-sixth session would be able to do so at an early stage of the thirty-seventh session, so that their comments might be taken into account by the Drafting Committee.

*Article 6*

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

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

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

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

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

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

*Article 7*

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

*Article 8*

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

*Article 9*

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

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

*Article 10*

"1. No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.

"2. Paragraph 1 does not apply to:

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

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

*Article 11*

"1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the

2. CONSIDERATION OF THE TOPIC  
AT THE PRESENT SESSION

108. At the present session, the Commission had before

internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that :

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

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

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

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

“Article 12

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

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

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

“Article 13

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

“Article 14

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

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

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

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

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

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

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

“Article 15

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

it the sixth report (A/CN.4/389)<sup>67</sup> submitted by the Special Rapporteur.

109. The report set out the four draft articles, with commentaries, already provisionally adopted by the Commission at its thirty-fifth session, and the remaining 12 draft articles submitted by the Special Rapporteur at the thirty-sixth session, which together were intended to constitute part 2 of the draft articles on State responsibility.

110. The report also contained commentaries to those 12 other draft articles.

111. The report furthermore set out the proposals of the Special Rapporteur on the possible content of a part 3 of the draft articles on State responsibility which the Commission might decide to include to deal with the “implementation” (*mise en œuvre*) of international responsibility and the settlement of disputes.

112. The proposed outline of part 3 was based on the thesis that there existed a close analogy between, on the one hand, the situation envisaged in the 1969 Vienna Convention on the Law of Treaties<sup>68</sup> (in particular in articles 42, 65, 66 and 67 thereof and the annex), dealing with the question of the invalidity, termination and suspension of the operation of treaties, and on the other hand, the situation in which new legal relationships between States resulting from the commission of an internationally wrongful act were alleged to have arisen.

113. In particular, the Special Rapporteur stated that, if an alleged injured State exercised its new rights, under the provisions of part 2, to suspend the performance of its obligations towards the alleged author State, and if the latter State, denying having committed an internationally wrongful act, in its turn, as an alleged injured State, suspended the performance of its obligations towards the former State, an escalation would have been set in motion which would in fact threaten to nullify completely the existing “primary” legal relationships between the States involved in the situation.

114. To prevent such escalation, the Special Rapporteur proposed the introduction of a compulsory conciliation procedure along the lines of that provided in the Vienna Convention on the Law of Treaties and in the 1982 United Nations Convention on the Law of the Sea.<sup>69</sup>

115. With regard to the provisions of part 2, the Special Rapporteur noted, furthermore, that (a) they contained a reference to the rules of *jus cogens* and (b) they attached special legal consequences to international crimes. In view of the connection between those two concepts, he proposed that a procedure analogous to the one provided for in article 66 (a) of the Vienna Convention on the Law of

“Article 16

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

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

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

“(c) belligerent reprisals.”

<sup>67</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One).

<sup>68</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

<sup>69</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

Treaties be included in part 3 of the draft articles on State responsibility, to the effect that any dispute concerning the interpretation or application of article 19 of part 1 of the draft articles<sup>70</sup> and of article 14 of part 2<sup>71</sup> might, by a written application of any one of the parties to the dispute, be submitted to the ICJ for a decision.

116. The Commission considered the sixth report of the Special Rapporteur at its 1890th to 1902nd meetings, from 29 May to 13 June 1985 taking into account that, in accordance with its decision taken at its previous session (see paragraph 107 above), draft articles 5 and 6, although already referred to the Drafting Committee, could still be commented upon.

117. In the discussions in the Commission, the overall structure of the set of draft articles for part 2 was generally considered acceptable, although several members expressed the opinion that the special legal consequences of international crimes should be further elaborated. In that connection, reference was made to the relationship between the present topic and the topic of the draft Code of Offences against the Peace and Security of Mankind, and it was observed that the criminal responsibility of States as such should be considered by the Commission under either the one or the other topic. It was recognized by several members, however, that it was difficult, at the current stage, to determine the specific additional legal consequences of international crimes in the context of the legal relationships between States since, on the one hand, article 19 of part 1 of the draft articles, as now drafted, left open several questions as to the determination of the facts and the qualification of an internationally wrongful act as a crime, and, on the other hand, a "punishment" to be meted out to a State as such (beyond the normal legal consequences of an internationally wrongful act) raised questions as to its compatibility with rules otherwise considered as peremptory norms protecting the existence of States, the right of peoples to self-determination and individual human rights.

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

119. As to draft article 6,<sup>72</sup> the point was made that the words "may require", in the *chapeau* of paragraph 1 and in paragraph 2, would seem too weak and that it should be stated that the author State was under an obligation to take the measures required of it under that article.

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

121. The question was also raised whether distinctions should not be made as between injured States, both from

the point of view of injury suffered and from the point of view of countermeasures which such States would be entitled to take.

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

123. As to subparagraph (a) of paragraph 1, it was suggested that the words "release and return the persons and objects held through such act" should be deleted since that was already implied by the other words of the subparagraph.

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

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

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

127. With regard to draft article 7,<sup>73</sup> some members were opposed to the inclusion of a special rule relating to the position of aliens, while other members considered article 7 to be useful not only in the context of North-South co-operation but also in the context of South-South co-operation.

128. In respect of draft articles 8<sup>74</sup> and 9,<sup>75</sup> several members considered the distinction between "reciprocity" and "reprisal" not entirely clear. Some of those members would prefer to deal with both types of measures in the same way, under the heading of "countermeasures" (as in article 30 of part 1 of the draft); other members would at any rate prefer to leave out the words "by way of reciprocity" in article 8 and the words "by way of reprisal" in paragraph 1 of article 9. It was also pointed out that the suspension of the performance of obligations "directly connected with the obligation breached" (article 8) might under particular circumstances amount to a form of pressure coming in effect close to a "reprisal" (article 9).

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

130. In particular, some members considered that the idea underlying draft article 10<sup>76</sup> — prior exhaustion of third-party dispute-settlement procedures — should apply also to measures by way of "reciprocity".

<sup>70</sup> See footnote 54 above.

<sup>71</sup> See footnote 66 above.

<sup>72</sup> For the text submitted by the Special Rapporteur, see footnote 66 above.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

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

“Article 8

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

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

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

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

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

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

132. With regard to draft article 8, the opinion was expressed that a restrictive interpretation of a treaty in response to such an interpretation being applied by another State party to the treaty did not constitute a counter-measure.

133. As to draft article 9, some members considered that the term “manifestly disproportional”, in paragraph 2, was too vague.

134. Some members advocated the inclusion in article 9 of an express prohibition of armed reprisals.

135. There was general agreement with the idea underlying draft article 10, although some comments were made as to its elaboration.

136. The point was made that Article 33 of the Charter of the United Nations listed “negotiation” among the procedures for the peaceful settlement of disputes, but that procedure was generally time-consuming and often not effective. More generally, the limitation provided for in paragraph 1 of article 10 should apply only if the dispute-settlement procedure was not only “available” but also effective.

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

138. Doubts were expressed concerning the appropriateness of the term “interim measures of protection” in paragraph 2 (a).

139. The basic purpose of draft article 11<sup>77</sup> was generally accepted, although some doubts were expressed as to the wording of subparagraphs (b) and (c) of paragraph 1.

140. With reference to paragraph 2, the point was made that a “collective decision” might not be a simple matter, particularly if unanimity was required, and would involve delays ; that paragraph would thus provide for too severe a limitation.

141. Draft article 12<sup>78</sup> was considered, in substance, acceptable by most members, although observations were made as to its drafting and its place within the set of draft articles of part 2.

142. As to paragraph (a), the point was made that its scope should be limited to such immunities as were essential for the continuance of smooth international relations. It was also remarked that its scope should be expanded to cover also the immunities provided for in the 1969 Convention on Special Missions<sup>79</sup> and in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>80</sup>

143. With regard to paragraph (b), some members were reluctant to apply the concept of *jus cogens* outside the framework of the 1969 Vienna Convention on the Law of Treaties. Other members, however, favoured the retention of that paragraph.

144. The view was expressed that a provision relating to *jus cogens* required, perhaps in part 3 of the draft articles, a procedural provision along the lines of that provided for in the 1969 Vienna Convention.

145. Article 13<sup>81</sup> was generally considered acceptable. The suggestion was made that its language could be adapted to that of article 60 of the 1969 Vienna Convention.

146. Apart from the general observations on draft article 14<sup>82</sup> as a whole already referred to above (paragraph 117), the point was made, in relation to paragraph 1 of the article, that the expression “the applicable rules accepted by the international community as a whole” was too vague and should perhaps be replaced by the terms “applicable rules of international law”. However that modification was objected to by other members.

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

148. It was suggested that in subparagraph (a) of paragraph 2 the word “legal” was unnecessary. It was pointed out, however, that that word was contained 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,<sup>83</sup> from which the subparagraph drew its inspiration.

<sup>78</sup> *Ibid.*

<sup>79</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

<sup>80</sup> *Ibid.*, 1975 (Sales No. E.77.V.3), p. 87.

<sup>81</sup> For the text submitted by the Special Rapporteur, see footnote 66 above.

<sup>82</sup> *Ibid.*

<sup>83</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>77</sup> *Ibid.*

149. The view was expressed, concerning subparagraph (c) of paragraph 2, that its application would be difficult and required a "consolidation" of the response of the international community in the case of an international crime.

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

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

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

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

154. Conflicting views were expressed with regard to the inclusion of a separate article 15.<sup>84</sup> While some members were in favour of deleting the article or combining it with article 14, on the grounds that aggression constituted an international crime and that a separate article would tend to diminish the significance of other international crimes, other members thought that a separate article 15 was necessary in view of the fact that the legal consequences of aggression were specifically dealt with in the Charter of the United Nations and included the right of self-defence as recognized in Article 51 of the Charter.

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

156. While several members considered draft article 16<sup>85</sup> an acceptable "saving clause", the point was made by some members that the enumeration of areas not covered might not be exhaustive. On the other hand, some members doubted the necessity of article 16 in view of article 3.

157. With regard to paragraph (a) of article 16, it was remarked that the prime relationship between the draft articles on State responsibility and the Vienna Convention on the Law of Treaties should be further clarified, particularly in view of the subtle distinction between the "performance of treaty obligations" and the "operation" of treaties.

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

159. As to the outline of part 3, it was generally considered that provisions on the settlement of disputes were necessary for the implementation of parts 1 and 2, many of the provisions of which, in the absence of agreement between the alleged author State and the alleged injured State, would lead to dispute and the escalation thereof.

The proposals made were also generally considered acceptable.

160. One member, however, considered a part 3 unnecessary for the implementation of the other parts of the draft articles. Some other members expressed the need for caution in the elaboration of proposals in that field, referring to the reluctance of States to accept third-party dispute-settlement procedures. In that connection, the question was also raised whether the ICJ could be considered to be in a position to take a decision on behalf of "the international community as a whole". In view of those hesitations, some members preferred to express their definite opinion only after the presentation by the Special Rapporteur of draft articles for part 3.

161. The point was made that a number of specific questions would arise for consideration when dealing with the articles of part 3. Thus, for example, account would have to be taken of the consequences of the eventual establishment of an international criminal court in connection with the draft Code of Offences against the Peace and Security of Mankind.

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

163. At its 1930th meeting, on 18 July 1985, the Commission, having considered the text of draft article 5 proposed by the Drafting Committee, provisionally adopted that draft (see section B below). For lack of time, the Drafting Committee had been unable to consider draft articles 6 to 16.

## B. Draft articles on State responsibility

### Part 2. Content, forms and degrees of international responsibility

#### 1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION:<sup>86</sup>

##### Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

##### Article 2

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

<sup>84</sup> For the text submitted by the Special Rapporteur, see footnote 66 above.

<sup>85</sup> *Ibid.*

<sup>86</sup> As a result of the provisional adoption of draft article 5 at the present session, the Commission decided to modify articles 2, 3 and 5, provisionally adopted at the thirty-fifth session (see paragraph 106 above), as follows: in articles 2 and 3, the reference to "articles [4] and 5" was replaced by a reference to "articles 4 and [12]"; and article "5" was renumbered article "4".

## 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 1 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 judgment or other binding dispute-settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right ;

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

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

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

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

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

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

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

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

2. TEXT OF ARTICLE 5, WITH COMMENTARY THERETO,  
PROVISIONALLY ADOPTED BY THE COMMISSION AT  
ITS THIRTY-SEVENTH SESSION

## Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part 1 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 judgment or other binding dispute-settlement decision of an international court or tribunal, the other

State or States parties to the dispute and entitled to the benefit of that right ;

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

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

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

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

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

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

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

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

## Commentary

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

(2) Part 1 of the draft articles defines an internationally wrongful act solely in terms of obligations, not of rights. This was done on the assumption that to each and every obligation corresponds *per definitionem* a right of at least one other State.

(3) For the purposes of the articles of part 2 of the draft, it is necessary to determine which State or States are legally considered "injured" State or States, because only that State is, or those States are, entitled to invoke the new legal relationship, as described in part 2, entailed by the internationally wrongful act.

(4) This determination is obviously connected with the origin and content of the obligation breached by the internationally wrongful act in question, in the sense that the



nature of the "primary" rules of international law and the circle of States participating in their formation are relevant to the indication of the State or States "injured" by the breach of an obligation under such "primary" rules.

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

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

(7) Paragraph 1 of article 5 states the general proposition which underlies part 1 of the draft articles (see paragraph (2) above). The "right" to which reference is made in the first part of the paragraph is, of course, a right under international law; in fact, this is implied by the second part of the paragraph, in conjunction with the first sentence of article 4 of part 1 of the draft.

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

(9) Subparagraph (a) of paragraph 2 deals with the situation in which the obligation breached is one imposed on a State in a bilateral treaty; the right infringed in such a case is then the right of the other State party to that bilateral treaty, and consequently it must be presumed that the other State is an "injured State".

(10) According to article 36 of the 1969 Vienna Convention on the Law of Treaties, a right may arise from a provision of a treaty for a third State; this situation is dealt with in subparagraph (d) of paragraph 2, applicable to both bilateral and multilateral treaties.

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

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

(13) In most cases there are only two States parties to a

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

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

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

(16) Where as regards international courts and tribunals there clearly is a residual rule, as stated in subparagraph (b) of paragraph 2, the situation is somewhat different in respect of binding decisions of an international organ other than an international court or tribunal. Here, a reference to the constituent instrument of the international organization concerned is necessary to determine the injured State or States. Actually such constituent instrument is either a bilateral treaty, in which case subparagraph (a) of paragraph 2 applies, or a multilateral treaty, in which case subparagraph (e) applies.

(17) Particular questions arise in "multilateral" situations, where more than two States are bound by a rule of international law, conventional or customary, imposing obligations the breach of which constitutes the internationally wrongful act. In such situations it cannot always be presumed that all those States (other than the author State) are "injured" by the particular act. In fact, universal international customary law recognizes that the sovereign equality of States entails certain obligations the breach of which in a particular case in the first instance "injures" only the State whose rights are thereby infringed. The same applies in the case of certain multilateral treaties. Subparagraph (e) (i) of paragraph 2 deals with this type of situation.

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

(19) Thus subparagraph (e) (ii) of paragraph 2 deals with



a situation of fact recognized as a special one also in the Vienna Convention of the Law of Treaties in so far as multilateral treaties are concerned (see e.g. article 41, paragraph 1 (b) (i), article 58, paragraph 1 (b) (i), and, in a somewhat different context and wording, article 60, paragraph 2 (c)). As is apparent from the use of the word "other" in the *chapeau* of paragraph 2 (e) and in paragraph 2 (e) (ii), the expression "act of a State" in that *chapeau* and in subparagraph (e) (ii) must be understood as meaning the act of a State party to the multilateral treaty or bound by the relevant rule of customary international law.

(20) Subparagraph (e) (iii) of paragraph 2 relates to the growing number of rules of international law concerning the obligation of States to respect human rights and fundamental freedoms. The interests protected by such provisions are not allocatable to a particular State. Hence the necessity to consider in the first instance every other State party to the multilateral convention, or bound by the relevant rule of customary law, as an injured State.

(21) The term "human rights and fundamental freedoms" is here used in the sense which is current in present-day international relations. It is meant to cover also the right of peoples to self-determination, which indeed is referred to in the two United Nations covenants on human rights.<sup>87</sup>

(22) Obviously the provision in subparagraph (e) (iii) cannot and does not prejudice the question to what extent "primary" rules of international law, either customary or conventional, impose obligations on States and create or establish rights of States for the protection of human rights and fundamental freedoms. While the Universal Declaration on Human Rights<sup>88</sup> and other relevant instruments are certainly pertinent for the determination of the possible scope of this provision, it is clear that not every one of the rights enumerated in these instruments, nor every single act or omission attributable to a State which could be considered as incompatible with the respect of such rights even if an isolated act or mission (which might not

even be intentional), must necessarily be qualified as giving rise to the application of the present provision.

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

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

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

(26) Paragraph 3 of article 5 deals with international crimes. While it is clear from the very wording of article 19 of part 1 of the draft articles that, in the first instance, all States other than the author State are to be considered "injured States", the Commission, at the outset, in provisionally adopting article 19, recognized that the "legal consequences" of an international crime might require further elaboration and distinctions.

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

(28) Obviously, paragraph 3, while implying that all other States, individually, are entitled to invoke some legal consequences as "injured" States (including in any case the entitlement to require the author State to stop the breach), does not and cannot prejudice the extent of the legal consequences otherwise to be attached to the commission of an international crime. This is a matter to be dealt with within the framework of the particular articles of part 2 of the draft relating to international crimes. For this reason, the words "and in the context of the rights and obligations of States under articles 14 and 15" are provisionally placed in square brackets.

<sup>87</sup> International Covenant on Economic, Social and Cultural Rights (United Nations, *Treaty Series*, vol. 993, p. 3) and International Covenant on Civil and Political Rights (*ibid.*, vol. 999, p. 171).

<sup>88</sup> General Assembly resolution 217 A (III) of 10 December 1948.

## Chapter IV

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

#### A. Introduction

##### 1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

164. The Commission began its consideration of the topic concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at its twenty-ninth session, in 1977, pursuant to General Assembly resolution 31/76 of 13 December 1976. At its thirtieth session in 1978, the Commission considered the report of the Working Group on the topic introduced by its Chairman, Mr. Abdullah El-Erian. The result of the study undertaken by the Working Group was submitted to the General Assembly at its thirty-third session, in 1978.<sup>89</sup> At that session, after having discussed the results of the Commission's work, the Assembly recommended in resolution 33/139 of 19 December 1978 that the Commission:

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

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

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

166. At its thirty-first session, in 1979, the Commission again established a Working Group, under the chairmanship of Mr. Alexander Yankov, which studied issues concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. As recommended by the Working Group, the Commission, at that session, appointed Mr. Alexander Yankov Special Rapporteur for the topic and decided to entrust him with the preparation of a set of draft articles for an appropriate legal instrument.<sup>90</sup>

167. At its thirty-second session, in 1980, the Commission had before it a preliminary report<sup>91</sup> submitted by the Special Rapporteur, and also a working paper<sup>92</sup> prepared by the Secretariat. At that session, the Commission considered the preliminary report in a general discussion.<sup>93</sup> The General Assembly, by resolution 35/163 of 15 December 1980, recommended that the Commission, taking into account the written comments of Governments and views expressed in debates in the General Assembly, should continue its work on the topic with a view to the possible elaboration of an appropriate legal instrument.

168. At its thirty-third session, in 1981, the Commission had before it the second report of the Special Rapporteur,<sup>94</sup> containing the texts of six draft articles constituting part 1 of the draft entitled "General provisions".<sup>95</sup> The six draft articles comprised three main issues, namely the scope of the draft articles on the topic, the use of terms and the general principles of international law relevant to the status of the diplomatic courier and the diplomatic bag.

169. After discussion of the second report of the Special Rapporteur at that session,<sup>96</sup> the Commission referred the six articles to the Drafting Committee, but the Committee did not consider them owing to lack of time.

170. At its thirty-fourth session, in 1982, the Commission had before it the third report of the Special Rapporteur.<sup>97</sup> Since the six draft articles contained in the second report were not considered by the Drafting Committee, the Special Rapporteur re-examined them, in the light of

pp. 162 *et seq.*, paras. 145-176; *Yearbook* . . . 1981, vol. II (Part Two), pp. 159 *et seq.*, paras. 228-249; *Yearbook* . . . 1982, vol. II (Part Two), pp. 112 *et seq.*, paras. 199-249; (b) the reports of the Special Rapporteur: preliminary report, *Yearbook* . . . 1980, vol. II (Part One), p. 231, document A/CN.4/335; second report, *Yearbook* . . . 1981, vol. II (Part One), p. 151, document A/CN.4/437 and Add.1 and 2; third report, *Yearbook* . . . 1982, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1.

<sup>91</sup> See footnote 90 (b) above.

<sup>92</sup> A/CN.4/WP.5.

<sup>93</sup> See *Yearbook* . . . 1980, vol. I, pp. 260-264, 1634th meeting, and pp. 274-276 and 281-287, 1636th and 1637th meetings; and *Yearbook* . . . 1980, vol. II (Part Two), pp. 164-165, paras. 162-176.

<sup>94</sup> See footnote 90 (b) above.

<sup>95</sup> For the texts of the six draft articles, see *Yearbook* . . . 1981, vol. II (Part Two), pp. 159 *et seq.*, footnotes 679 to 683.

<sup>96</sup> See *Yearbook* . . . 1981, vol. I, pp. 255-260, 1691st meeting, and pp. 273-281, 1693rd and 1694th meetings; and *Yearbook* . . . 1981, vol. II (Part Two), pp. 159 *et seq.*, paras. 230-249.

<sup>97</sup> See footnote 90 (b) above.

<sup>89</sup> *Yearbook* . . . 1978, vol. II (Part Two), pp. 138 *et seq.*, paras. 137-144.

<sup>90</sup> For a review of the work of the Commission on the topic, see (a) the reports of the Commission: *Yearbook* . . . 1979, vol. II (Part Two), p. 170, paras. 149-155; *Yearbook* . . . 1980, vol. II (Part Two),

the discussion in the Commission and in the Sixth Committee of the General Assembly at its thirty-sixth session<sup>98</sup> and reintroduced them, as amended, in the third report. The third report consisted of two parts and contained 14 draft articles. Part I, dealing with "General provisions", contained the following six draft articles: "Scope of the present articles" (art. 1); "Couriers and bags not within the scope of the present articles" (art. 2); "Use of terms" (art. 3); "Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" (art. 4); "Duty to respect international law and the laws and regulations of the receiving and the transit State" (art. 5); and "Non-discrimination and reciprocity" (art. 6). Part II, dealing with the "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag", contained eight draft articles: "Proof of status" (art. 7); "Appointment of a diplomatic courier" (art. 8); "Appointment of the same person by two or more States as a diplomatic courier" (art. 9); "Nationality of the diplomatic courier" (art. 10); "Functions of the diplomatic courier" (art. 11); "Commencement of the functions of the diplomatic courier" (art. 12); "End of the function of the diplomatic courier" (art. 13); and "Persons declared *non grata* or not acceptable" (art. 14).<sup>99</sup>

171. The Commission considered the third report of the Special Rapporteur at its thirty-fourth session and referred the 14 draft articles to the Drafting Committee.<sup>100</sup> By its resolution 37/111 of 16 December 1982, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work aimed at the preparation of drafts on all the topics in its current programme.

172. At its thirty-fifth session, in 1983, the Commission had before it the fourth report of the Special Rapporteur,<sup>101</sup> as well as information on the topic received from Governments.<sup>102</sup> Due to lack of time, however, the Commission considered only the first and second instalments of the report.<sup>103</sup> Those instalments contained draft articles 15 to 23 of part II of the draft articles, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag",<sup>104</sup> namely: "General facilities" (art. 15); "Entry into the territory of the receiving State and the transit State" (art. 16); "Freedom of movement" (art. 17); "Freedom of communication" (art. 18); "Temporary accommodation" (art. 19); "Personal inviolability" (art. 20); "Inviolability of temporary accommo-

dation" (art. 21); "Inviolability of the means of transport" (art. 22); and "Immunity from jurisdiction" (art. 23). At the same session the Commission decided to refer draft articles 15 to 19 to the Drafting Committee and to resume its debate on draft articles 20 to 23 at its thirty-sixth session, in 1984, before referring them to the Drafting Committee.<sup>105</sup> It also decided to adopt provisionally on first reading articles 1 to 8 of the set of draft articles.<sup>106</sup> By its resolution 38/138 of 19 December 1983, the General Assembly recommended that, taking into account the comments of Governments, whether expressed in writing or orally in debates in the General Assembly, the Commission should continue its work on all the topics in its current programme.

173. At its thirty-sixth session, in 1984, the Commission had before it the four remaining instalments of the fourth report of the Special Rapporteur.<sup>107</sup> One<sup>108</sup> contained the texts of and explanations concerning draft articles 20 to 23, entitled "Personal inviolability" (art. 20), "Inviolability of temporary accommodation" (art. 21), "Inviolability of the means of transport" (art. 22), and "Immunity from jurisdiction" (art. 23), the discussion of which was resumed by the Commission at that session. The others<sup>109</sup> contained the texts of and explanations concerning draft articles 24 to 42, entitled "Exemption from personal examination, customs duties and inspection" (art. 24); "Exemption from dues and taxes" (art. 25); "Exemption from personal and public services" (art. 26); "Exemption from social security provisions" (art. 27); "Duration of privileges and immunities" (art. 28); "Waiver of immunity" (art. 29); "Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew" (art. 30); *Part III* ("Status of the diplomatic bag"): "Indication of status of the diplomatic bag" (art. 31); "Content of the diplomatic bag" (art. 32); "Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew" (art. 33); "Status of the diplomatic bag dispatched by postal services or other means" (art. 34); "General facilities accorded to the diplomatic bag" (art. 35); "Inviolability of the diplomatic bag" (art. 36); "Exemption from customs and other inspections" (art. 37); "Exemption from customs duties and all dues and taxes" (art. 38); "Protective measures in circumstances preventing the delivery of the diplomatic bag" (art. 39); *Part IV* ("Miscellaneous provisions"): "Obligations of the transit State in case of *force majeure* or fortuitous event" (art. 40); "Non-recognition of States or Governments or absence of diplomatic or consular relations" (art. 41); and "Relation of the present articles to other conventions and international agreements" (art. 42).<sup>110</sup> The Commission also had before it the fifth report of the Special Rapporteur<sup>111</sup> and information received from Governments.<sup>112</sup>

<sup>98</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), sect. F.

<sup>99</sup> For the texts of the 14 draft articles, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 45-46, footnotes 181 to 194.

<sup>100</sup> See *Yearbook . . . 1982*, vol. I, pp. 293 *et seq.*, 1745th meeting, paras. 7 *et seq.*, and 1746th and 1747th meetings; and *Yearbook . . . 1982*, vol. II (Part Two), pp. 114 *et seq.*, paras. 206-249.

<sup>101</sup> *Yearbook . . . 1983*, vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4.

<sup>102</sup> *Ibid.*, p. 57, document A/CN.4/372 and Add.1 and 2.

<sup>103</sup> A/CN.4/374 and A/CN.4/374/Add.1.

<sup>104</sup> For the texts of draft articles 15 to 23, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 48 *et seq.*, footnotes 202 to 206 and 209 to 212.

<sup>105</sup> *Ibid.*, p. 50, para. 171, and p. 53, para. 189.

<sup>106</sup> *Ibid.*, p. 53, para. 190.

<sup>107</sup> See footnote 103 above.

<sup>108</sup> A/CN.4/374/Add.1.

<sup>109</sup> A/CN.4/374/Add.2-4.

<sup>110</sup> For the texts of draft articles 20 to 42, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 20 *et seq.*, footnotes 79 to 82, 84 to 90 and 93 to 104.

<sup>111</sup> *Yearbook . . . 1984*, vol. II (Part One), p. 72, document A/CN.4/382.

<sup>112</sup> *Ibid.*, p. 59, document A/CN.4/379 and Add.1.

174. For the consideration of the topic at its thirty-sixth session, the Commission proceeded as follows: (a) the Special Rapporteur submitted his fifth report and draft articles 24 to 42; (b) the Commission resumed its consideration of draft articles 20 to 23, which it had begun at its thirty-fifth session, and decided to refer those drafts to the Drafting Committee; (c) it also considered draft articles 24 to 35 and decided to refer them to the Drafting Committee; (d) it commenced its discussion of draft articles 36 to 42 and decided to pursue that discussion at its thirty-seventh session, in 1985; (e) finally, it considered the report of the Drafting Committee.<sup>113</sup> After discussing the report, the Commission decided to adopt provisionally draft articles 9, 10, 11, 12,<sup>114</sup> 13, 14, 15, 16, 17, 19 and 20, and consequently an amended version of draft article 8 and of the commentary thereto. By its resolution 39/85 of 13 December 1984, the General Assembly recommended that the Commission, taking into account the comments of Governments, whether expressed in writing or orally in debates in the General Assembly, should continue its work on all the topics in its current programme.

## 2. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

175. At its thirty-seventh session, the Commission had before it the sixth report submitted by the Special Rapporteur (A/CN.4/390).<sup>115</sup> That report contained revised texts, with explanations, of draft articles 23 (Immunity from jurisdiction), 36 (Inviolability of the diplomatic bag), 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag) and 42 (Relation of the present articles to other conventions and international agreements).<sup>116</sup> The report also contained the proposed text, with explanations, of a new draft article 37 entitled "Exemption from customs inspection, customs duties and all dues and taxes",<sup>117</sup> to replace former draft articles 37 (Exemption from customs and other inspection) and 38 (Exemption from customs duties and all dues and taxes).<sup>118</sup> Furthermore, the report included the text, with explanations, of a new draft article 43 entitled "Declaration of optional exceptions to applicability in regard to designated types of couriers and bags".<sup>119</sup> Draft articles 40 and 41 were resubmitted by the Special Rapporteur in his sixth report in their original form.<sup>120</sup>

<sup>113</sup> See *Yearbook . . . 1984*, vol. I, pp. 55 *et seq.*, 1824th meeting (paras. 10 *et seq.*), 1825th to 1829th meetings, and 1830th meeting (paras. 1 to 25); pp. 107 *et seq.*, 1832nd meeting (paras. 17 *et seq.*); pp. 162 *et seq.*, 1842nd to 1847th meetings; and pp. 281 *et seq.*, 1862nd to 1864th meetings.

<sup>114</sup> The Commission decided to resume consideration of paragraph 2 of article 12 once it had considered article 28.

<sup>115</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One).

<sup>116</sup> For the revised texts of draft articles 36, 39 and 42, see footnotes 123, 130 and 135 below.

<sup>117</sup> For the text of the new draft article 37, see footnote 128 below.

<sup>118</sup> For the text of draft articles 37 and 38 as originally submitted by the Special Rapporteur, see *Yearbook . . . 1984*, vol. II (Part Two), p. 26, footnotes 99 and 100.

<sup>119</sup> For the text of draft article 43, see footnote 138 below.

<sup>120</sup> For the text of draft articles 40 and 41, see footnotes 131 and 133 below. When introducing draft article 40 in the Commission, the Special Rapporteur orally proposed an amendment thereto (see para. 190 below).

176. The Commission considered the sixth report at its 1903rd to 1911th meetings, from 14 to 26 June, and again at its 1913th and 1914th meetings, on 28 June and 1 July 1985. It proceeded as follow:

(a) The Special Rapporteur introduced the draft articles contained in his sixth report (see paragraph 175 above).

(b) The Commission resumed from its thirty-sixth session its discussion of draft articles 36 to 42, on the basis of the text contained in the Special Rapporteur's sixth report. It also discussed the new draft article 43 submitted by the Special Rapporteur in his sixth report and draft article 23, taking into account the text proposed by the Drafting Committee at the previous session<sup>121</sup> and the revised text submitted by the Special Rapporteur in his sixth report.

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

177. At its 1911th, 1912th, 1913th and 1930th meetings, the Commission considered the report of the Drafting Committee (see paragraph 202 below). After discussing the report, the Commission decided to adopt provisionally draft articles 23 [18], 28 [21], 29 [22], 30 [23], 31 [24], 32 [25], 34 [26] and 35 [27] and the commentaries thereto;<sup>122</sup> it also decided to delete the brackets from paragraph 2 of article 12 and to adopt a new commentary to that paragraph.

178. The paragraphs that follow reflect in more detail aspects of the Commission's work on the topic at its present session.

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

179. Introducing the revised text of draft article 36,<sup>123</sup> the Special Rapporteur stated that the question of the inviolability of the diplomatic bag, including its possible scanning through electronic means, had given rise to much discussion and opposing views both in the Commission and in the Sixth Committee of the General Assembly. He had come to the conclusion that, on balance, it would be wisest to abide by the well-established rule of absolute inviolability, while possibly providing for some flexibility in its application. Accordingly, he had submitted a revised version of draft article 36. In paragraph 1, he proposed the deletion, from the original version of the draft article,<sup>124</sup> of the words "in the territory of the receiving State or the transit State" after the words "wherever it may be", in

<sup>121</sup> See *Yearbook . . . 1984*, vol. II (Part Two), pp. 41-42, paras. 188-193.

<sup>122</sup> The new numbers assigned to those articles appear in brackets.

<sup>123</sup> The revised text of draft article 36 as submitted by the Special Rapporteur read:

*"Article 36. Inviolability of the diplomatic bag*

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

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

<sup>124</sup> See *Yearbook . . . 1984*, vol. II (Part Two), p. 25, footnote 98.

order to avoid the impression that the same degree of inviolability should not be accorded the diplomatic bag on the high seas or in airspace above the high seas. Paragraph 2 of the revised text had been formulated on the basis of a significant body of practice which suggested that the return of the bag to its place of origin, in the event of serious suspicion as to its contents, was preferable to a provision requiring the bag to be opened.

180. Observations were made by members of the Commission with regard to different parts of the draft article. In paragraph 1, the words "at all times", as applied to the inviolability of the bag, were criticized on the ground that there were occasions on which the bag was empty or contained only other bags that were empty. Some members thought that the concept of inviolability should apply not to the bag but to its contents, since the only purpose of the bag's protection was to ensure the confidentiality of its contents. Other members could not perceive how the bag could be dissociated from its contents. The phrase "unless otherwise agreed by the States concerned" also gave rise to various observations. It was asked whether the said "agreement" would be an agreement *ex ante*, a general agreement or a special agreement establishing a régime that would apply to all diplomatic bags and be applicable in case of difficulties. It was also suggested that the phrase could be deleted, since, under paragraph 2 (b) of article 6 as provisionally adopted, the sending State and the transit State could modify among themselves "by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags". The words "from any kind of examination" were criticized for being too broad, for, if they were to be interpreted literally, even olfactory examination by means of sniffing dogs for the detection of drugs, as well as the external examination of the bag, would be prohibited.

As to the prohibition of electronic scanning contained in the paragraph, some members considered that, although such scanning should not be practised as a matter of routine, it should be allowed under specific circumstances, when the grounds for suspicion were sufficiently strong to justify electronic scanning. They were therefore opposed to the inclusion of such a prohibition in the paragraph, although they could agree to the inclusion of some reference to scanning in the commentary, together with an indication that it should be carried out under strictly controlled conditions. One member, in particular, pointed out that the prohibition of electronic scanning, as provided for in paragraph 1, could be held to extend to airlines, which might then refuse to take on board any bag not accompanied by courier. He suggested that the paragraph should end with the word "detained". Most members, however, were in favour of prohibiting the electronic scanning of the bag on the ground that such scanning might easily break into the confidential character of the bag's contents, particularly if account was taken of the rapid pace of technical progress in that area. Furthermore, to allow electronic scanning would place at a disadvantage developing countries which did not possess the sophisticated means available to developed countries for that purpose. Another problem that electronic scanning might create was that of possible compensation should such scanning prove to have been unjustified.

181. Observations were also made in connection with paragraph 2 of draft article 36. It was observed that, in cases of suspicion as to the contents of the bag, the para-

graph appeared to leave it to the receiving State or the transit State to decide whether the bag should be sent back to the sending State. That solution was excessive, and a preference was expressed by several members for a solution along the lines of that contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations,<sup>125</sup> according to which it was for the sending State either to allow the suspected bag to be opened in the presence of its representatives, or to have it sent back home unopened. It was also wondered what would happen, under the term of the proposed paragraph, if the bag was not returned to its place of origin as the competent authorities of the receiving State or the transit State had requested, or if the sending State offered to allow the bag to be opened.

182. It was also observed that, given the plurality of régimes concerning the bag established by the 1961 Vienna Convention on Diplomatic Relations<sup>126</sup> and the 1963 Vienna Convention on Consular Relations respectively, it was not possible simply to extend the régime of consular bags to all bags, as had been suggested. The solution might be to differentiate in the draft article itself between the consular bag and other types of bags and then to provide States with an option to apply to all bags the more qualified régime applicable to the consular bag. Unlike draft article 43, which would leave a State no choice but to apply the whole set of articles to certain types of couriers and bags, the proposed solution offered an option confined to draft article 36 alone and which would provide the flexibility that would be acceptable to all members of the Commission. Taking that into account, as well as some of the observations made with regard to paragraph 1, one member, later supported by some other members, suggested that the draft article should be reformulated as follow:

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

"2. However, in the case of a consular bag within the meaning of article 35 of the Vienna Convention on Consular Relations, the competent authorities of the receiving State may, if they have serious reason to believe that the bag contains something other than the official correspondence, documents or articles referred to in article 25 of these articles, request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

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

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

183. One member suggested that the words "by the authorities of the receiving State or the transit State" should be added at the end of paragraph 1 of that propo-

<sup>125</sup> See footnote 127 below.

<sup>126</sup> *Ibid.*

sal. It was also observed in connection with the proposal that, if adopted, it might create some problems with existing codification conventions.<sup>127</sup> Under the terms of article 47, paragraph 2 (b), of the 1961 Vienna Convention on Diplomatic Relations, discrimination was not regarded as taking place where, by custom or agreement, States extended to each other more favourable treatment than was required by the provisions of that Convention. However, the proposal appeared to confer a more severe rather than a more favourable treatment to the diplomatic bag. Some other members found that the proposal dispensed with the concept of the inviolability of the diplomatic bag, which was essential to ensure the confidentiality of the communications of the sending State with its missions, consular posts and delegations, and which was to be found in specific provisions of existing multilateral conventions, such as article 40, paragraph 3, of the 1961 Vienna Convention. One member raised the question of possible objections to the declaration under paragraph 3 of the proposal. He explained that such an optional declaration related to articles which themselves would be accepted in advance by the negotiating States concerned; there could be no question of any objection to it, since under general international law objections were possible to a unilateral reservation but not to a declaration of the type contemplated here.

184. The Special Rapporteur addressed some of the observations made with regard to the revised text of draft article 36. With reference to the use of the words "at all times", he pointed out that they were based on article 24 of the 1961 Vienna Convention and corresponding provisions of other codification conventions, which used the words "at any time". He had no strong feelings about one expression or the other. He shared the view of those who thought that the contents of the bag were indivisible from the bag itself and that the concept of inviolability should apply to the latter. In that connection, articles 24, 27 (paras. 2 and 4) and 40 (para. 3) of the 1961 Vienna Convention formed a coherent whole and could not be disregarded. Recent State practice showed that States had formally opposed attempts to interpret the 1961 Vienna Convention as permitting the opening of the bag under certain circumstances. Inviolability should apply to the bag itself and its entire contents, whether correspondence or other articles.

As to the means of examining the bag, it was clear that a routine identification check of the visible marks, seals and other external features would not affect the bag's inviolability, but a close examination of the packages constituting the bag in a manner which might reveal their contents was an entirely different matter. In that connection, electronic scanning of the bag, even under controlled conditions, might not only affect the confidentiality of its contents, at the discretion of the receiving or the transit State, but would also discriminate against less developed countries. With regard to some proposals made in the Commission

<sup>127</sup> The four conventions codifying diplomatic and consular law (hereinafter referred to as "codification conventions") are the following: 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95); 1963 Vienna Convention on Consular Relations (*ibid.*, vol. 596, p. 261); 1969 Convention on Special Missions (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125); 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (*ibid.* 1975 (Sales No. E.77.V.3), p. 87), hereinafter referred to as "1975 Vienna Convention on the Representation of States".

to amend or replace the draft article, he thought that the application of the régime established in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations to the diplomatic bag, without any previously agreed procedure, would clearly derogate from the régime established in the 1961 Vienna Convention on Diplomatic Relations and the other two codification conventions. Furthermore, if a special régime were established by way of reciprocity through unilateral declarations of optional exceptions, as envisaged in paragraphs 3 and 4 of the proposal (see paragraph 182 above), then such declarations might also, in the view of the Special Rapporteur, provide for the application to the consular bag of article 27, paragraph 3, of the 1961 Vienna Convention, as was in fact the case with a number of bilateral consular agreements; the option should be a two-way one.

Concluding his remarks on draft article 36, he said that the Commission and, possibly, the Drafting Committee might consider the suggestion that article 36 should state as a general rule that the diplomatic bag should be inviolable at all times, or at any time, and wherever situated; that it should not be opened or detained; and that it should be exempt from customs and other similar inspection or examination through electronic or other mechanical devices which might be prejudicial to its inviolability and confidential character. Article 36 might also contain a provision concerning the consular bag and the application of the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention, as well as a reference to the declaration of optional exceptions provided for in article 43 of the draft articles.

185. Introducing the new draft article 37,<sup>128</sup> the Special Rapporteur pointed out that it was an amalgamation of former draft articles 37 (Exemption from customs and other inspection) and 38 (Exemption from customs duties and all dues and taxes).<sup>129</sup> The first part of the new draft article, dealing with exemption of the diplomatic bag from customs and other inspections, had long been recognized as a rule of customary international law. As to the second part of the draft article, the exemption of the diplomatic bag from payment of customs duties and/or other dues and taxes was based on the sovereign equality of States and the immunities accorded to official State agents.

186. The new draft article was generally regarded as an improvement over the previous two draft articles it was intended to replace. Several drafting suggestions were made in its regard, such as the insertion of the words "as appropriate" between the words "the receiving State or" and "the transit State", the insertion of the word "free" between the words "permit the" and "entry", and the insertion of the word "similar" between the words "other" and "inspections". It was doubted whether the phrase "in accordance with such laws and regulations as it may

<sup>128</sup> The new draft article 37 submitted by the Special Rapporteur read:

*"Article 37. Exemption from customs inspection, customs duties and all dues and taxes*

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

<sup>129</sup> See footnote 118 above.

adopt” was acceptable in the case of the diplomatic bag, since it appeared obvious that the receiving State would adopt provisions to regulate the quantity and frequency of duty-free imports. Several speakers wondered about the relationship between draft article 36, particularly its paragraph 2, and draft article 37. They pointed out that it might perhaps be advisable to have article 37 deal exclusively with matters relating to exemption from taxation, leaving all matters relating to exemption from customs and other inspections to be dealt with in article 36. Regarding the latter suggestion, the Special Rapporteur stated that he had no objection to it provided that the wording of article 36 was amended accordingly.

187. Introducing the revised text of draft article 39,<sup>130</sup> the Special Rapporteur stressed that its main object was to protect the diplomatic bag when, in exceptional circumstances, the bag was no longer in the custody or under the control of a person authorized by the sending State. It was designed to cover the possibility of the functions of the diplomatic courier being terminated before the diplomatic bag had been delivered to its destination rather than cases of *force majeure* or fortuitous event. The new version of the draft article did not introduce changes of substance, but took into account comments made in the Commission and in the Sixth Committee of the General Assembly.

188. Most speakers were generally in agreement with the substance of the draft article, although some reservations were expressed about its wording which, it was said, might give rise to misinterpretation. In particular, the words “in the event of termination of the functions of the diplomatic courier” were criticized as not covering all possible situations which could prevent a diplomatic bag from being delivered. The view was also expressed that the notification of the sending State provided for in the draft article should be specifically required only in the rare cases of illness or accident, where the circumstances were known to the receiving State but not to the sending State, or where some special purpose would be served by the notification. The suggestion was also made that draft articles 39 and 40 could be merged, since the situation as described in draft article 39 could be considered as constituting a case of *force majeure*. Some speakers thought that the Commission should exercise restraint in imposing additional obligations on the receiving State and the transit State, which could not be expected to know exactly where the diplomatic bag was at all times.

189. In connection with the latter observation, the Special Rapporteur stated that the operation of the draft article would depend on the circumstances of each particular case and that no general prescription could be provided; he therefore thought that the provision could be drafted in

a more flexible manner. Appropriate wording could also be found to make the draft article cover circumstances other than the termination of the functions of the diplomatic courier. The suggestion to combine draft articles 39 and 40 in a single article could be accommodated by having one paragraph deal with the situations covered by the present draft article 39, duly broadened, and another paragraph with the obligations of an “unforeseen” transit State in case of *force majeure* or fortuitous event.

190. Referring to draft article 40, the Special Rapporteur stated that, although the text contained in his sixth report was identical with the text he had originally submitted, he now wished to submit a slight drafting amendment consisting of the insertion of the words “to the diplomatic courier or the diplomatic bag” between the words “shall accord” and “the inviolability”.<sup>131</sup> The main obligations under the draft article were based on the rule *jus transitus innoxii* and were addressed to an unforeseen transit State, referred to as a “third State”, in the corresponding provisions of the codification conventions. However, the expression “third State”, in those instruments, did not have the same meaning as in the 1969 Vienna Convention on the Law of Treaties.<sup>132</sup> The obligation of the unforeseen transit State was to ensure the protection and inviolability of the courier and bag and to make available the necessary facilities for the continuation of the journey. The proposed draft article had found general support in the Sixth Committee of the General Assembly.

191. Most speakers spoke in favour of the draft article, although some improvements were proposed. It was suggested that the words “remain for some time in the territory of a State” be replaced by the words “pass through the territory of a State”, and the words “the receiving State is bound to accord” by the words “any transit State is bound to accord”. It was also pointed out that the words “or to return to the sending State” could be deleted. The draft article, it was further proposed, could be redrafted to cover the case, referred to in draft article 39, of the diplomatic bag being entrusted to the captain of a commercial aircraft or the master of a merchant ship. While one member thought that the article or the commentary thereto should provide for an obligation to notify the State concerned of the presence in its territory of a courier or bag in the special circumstances described in the article, another member thought that that would not be practical since a situation of *force majeure* necessarily implied unforeseen circumstances. Several members thought that the obligations of a State not initially foreseen as a transit State should be equal to those of a transit State rather than to those of a receiving State, but the view was also expressed that in

<sup>130</sup> The revised text of draft article 39 submitted by the Special Rapporteur read:

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

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

<sup>131</sup> Draft article 40 as amended by the Special Rapporteur read:

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

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

<sup>132</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.



practice there was little difference between the two kinds of obligations. The word "inviolability" in reference to the bag was questioned. One member thought that the draft article would be relevant only in cases where a visa was necessary, since there was no obligation for the prior notification of any transit State, whether unforeseen or not. Another member thought that the draft article should refer only to *force majeure*; the notion of fortuitous event might give rise to difficulties of interpretation.

192. Referring to draft article 41,<sup>133</sup> the Special Rapporteur pointed out that its purpose was to contemplate the situation of non-recognition or absence of diplomatic or consular relations between a sending State and the State host to an international conference or an international organization. The Commission, in its work on special missions, had already affirmed that the rights and obligations of the host and sending States were not dependent on recognition or existence of diplomatic or consular relations at the bilateral level. A provision along those lines could be found in the 1975 Vienna Convention on the Representation of States.<sup>134</sup>

193. Several members, while supporting in principle the rule embodied in draft article 41 expressed reservations regarding what they considered to be its all-encompassing nature. It was argued, in particular, that the article might be interpreted as imposing obligations on a receiving State, at the bilateral level, with regard to couriers and bags from a sending State with which it did not maintain diplomatic or consular relations, or in a situation of non-recognition of the State itself or of its Government. In the first case, it was said, it was international practice for the sending State to entrust the protection of its interests to a third State acceptable to the receiving State. Some members considered that the provision might not even be necessary in the case of couriers or bags dispatched to missions to international organizations or conferences, since the headquarters agreements would normally take care of that situation. According to another view, the substance of draft article 41 might be included in draft article 40, since a provision concerning the non-recognition of States or Governments or the absence of diplomatic or consular relations could be useful in dealing with the problems arising with regard to the obligations of an unforeseen transit State in case of *force majeure* or fortuitous event.

194. Commenting on the observations made on draft article 41, the Special Rapporteur stressed that he had

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

195. Introducing the revised text of draft article 42,<sup>135</sup> the Special Rapporteur explained that, in the light of certain suggestions made at the Commission's previous session, he had shortened the draft article by deleting paragraph 1 of the original version,<sup>136</sup> which indicated the complementary nature of the draft articles with regard to the corresponding provisions on the courier and the bag contained in the four codification conventions. He recognized however that, in its present form, the article had a very modest function; the Commission might therefore wish to consider whether a new paragraph should be added to define in more explicit terms the position of the draft articles *vis-à-vis* other conventions in regard to the status of the courier and the bag.

196. With regard to draft article 42 as a whole, most members appeared to prefer the original version. They considered it desirable to stress that the draft articles were intended to complement the existing codification conventions. It was pointed out in that connection that the word "complement", contained in the original wording of paragraph 1, presumably meant that the draft articles did not derogate from the relevant provisions of the four codification conventions; but did that also mean that, where the draft articles provided for additional protection, such protection would exist even though it was not provided for in the existing codification conventions? With specific reference to paragraph 1 of the revised text of the draft article, the view was expressed that the words "without prejudice to" were not clear enough. One member also suggested that the paragraph could be deleted. As to paragraph 2, the words "confirming or supplementing or extending or amplifying" were the subject of criticism by several members. It was pointed out that a drafting change might be required in order to bring paragraph 1 into line with article 6, paragraph (2) (b), as provisionally adopted. The words in question were presumably not intended to prohibit *inter se* modifications of the draft articles by two or more States within the limits set by article 41 of the 1969 Vienna Convention on the Law of Treaties, but they could bear that meaning, since the paragraph made no mention of

<sup>133</sup> Draft article 41 submitted by the Special Rapporteur read:

*"Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations"*

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

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

<sup>134</sup> See footnote 127 above.

<sup>135</sup> The revised text of draft article 42 submitted by the Special Rapporteur read:

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

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

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

<sup>136</sup> See *Yearbook* . . . 1984, vol. II (Part Two), p. 27, footnote 104.



“modification”. It was suggested that the words could be deleted. Another suggestion was that the word “modifying” could either replace those words or be added to them.

197. Commenting on the observations made on the revised text of draft article 42, the Special Rapporteur stressed that he had revised the draft article in the light of a suggestion made at the previous session of the Commission.<sup>137</sup> He saw no objection to clarifying the words “without prejudice to” in order to bring out the fact that there must be compatibility in object and purpose between the draft articles, the four codification conventions and other international agreements with a bearing on the status and, especially, on the legal protection of the courier and the bag. He would also be prepared to revert to the original wording of paragraph 1. With regard to paragraph 2, although the words “confirming or supplementing or extending or amplifying” had been taken from article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations, he agreed that to replace them by the word “modifying” would constitute an improvement.

198. Presenting the text of draft article 43,<sup>138</sup> the Special Rapporteur stressed that he was proposing that new article in response to certain suggestions. The four codification conventions contemplated different régimes concerning the inviolability of the diplomatic courier and diplomatic bag, and only two of those conventions were in force. The other two might eventually enter into force, but that would simply add to the plurality of régimes. He had therefore sought to draft a provision intended to achieve a measure of flexibility. In so doing, he had drawn on articles 19, 22 and 23 of the 1969 Vienna Convention on the Law of Treaties, and had also found some support in article 298 of the 1982 United Nations Convention on the Law of the Sea,<sup>139</sup> which dealt with optional exceptions to the applicability of compulsory proceedings entailing binding decisions. That article might in turn have been influenced to some extent by article 22 of the Vienna Convention on the Law of Treaties. Against that background, he had sought to reflect three main ideas: (a) the right to make a declaration of optional exceptions to applicability in regard to designated types of couriers and bags, together with the legal consequences of such a declaration; (b) the right to formulate the declaration and the right to withdraw it; and (c) the procedural matter of making such a declaration in writing. The “types of couriers and bags”

<sup>137</sup> *Ibid.*, pp. 36-37, para. 150.

<sup>138</sup> The new draft article 43 submitted by the Special Rapporteur read:

*“Article 43. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags*

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

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

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

<sup>139</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 201, document A/CONF.62/122.

referred to in the draft article were those provided for in article 3, as provisionally adopted, corresponding to the four existing codification conventions.

199. Most members welcomed the element of flexibility that draft article 43 introduced in the draft articles. If the uniform approach were retained, some provision along the lines of draft article 43 would be essential to permit States to distinguish between the four codification conventions as to the manner in which the present articles would ultimately apply. States should be free not to apply the articles to all or some of the types of couriers and bags referred to in article 3 as provisionally adopted. In the view of some members, however, such flexibility would be inconsistent with the underlying objective of the draft articles and would result in uncertainty as to their interpretation and application. It was stated in that connection that the Commission could not, in drafting the present instrument, either weaken the régime of the 1961 Vienna Convention on Diplomatic Relations or strengthen the régime of the 1963 Vienna Convention on Consular Relations. It was suggested that draft article 43 should perhaps be reformulated so as to make it clear that the option of making the declaration was available only to States acceding to the new convention without as yet having ratified any one of the four codification conventions mentioned in article 3. With regard to the title of the draft article, the suggestion was made that the adjective “optional” should apply to the word “declaration” rather than to the word “exceptions”. As to paragraph 1, several members thought that the words “without prejudice to” were inappropriate, since some prejudice to the obligations arising under the provisions of the draft articles was bound to occur. In connection with the same paragraph, it was noted that it referred to the possibility of making a declaration only at the time of signature, ratification or accession, but that some States, especially host States to international organizations, might prefer to be allowed to make a declaration at any time after signature, ratification or accession. That would bring the wording into line with article 298 of the United Nations Convention on the Law of the Sea, on which the draft article was modelled. With reference to paragraph 2 of the draft article, one member observed that its contents already seemed to be covered by paragraph 2 (b) of provisionally adopted article 6. Furthermore, the possibility that the declaration allowed by paragraph 1 could be withdrawn at any time might become a source of instability in international relations. That member suggested the deletion of paragraph 2.

200. Referring to the observations made on draft article 43, the Special Rapporteur said that the existence of a plurality of régimes was a result of the régimes established in the four codification conventions and, more specifically, of the difference between the status of the consular bag and that of bags referred to in the three other conventions. Although a plurality of régimes might obviously create highly complex situations, flexibility was undoubtedly needed. Most of the comments made on draft article 43 had related to its wording. He therefore suggested that paragraph 1 should state that a declaration of optional exceptions could be made without prejudice “to the object and purpose of the present articles”. The words “or at any time thereafter” should be added after the words “acceding to these articles”. A new sentence should be added at the end of paragraph 2 to show that the declaration of withdrawal had to be made in writing. Special provisions

should also be introduced on the application of the régime of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations to all kinds of bags, or of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations to the consular bag, through a declaration of optional exceptions and by way of reciprocity.

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

(b) *Discussion of the report of the Drafting Committee*

202. As shown above (paragraph 177), the Commission devoted four meetings to the discussion of the report of the Drafting Committee, which was introduced by its Chairman. The report contained the texts of eight of the nine draft articles which the Commission had referred to the Drafting Committee at its thirty-sixth session (see paragraph 174 above), one draft article having been deleted (see paragraph 203 below). The Drafting Committee recommended texts for the following draft articles: 23 [18], 28 [21], 29 [22], 30 [23], 31 [24], 32 [25], 34 [26] and 35 [27].<sup>140</sup> It also recommended the deletion of the brackets from paragraph 2 of article 12, provisionally adopted at the thirty-sixth session. The comments, observations and reservations made by members of the Commission during the discussion of those draft articles were reflected in the commentaries to the articles provisionally adopted by the Commission at the present session (section B.2 below).

203. On the recommendation of the Drafting Committee, the Commission decided not to adopt a provision along the lines of draft article 33 submitted by the Special Rapporteur, which dealt with the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew.<sup>141</sup> The Commission was of the view that the language of articles 24 and 25, as provisionally adopted, and of draft articles 36 and 39, as originally submitted by the Special Rapporteur or as revised by him in his sixth report, clearly showed that the provisions concerned applied also to the bags referred to in the omitted draft article.

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

1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION<sup>142</sup>

*Article 1. Scope of the present articles*

The present articles apply to the diplomatic courier and the diplo-

matic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

*Article 2. Couriers and bags not within the scope of the present articles*

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

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

*Article 3. Use of terms*

1. For the purposes of the present articles:

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

- (a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

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

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

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

- (a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention 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;

vol. II (Part Two), pp. 53 *et seq.* For the commentary to article 8, provisionally adopted at the thirty-fifth and thirty-sixth sessions, and the commentaries to articles 9 to 17, 19 and 20, provisionally adopted at the thirty-sixth session, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 46 *et seq.* For the new commentary to paragraph 2 of article 12 and the commentaries to articles 18 and 21 to 27, see subsection 2 below.

<sup>140</sup> See footnote 122 above.

<sup>141</sup> See *Yearbook . . . 1984*, vol. II (Part Two), p. 24, footnote 95.

<sup>142</sup> For the commentaries to articles 1 to 7, provisionally adopted by the Commission at its thirty-fifth session, see *Yearbook . . . 1983*,

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

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

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

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

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

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

#### *Article 4. Freedom of official communications*

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

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

#### *Article 5. Duty to respect the laws and regulations of the receiving State and the transit State*

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

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

#### *Article 6. Non-discrimination and reciprocity*

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

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

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

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

#### *Article 7.\* Documentation of the diplomatic courier*

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

#### *Article 8.\* Appointment of the diplomatic courier*

Subject to the provisions of articles 9 and 12, the diplomatic courier

is freely appointed by the sending State or by its missions, consular posts or delegations.

#### *Article 9. Nationality of the diplomatic courier*

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

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

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

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

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

#### *Article 10. Functions of the diplomatic courier*

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

#### *Article 11. End of the functions of the diplomatic courier*

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

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

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

#### *Article 12. The diplomatic courier declared persona non grata or not acceptable*

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

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

#### *Article 13. Facilities*

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

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

#### *Article 14. Entry into the territory of the receiving State or the transit State*

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

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

\* Provisional numbering.

*Article 15. Freedom of movement*

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

*Article 16. Personal protection and inviolability*

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

*Article 17. Inviolability of temporary accommodation*

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

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

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

*Article 18. Immunity from jurisdiction*

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

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

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

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

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

*Article 19. Exemption from personal examination, customs duties and inspection*

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

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier

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

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

*Article 20. Exemption from dues and taxes*

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

*Article 21. Duration of privileges and immunities*

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

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

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

*Article 22. Waiver of immunities*

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

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

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

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

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

*Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag*

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

2. The 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.

*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.

2. TEXT OF ARTICLE 12, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SIXTH AND THIRTY-SEVENTH SESSIONS, AND TEXTS OF ARTICLES 18 AND 21 TO 27, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION, WITH COMMENTARIES THERETO\*

204. At its present session (1911th, 1912th, 1913th and 1930th meetings), the Commission adopted, on first reading, the draft articles and commentaries thereto which follow. It should be noted, however, that draft article 12 and the commentary thereto had been provisionally adopted by the Commission at its thirty-sixth session. Paragraph 2 of article 12 had been placed between brackets with the proviso that the Commission would revert to its consideration at the time of considering draft article 28.<sup>143</sup> Having provisionally adopted draft article 28, which became article 21, the Commission decided to delete the brackets from paragraph 2 of article 12. However, it provisionally adopted a new commentary to the paragraph, in view of the relationship between that clause and paragraph (b) of article 11 and paragraph 2 of article 21. To facilitate the comprehension of that relationship, the text of article 12 is reproduced again below.

\* In the commentaries to the articles contained in the present section, the four multilateral conventions on diplomatic and consular law concluded under the auspices 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 (hereinafter referred to as "1975 Vienna Convention on the Representation of States"), are referred to as "codification conventions".

<sup>143</sup> See *Yearbook* . . . 1984, vol. II (Part Two), p. 49, paragraph (6) of the commentary to article 12.

*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.

*Commentary<sup>144</sup>*

...

*Paragraph 2*

(6) Paragraph 2 is based on comparable provisions contained in the corresponding articles of the codification conventions cited in paragraph (1) of the present commentary. This paragraph should be read in conjunction with article 11 (b) and article 21, paragraph 2, and the commentaries thereto. The commentary to paragraph 2 of article 21 explains in greater detail the interrelationship between the present paragraph and the above-mentioned provisions. It should however be noted here that in the Commission's conception the present paragraph refers to the refusal or failure of the sending State to carry out its obligations under paragraph 1 of article 12. It is therefore concerned with the termination of the functions of the courier and the consequences of such termination. By way of contrast, the second part of paragraph 2 of article 21 refers to the requirement that the courier himself should leave the territory of the receiving State within a reasonable period, and is particularly concerned with the cessation of his privileges and immunities. The two provisions are therefore complementary.

*Article 18. Immunity from jurisdiction<sup>145</sup>*

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

<sup>144</sup> For the commentary to paragraph 1 of article 12, *ibid.*, paras. (1) to (5).

<sup>145</sup> Text corresponding to revised draft article 23 as submitted by the Special Rapporteur in his sixth report (A/CN.4/390, para. 29).

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.

### Commentary

(1) The sources for article 18 are the following provisions from the codification conventions: article 31 and article 37, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations; articles 31 and 36 of the 1969 Convention on Special Missions; and article 30, article 36, paragraph 2, and article 60 of the 1975 Vienna Convention on the Representation of States.

#### Paragraph 1

(2) Paragraph 1, which refers to the immunity from criminal jurisdiction of the diplomatic courier, represents a compromise solution between two distinct bodies of opinion in the Commission: the opinion that the granting of absolute immunity from criminal jurisdiction to the courier was essential and entirely justified because of his position and his functions, and the opinion that such granting of immunity was superfluous and functionally unnecessary. The article therefore differs from the text initially submitted by the Special Rapporteur,<sup>146</sup> in that the granting of immunity from criminal jurisdiction is qualified by the phrase "in respect of all acts performed in the exercise of his functions", a phrase similar to that adopted in paragraph 2 for immunity from civil and administrative jurisdiction.

(3) The addition of the phrase "in respect of all acts performed in the exercise of his functions" is intended to make it clear that the immunity from criminal jurisdiction would not apply to any act performed by the courier not directly related to the performance of his functions. Acts not covered by immunity from criminal jurisdiction would range from the most obvious offences, such as theft or murder, to cases of serious abuse of the diplomatic bag, for example the act of intentionally carrying articles prohibited under article 25, such as weapons for terrorists or narcotic drugs. It was pointed out in that connection that paragraph 1 should be interpreted in the light of and in conjunction with the following: article 5, on the duty to respect the laws and regulations of the receiving State and the transit State; article 10, on the functions of the diplomatic courier, which consisted in taking custody of, transporting and delivering the bag; article 12, on the diplomatic courier declared *persona non grata* or not acceptable; and article 25, on the content of the diplomatic bag. Further observations on the interpretation and practical

application of the phrase "in respect of all acts performed in the exercise of his functions" are contained in paragraphs (6) to (10) of the present commentary.

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

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

#### Paragraph 2

(6) The direct and immediate source of the first sentence of paragraph 2 is the second sentence of paragraph 1 of article 60 of the 1975 Vienna Convention on the Representation of States. Although the four codification conventions adopt a functional approach in respect of immunity from the civil and administrative jurisdiction of the receiving or transit State, most of them do so by enumerating exceptions to the principle of immunity, the underlying rationale being that those exceptions constitute clear cases of acts performed outside the functions of the person enjoying the immunity concerned, such as, for instance, an action relating to any professional or commercial activity exercised by the person in question in his personal capacity. The present paragraph, like article 60, paragraph 1, of the 1975 Vienna Convention, reflects the functional approach to immunity from civil and administrative jurisdiction in a non-specific manner by means of a general formula, namely, "in respect of all acts performed in the exercise of his functions". This is also the approach taken by the codification conventions mentioned in paragraph (1) of the present commentary with regard to members of the administrative and technical staff of the mission concerned, which stipulate that such immunity "shall not extend to acts performed outside the course of their duties".

(7) The next question, as in the case of paragraph 1, is the determination of the legal nature and scope of an act "performed in the exercise of his functions" as distinct from the private activity of the person concerned. The functional approach in this case presupposes that the immunity is recognized in fact by the sending State and is therefore limited to the acts performed by the courier as an authorized official fulfilling a mission for the sending State. The character of such acts could be determined by multilateral or bilateral treaties or conventions, by customary international law or by the internal laws and regulations of States. Clear examples of acts outside the performance of his functions are those enumerated in the provisions of the codification conventions, such as article 31 of the 1961 Vienna Convention on Diplomatic Relations. However, there could be other acts performed by the person enjoying immunity from local civil jurisdiction, such as contracts concluded by him which were not expressly or implicitly concluded in his capacity as an authorized of-

<sup>146</sup> For the original text of article 23 submitted by the Special Rapporteur, see *Yearbook . . . 1984*, vol. II (Part Two), p. 21, footnote 82.

ficial performing a mission for the sending State. This may be the case in respect of the renting of a hotel room, the renting a car, the use of services for cartage and storage or the conclusion of a lease or purchase contract by a diplomatic courier during his journey. The obligation to settle a hotel bill or purchases made by and services rendered to the diplomatic courier, although arising during and even in connection with the exercise of his official functions, is not exempt from the application of local laws and regulations. The main reason for such a conclusion is that in all these instances purchases are made by and services of a general commercial nature are rendered to the person concerned which have to be paid by anyone who is their beneficiary. The same rule applies to charges levied for specific services rendered, as provided for in article 34 (e) of the 1961 Vienna Convention and the corresponding articles in the other codification conventions. Consequently, acts relating to such purchases or services cannot be considered *per se* to be acts performed in the exercise of the official functions of the courier, and therefore covered by the immunity from local civil and administrative jurisdiction.

(8) As to who is entitled to determine whether an act of a diplomatic courier is or is not "an act performed in the exercise of his functions", the question, as in the case of consuls and members of delegations to international organizations, may receive different answers in doctrine and in State practice. One position favours the receiving State, whereas another considers that the determination may be jointly made by the receiving or transit State and the sending State. In the practice of States on this matter both doctrines are followed, i.e. the decision on the distinction may be made by both the sending and the receiving States, or by the receiving State alone. In case of dispute between the sending State and the receiving State, the most appropriate practical solution would be an amicable settlement through diplomatic channels.

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

namely article 43, paragraph 2 (b), of the 1963 Vienna Convention on Consular Relations; article 31, paragraph 2 (d), of the 1969 Convention on Special Missions; and article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States.

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

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

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

#### Paragraph 3

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

#### Paragraph 4

(12) Paragraph 4 is inspired by article 31, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations and the corresponding provisions of the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States as to the basis principle it lays down, namely that the diplomatic courier is not obliged to give evidence as a witness. In substance, however,



although with important differences in drafting, it is closer to article 44 of the 1963 Vienna Convention on Consular Relations as to the qualifications or modalities to which the above-mentioned principle is subject.

(13) Paragraph 4 states that the diplomatic courier is not obliged to give evidence as a witness "in cases involving the exercise of his functions". In that connection two points were particularly stressed in the Commission. In the first place, it was said that the expression "in cases involving the exercise of his functions" should be interpreted with the same reservations and qualifications as had been expressed in the case of paragraphs 1 and 2, and reflected in the relevant paragraphs above of the present commentary. Secondly, it was said that the paragraph referred to cases in which the courier was called upon to give evidence on his having witnessed someone else's acts or behaviour. It did not refer to cases concerning his own acts as an accused or indicted person, as in the second sentence of paragraph 2, in which instance he might be called upon to give evidence in a case arising from an accident caused by a vehicle the use of which might have involved his liability.

(14) Paragraph 4 further provides that the courier "may be required to give evidence in other cases". Two points are also in order in this connection. In the first place, it was the clear understanding in the Commission that a receiving or transit State could request testimony in writing from the courier in accordance with its internal rules of civil procedure or applicable agreements contemplating such a possibility. Secondly, it should be noted that an essential goal of the functions and status of the diplomatic courier is to ensure the safe and speedy delivery of the diplomatic bag, and this goal cannot be compromised by possible undue delays caused by a requirement to give evidence. The paragraph therefore qualifies the possibility that the courier may be required to give evidence in certain cases by the condition that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

#### Paragraph 5

(15) Paragraph 5, which is common to all the provisions on immunity from jurisdiction noted in paragraph (1) of the present commentary, recognizes the fact that the effective jurisdiction of the sending State over its officials abroad serves to enhance justice and legal order. It suggests a legal remedy in the sending State in favour of a claimant of the receiving State whose rights could not be otherwise protected, owing to the immunity of the diplomatic agent. The provision also rests on the permanent legal relationship between a person and the State of his nationality, even when the person is abroad.

(16) But to state, as does paragraph 5, that the courier's immunity in the receiving or transit State does not exempt him from the jurisdiction of his own country is not the same as to affirm the existence of such jurisdiction. As pointed out in the commentary to the parallel provision in the Commission's draft articles on diplomatic intercourse and immunities, namely article 29, on which article 31 of the 1961 Vienna Convention on Diplomatic Relations was based :

... it may happen that this jurisdiction does not apply, either because the case does not come within the general competence of the country's courts, or because its laws do not designate a local forum in

which the action can be brought. In the provisional draft the Commission had meant to fill this gap by stipulating that in such a case the competent court would be that of the seat of the Government of the sending State. This proposal was, however, opposed on the ground that the *locus* of the jurisdiction is governed by municipal law.<sup>147</sup>

(17) Notwithstanding the foregoing, the Commission considered that paragraph 5, although not as effective as would be desirable, had a certain value and was useful, even from a psychological point of view. It constituted a subtle suggestion to the sending State that it should exercise its jurisdiction in cases which otherwise might constitute a denial of justice because of the invocation of the prerogative of immunity with respect to the jurisdiction of the receiving or transit State.

...

#### Article 21. Duration of privileges and immunities<sup>148</sup>

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.

#### Commentary

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

<sup>147</sup> *Yearbook* . . . 1958, vol. II, p. 99, document A/3859, chap. III, sect. II, paragraph (12) of the commentary to article 29.

<sup>148</sup> Text corresponding to that of draft article 28 as originally submitted by the Special Rapporteur (see *Yearbook* . . . 1984, vol. II (Part Two), p. 22, footnote 88).



### Paragraph 1

(1) The first sentence of paragraph 1 acknowledges the close link between the beginning of the privileges and immunities of the diplomatic courier and the performance or exercise of his functions. As stated in paragraph (6) of the commentary to article 10, provisionally adopted at the thirty-sixth session,<sup>149</sup> the Commission had decided to delete draft article 12 submitted by the Special Rapporteur, dealing with the commencement of the functions of the diplomatic courier, on the grounds that the matter would be better dealt with in the context of the draft article on the duration of privileges and immunities. As a general rule, the diplomatic courier enjoys privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions. The moment of commencement of the privileges and immunities is thus the moment when the diplomatic courier crosses the frontier of the territory, the objective of the crossing being the performance of his functions. In such a case, the functions of the courier may well of course have commenced before the crossing, for example if he had previously received the bag to be transported, but the reason or need for the privileges and immunities arises only when, having left the territory of the sending State, he enters the territory of the transit or receiving State. This would normally be the case of a permanent courier appointed by the Ministry for Foreign Affairs who finds himself at the time of the appointment in the territory of the sending State. But the situation may arise in which the person appointed as a courier already finds himself in the territory of the receiving State at the time of his appointment. This would usually happen in the case of an *ad hoc* courier appointed by the mission, consular post or delegation of the sending State in the receiving State. In this case the article provides that the courier's privileges and immunities shall commence from the moment he actually begins to exercise his functions. Certain members of the Commission expressed the view that the expression "from the moment he begins to exercise his functions" should be interpreted as referring to the moment of the courier's appointment and receipt of the documentation referred to in article 7. It was also made clear that, although for drafting reasons the article read "if he is already in the territory of the receiving State", that phrase should be understood as meaning that the person concerned, when appointed a courier, should already be in the territory of the receiving State.

(2) The second sentence of paragraph 1 adopts, with respect to the moment at which the privileges and immunities of the diplomatic courier cease, a criterion or rationale symmetric to that adopted in the first sentence for their commencement. It lays down that such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. This would be the case of a permanent courier. The courier no longer being in the receiving State or the transit State, the foundation for his privileges and immunities disappears. The word "normally" has been used not only because it is contained in the relevant provisions of the codification conventions listed at the beginning of the present commentary, but also because

the article itself provides for two exceptions to the general principle laid down in this second sentence. Those exceptions are contained in the third sentence of paragraph 1 and in the last phrase of paragraph 2. One member of the Commission nevertheless pointed out that he found the words of the second sentence of paragraph 1 unclear.

(3) The third sentence of paragraph 1 contemplates an exception to the general rule laid down in the second sentence. While some members of the Commission thought that the granting of a different treatment to permanent and *ad hoc* couriers with respect to the moment at which their privileges and immunities were to cease was not justified, the Commission considered that on that matter it was bound to follow the solution adopted by the specific provisions on that issue contained in all four codification conventions namely article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 6, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 7, of the 1969 Convention on Special Missions; and article 27, paragraph 6, and article 57, paragraph 7, of the 1975 Vienna Convention on the Representation of States. It was uniformly provided for in those conventions that the privileges and immunities of the diplomatic courier *ad hoc* should cease at the moment when the courier had delivered to the consignee the diplomatic bag in his charge. That was also the solution adopted by the Commission in the present article.

### Paragraph 2

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

(5) It should be noted that the expression "privileges and immunities" used in paragraphs 1 and 2 of article 21, unlike the word "immunity" used in paragraph 3, refers to all the privileges and immunities granted to the diplomatic courier and dealt with in the present draft articles.

<sup>149</sup> *Ibid.*, p. 47.

*Paragraph 3*

(6) Paragraph 3 is modelled on the corresponding provisions of the codification conventions listed at the beginning of the present commentary. This provision, which prolongs the immunity of the courier for acts performed in the exercise of his functions after those functions have ended and subsequent to his departure from the receiving State, refers only to the immunity from jurisdiction provided for in article 18. Its *raison d'être* is to be found in the official nature of the mission performed by the courier, which corresponds to a sovereign decision of the sending State.

*Article 22. Waiver of immunities*<sup>150</sup>

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

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

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

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

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

*Commentary*

(1) The sources for article 22 are the corresponding provisions of the codification conventions, namely article 32 of the 1961 Vienna Convention on Diplomatic Relations, article 45 of the 1963 Vienna Convention on Consular Relations, article 41 of the 1969 Convention on Special Missions and, particularly for paragraph 5, articles 31 and 61 of the 1975 Vienna Convention on the Representation of States.

(2) Article 22 extends to the immunities of the diplomatic courier the procedure of waiver to be found in all these codification conventions. Waiver may thus be considered as one of the forms of suspension of the immunities of the diplomatic courier. This procedure is based on the fundamental concept that such immunities are an expression of the principle of the sovereign equality of States and that they are granted not to benefit individuals but to ensure the efficient performance of the courier's functions.

*Paragraph 1*

(3) Paragraph 1 states the general principle that the immunities of the diplomatic courier may be waived only by the sending State. The waiver of immunities must emanate from the sending State because the object of the immunities is that the diplomatic courier should be able

to discharge his duties in full freedom and with the dignity befitting such duties.<sup>151</sup>

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

(5) While paragraph 1 states the principle that the immunities of the diplomatic courier may be waived by the sending State, it does not say which is the competent authority within the sending State to give such a waiver. There has been a great deal of diversity in State practice and in doctrinal views regarding the authority entitled to exercise the right of waiver. The question has been raised whether it should in all cases be the central authority, for example the Ministry for Foreign Affairs, or whether the head of the mission, another diplomatic agent, or the member of the mission involved in a particular case, should also have the right to waive jurisdictional immunity. The Commission was of the view that the possible solutions to this problem depended essentially upon the domestic laws and regulations of the sending State, where such laws and regulations had been enacted, or upon established practice and procedures where no special legislation existed. Some States confer the power to waive jurisdictional immunity to heads of missions or their members, but only on instructions from the Ministry given prior to or on the occasion of a specific case. In such instances heads of diplomatic and other missions or members of such missions may be required to seek instructions before making a statement of waiver.

(6) Extensive State practice and the relevant commentaries to draft articles which formed the basis of similar provisions in the codification conventions<sup>152</sup> agree that proceedings, in whatever court or courts, are regarded as an indivisible whole and consequently that a waiver given in accordance with the relevant requirements and recognized or accepted by the court concerned precludes the right to plead immunity either before the judgment is pronounced by that court or on appeal.

(7) It was pointed out in the Commission that the principle stated in paragraph 1 of article 22 that the waiver was effected by the sending State should not be interpreted as detracting from the very specific situation contemplated in paragraph 3, in which the act of the courier himself was taken as an implied waiver. It was pointed out in the Commission that the apparently diverse solutions adopted in paragraphs 1 and 3 of the article were in practice made more uniform by the usual requirement of sending States

<sup>151</sup> See paragraph (1) of the commentary to article 30 of the draft articles on diplomatic intercourse and immunities prepared by the Commission in 1958, which served as the basis for article 32 of the 1961 Vienna Convention on Diplomatic Relations (*Yearbook* . . . 1958, vol. II, p. 99, document A/3859, chap. III, sect. II).

<sup>152</sup> See in particular paragraph (5) of the commentary cited in footnote 151 above.

<sup>150</sup> Text corresponding to that of draft article 29 as originally submitted by the Special Rapporteur (*ibid.*, p. 22, footnote 89).

that their diplomatic personnel must have prior authorization to initiate proceedings in the receiving State, as further explained in paragraph (9) below of the present commentary.

#### *Paragraphs 2 and 3*

(8) Paragraph 2, which follows closely paragraph 2 of article 45 of the 1963 Vienna Convention on Consular Relations, lays down the principle that the waiver must be express and that it must be communicated in writing as the most appropriate and unequivocal manifestation of its express character. The same paragraph refers to the exception contemplated in paragraph 3, whereby the initiation of proceedings by the diplomatic courier shall be construed as an implied waiver in respect of any counterclaim directly connected with the principal claim. The rationale behind the provision of paragraph 3 is that under such circumstances the courier is deemed to have accepted the jurisdiction of the receiving State as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.<sup>153</sup> It is the understanding of the Commission that the implied waiver in paragraph 3 refers to civil and administrative proceedings, and that any waiver of immunity from jurisdiction in respect of criminal proceedings should always be express and communicated in writing.

(9) As already mentioned in paragraph (7) above, the regulations of the sending State usually require that its diplomatic agents as well as couriers obtain prior authorization from the central authorities before instituting legal proceedings in the receiving State. It should however be noted that the implied waiver arises from the behaviour of the courier himself and that if he institutes proceedings, he is presumed to have the necessary authorization. *A fortiori*, if in such proceedings a valid waiver may be inferred from the diplomatic courier's behaviour, then his expressly declared waiver must naturally also be regarded as valid.<sup>154</sup>

#### *Paragraph 4*

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

#### *Paragraph 5*

(11) Paragraph 5 reproduces a provision first introduced by articles 31 and 61 of the 1975 Vienna Convention on

<sup>153</sup> See paragraph (6) of the commentary cited in footnote 151 above.

<sup>154</sup> See paragraph (3) of the commentary cited in footnote 151 above.

the Representation of States. As stated by the Commission in its commentary to paragraph 5 of article 62 (Waiver of immunity) of the draft articles on the representation of States in their relations with international organizations:

... the provision set forth in paragraph 5 places the sending State, in respect of a civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation which may give to the host State grounds for complaint if the sending State fails to comply with it.<sup>155</sup>

(12) Paragraph 5 should be considered as a practical method for the settlement of disputes in civil matters. It may offer, in some instances, effective ways to resolve problems. Taking into account the specific features of the legal status and official functions of the diplomatic courier, the extrajudicial method of amicable settlement of a dispute may be appropriate. It compensates for the eventuality that a sending State may refuse to waive the courier's immunity, offering the possibility of arriving at a just settlement through negotiation and equity.

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

#### *Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag<sup>156</sup>*

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

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

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

#### *Commentary*

(1) With the exception of a few complementary elements and drafting adjustments, the basic components of article 23 are contained in the corresponding provisions of the four codification conventions, namely article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 7, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 8, of the 1969 Convention on Special Missions; and article 27, paragraph 7, and article 57, paragraph 8, of the

<sup>155</sup> *Yearbook* . . . 1971, vol. II (Part One), p. 321, document A/8410/Rev.1, chap. II, sect. D, paragraph 2 of the commentary to article 62.

<sup>156</sup> Text corresponding to that of draft article 30 as originally submitted by the Special Rapporteur (see *Yearbook* . . . 1984, vol. II (Part Two), p. 23, footnote 90).

1975 Vienna Convention on the Representation of States.

#### Paragraph 1

(2) The relevant provisions of the above-mentioned multilateral conventions, as well as of numerous bilateral agreements, which are confirmed by an examination of the behaviour of States, demonstrate that the practice dealt with in the present article of employing the captain of a ship or aircraft in commercial service for the custody, transportation and delivery of diplomatic bags forms part of modern international law. The practice of entrusting the diplomatic bag to the captain of a commercial aircraft, in particular, is widespread today. This practice has proved its advantages, which may be summarized as economy, speed and reasonable safety, since the bag, although not accompanied by a courier, is still in the custody or the care of a responsible person. The employment of the captain of a passenger or other merchant ship, although not so frequent, has been resorted to where sea-borne transport is the most convenient means of communication or where the shipment of sizeable consignments is more economical by sea.

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

(4) The phrase "which is scheduled to arrive at an authorized port of entry" has been included in the paragraph to denote ships or aircraft in regular service or belonging to a regular line between the States and the port of entry concerned rather than voyages or flights undertaken by any ship or aircraft on an *ad hoc* basis. It was accepted in the Commission that, under the regulations of certain airlines and the arrangements made with certain countries, "charter flights" could offer all the characteristics of a regular flight, except for the booking system, and could be considered as covered by the expression "scheduled to arrive". It was however also pointed out that the phrase was designed to take into account the fact that the article established certain obligations on the part of the receiving State under paragraph 3, and that the receiving State might have difficulties in fulfilling those obligations in the

case of non-scheduled flights or voyages. Yet nothing in paragraph 1 should be interpreted as precluding the possibility that States, by mutual agreement, might decide to entrust their bags to the captain of a ship or aircraft on a non-scheduled flight or voyage or of a nature other than "in commercial service".

(5) Although not expressly mentioned in the text of paragraph 1 itself, the Commission was of the view that the wording of the paragraph did not preclude the existing practice of several States to entrust the unaccompanied bag to a member of the crew of the ship or aircraft, either by decision of the central authorities of the State or by delegation from the captain of the ship or aircraft to the crew member.

#### Paragraph 2

(6) The captain of a ship or aircraft to whom a bag is entrusted is provided with an official document indicating the number of packages constituting the diplomatic bag entrusted to him. This document may be considered as having the same character as the official document issued to a diplomatic courier, as elaborated upon in the commentary to article 7.<sup>157</sup> It should however be noted (and all the above-mentioned codification conventions are clear on this point) that he is not to be considered as a diplomatic courier, whether permanent or *ad hoc*. Therefore the provisions of the present articles that concern the personal status of the diplomatic courier do not apply to the captain of a ship or aircraft.

#### Paragraph 3

(7) Whenever a bag is entrusted by the sending State to the captain of a ship or aircraft in commercial service, the overriding obligation for the receiving State is to facilitate the free and direct delivery of the diplomatic bag to the authorized members of the diplomatic mission or other authorized officials of the sending State, who are entitled to access to the aircraft or ship in order to take possession of the bag. The receiving State should enact relevant rules and regulations and establish appropriate procedures in order to ensure the prompt and free delivery of the diplomatic bag at its port of entry. Unimpeded access to the aircraft or ship should be provided for the reception of the incoming diplomatic bag at the authorized port of entry or for the handing over of the outgoing diplomatic bag to the captain of the aircraft or ship. In both instances the persons entitled to receive or hand over the diplomatic bag should be authorized members of the diplomatic mission, consular post or delegation of the sending State. This two-way facility for receiving from or handing over the diplomatic bag to the captain should be reflected in the relevant provisions of the rules governing the dispatch of a diplomatic bag entrusted to the captain of an aircraft or ship in commercial service. The drafting changes undergone by the present paragraph since its original submission by the Special Rapporteur are intended to stress the above-mentioned obligation of the receiving State, shifting the emphasis from the facilities accorded to the captain to the obligation of the receiving State to permit unimpeded access to the ship or aircraft. It was pointed out in the Commission that, in order to carry out its obligations under the paragraph, the receiving State must know of the arrival of the bag, either because of the scheduled and regular nature of the flight or voyage involved or because of

<sup>157</sup> *Yearbook* . . . 1983, vol. II (Part Two), p. 60.

the mutual agreements concluded with specific States, as explained above in paragraph (4) of the present commentary.

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

(9) It was discussed in the Commission whether the obligation for the receiving State laid down in paragraph 3 should be qualified by the words "by arrangement with the appropriate authorities of the sending State", mention of which was to be found in the corresponding provisions of the codification conventions listed in paragraph (1) of the present commentary. The Commission decided against incorporating those words in the paragraph so as not to create the impression that such an arrangement would constitute a precondition for the existence of the said obligation for the receiving State. Such arrangements could, instead, regulate the modalities of the practical implementation of that obligation.

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

#### *Article 24. Identification of the diplomatic bag*<sup>158</sup>

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

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

#### *Commentary*

##### *Paragraph 1*

(1) Paragraph 1 of article 24 is modelled on the initial part of the following provisions of the four codification conventions: article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 5, of the 1969 Convention

on Special Missions; and article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

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

(3) The provisions of paragraph 1 apply to all kinds of bags, whether accompanied or not.

##### *Paragraph 2*

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

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

<sup>158</sup> Text corresponding to that of draft article 31 as originally submitted by the Special Rapporteur (*Yearbook* . . . 1984, vol. II (Part Two), pp. 23-24, footnote 93).

the Commission that, although paragraph 2 provided for an additional requirement for the practical purpose of ensuring the delivery of the unaccompanied bag, the lack of any such additional indication should not detract from the status of the bag as a diplomatic bag.

(6) It was explained in the Commission that the wording "the packages constituting the diplomatic bag" had been adopted for the sake of uniformity with the language of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations. It was intended to cover the various physical elements constituting the diplomatic bag, as a unified legal notion, but not the individual pieces constituting the contents of the bag.

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

(8) The draft article originally submitted by the Special Rapporteur contained a paragraph 3 to the effect that "the maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State". After carefully considering the paragraph, as well as proposals for its amendment, the Commission decided not to incorporate it. It was considered that, if drafted in optional terms, as suggested in one amendment, the paragraph would be superfluous, while if adopted in mandatory terms, as originally proposed, it might convey the mistaken impression that such an agreement was a precondition for the granting of facilities for a diplomatic bag by the receiving State. The Commission agreed, however, that it was advisable to determine by agreement between the sending State and the receiving State the maximum size or weight of the diplomatic bag and that that procedure was supported by widespread State practice.

#### *Article 25. Content of the diplomatic bag*<sup>159</sup>

**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.**

<sup>159</sup> Text corresponding to that of draft article 32 as originally submitted by the Special Rapporteur (*ibid.*, p. 24, footnote 94).

#### *Commentary*

##### *Paragraph 1*

(1) Paragraph 1 of article 25 is modelled on the second part of paragraph 4 of article 35 of the 1963 Vienna Convention on Consular Relations. Its wording is also closely related to article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, article 28, paragraph 5, of the 1969 Convention on Special Missions, and article 27, paragraph 4, and article 57, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

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

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

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

(5) One member of the Commission had reservations about paragraph 1. He thought that more emphasis should have been placed on the confidential nature of the items included in the bag so as to ensure that the bag was used as a true means of communication rather than as a means of transport.

##### *Paragraph 2*

(6) The rules governing the content of the diplomatic bag should comprise not only provisions dealing with the permissible content of the bag, as in paragraph 1 of the pre-



sent article, but also provisions for the appropriate preventive measures to be taken in order to ensure compliance with the rules on the content of the diplomatic bag and to avoid any abuses of the facilities, privileges and immunities accorded by international and domestic law to the diplomatic bag. These two elements, namely, the rule for the legally admissible content of the bag and its efficient implementation, have practical significance for the proper functioning of official communications in the interest of international co-operation and understanding. Their strict observance would prevent mutual suspicions on the part of the receiving State, when the diplomatic bag is admitted into its territory, and on the part of the sending State, when procedures for inspection, including the use of sophisticated devices for examination, are required by the receiving State. None of the codification conventions has so far offered a viable solution to the problem of verifiability in respect of the legally admissible content of the diplomatic bag. The increasing number of abuses has given particular importance to this problem, with certain political, economic and other implications. For these reasons, the Commission has deemed it advisable to state expressly in a separate paragraph the duty of the sending State to take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1. That paragraph should be read in conjunction with the provisions of proposed draft article 36.<sup>160</sup>

**Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport<sup>161</sup>**

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

*Commentary*

(1) Article 26, which deals with the transmission of the diplomatic bag by postal service or by any mode of transport, concerns types of unaccompanied bag other than the unaccompanied bag entrusted to the captain of a ship or aircraft. While this latter type is expressly provided for in specific provisions of the codification conventions referred to above in paragraph (1) of the commentary to article 23, the types of unaccompanied bag referred to in the present article must be considered as covered by the expression "all appropriate means" to be used by missions, consular posts and delegations in communications with the sending State, an expression used in all the relevant provisions of the codification conventions, namely article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations; article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 1, of the 1969 Convention on Special Missions; and article 27, paragraph 1, and article 57, paragraph 1, of the 1975 Vienna Convention on the Representation of States.

(2) The rules establishing the conditions governing the use of the postal service for the transmission of a diplo-

matic bag may be of more than one kind: there are multilateral agreements such as the international postal regulations established by the Universal Postal Union (UPU); there also exist consular or other bilateral agreements which may mention the postal service among the means of communication between the sending State and its missions or consular posts; and there are special agreements for the transmission by post of diplomatic correspondence or the exchange of diplomatic correspondence through postal channels by air mail. Besides these international regulations there are also national administrative and postal regulations adopted by some States. In accordance with the terms of article 26, the UPU international postal regulations would apply whenever appropriate between the States concerned. If not ruled out by such regulations, other international regulations would also apply, such as bilateral agreements. Finally, national rules would apply if they were not in contradiction with the international rules in force between the States concerned or in the absence of such international rules. Among national rules, there may be provision for the transmission of bags by commercial means of transportation, in accordance with the internal legislation and administrative rules of each State.

(3) With regard to the "mode of transport" to which the article refers, this expression replaces the clause "whether by land, air or sea" used by the Special Rapporteur in the original draft article. The dispatch of diplomatic bags as cargo consignments through commercial means of transportation, whether by land, air or sea, was common practice among States long before the 1961 Vienna Convention on Diplomatic Relations. This kind of official communication has been particularly used for heavy and sizeable consignments or for non-confidential correspondence, documents and other articles, such as books, exhibits, films and other items for the official use of diplomatic missions, consular posts and other missions. In this case again, the article refers to international or national rules governing the conditions of transmission of the bag by such modes. In this connection, the 1980 United Nations Convention on International Multimodal Transport of Goods,<sup>162</sup> which is concerned with the multilateral regulation of various modes of transport, should be noted. There also exist other international conventions, including regional ones, regulating the carriage of goods by land, air or sea. If any of those conventions is applicable between the States concerned, then such international regulations would apply. National rules would apply in the absence of applicable international regulations.

(4) In the draft article originally submitted by the Special Rapporteur, the "conveyance of the diplomatic bag by postal services" was treated separately in paragraph 2, and the "dispatch of diplomatic bags by ordinary means of transportation, whether by land, air or sea", in paragraph 3. The Commission combined the two paragraphs and made the changes in terminology reflected in paragraphs (2) and (3) of the present commentary above; it also deleted a second sentence contained in both earlier paragraphs which referred, *mutatis mutandis*, to the obligation of the competent authorities of the receiving State or the transit State to facilitate the safe and expeditious

<sup>160</sup> See footnote 123 above.

<sup>161</sup> Text corresponding to that of draft article 34 as originally submitted by the Special Rapporteur (*Yearbook . . . 1984*, vol. II (Part Two), p. 24, footnote 96).

<sup>162</sup> See UNCTAD, *United Nations Conference on a Convention on International Multimodal Transport*, vol. 1: *Final Act and Convention on International Multimodal Transport of Goods* (United Nations publication, Sales No. E.81.II.D.7 (vol. I)).

transmission of the bag dispatched by the postal service or through the ports of those States. The Commission was of the view that those sentences were unnecessary, since their content was covered by article 27, dealing with the facilities to be accorded to the diplomatic bag by the receiving State or the transit State.

(5) The original draft article included a paragraph 1 providing for the applicability to the unaccompanied diplomatic bag dispatched by postal service or by any ordinary means of transport of draft articles 31 (now 24) and 35 (now 27) to 39. The provision was deleted for the same reasons, explained in the present report,<sup>163</sup> as those governing the omission of draft article 33. It was considered that the language of those draft articles made it clear that they also applied to all unaccompanied bags, including those covered by the present article.

(6) In that connection, it was also considered unnecessary to refer in the article to the bill of lading (as had the original draft article) or to the postal receipt "as a document indicating the official status of the diplomatic bag". It was considered that article 24 and its commentary, which also applied to the bags referred to in the present article, provided sufficient regulation on the identification of those bags. Although the Commission was of the view that the inclusion of such reference was not necessary in the text of the article itself, it recognized that the bill of lading or the postal receipt was frequently used in practice as evidence of the nature of the consignment as a diplomatic bag. Although those documents were not strictly necessary for the identification of the diplomatic bag as such, they could serve to facilitate the evidence or proof of such identification.

#### *Article 27. Facilities accorded to the diplomatic bag*<sup>164</sup>

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

#### *Commentary*

(1) Article 27, which deals with the facilities to be accorded to the diplomatic bag by the receiving State or the transit State, is inspired by considerations similar to those that led to the inclusion of article 13 in the set of draft articles provisionally adopted by the Commission. It may therefore be said that the sources for this article are *mutatis mutandis* those indicated in paragraph (2) of the commentary to paragraph 1 of article 13.<sup>165</sup>

(2) Although article 27 applies to all kinds of diplomatic bags, whether accompanied by diplomatic courier, entrusted to the captain of a ship or aircraft or transmitted by postal service or by any mode of transport, the existence of a specific provision on facilities to the diplomatic courier, a provision which is in practice intended to make

easier the safe and speedy transportation and delivery of the accompanied bag, makes the present article even more important for unaccompanied bags, particularly those that are dispatched by postal service or any mode of transport which in practice require greater care for their safe and expeditious transmission and delivery.

(3) The facilities accorded to the bag should be conceived also in close relationship with all other provisions that contain explicit or implicit reference to the need to grant certain assistance or extend co-operation on the part of the receiving State or the transit State and their authorities for the proper functioning of official communications through the use of the diplomatic bag. As in the case of the facilities accorded to the diplomatic courier, those accorded to the diplomatic bag should always be considered on the basis of functional necessity and the actual need for assistance, depending on the various modes of transport and the concrete circumstances.

(4) It would seem neither advisable nor possible to provide a complete listing of the facilities to be accorded to the diplomatic bag. It would rather seem preferable to define the circumstances in which the need for according such facilities would arise. In general terms it may be affirmed that the scope of the facilities should be determined by the official function of the diplomatic bag and the conditions required for the safe and speedy transmission or delivery of the bag to its final destination. Therefore the general criterion would be that the need for facilities could or would arise whenever the safe or speedy transmission or delivery of the bag, or both are endangered. In that connection, it was noted in the Commission that the expression "transmission or delivery" should be read as "transmission and/or delivery", meaning that the need for facilities could apply to each of those operations, either separately or taken together. The word "transmission" was preferred to the word "transportation", contained in the draft article originally submitted by the Special Rapporteur, for the sake of uniformity with the language adopted in article 26 and because of its broader character, which clearly covered not only bags transmitted by any mode of transport but also those transmitted by postal service. The use of the word "transmission" also purports to cover the ground of the second sentence of paragraphs 2 and 3 of draft article 34 as originally submitted by the Special Rapporteur, which were later deleted in the corresponding article 26, as provisionally adopted (see paragraph (4) of the commentary to article 26 above).

(5) Although in many cases the facilities to be accorded to the diplomatic bag would entail duties of abstention on the part of the receiving or transit State, in other instances more positive obligations might be involved, such as favourable treatment in case of transportation problems or, again, the speeding up of the clearance procedures and formalities applied to incoming and outgoing consignments. The present article and the commentary thereto should also be read in conjunction with paragraph 3 of article 23 and the commentary thereto.

(6) The Commission considered it desirable that at a later stage the title of article 13 as provisionally adopted by the Commission be aligned with that of the present article, so as to read "Facilities accorded to the diplomatic courier" instead of "Facilities".

<sup>163</sup> See paragraph 203 above.

<sup>164</sup> Text corresponding to that of draft article 35 as originally submitted by the Special Rapporteur (*Yearbook . . . 1984*, vol. II (Part Two), p. 25, footnote 97).

<sup>165</sup> *Ibid.*, p. 50.



## Chapter V

### JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

#### A. Introduction

##### 1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

205. The topic entitled "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by the decision of the Commission at its thirtieth session, in 1978,<sup>166</sup> on the recommendation of the Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.

206. At its thirty-first session, in 1979, the Commission had before it a preliminary report<sup>167</sup> on the topic submitted by the Special Rapporteur, Mr. Sompong Sucharitkul. The preliminary report gave a historical sketch of international efforts towards codification and examined sources of international law and the possible content of the law of State immunities, including the practice of States, international conventions, international adjudications, and opinions of writers as source materials. The report also made an inquiry into initial questions, definitions, the use of the inductive approach to the study of the topic, the general rule of State immunity and possible exceptions to the rule itself.

207. During the discussion of the preliminary report, it was pointed out that relevant materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible. It was also emphasized that another potential source of materials would be found in the treaty practice of States, which indicated consent to some limitations on jurisdictional immunity in specific circumstances. In that connection, the Commission, at its thirty-first session, decided to seek further information from Governments of Member States of the United Nations in the form of replies to a questionnaire. It was noted that States knew best their own practice, wants and needs as to immunities in respect of their activities and that the views and comments of Governments could provide an appropriate indication of the direction in which the codification and progressive

development of the international law of State immunity should proceed.<sup>168</sup>

208. Following the preliminary report, the Special Rapporteur submitted his second report<sup>169</sup> for the consideration of the Commission at its thirty-second session, in 1980. In that second report he introduced six draft articles: "Scope of the present articles" (art. 1); "Use of terms" (art. 2); "Interpretative provisions" (art. 3); "Jurisdictional immunities not within the scope of the present articles" (art. 4); "Non-retroactivity of the present articles" (art. 5); and "The principle of State immunity" (art. 6). The first five constituted part I, entitled "Introduction", while the sixth was placed in part II, entitled "General principles". The Commission referred draft articles 1 and 6 to the Drafting Committee. At the same session, the Commission provisionally adopted, on the recommendation of the Drafting Committee, draft article 1, entitled "Scope of the present articles" and draft article 6, entitled "State immunity".

209. In his third report,<sup>170</sup> submitted to the Commission at its thirty-third session, in 1981, the Special Rapporteur proposed the following five draft articles: "Rules of competence and jurisdictional immunity" (art. 7); "Consent of State" (art. 8); "Voluntary submission" (art. 9); "Counter-claims" (art. 10); and "Waiver" (art. 11). Those five draft articles, together with article 6, provisionally adopted, constituted part II of the draft entitled "General principles". The Commission referred draft articles 7 to 11 to the Drafting Committee. At the same session, in the

<sup>168</sup> The materials received were originally organized by the Secretariat in a systematic order, and published in English, French, Russian and Spanish, as follows: part I consisted of replies of Governments to the questionnaire (A/CN.4/343 and Add.3-4); part II contained materials that Governments had submitted together with their replies to the questionnaire (A/CN.4/343/Add.1); part III contained materials submitted by Governments which had not replied to the questionnaire (A/CN.4/343/Add.2). The materials now appear (in English or French) in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10), hereinafter referred to as *Materials on Jurisdictional Immunities* . . .

<sup>169</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1. For the discussion of the second report by the Commission, see *Yearbook* . . . 1980, vol. I, pp. 195 *et seq.*, 1622nd meeting (paras. 4 *et seq.*), 1623rd meeting and 1624th meeting (paras. 1 to 27); and pp. 214 *et seq.*, 1625th and 1626th meetings.

<sup>170</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1. For the discussion of the third report by the Commission, see *Yearbook* . . . 1981, vol. I, pp. 55 *et seq.*, 1653rd meeting (paras. 1 to 33) and 1654th to 1657th meetings; and pp. 110 *et seq.*, 1663rd to 1665th meetings.

<sup>166</sup> *Yearbook* . . . 1978, vol. II (Part Two), pp. 152-155, paras. 179-190.

<sup>167</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323. For the discussion of the preliminary report by the Commission, see *Yearbook* . . . 1979, vol. I, pp. 208 *et seq.*, 1574th and 1575th meetings.

light of the discussion in the Commission, the Special Rapporteur prepared and submitted for the consideration of the Drafting Committee a revised version of the five draft articles originally submitted, which he reduced to the four following articles: "Obligation to give effect to State immunity" (art. 7); "Consent of State" (art. 8); "Expression of consent" (art. 9); and "Counter-claims" (art. 10).<sup>171</sup> Owing to lack of time, the Drafting Committee was unable to consider those articles at the thirty-third session.

210. In his fourth report,<sup>172</sup> submitted at the thirty-fourth session of the Commission, in 1982, the Special Rapporteur dealt with part III of the draft articles, entitled "Exceptions to State immunity", and proposed two draft articles: "Scope of the present part" (art. 11); and "Trading or commercial activity" (art. 12). The Commission decided to refer articles 11 and 12 to the Drafting Committee. It further decided that article 6, already provisionally adopted, should be re-examined by the Drafting Committee in the light of the discussion of the rest of the draft articles constituting part II of the draft, and further decided that the Drafting Committee should also examine the provisions of articles 2 and 3 relating to the problem of the definition of the terms "jurisdiction" and "trading or commercial activity".<sup>173</sup> At the same session, on the recommendation of the Drafting Committee, the Commission provisionally adopted draft articles 7, 8 and 9, as well as paragraph 1 (a) of draft article 2, and a revised version of draft article 1.<sup>174</sup> The drafting Committee re-examined article 6 as provisionally adopted and, while not proposing a new formulation thereof, agreed to re-examine the article at the following session.

211. In his fifth report,<sup>175</sup> submitted at the thirty-fifth session of the Commission, in 1983, the Special Rapporteur proposed three additional articles for inclusion in part III of the draft. They were: "Contracts of employment" (art. 13); "Personal injuries and damage to property" (art. 14); and "Ownership, possession and use of property" (art. 15). The Commission also had before it a memorandum on the topic submitted by one of its members.<sup>176</sup> At the conclusion of its debate on the topic, the Commission decided to refer draft articles 13, 14 and 15 to the Drafting Committee.<sup>177</sup> The Commission, on the recommendation of the Drafting Committee, provisionally adopted draft articles 10, 12 and 15, as well as paragraph 1 (g) of article 2 and paragraph 2 of article 3.<sup>178</sup> At the same session, on the basis of the discussions in the Commission, the Special Rapporteur prepared and submitted to the Drafting Com-

<sup>171</sup> *Yearbook* ... 1981, vol. II (Part Two), pp. 157-158, document A/36/10, para. 226.

<sup>172</sup> *Yearbook* ... 1982, vol. II (Part One), p. 199, document A/CN.4/357. For the discussion of the fourth report by the Commission, see *Yearbook* ... 1982, vol. I, pp. 59 *et seq.*, 1708th to 1717th meetings and 1718th meeting (paras. 1-39), and pp. 183 *et seq.*, 1728th meeting (paras. 7 *et seq.*) and 1729th to 1730th meetings.

<sup>173</sup> *Yearbook* ... 1982, vol. II (Part Two), p. 99, para. 198.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Yearbook* ... 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1. For the discussion of the fifth report by the Commission, see *Yearbook* ... 1983, vol. I, pp. 43 *et seq.*, 1762nd to 1770th meetings.

<sup>176</sup> *Yearbook* ... 1983, vol. II (Part One), p. 53, document A/CN.4/371.

<sup>177</sup> *Yearbook* ... 1983, vol. II (Part Two), p. 20, para. 94.

<sup>178</sup> *Ibid.*, para. 95.

mittee revised versions of draft article 13 (Contracts of employment) and draft article 14 (Personal injuries and damage to property).<sup>179</sup> Owing to lack of time, the Drafting Committee was unable to consider those articles or to re-examine draft article 6.

212. In his sixth report,<sup>180</sup> submitted at the thirty-sixth session of the Commission, in 1984, the Special Rapporteur proposed five draft articles, thereby completing part III of the draft. They were: "Patents, trade marks and other intellectual properties" (art. 16); "Fiscal liabilities and customs duties" (art. 17); "Shareholdings and membership of bodies corporate" (art. 18); "Ships employed in commercial service" (art. 19, alternatives A and B); and "Arbitration" (art. 20). The Commission decided to refer articles 16, 17 and 18 to the Drafting Committee for consideration.<sup>181</sup> Owing to lack of time, the Commission was not in a position to conclude its deliberations on draft article 19 or to take up draft article 20. It decided to consider those articles in 1985, at its thirty-seventh session.<sup>182</sup> However, in the light of the preliminary discussions held in the Commission on article 19, the Special Rapporteur prepared and submitted a revised version of draft article 19 (Ships employed in commercial service).<sup>183</sup> At the same session, on the recommendation of the Drafting Committee, the Commission provisionally adopted draft articles 13, 14, 16, 17 and 18.<sup>184</sup> In connection with the provisional adoption of draft article 16 by the Commission, the Special Rapporteur submitted the text of paragraph 2 of draft article 11 to the Commission.<sup>185</sup> The Commission decided to refer paragraph 2 of article 11 to the Drafting Committee.<sup>186</sup>

## 2. CONSIDERATION OF THE TOPIC AT THE PRESENT SESSION

213. At its present session, the Commission had before it draft article 19 (Ships employed in commercial service) and draft article 20 (Arbitration) contained in the sixth report submitted by the Special Rapporteur, the consideration of which it had not completed at its thirty-sixth session. Those two provisions completed part III of the draft articles. In addition, the Commission had before it the seventh report submitted by the Special Rapporteur (A/CN.4/388),<sup>187</sup> introducing the last two parts of the draft articles, namely part IV, entitled "State immunity in respect of property from attachment and execution", and part V, entitled "Miscellaneous provisions". Part IV comprised the following draft articles: "Scope of the present part" (art. 21); "State immunity from attachment and execution" (art. 22); "Modalities and effect of consent to attachment and execution" (art. 23); and "Types of State property permanently immune from attachment and execution" (art. 24). Part V comprised the following draft articles: "Immunities of personal sovereigns and other

<sup>179</sup> *Ibid.*, footnotes 58 and 59.

<sup>180</sup> *Yearbook* ... 1984, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2. For the discussion of the sixth report by the Commission, see *Yearbook* ... 1984, vol. I, pp. 110 *et seq.*, 1833rd to 1841st meetings.

<sup>181</sup> *Yearbook* ... 1984, vol. II (Part Two), p. 59, para. 205.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*, p. 61, footnote 202.

<sup>184</sup> *Ibid.*, p. 59, para. 206.

<sup>185</sup> *Ibid.*, p. 59, footnote 200.

<sup>186</sup> *Ibid.*, p. 59, para. 207.

<sup>187</sup> Reproduced in *Yearbook* ... 1985, vol. II (Part One).

heads of State" (art. 25); "Service of process and judgment in default of appearance" (art. 26); "Procedural privileges" (art. 27); and "Restriction and extension of immunities and privileges" (art. 28). Owing to lack of time, the Commission was not able to take up part V, and limited its discussion to draft articles 19 and 20 in part III and draft articles 21 to 24 in part IV. It decided to consider part V in 1986, at its thirty-eighth session.

214. The Commission, after considering the sixth and seventh reports at its 1915th to 1924th meetings, from 1 to 11 July 1985, referred draft articles 19 to 24 to the Drafting Committee.

215. As recommended by the Drafting Committee, the Commission at its 1932nd meeting provisionally adopted draft articles 19 and 20.<sup>188</sup>

216. For the benefit of the General Assembly, a summary of the debate on the articles constituting part IV of the draft is presented below.

217. In introducing part IV, the Special Rapporteur recalled that many members of the Commission had thought, at an earlier stage of the consideration of the topic, that it would be better to concentrate on immunities of States from jurisdiction and to leave aside the question of immunity from attachment and execution. He believed, however, that, in the course of studying the topic, the Commission would necessarily have to deal with the property aspects of immunity in a number of instances. His view had been confirmed. The question of property bore an important relationship to article 7, paragraph 2, and article 15 of the draft articles. In a separate connection, property bore a direct relation to the jurisdictional immunities of States inasmuch as States, under part IV of the draft, were immune, not only in respect of property belonging to them but also, invariably, in respect of property in their possession or control or in which they had an interest, from attachment, arrest and execution by order or pursuant to an order of a court of another State. In defining State property, the Special Rapporteur stated that he had followed the suggestion that such a definition should be borrowed from the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.<sup>189</sup> That definition appeared in article 2, paragraph 1 (*f*), which had not yet been referred to the Drafting Committee. However, during his work on the topic, he had come to believe that that definition of State property was incomplete and inappropriate as far as the jurisdictional immunities of States and their property were concerned. Such a definition of property did not take into account, for example, property taken in violation of the generally accepted principles of international law. A number of other difficulties arose with respect to that definition if it was sought to apply it to the topic. That explained his new efforts to define State property for the purposes of the draft articles.

218. The Special Rapporteur further drew attention to the general and well-known difficulties associated with enforcement measures in international law.<sup>190</sup> That was an

<sup>188</sup> For the texts of draft articles 19 and 20 and the commentaries thereto, see section B.2 below.

<sup>189</sup> A/CONF.117/14.

<sup>190</sup> See, for example *Société commerciale de Belgique* [Socobelge], judgment of the Permanent Court of International Justice of 15 June 1939 relating to arbitral awards of 3 January and 25 July 1936, *P.C.I.J., Series A/B, No. 78*, p. 162; and *Socobelge et Etat belge v.*

aspect of international law where fundamental political and diplomatic issues relating to the sovereignty of States were soon encountered. Moreover, the technical problems of enforcement were formidable. But it was equally apparent that the implementation of rights, once lawfully established, was a central and indispensable part of a meaningful legal system.

219. The Special Rapporteur had arranged the structure of part IV in such a way as to present a clear and easily perceptible picture of the treatment of State immunities.

220. Introducing draft article 21, entitled "Scope of the present part",<sup>191</sup> the Special Rapporteur pointed out his intention to draw distinctions and at the same time to underline the close connection between State immunities from the jurisdiction of the courts of another State, dealt with in parts II and III, and State immunities from attachment and execution in respect of property by order of the courts of another State, dealt with in part IV. Jurisdiction was normally understood to refer to the power to adjudicate or to settle disputes by adjudication, but immunity from attachment and execution related more specifically to immunities of States in respect of their property from pre-judgment attachment and arrest as well as from execution of the judgment rendered. That distinction, namely that waiver of immunity from jurisdiction did not automatically entail waiver of immunity from execution, emerged clearly from State practice. Some linkage between the two types of immunity had, however, been seen in a number of instances. A further question that might be raised, was whether there should be immunity from execution, attachment or seizure arising under an executive order or legislative decree. He thought, however, that cases of that type were beyond the scope of the current inquiry. He had limited the possibility of attachment, arrest and execution solely to cases where such measures were ordered by a court of law or tribunal of another State, or emanated from judicial proceedings.

221. In introducing draft article 22, entitled "State immunity from attachment and execution",<sup>192</sup> the Special

*Etat hellénique, Banque de Grèce et Banque de Bruxelles* (judgment of 30 April 1951 of the Brussels civil court) (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), p. 244).

<sup>191</sup> Draft article 21 submitted by the Special Rapporteur read as follows:

*"Article 21. Scope of the present part*

"The present part applies to the immunity of one State in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution by order of a court of another State."

<sup>192</sup> Draft article 22 submitted by the Special Rapporteur read as follows:

*"Article 22. State immunity from attachment and execution*

"1. In accordance with the provisions of the present articles, State property, or property in the possession or control of a State, or property in which a State has an interest, is protected by the rule of State immunity from attachment, arrest and execution by order of a court of another State, as an interim or precautionary pre-judgment measure, or as a process to secure satisfaction of a final judgment of such a court, unless:

"(a) the State concerned has consented to such attachment, arrest or execution against the property in question; or

"(b) the property is in use or intended for use by the State in commercial and non-governmental service; or

(Continued on next page)

Rapporteur stated that the principles of immunity from attachment, arrest and execution flowed from the same principle as did jurisdictional immunity, namely *par in parem imperium non habet*, and were thus founded on the principles of the independence and sovereign equality of States. Like jurisdictional immunity, immunity from attachment and execution was linked to the question of consent. He mentioned that in drafting that article he had relied on national legislation, international and regional conventions, bilateral treaties and the decisions of domestic courts. He had also thought that that was an area in which international opinion seemed to favour more absolute and less qualified immunity.

222. Explaining draft article 23, entitled "Modalities and effect of consent to attachment and execution",<sup>193</sup> the Special Rapporteur stated that consent to attachment was normally expressed in writing, in multilateral or in bilateral treaties. Consent might also be expressed in general terms, which could be interpreted as allowing attachment and execution against assets connected with the commercial transactions in question. Consent might be limited to specific assets or property allocated for the purpose of satisfying judgment debts. In any event, attachment and execution would not be exercised against assets forming part of the public property of a State devoted to public services or used for public purposes.

223. Draft article 24, entitled "Types of State property permanently immune from attachment and execution",<sup>194</sup> imposed certain limitations on the effects of consent and

was designed to protect States that might unknowingly have been led to agree in advance to allow available assets, including bank accounts of their embassies or diplomatic premises, to be seized, without being fully aware of the extent of the resulting disruption of diplomatic relations. There were certain types of property the seizure of which might conceivably cause an outbreak of hostilities. Article 24 was therefore designed primarily to protect the public order of inter-State relationships. He had identified five categories of property that were clearly immune from attachment and execution.

(a) *General comments*

224. It was generally recognized that, at the current stage of international trade, both Governments and private entities were involved in the production, transfer and sale of goods. There were also States that supported the conduct of foreign trade by government-owned companies and others that supported and encouraged the private sector in that area. It was further understood that such an interaction between government and private entities, which had competing interests, must result in conflicts, and that there should be a system of resolution of conflicts that took into account the essential interests of both parties. It was generally understood that the substance of part IV was related to, although analytically distinct from, the conceptual approach, the nature, extent and scope of jurisdictional immunity itself. In that connection, the emphasis placed in the Special Rapporteur's seventh report on the significance of consent, whether in the form of prior consent or waiver, or in the form of express or implied consent, was considered significant and essential to that part of the draft.

225. Different views were expressed as to the overall approach taken by the Special Rapporteur in part IV of the draft and as to the extent to which he had succeeded in balancing the competing interests involved. In the view of some members of the Commission, the approach did not sufficiently take into account the principle of the sovereign

(Footnote 192 continued.)

"(c) the property, being movable or immovable, intellectual or industrial, is one in respect of which it is the object of the proceeding to determine the question of ownership by the State, its possession or use, or any right or interest arising for the State by way of succession, gift or *bona vacantia*; or

"(d) the property is identified as specifically allocated for satisfaction of a final judgment or payment of debts incurred by the State.

"2. A State is also immune in respect of its property, or property in its possession or control or in which it has an interest, from an interim or final injunction or specific performance order by a court of another State, which is designed to deprive the State of its enjoyment, possession or use of the property or other interest, or otherwise to compel the State against its will to vacate the property or to surrender it to another person."

<sup>193</sup> Draft article 23 submitted by the Special Rapporteur read as follows:

*"Article 23. Modalities and effect of consent to attachment and execution"*

"1. A State may give its consent in writing, in a multilateral or bilateral treaty or in an agreement or contract concluded by it or by one of its agencies with a foreign person, natural or juridical, not to invoke State immunity in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution, provided that the property in question, movable or immovable, intellectual or industrial:

"(a) forms part of a commercial transaction or is used in connection with commercial activities, or is otherwise in use for non-public purposes unconnected with the exercise of governmental authority of the State; and

"(b) is identified as being situated in the territory of the State of the forum.

"2. The effect of paragraph 1 is further limited by the provisions of article 24."

<sup>194</sup> Draft article 24 submitted by the Special Rapporteur read as follows:

*"Article 24. Types of State property permanently immune from attachment and execution"*

"1. Notwithstanding article 23 and regardless of consent or waiver of immunity, the following property may not be attached, arrested or otherwise taken in forced execution of the final judgment by a court of another State:

"(a) property used or intended for use for diplomatic or consular purposes or for the purposes of special missions or representation of States in their relations with international organizations of universal character internationally protected by inviolability; or

"(b) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of the State; or

"(c) property of a central bank held by it for central banking purposes and not allocated for any specified payments; or

"(d) property of a State monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgment or any other debts; or

"(e) property forming part of the national archives of a State or of its distinct national cultural heritage.

"2. Nothing in paragraph 1 shall prevent a State from undertaking to give effect to the judgment of a court of another State, or from consenting to the attachment, arrest or execution of property other than the types listed in paragraph 1."

equality of States and the principle that State property could not be attached without the State's consent. According to that view, part IV overlooked the interests of the developing countries, where Governments were obliged under their legal system to conduct trade with foreign entities. The purpose of that type of foreign trade or "commercial activity" was not, however, profit-making but internal development, satisfying the basic needs of their population. The commercial activities of Governments in such circumstances should therefore not be treated on the same footing as the commercial activities of private entities. The purpose of the activity should therefore be given a more prominent role in part IV.

226. It was also stated that, as States were sovereign on their territory and outside it, and on an equal footing with other States, a State could not be made subject to another State's public authority unless it consented thereto. It was further held that, since attachment or execution measures involved the use of force by the public authority of the forum State, the express consent of the defendant State was essential. Part IV, according to that view, overlooked that important principle.

227. On the other hand, it was considered that part IV, by expanding immunity to State property in respect of attachment and execution, brought a balance to the whole structure of the draft articles, and that the interests of developing countries and of States with different socio-economic structures were harmonized with those of States promoting private trade.

228. In addition, the view was expressed that part IV in general represented current State practice and that the policies behind it were fair to all sides. Part IV clearly recognized the reality that, in all matters pertaining to a claim to State immunity, in addition to the forum State and the State that conducted commercial activity, there was a third party which could not be ignored, namely, the private party wishing to pursue a claim against the foreign State and which was, or might be, frustrated by a plea of State immunity. That triangular relationship, which involved the interests of the acting State, the territorial State and the private claimant, should be acknowledged. It was further suggested that there was ample authority for the proposition that immunity of State property from attachment, arrest and execution was not absolute, but dependent upon the uses to which the property was being or had been put.

229. Finally, it was stated that the realities of international trade had to be recognized, namely, that in the present-day world, with States following by choice or necessity different economic and foreign trade policies, in which both State and private agencies were involved, draft articles of that nature ought to take into account the interests of all the parties involved, and part IV therefore had to be pragmatic and to set forth provisions that would be acceptable to most States.

230. Several concepts used in the articles of part IV gave rise to some concern as to their appropriateness for general application. For example, the concepts "attachment", "arrest" and "execution" might have different meanings under the domestic laws of States and could therefore be replaced by a general term, such as "judicial measures of constraint upon the use of such property, including attachment, arrest or execution". That general reference, it was thought, would also include all other measures of judicial

constraint under domestic law, including certain types of interlocutory injunctions that might not be strictly considered as attachment, arrest or execution.

231. The concept of "State property" also gave rise to questions as to its exact meaning within the formula "property in which a State has an interest". There were uncertainties as to what "interest" referred to in that context. It was explained that the term "interest", which was equivalent to *intérêt* in French, had nothing to do with the concept of "controlling interest" in a company. The question of the participation of a State in a company as a shareholder was governed by article 18. It was thought that an illustration of a case where a State, without having ownership of a property, might have an interest in it, was the *Dollfus Mieg* case,<sup>195</sup> which had taken place immediately after the Second World War. Another illustration was provided by the *Vavas seur v. Krupp* case (1878).<sup>196</sup>

232. The term "control", it was thought, could also be helpful as a criterion for determining the party that enjoyed immunity, in situations where the ownership of a particular property was claimed by a *de facto* or a *de jure* Government. In State practice, physical control in such situations appeared to be an important if not always determinative factor.

#### (b) Comments on the draft articles

233. Some members of the Commission stated that draft article 21<sup>197</sup> as worded did not contribute to the overall understanding of part IV, nor did it give a comprehensive account. Furthermore, it was thought that property within the meaning of article 21 differed from State property as tentatively defined in draft article 2, paragraph 1 (*f*), now withdrawn by the Special Rapporteur. Article 21, it was suggested, did not provide for a sufficient variety of available modalities of execution and enforcement, for it was seemingly limited to attachment, arrest and execution by order of a "court".

234. Other members favoured having an article on scope in part IV which would bring symmetry and restore equilibrium between that part and the earlier parts. Furthermore, it was considered essential that a provision such as article 21 should indicate the relationship between immunity from jurisdiction and immunity from execution.

235. The broad framework of draft article 22<sup>198</sup> appeared acceptable. The general rule of that article, it was suggested, could be founded on the equality and sovereignty of States. In the view of some members, in the absence of either a prior explicit agreement or an express waiver, the State of the forum should not dispose of any means of enforcing the award or judgment against the other State.

<sup>195</sup> *Dollfus Mieg et Cie S.A. v. Bank of England* (1950) (United Kingdom, *The Law Reports, Chancery Division*, 1950, p. 333); *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports*, 1952, vol. 1, p. 572); see also *Annual Digest and Reports of Public International Law Cases 1949* (London, 1955), vol. 16, p. 103, case No. 36.

<sup>196</sup> United Kingdom. *The Law Reports, Chancery Division*, vol. IX (1878), p. 351.

<sup>197</sup> See footnote 191 above.

<sup>198</sup> See footnote 192 above.

Accordingly, execution was subsequent to and dependent either upon the judgment requiring satisfaction or upon failure on the part of the debtor State to comply with the award. Similarly, it was thought that the principle of reciprocity was an important component of the principle of the equality of States and should be given a place in the text. Some members of the Commission believed that diplomatic negotiations might be regarded as one possible way of arriving at a solution before resorting to measures of execution and even before the judgment had been made final.

236. As to the exceptions to immunity listed in paragraph 1 (a) to (d) of article 22, several suggestions were made. According to one suggestion, it would be useful to combine subparagraphs (a) and (b), in order to extend the requirement of consent even to attachment of property in commercial and non-governmental service. It was believed that such a merger would give greater protection to the interests of developing countries which had to be involved in external commercial activities. For others, such a merger and the extension of consent to State property for commercial use was unacceptable, since it would provide undue protection for States even when they were engaged solely in commercial activity. Subparagraph (b) raised a number of questions. It was mentioned that, under that subparagraph, immunity was withheld in respect of property used in commercial and non-governmental service, while under article 23, paragraph 1 (a), seizure or execution in respect of the same property required the consent of the State. There was therefore an apparent inconsistency between the two provisions.

237. While some members of the Commission supported the requirement, in subparagraph (b), concerning State property in "commercial and non-governmental service" and considered it as a positive step in protecting the interests of developing countries, others found the conjunction "and" used to link the concepts of commercial and non-governmental service unacceptable, since it would seem to allow for the possibility of extending immunity to an activity characterized as "governmental service", even though it was solely "commercial" in nature. It was suggested that the term be replaced by "commercial use" or "use for commercial purposes". The Special Rapporteur pointed out that the term "governmental and non-commercial" was used in article 3 of the 1926 Brussels Convention,<sup>199</sup> while article 9 of the 1958 Geneva Convention on the High Seas<sup>200</sup> referred to "government non-commercial". The 1982 United Nations Convention on the Law of the Sea<sup>201</sup> used the term "non-commercial purposes" in articles 31 and 32, and "government non-commercial" in article 236. There was thus no uniformity in references to that term.

238. With regard to subparagraph (c), concern was expressed as to its possible relationship with nationalized property. It frequently happened that, subsequent to nationalization, the former owners of such properties tried

to attach them in the importing States. Such a proceeding, it was believed, could embarrass or even paralyse the economy of the State that had carried out the nationalization. The Special Rapporteur did not believe that that subparagraph could be used as a means of resolving the many delicate questions connected with nationalization. As he had stated earlier in his report, the topic dealt directly with the jurisdictional immunities of States and their property and not with the acquisition of legal titles or with the legality or illegality, under international law, of State acts in the seizure of property.

239. Finally, it was suggested that, if the terms "attachment", "arrest" and "execution" were replaced by a broader phrase suggested above (paragraph 230), namely "judicial measures of constraint upon the use of such property, including attachment, arrest or execution", paragraph 2 of article 22 could be deleted. It was generally agreed that the article needed redrafting and could be further simplified.

240. With regard to draft article 23,<sup>202</sup> it was considered that the article should be limited to modalities and to the effect of consent to attachment and execution, as the title suggested, and that the proviso at the end of paragraph 1 should therefore be deleted. It was also suggested that in the final drafting of article 23 due regard should be had to the wording of article 8, dealing with express consent to the exercise of jurisdiction. In addition, in article 23, paragraph 1, it should be made clear that consent could also be given before the court.

241. Draft article 24<sup>203</sup> generated considerable discussion concerning the implied principle which it seemed to suggest. The opening clause of paragraph 1, stating "Notwithstanding article 23 and regardless of consent or waiver of immunity, . . .", appeared to place a limitation upon the consent which a State might give. No such limitations, it was held could be imposed on State sovereignty with regard to the circumstances in which a State could give its consent. Otherwise, it would seem that the article was creating a rule bordering on *jus cogens*. Moreover, the opening clause might also be incompatible with existing codification conventions which provided that, once a separate waiver of immunity from execution had been given, there was no restriction on the types of property that could be affected in relation to execution. Since article 24 listed the various types of State property that could not in any circumstances be regarded as being used for commercial purposes, it might be drafted in such a way as to present its provisions as an interpretation of what constituted property used for commercial activities. It was of course clear that the intention of the Special Rapporteur was to avoid pressure being placed on a developing country to make it give its consent or waiver in a contract. But the opening clause, as drafted, posed other difficulties, since it imposed limitations on the sovereign power of States. Questions were raised whether or not certain types of property which, by their nature or because of the use to which they were put, could be regarded as unattachable; for example, whether the article could include property deemed to be indispensable for the livelihood of a State. It was understood that that analogy was borrowed from domestic law and that there might be certain difficulties in adapting it to international law.

<sup>199</sup> International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926 (League of Nations, *Treaty Series*, vol. CLXXVI, p. 199).

<sup>200</sup> United Nations, *Treaty Series*, vol. 450, p. 11.

<sup>201</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

<sup>202</sup> See footnote 193 above.

<sup>203</sup> See footnote 194 above.



242. The Special Rapporteur agreed that the language of the opening clause should be changed to remove any suggestion of a rule of *ius cogens*.

243. With regard to the list of types of State property that were immune from attachment and execution, it was suggested that the property of regional organizations should be included, in addition to that of international organizations of a universal character. The Special Rapporteur, however, pointed out that he was prepared to do so but that some problems arose from that addition. First, regional organizations were not covered by the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>204</sup> Secondly, some regional organizations had disappeared after a short existence. Thirdly, the legal personality and capacity of regional organizations were not, in every State, recognized under municipal law. For example, in Japan and Thailand, the law recognized the European Economic Community as a legal person, but the legal personality of the Community was not fully recognized in various other States. There was general agreement that property constituting *instrumentum legati* or consular premises, archives, etc., could not be attached.<sup>205</sup>

244. As for subparagraph (b), questions were raised as to the scope of the term "property of a military character". That term, it was suggested, seemed to have a broad meaning that could cause certain difficulties. For example, it was mentioned that transactions relating to the supply of cigarettes to the army of a State should not constitute, under that provision, an act of State *jure imperii*. The Special Rapporteur stated that he did not intend to give a broad interpretation to the concept of "property of a military character". By referring to "the military authority or defence agency of the State" he also wished to take into account for example, the defence agency of Japan, since under its Constitution that country did not have a military authority.

245. It was stated that subparagraph (c) was particularly important to the developing countries, which, by necessity, had to maintain a certain part of their foreign currency reserves abroad. Questions were raised as to the necessity for the qualifications set forth in subparagraphs (c) and (d). Some members of the Commission, however, found the qualifications too narrow. It was also proposed that the words "property of a central bank" be replaced by "funds of a central bank", which conveyed a narrower meaning. In the view of some members, the property of a central bank should be immune from attachment unless it had been specifically placed in the bank as a security or guarantee which might then be subject to attachment or execution. Some clarification was also requested concerning the meaning and scope of the term "property of a State monetary authority", used in subparagraph (d). It was also suggested that subparagraphs (c) and (d) might be merged for purposes of economy in drafting.

<sup>204</sup> United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

<sup>205</sup> For the case-law regarding attachment of embassy bank accounts, see e.g. *Birch Shipping Corp. v. Embassy of Tanzania* (1980) (United States of America, *Federal Supplement*, vol. 507 (1981), p. 311); *Alcom Ltd. v. Republic of Colombia* (1984) (*The All England Law Reports, 1984*, vol. 2, p. 6); *X v. Republic of the Philippines*, decision of 13 December 1977 of the Federal Constitutional Court of the Federal Republic of Germany (United Nations, *Materials on Jurisdictional Immunities . . .*, p. 297).

246. Subparagraph (e) was considered by some members of the Commission as essential and particularly important to the developing countries and to their efforts to protect their national heritage. It was proposed that "religious heritage" should be added to cultural heritage. Some reservations were also expressed regarding the scope of the subparagraph, since it seemed to cover works of artistic or historic value that were in private hands. In many countries, the State imposed restrictions upon the export of such items, but without affecting their character as purely private property. Property of that kind, it was believed, should not be covered by State immunity and the article should not even imply it.

247. In the light of the discussions held in the Commission, the Special Rapporteur prepared and submitted a new title for part IV as well as revised texts of draft articles 21 to 24 for the consideration of the Drafting Committee, which will take up these articles at the Commission's next session, in 1986.<sup>206</sup>

<sup>206</sup> The new title of part IV and the revised texts of draft articles 21 to 24 submitted by the Special Rapporteur for the consideration of the Drafting Committee read as follows:

#### "PART IV

#### "STATE IMMUNITY IN RESPECT OF PROPERTY FROM ENFORCEMENT MEASURES

##### "Article 21. Scope of the present part

"The present part applies to the immunity of one State in respect of its property, or property in its possession or control or in which it has an interest, from judicial measures of constraint upon the use of such property, including attachment, arrest and execution, in connection with a proceeding before a court of another State."

##### "Article 22. State immunity from enforcement measures

"A State is immune without its consent in respect of its property, or property in its possession or control or in which it has an interest, from judicial measures of constraint upon the use of such property, including attachment, arrest and execution, in connection with a proceeding before a court of another State, unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgment or any other debts."

##### "Article 23. Effect of express consent to enforcement measures

"1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint upon the use of its property, or property in its possession or control or in which it has an interest, in a proceeding before a court of another State if the property in question is located in the State of the forum and it has expressly consented to the exercise of judicial measures of constraint upon the property, which it has specifically identified for that purpose:

"(a) by international agreement; or

"(b) in a written contract; or

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

"2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under part IV of the present articles, for which a separate waiver is required."

##### "Article 24. Types of property generally immune from enforcement measures

"1. Unless otherwise expressly and specifically agreed by the State concerned, no judicial measure of constraint by a court of

(Continued on next page.)

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

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

#### PART I INTRODUCTION

##### *Article 1. Scope of the present articles*<sup>207</sup>

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*<sup>208</sup>

#### 1. For the purposes of the present articles :

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

...

(g) "commercial contract" means :

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services ;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction ;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

...

(Footnote 206 continued.)

another State shall be permitted upon the use of the following property :

"(a) property used or intended for use for diplomatic or consular purposes or for the purposes of special missions or representation of States in their relations with international and regional organizations protected by inviolability ; or

"(b) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of a State ; or

"(c) property of a central bank held by it for central banking purposes and not allocated to any specific payments ; or

"(d) property of a State monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgment or any other debts ; or

"(e) public property forming part of the national archives of a State or of its distinct national cultural heritage.

"2. In no circumstances shall any property listed in paragraph 1 be regarded as property used or intended for use for commercial and non-governmental purposes."

<sup>207</sup> Text provisionally adopted by the Commission at its thirty-fourth session, during which the article was re-examined. For the commentary thereto, see *Yearbook . . . 1982*, vol. II (Part Two), pp. 99-100. An earlier version of the article was provisionally adopted by the Commission at its thirty-second session (*ibid.*, p. 94, footnote 209).

<sup>208</sup> The Commission adopted the text of paragraph 1 (a) at its thirty-fourth session during its consideration of article 7, dealing with the modalities for giving effect to State immunity. For the commentary to that text, *ibid.*, p. 100. The Commission adopted the text of paragraph 1 (g) at its thirty-fifth session, during its consideration of article 12, dealing with commercial contracts. For the commentary to that text, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 34-35.

##### *Article 3. Interpretative provisions*<sup>209</sup>

...

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

#### PART II

#### GENERAL PRINCIPLES

##### *Article 6. State immunity*<sup>210</sup>

##### *Article 7. Modalities for giving effect to State immunity*<sup>211</sup>

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

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

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

##### *Article 8. Express consent to the exercise of jurisdiction*<sup>212</sup>

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.

<sup>209</sup> The Commission adopted the text of paragraph 2 of article 3 at its thirty-fifth session during its consideration of article 12, dealing with commercial contracts. For the commentary to that text, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 35-36.

<sup>210</sup> Article 6 as provisionally adopted at the thirty-second session read as follows :

##### *Article 6. State immunity*

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

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

For the commentary to the article, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 142 *et seq.*

Article 6 was further discussed by the Commission at its thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee, the Commission agreed to re-examine article 6 at its future sessions. The Drafting Committee proceeded to a brief examination of article 6 at the present session, but was unable to complete it owing to lack of time.

<sup>211</sup> Provisionally adopted by the Commission at its thirty-fourth session ; for the commentary, see *Yearbook . . . 1982*, vol. II (Part Two), pp. 100 *et seq.*

<sup>212</sup> Provisionally adopted by the Commission at its thirty-fourth session ; for the commentary, *ibid.*, pp. 107 *et seq.*



*Article 9. Effect of participation in a proceeding before a court*<sup>213</sup>

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*<sup>214</sup>

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

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

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

## PART III

EXCEPTIONS TO STATE IMMUNITY<sup>215</sup>*Article 12. Commercial contracts*<sup>216</sup>

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

2. Paragraph 1 does not apply :

- (a) in the case of a commercial contract concluded between States or on a government-to-government basis ;
- (b) if the parties to the commercial contract have otherwise expressly agreed.

*Article 13. Contracts of employment*<sup>217</sup>

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

and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if :

- (a) the employee has been recruited to perform services associated with the exercise of governmental authority ;
- (b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual ;
- (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded ;
- (d) the employee is a national of the employer State at the time the proceeding is instituted ;
- (e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

*Article 14. Personal injuries and damage to property*<sup>218</sup>

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

*Article 15. Ownership, possession and use of property*<sup>219</sup>

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

- (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum ; or
- (b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia* ; or
- (c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt ; or
- (d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up ; or
- (e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

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

- (a) which is in the possession or control of the State ; or
- (b) in which the State claims a right or interest,

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

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

<sup>213</sup> Provisionally adopted by the Commission at its thirty-fourth session ; for the commentary, *ibid.*, pp. 109 *et seq.*

<sup>214</sup> Provisionally adopted by the Commission at its thirty-fifth session ; for the commentary, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 22 *et seq.*

<sup>215</sup> The title of part III will be re-examined after the Commission has considered all possible exceptions.

<sup>216</sup> Provisionally adopted by the Commission at its thirty-fifth session ; for the commentary, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 25 *et seq.*

<sup>217</sup> Provisionally adopted by the Commission at its thirty-sixth session ; for the commentary, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 63-66.

<sup>218</sup> Provisionally adopted by the Commission at its thirty-sixth session ; for the commentary, *ibid.*, pp. 66-67.

<sup>219</sup> Provisionally adopted by the Commission at its thirty-fifth session ; for the commentary, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 36 *et seq.*

*Article 16. Patents, trade marks and intellectual or industrial property*<sup>220</sup>

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

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

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

*Article 17. Fiscal matters*<sup>221</sup>

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

*Article 18. Participation in companies or other collective bodies*<sup>222</sup>

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body :

(a) has participants other than States or international organizations ; and

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

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

*Article 19. State-owned or State-operated ships engaged in commercial service*<sup>223</sup>

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

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

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

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

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

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

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the

<sup>220</sup> Provisionally adopted by the Commission at its thirty-sixth session ; for the commentary, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 67-69.

<sup>221</sup> Provisionally adopted by the Commission at its thirty-sixth session ; for the commentary, *ibid.*, pp. 69-70.

<sup>222</sup> Provisionally adopted by the Commission at its thirty-sixth session ; for the commentary, *ibid.*, pp. 70-72.

<sup>223</sup> Provisionally adopted by the Commission at its present session ; for the commentary, see subsection 2 below.

carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

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

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

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

*Article 20. Effect of an arbitration agreement*<sup>224</sup>

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

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

(b) the arbitration procedure,

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

2. TEXTS OF ARTICLES 19 AND 20, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION

PART III

EXCEPTIONS TO STATE IMMUNITY<sup>225</sup>

. . .

*Article 19. State-owned or State-operated ships engaged in commercial service*

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

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

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

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

(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.

<sup>224</sup> *Ibid.*

<sup>225</sup> See footnote 215 above.

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

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

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

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

#### Commentary

(1) Draft article 19 is concerned with a very important area of maritime law as it relates to the conduct of external trade. It is entitled "State-owned or State-operated ships engaged in commercial service". The expression "ship" in this context should be interpreted as covering all types of seagoing vessels, whatever their nomenclature and even if they are engaged only partially in seagoing traffic. It is formulated as a residual rule, since States can always conclude agreements or arrangements<sup>226</sup> allowing, on a reciprocal basis or otherwise, for the application of jurisdictional immunities in respect of ships in commercial service owned or operated by States or their agencies.

(2) Paragraphs 1 to 3 are exclusively concerned with ships engaged in commercial service, and paragraphs 4 and 5 with the status of cargo. Paragraph 4 enunciates the rule of non-immunity in proceedings relating to the carriage of cargo on board a ship owned or operated by a State and engaged in commercial non-governmental service. Paragraph 5 maintains State immunity in respect of any cargo carried on board the ships referred to in paragraph 2 as well as of any cargo belonging to a State and

used or intended for use in government non-commercial service.

(3) The difficulties inherent in the formulation of rules for the exception provided for under article 19 are manifold. They are more than linguistic. The English language presupposes the employment of terms that may be in current usage in the terminology of common law but are unknown to and have no equivalents in other legal systems. Thus the expressions "suits in admiralty", "libel *in rem*", "maritime lien" and "proceedings *in rem* against the ship", may have little or no meaning in the context of civil law or other non-common-law systems. That is why the terms used in article 19 as originally submitted by the Special Rapporteur have been replaced by terms that could have a more general application.

(4) There are also conceptual difficulties surrounding the possibilities of proceedings *in rem* against ships, for example by service of writs on the main mast of the ship, or by arresting the ship in port, or attaching it and releasing it on bond. In addition, there is a special process of arrest *ad fundandam jurisdictionem*. In some countries, it is possible to proceed against another merchant ship in the same ownership as the ship in respect of which the claim arises, on the basis of what is known as sister-ship jurisdiction, for which provision is made in the International Convention relating to the Arrest of Seagoing Ships (Brussels, 1952).<sup>227</sup>

(5) The problem of government-owned or State-operated vessels employed in ordinary commercial activities is not new. This is apparent from the vivid account given by one author<sup>228</sup> and confirmed by the fact that some maritime Powers felt it necessary to convene a conference to adopt the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926)<sup>229</sup> and its Additional Protocol (1934)<sup>230</sup> on the subject. The main purpose of the 1926 Brussels Convention was to reclassify seagoing vessels not according to ownership but according to the nature of their operation (*exploitation*) or their use, whether in "governmental and non-commercial" or in "commercial" service.

(6) The dichotomy of service of vessels, classified according to a dual criterion of "commercial and non-governmental" or "governmental and non-commercial" use, was pointed out by Gilbert Gidel.<sup>231</sup> The term "governmental and non-commercial" is used in the 1926 Brussels Convention, and the term "government non-commercial" in conventions of a universal character such as the Convention on the High Seas (Geneva, 1958)<sup>232</sup> and the 1982 United Nations Convention on the Law of the Sea,<sup>233</sup> in

<sup>226</sup> See, for example, the Protocol of 1 March 1974 to the Treaty of Merchant Navigation of 3 April 1968 between the United Kingdom and the Soviet Union (United Kingdom, *Treaty Series No. 104* (1977)). See also the treaties on maritime navigation concluded between the Soviet Union and the following States: France, Maritime Agreement of 20 April 1967 (art. 14) (United Nations, *Treaty Series*, vol. 1007, p. 183); Netherlands, Agreement of 28 May 1969 concerning shipping (art. 16) (*ibid.*, vol. 815, p. 159); Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Agreement of 3 December 1971 on co-operation with regard to maritime merchant shipping (art. 13) (*ibid.*, vol. 936, p. 19); Algeria, Agreement of 18 April 1973 concerning maritime navigation (art. 16) (*ibid.*, vol. 990, p. 211); Iraq, Agreement of 25 April 1974 on maritime merchant shipping (art. 15); Portugal, Agreement of 20 December 1974 on maritime navigation (art. 15). Cf. M. M. Boguslavsky, "Foreign State immunity: Soviet doctrine and practice", *Netherlands Yearbook of International Law* (Alphen aan den Rijn), vol. X (1979), pp. 173-174.

<sup>227</sup> United Nations, *Treaty Series*, vol. 439, p. 193.

<sup>228</sup> See, for example, G. van Slooten, "La Convention de Bruxelles sur le statut juridique des navires d'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VII (1926), p. 453, in particular p. 457.

<sup>229</sup> League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

<sup>230</sup> *Ibid.*, p. 214.

<sup>231</sup> G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. I, pp. 98-99.

<sup>232</sup> United Nations, *Treaty Series*, vol. 450, p. 11.

<sup>233</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 157, document A/CONF.62/122.

which ships are classified according to their use, i.e. governmental and non-commercial service as opposed to commercial service.

(7) Some members of the Commission expressed misgivings concerning that dual criterion, as it might suggest the possibility of a very different combination of the two adjectives, such as "governmental commercial" service or "commercial and governmental" service. Other members, on the other hand, denied the likelihood of that interpretation, and considered that "commercial" and "non-governmental" could be taken cumulatively. Others again added that States, particularly developing countries, and other public entities could engage in activities of a commercial and governmental nature without submitting to the jurisdiction of national courts. Furthermore, the purchase of armaments was often concluded on a government-to-government basis, including the transport of such armaments by any type of carrier, which would not normally be subject to the exercise of jurisdiction by any national court. The diversity of views led the Commission to maintain square brackets round the phrase "non-governmental" in paragraphs 1 and 4 of the draft article.

(8) Some members opposed the retention of the expression "non-governmental" which appeared in square brackets in paragraphs 1 and 4.

(9) While some other members did not insist on the retention of that expression, holding that the wording in paragraph 2, if adopted, could also be so interpreted as to cover the situation envisaged with the addition of the adjective "non-governmental" in square brackets, a few other members still found it useful to maintain those words.

(10) The words "operate" (*exploiter*) and "operation" (*exploitation*) in paragraph 1 must be understood against the background of the 1926 Brussels Convention and existing State practice. Both terms refer to the exploitation or operation of ships in the transport of goods and passengers by sea. The carriage of goods by sea constitutes an important subject in international trade law. Its study has been undertaken by UNCITRAL, and a standard convention or legislation on maritime law or the law of carriage of goods by sea<sup>234</sup> has been proposed to serve as a model for developing countries which are contemplating national legislation on the subject. The subject covers a wide field of maritime activities, from organization of the merchant marine, construction and building of a merchant fleet, training of master and crew, establishment of forwarding and handling agents, and taking of marine insurance. More generally known are questions relating to the liabilities of carriers for the carriage of dangerous goods or of animals, the discharge of oil off-shore away from port, collision at sea, salvage and repair, general average, seamen's wages, maritime liens and mortgages. The concept of the operation of merchant ships or ships engaged in commerce is given some clarification by way of illustration in paragraph 3. The expression "State-operated ships" covers also the "possession", "control", "management" and "charter" of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise.

<sup>234</sup> See the 1978 United Nations Convention on the Carriage of Goods by Sea (*Yearbook of the United Nations Commission on International Trade Law*, vol. IX (1978) (United Nations publication, Sales No. E.80.V.8), p. 212).

(11) Some members expressed a reservation regarding a point in paragraph 1. The question was raised why a State, owning a ship but allowing a separate entity to operate it, could still be proceeded against. The answer lay in the special nature of proceedings *in rem* or in admiralty or maritime lien which might be provided for in some common-law countries, and which were directed to all persons having an interest in the ship or cargo. In practice, a State owning a ship but not operating it should not otherwise be held liable for its operation at all, as the corporation or operating entity existed to answer for all liabilities arising out of the operation of that ship.

The question was one of the choice of parties against which to bring an action. According to that view, it should be possible to allow actions to proceed relating to the operation of the ship without involving the State or its claim for jurisdictional immunity. There seemed to be no need in such a case to institute a proceeding *in personam* against the State owning the ship as such, particularly if the cause of action related to its operation, such as collision at sea, general average, or carriage of goods by sea. But if the proceeding related to repairs or salvage services rendered to the ship, it might be difficult in some legal systems to imagine that the owner did not benefit from the repairs or services rendered and that the operator alone was liable. Further mutual understanding may be needed in this connection to avoid unnecessary embarrassment, such as a proceeding against the State for which a more convenient defendant could be substituted, namely, the entity or corporation set up for the operation of the merchant marine and purposely made answerable for whatever causes of action might have arisen in connection with the operation or exploitation of the ship. If such an eventuality occurred, a State owning but not operating the vessel could allow the operator to appear in its place to answer the complaint or claim made. The practice is slowly evolving in this direction through bilateral arrangements.

(12) Paragraph 2 enunciates the rule of State immunity in favour of warships and naval auxiliaries, even though such vessels may be employed occasionally for the carriage of cargoes for such purposes as to cope with an emergency or other natural calamities. Immunity is also maintained for other government ships such as police patrol boats, customs inspection boats, oceanographic survey ships, training vessels and dredgers, owned or operated by a State and used or intended for use in government non-commercial service.

(13) It is important to note that paragraphs 1 and 2 apply to both "use" and "intention to use". The application of the criterion of use of the ship, which may be actual and current but also eventual or intended, is thus clarified. A ship under construction may not be in actual use, but the intention of the user may be well known or apparent, either from the fitting of the ship with loading and unloading gear or from the nature of the State agencies that ordered the construction, if the character of the ship, such as a transport, does not *per se* determine its destined use. A ship may also be put to a different use — so different as to alter its character. Thus an ordinary merchant ship may be requisitioned by a Government and converted into a warship, but, before its actual commission or use as a man-of-war, attempts may be made to arrest or attach the ship intended for use as a warship. Such arrest or attachment would not be permitted under the test of "intended

for use". Thus the schooner *Exchange* was not, at the material time, intended for use as a trading vessel but as a frigate, and therefore had to be released.<sup>235</sup>

(14) The adverb "exclusively" inserted between "intended" and "for use for commercial [non-governmental] purposes" raised some difficulties, and doubts were expressed regarding its usefulness in that context.

(15) The expression "before a court of another State which is otherwise competent in any proceeding" is designed to refer back (*renvoyer*) to the existing jurisdiction of the courts competent under the internal law, including the maritime law, of the forum State, which may recognize a wide variety of causes of action and may allow a possible choice of proceedings, such as *in personam* against the owner and operator or *in rem* against the ship itself, or suits in admiralty or actions to enforce a maritime lien or to foreclose a mortgage. A court may be competent on a variety of grounds, including the presence of the ship at a port of the forum State, and it need not be the same ship as the one, that caused damage at sea or had other liabilities but a similar merchant ship belonging to the same owner. Courts in common-law systems generally recognize the possibility of arrest or seizure of a sister ship *ad fundam jurisdictionem*, but once bond is posted the ship would be released and the proceedings allowed to continue. Thus the expression "any proceeding" refers to "any type of proceeding", regardless of its nature, whether *in rem*, *in personam*, in admiralty or otherwise. The rules enunciated in paragraphs 1 and 2 are supported by State practice, both judicial and governmental, as well as by multilateral and bilateral treaties.<sup>236</sup>

(16) Another question was raised regarding the rule of non-immunity contained in paragraph 4 as well as, to some extent, in paragraph 1, applicable to a cargo belonging to a State and used or intended for use for commercial non-governmental purposes. According to one view, it was difficult to see how property such as a ship or cargo could be State-owned and used by the State for non-governmental purposes. According to that view, therefore, every use made by a State of its property must be essentially governmental and consequently not commercial.

(17) Paragraph 5 is designed to maintain immunity for any cargo, commercial or non-commercial, carried on board the ships referred to in paragraph 2, as well as for any cargo belonging to a State and used, or intended for use, in government non-commercial service. This provision maintains immunity for, *inter alia*, cargo involved in emergency operations such as food relief or transport of medical supplies.

(18) Paragraphs 6 and 7 apply to both ships and cargoes and are designed to strike an appropriate balance between the State's non-immunity under paragraphs 1 and 4 and a certain protection to be afforded the State. Paragraph 6 reiterates that States owning and operating ships engaged in commercial service may invoke all measures of defence, prescription and limitation of liability that are available to private ships and cargoes and their owners.

Paragraph 7 indicates a practical method for proving the government and non-commercial character of the ship or cargo, as the case may be, by a certificate signed in normal circumstances by the accredited diplomatic representative of the State to which the ship or cargo belongs. In the absence of an accredited diplomatic representative, a certificate signed by another competent authority, such as the Minister of Transport or the consular officer concerned, shall serve as evidence before the court. The communication of the certificate to the court will of course be governed by the applicable rules of procedure of the forum State.

#### Article 20. Effect of an arbitration agreement

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

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

(b) the arbitration procedure,

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

#### Commentary

(1) Draft article 20 is now entitled "Effect of an arbitration agreement" and not simply "Arbitration", as previously suggested by the Special Rapporteur. The longer title is preferred to ensure greater precision. The article is based upon the concept of implied consent to the supervisory jurisdiction of a court of another State which is otherwise competent to determine questions connected with the arbitration agreement, such as the validity of the obligation to arbitrate or to go to arbitration or to compel the settlement of a difference by arbitration, the interpretation and validity of the arbitration clause or agreement, the arbitration procedure and the setting aside of arbitral awards.

(2) The draft article was originally designed to cover arbitration of differences relating to a "civil or commercial matter". While some members of the Commission suggested the possibility of widening the scope of that exception to cover arbitration of differences other than those relating to a "civil and commercial matter", other members were more disposed to accept that exception only if limited to differences relating to a "contract" or a "commercial contract", as defined in article 2, paragraph 1 (g). The expressions "commercial contract" and "civil or commercial matter" have been placed in square brackets as alternative confines of the exception relating to an arbitration agreement.

(3) The expression "the court which is otherwise competent" in this context refers to the competence of a court, if any, to exercise supervisory jurisdiction under the internal law of the State of the forum, including in particular its rules of private international law, in a proceeding relating to the arbitration agreement. A court may be competent to exercise such supervisory jurisdiction in regard to a commercial arbitration for one or more reasons. It may be

<sup>235</sup> *The Schooner "Exchange" v. McFaddon and others* (1812) (W. Cranch, Reports of Cases Argued and Adjudged in the Supreme Court of the United States, vol. VII, 3rd ed. (New York, 1911), pp. 135-137).

<sup>236</sup> See the sixth report of the Special Rapporteur, *Yearbook* . . . 1984, vol. II (Part One), pp. 30 *et seq.*, document A/CN.4/376 and Add.1 and 2, paras. 136-230.

competent in normal circumstances because the seat of the arbitration is located in the territory of the State of the forum, or because the parties to the arbitration agreement have chosen the internal law of the forum as the applicable law of the arbitration. It may also be competent because the property seized or attached is situated in the territory of the forum.

(4) It should be pointed out in this connection that it is the growing practice of States to create conditions more attractive and favourable for parties to choose to have their differences arbitrated in their territory. One of the attractions is an endeavour to simplify the procedures of judicial control. Thus the United Kingdom and Malaysia have amended their legislation regarding supervisory jurisdiction applicable to arbitration in general. The fact remains that, in spite of this trend, many countries, such as Thailand and Australia, continue to maintain more or less strict judicial control or supervision of arbitration in civil, commercial and other matters taking place within the territory of the forum State. Thus it is possible, in a given instance, either that the court which is otherwise competent may decline to exercise supervisory jurisdiction, or that it may have its jurisdiction restricted as a result of new legislation. Furthermore, the exercise of supervisory jurisdiction may have been excluded, at least in some jurisdictions, by the option of the parties to adopt an autonomous type of arbitration, such as the arbitration of the International Centre for Settlement of Investment Disputes (ICSID) or to regard arbitral awards as final, thereby precluding judicial intervention at any stage. The proviso "unless the arbitration agreement otherwise provides" is designed to cover the option freely expressed by the parties concerned which may serve to take the arbitration procedure out of domestic judicial control. Some courts may still insist on the possibility of supervision or control over arbitration despite the expression of unwillingness on the part of the parties. In any event, agreements to arbitrate are binding on the parties thereto, although their enforcement may have to depend, at some point, on judicial participation.

(5) For the reasons indicated, submission to commercial arbitration under this article constitutes an expression of consent to all the consequences of acceptance of the obligation to settle differences by the type of arbitration clearly specified in the arbitration agreement. It is merely incidental to the obligation to arbitrate undertaken by a State that a court of another State, which is otherwise competent, may be prepared to exercise its existing supervisory jurisdiction in connection with the arbitration agreement, including the arbitration procedure and other matters arising out of the arbitration agreement or compromissary clause.

(6) Consent to arbitration is as such no waiver of immunity from the jurisdiction of a court which would otherwise be competent to decide the dispute or difference on the merits. However, consenting to a commercial arbitration necessarily implies consent to all the natural and

logical consequences of the commercial arbitration contemplated. In this limited area only, it may therefore be said that consent to arbitration by a State entails consent to the exercise of supervisory jurisdiction by a court of another State, competent to supervise the implementation of the arbitration agreement.

(7) It is important to note by way of commentary that the draft article refers to "arbitration agreement" between a State and a foreign natural or juridical person, and not between States themselves or between States and international organizations. Also excluded from this article are the types of arbitration provided by treaties between States or those that bind States to settle differences between themselves and nationals of other States, such as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 1965),<sup>237</sup> which is self-contained and autonomous, and contains provisions for execution of the awards. This does not prevent States and international organizations from concluding arbitration agreements that may entail consequences of submission to the supervisory jurisdiction of the forum State.

(8) It should also be added that, of the several types of arbitration available to States as peaceful means of settling various categories of disputes, only the type between States and foreign natural and juridical persons is contemplated in this article. Arbitration of this type may take any form, such as arbitration under the rules of the International Chamber of Commerce or UNCITRAL, or other institutionalized or *ad hoc* commercial arbitration. Submission of an investment dispute to ICSID arbitration, for instance, is not submission to the kind of commercial arbitration envisaged in this draft article and can in no circumstances be interpreted as a waiver of immunity from the jurisdiction of a court which is otherwise competent to exercise supervisory jurisdiction in connection with a commercial arbitration, such as an International Chamber of Commerce arbitration or an arbitration under the aegis of the American Arbitration Association.<sup>238</sup>

(9) The article in no way seeks to add to or detract from the existing jurisdiction of the courts of any State, nor to interfere with the role of the judiciary in any given legal system in the judicial control and supervision which it may be expected or disposed to exercise to ensure the morality and public order in the administration of justice needed to implement the arbitral settlement of differences. Only in this narrow sense is it correct to state that submission to commercial arbitration by a State entails an implied acceptance of the supervisory jurisdiction of a court of another State otherwise competent in matters relating to the arbitration agreement.

<sup>237</sup> United Nations, *Treaty Series*, vol. 575, p. 159.

<sup>238</sup> See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (United States of America, intervenor) (1982) (*Federal Reporter, 2nd Series*, vol. 693 (1983), p. 1094).

## Chapter VI

### RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

#### A. Introduction

248. The topic entitled "Relations between States and international organizations" has been studied by the Commission in two parts. The first part, relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session, in 1971, when it adopted a set of draft articles and submitted them to the General Assembly.<sup>239</sup>

249. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference which was convened in Vienna in 1975 and which adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.<sup>240</sup>

250. At its twenty-eighth session, in 1976, the Commission commenced its consideration of the second part of the topic, dealing with the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States.<sup>241</sup>

251. The second part of the topic was the subject of two previous reports submitted by the former Special Rapporteur, the late Abdullah El-Erian.

252. The Special Rapporteur submitted his first (preliminary) report<sup>242</sup> to the Commission at its twenty-ninth session, in 1977. At the conclusion of its debate, the Commission authorized the Special Rapporteur to continue his study of the second part of the topic along the lines indicated in the preliminary report. The Commission also decided that the Special Rapporteur should seek additional information and expressed the hope that he would carry out his research in the normal way, by examining *inter alia* the agreements concluded and the practices followed by international organizations, whether within or outside the United Nations system, and also the legislation and practice of States. Those conclusions of the Commission regarding its work on the second part of the topic were subsequently endorsed by the General Assembly, in paragraph 6 of its resolution 32/151 of 19 December 1977.

253. Pursuant to the authority to seek additional information to assist the Special Rapporteur and the Commission, the Legal Counsel of the United Nations, by a letter of 13 March 1978 addressed to the heads of the specialized agencies and IAEA, circulated a questionnaire aimed at eliciting information concerning the practice of the specialized agencies and IAEA relating to the status, privileges and immunities of those organizations, their officers, experts and other persons engaged in their activities, not being representatives of States. The replies to the questionnaire were intended to supplement the information gathered from a similar questionnaire circulated to the same organizations on 5 January 1965, which had formed the basis of a study prepared by the Secretariat in 1967 entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".<sup>243</sup>

254. The former Special Rapporteur on the topic submitted his second report<sup>244</sup> to the Commission at its thirtieth session, in 1978.

255. The Commission discussed the second report of the Special Rapporteur at that session.<sup>245</sup> Among the questions raised in the course of the discussion were: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by Governments for the express purpose of engaging in operational—and sometimes even commercial—activities, and difficulty of applying to them the general rules of international immunities; relationship between the privileges and immunities of international organizations and their responsibilities; responsibility of States to ensure respect by their nationals of their obligations as international officials; need to study the case-law of national courts in the sphere of international immunities; need to define the legal capacity of international organizations at the level of both internal and international law; need to study the proceedings of committees on host country relations, such as that functioning at the Headquarters of the

<sup>239</sup> *Yearbook* . . . 1971, vol. II (Part One), pp. 284 *et seq.*, document A/8410/Rev.1, chap. II, sects C and D.

<sup>240</sup> United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

<sup>241</sup> *Yearbook* . . . 1976, vol. II (Part Two), p. 164, para. 173.

<sup>242</sup> *Yearbook* . . . 1977, vol. II (Part One), p. 139, document A/CN.4/304.

<sup>243</sup> *Yearbook* . . . 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

<sup>244</sup> *Yearbook* . . . 1978, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

<sup>245</sup> See *Yearbook* . . . 1978, vol. I, pp. 260 *et seq.*, 1522nd meeting (paras. 22 *et seq.*), 1523rd meeting (paras. 6 *et seq.*) and 1524th meeting (para. 1); and *Yearbook* . . . 1978, vol. II (Part Two), pp. 146-147, paras. 155-156.



United Nations in New York ; need to analyse the relationship between the scope of the privileges and immunities of the organizations and their particular functions and objectives.

256. At the end of its debate, the Commission approved the conclusions and recommendations set out in the second report of the Special Rapporteur. From those conclusions it was evident that :

(a) General agreement existed both in the Commission and in the Sixth Committee of the General Assembly on the desirability of the Commission taking up the study of the second part of the topic "Relations between States and international organizations" ;

(b) The Commission's work on the second part of the topic should proceed with great prudence ;

(c) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, inasmuch as the study should include regional organizations. The final decision on whether to include such organizations in the eventual codification could be taken only when the study was completed ;

(d) The same broad outlook should be adopted in connection with the subject-matter of the study, inasmuch as the question of priority would have to be deferred until the study was completed.

257. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz González Special Rapporteur for the topic to succeed Mr. Abdullah El-Erian, who had resigned upon his election to the ICJ.<sup>246</sup>

258. Owing to the priority that the Commission had assigned, upon the recommendation of the General Assembly, to the conclusion of its studies on a number of topics in its programme of work with respect to which the process of preparing draft articles was already advanced, the Commission did not take up the topic during its thirty-second session, in 1980, or during its subsequent sessions, and resumed its work on it only at its thirty-fifth session, in 1983.

259. The Commission resumed its consideration of the topic at its thirty-fifth session on the basis of a preliminary report<sup>247</sup> submitted by the present Special Rapporteur.

260. In the preliminary report, the Special Rapporteur gave a concise history of the work done so far by the Commission on the topic, indicating the major questions that had been raised during the discussions on the previous reports,<sup>248</sup> and outlining the major decisions taken by the Commission concerning its approach to the study of the topic.<sup>249</sup>

261. The report was designed to offer an opportunity to the Commission in its enlarged membership, and especially to its new members, to express views, opinions and suggestions on the lines the Special Rapporteur should follow in his study of the topic, having regard to the issues raised and the conclusions reached by the Commission during the discussion of the two previous reports mentioned above.

262. It emerged from the Commission's discussion of the Special Rapporteur's preliminary report<sup>250</sup> that nearly all the members were in agreement with the conclusions endorsed by the Commission at its thirtieth session, in 1978 (see paragraph 255 above), and referred to in the preliminary report.

263. Virtually all the members of the Commission who spoke during the debate emphasized that the Special Rapporteur should be allowed considerable latitude and should proceed with great caution, endeavouring to adopt a pragmatic approach to the topic in order to avoid protracted discussions of a doctrinaire, theoretical nature.

264. In accordance with the Special Rapporteur's summing-up at the end of the discussion, the Commission reached the following conclusions :

(a) The Commission should take up the study of the second part of the topic "Relations between States and international organizations" ;

(b) That work should proceed with great prudence ;

(c) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, inasmuch as the study should include regional organizations. The final decision on whether to include such organizations in a future codification should be taken only when the study was completed ;

(d) The same broad outlook should be adopted in connection with the subject-matter of the study, in order to determine the order of work on the topic and the desirability of carrying it out in several stages ;

(e) The Secretariat should be requested to revise the study prepared in 1967 on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" and to update that study in the light of the replies to the further questionnaire which had been sent out on 13 March 1978, by letter of the Legal Counsel of the United Nations addressed to the legal counsels of the specialized agencies and IAEA, in connection with the status, privileges and immunities of those organizations, except in matters pertaining to representatives of States, and which complemented the questionnaire on the same topic sent out on 5 January 1965 ;

(f) The Legal Counsel of the United Nations should be requested to send the legal counsels of regional organizations a questionnaire similar to that circulated to the legal counsels of the specialized agencies and IAEA, with a view to gathering information of the same kind as that acquired through the two questionnaires sent to the United Nations specialized agencies and IAEA in 1965 and 1978.

## B. Consideration of the topic at the present session

265. At its thirty-seventh session, the Commission had before it the second report submitted by the Special Rapporteur (A/CN.4/391 and Add.1).<sup>251</sup> In his second report, the Special Rapporteur examined the question of the notion of an international organization and possible ap-

<sup>246</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 189, para. 196.

<sup>247</sup> *Yearbook* . . . 1983, vol. II (Part One), p. 227, document A/CN.4/370.

<sup>248</sup> *Ibid.*, p. 228, para. 9.

<sup>249</sup> *Ibid.*, para. 11.

<sup>250</sup> See *Yearbook* . . . 1983, vol. I, pp. 237 *et seq.*, 1796th to 1798th meetings and 1799th meeting (paras. 1 to 11).

<sup>251</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One).



proaches to the scope of the future draft articles on the topic, as well as the question of the legal personality of international organizations and the legal powers deriving therefrom. Regarding the latter question, the Special Rapporteur proposed to the Commission a draft article with two alternatives in regard to its presentation.<sup>252</sup> The Commission also had before it a supplementary study prepared at the Commission's request (see paragraph 264 (e) above) by the Secretariat on the basis of replies received to the questionnaire sent by the Legal Counsel of the United Nations to the legal counsels of the specialized agencies and IAEA, on the practice of those organizations concern-

ing their status, privileges and immunities (A/CN.4/L.383 and Add.1-3).<sup>253</sup>

266. The Commission considered the topic at its 1925th to 1927th and 1929th meetings, from 15 to 18 July 1985, focusing its discussion on the matters dealt with by the Special Rapporteur in his second report.

267. At the end of the discussion, the Commission reached the following conclusions :

(a) The Commission held a very useful debate on the topic and expressed appreciation for the efforts made by the Special Rapporteur to enable the Commission to achieve substantial progress on the topic and for his flexibility in referring to the Commission the decisions on the next steps to be taken ;

(b) The short time available for the discussion of the topic at the present session did not enable the Commission to take a decision at that stage on the draft article submitted by the Special Rapporteur, and made it advisable to resume the discussion at the Commission's thirty-eighth session to enable more members to express their views on the matter ;

(c) The Commission looks forward to the report which the Special Rapporteur has expressed the intention to present at its thirty-eighth session ;

(d) In this connection, the Special Rapporteur may examine the possibility of submitting at the thirty-eighth session of the Commission his concrete suggestions, bearing in mind the views expressed by members of the Commission, on the possible scope of the draft articles to be prepared on the topic ;

(e) The Special Rapporteur may also consider the possibility of presenting at the Commission's thirty-eighth session a schematic outline of the subject-matter to be covered by the various draft articles he intends to prepare on the topic ;

(f) It would be useful if the Secretariat could submit to the members of the Commission, at its thirty-eighth session, copies of the replies to the questionnaire referred to in paragraph 264 (f) above.

<sup>252</sup> The two alternatives for the draft article presented by the Special Rapporteur read as follows :

*"Title I. Legal personality*

"ALTERNATIVE A

*"Article 1*

"1. International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to :

"(a) contract ;

"(b) acquire and dispose of movable and immovable property ;  
and

"(c) institute legal proceedings.

"2. The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization."

"ALTERNATIVE B

*"Article 1*

"International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to :

"(a) contract ;

"(b) acquire and dispose of movable and immovable property ;  
and

"(c) institute legal proceedings.

*"Article 2*

"The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization."

<sup>253</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One).

## Chapter VII

### THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

#### A. Introduction

268. The Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work at its twenty-third session, in 1971,<sup>254</sup> in response to the recommendation made by the General Assembly in its resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report of the Secretary-General on legal problems relating to the non-navigational uses of international watercourses.<sup>255</sup> At the same session, the Commission established a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, chaired by Mr. Richard D. Kearney. The Sub-Committee submitted a report<sup>256</sup> which proposed the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee during the same session and also appointed Mr. Kearney Special Rapporteur for the topic.<sup>257</sup>

269. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States<sup>258</sup> to the questionnaire<sup>259</sup> which had been circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur.<sup>260</sup> At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from Governments, and dealt with in the report submitted by the Special Rapporteur, concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The Commission's consideration of the topic at that session

"led to general agreement . . . that the question of determining the scope of the term 'international watercourses' need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses".<sup>261</sup>

270. 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 reelection to the Commission.<sup>262</sup> 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,<sup>263</sup> which contained 10 draft articles. At that session the Commission held a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole.

271. Mr. Schwebel submitted a second report, containing six draft articles, at the Commission's thirty-second session, in 1980.<sup>264</sup> 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 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.

#### *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.

<sup>254</sup> See *Yearbook . . . 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

<sup>255</sup> *Yearbook . . . 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

<sup>256</sup> *Yearbook . . . 1974*, vol. II (Part One), p. 301, document A/9610/Rev. 1, chap. V, annex.

<sup>257</sup> *Ibid.*, p. 301, para. 159.

<sup>258</sup> *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 received from the Governments of 11 additional Member States; see *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.

<sup>259</sup> The final text of the questionnaire, as communicated to Member States, is reproduced in *Yearbook . . . 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6; see also *Yearbook . . . 1984*, vol. II (Part Two), pp. 82-83, para. 262.

<sup>260</sup> *Yearbook . . . 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

<sup>261</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 162, para. 164.

<sup>262</sup> *Yearbook . . . 1977*, vol. II (Part Two), p. 124, para. 79.

<sup>263</sup> *Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

<sup>264</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

*Article 4. Parties to the negotiation and conclusion of system agreements*

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

*Article 5. Use of waters which constitute a shared natural resource*

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

*Article X. Relationship between the present articles and other treaties in force*

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

272. As further recommended by the Drafting Committee, the Commission adopted at its thirty-second session 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.<sup>265</sup>

273. In its report to the General Assembly on the work of its thirty-second session, the Commission drew attention to the fact that, from the outset of its work on the topic it had recognized the diversity of international watercourses, in terms both of their physical characteristics and of the human needs they served. It also noted, however, that the existence of certain common watercourse characteristics had been recognized, and that it was

possible to identify certain principles of international law already existing and applicable to international watercourses in general. Mention was made in that regard of such concepts as the principle of good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as of the sovereign rights of riparian States.

274. By its resolution 35/163 of 15 December 1980, the General Assembly, noting with appreciation the progress made by the Commission in the preparation of draft articles on the law of the non-navigational uses of international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

275. The Commission did not consider the topic at its thirty-third session, in 1981, owing to the resignation of Mr. Schwebel from the Commission upon his election to the ICJ. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.<sup>266</sup> Also at that session, the Commission had before it the third report of Mr. Schwebel, who had begun its preparation prior to his resignation from the Commission.<sup>267</sup>

276. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.<sup>268</sup> That report contained an outline for a draft convention to serve as a basis for 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 on that of an international watercourse system as a shared natural resource.

277. At its thirty-sixth session, in 1984, the Commission had before it the second report submitted by Mr. Evensen.<sup>269</sup> That report contained the revised text of the outline for a draft convention on the law of the non-navigational uses of international watercourses. The outline consisted of 41 draft articles arranged in six chapters, as follows:

CHAPTER I. INTRODUCTORY ARTICLES

*Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention*

*Article 2. Scope of the present Convention*

*Article 3. Watercourse States*

*Article 4. Watercourse agreements*

*Article 5. Parties to the negotiation and conclusion of watercourse agreements*

<sup>266</sup> *Yearbook* ... 1982, vol. II (Part Two), p. 121, para. 250.

<sup>267</sup> *Yearbook* ... 1982, vol. II (Part One), p. 65, document A/CN.4/348. That report contained *inter alia* the following draft articles: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

<sup>268</sup> *Yearbook* ... 1983, vol. II (Part One), p. 155, document A/CN.4/367.

<sup>269</sup> *Yearbook* ... 1984, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>265</sup> *Yearbook* ... 1980, vol. II (Part Two), p. 108, para. 90.

CHAPTER II. GENERAL PRINCIPLES, RIGHTS AND DUTIES  
OF WATERCOURSE STATES

Article 6. *General principles concerning the sharing of the waters of an international watercourse*

Article 7. *Equitable sharing in the uses of the waters of an international watercourse*

Article 8. *Determination of reasonable and equitable use*

Article 9. *Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States*

CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD  
TO INTERNATIONAL WATERCOURSES

Article 10. *General principles of co-operation and management*

Article 11. *Notification to other watercourse States. Content of notification*

Article 12. *Time-limits for reply to notifications*

Article 13. *Procedures in case of protest*

Article 14. *Failure of watercourse States to comply with the provisions of articles 11 to 13*

Article 15. *Management of international watercourses. Establishment of commissions*

Article 15 bis. *Regulation of international watercourses*

Article 15 ter. *Use preferences*

Article 16. *Collection, processing and dissemination of information and data*

Article 17. *Special requests for information and data*

Article 18. *Special obligations in regard to information about emergencies*

Article 19. *Restricted information*

CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH  
HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL AND REGIONAL  
SITES

Article 20. *General provisions on the protection of the environment*

Article 21. *Purposes of environmental protection*

Article 22. *Definition of pollution*

Article 23. *Obligation to prevent pollution*

Article 24. *Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution.*

Article 25. *Emergency situations regarding pollution*

Article 26. *Control and prevention of water-related hazards*

[Article 27 of the original draft was replaced by article 15 bis]

Article 28. *Safety of international watercourses, installations and constructions, etc.*

Article 28 bis. *Status of international watercourses, their waters and constructions, etc. in armed conflicts*

[Article 29 of the original draft was replaced by article 15 ter]

Article 30. *Establishment of international watercourses or parts thereof as protected national or regional sites*

CHAPTER V. PEACEFUL SETTLEMENT OF DISPUTES

Article 31. *Obligation to settle disputes by peaceful means*

Article 31 bis. *Obligations under general, regional or bilateral agreements or arrangements*

Article 32. *Settlement of disputes by consultations and negotiations*

Article 33. *Inquiry and mediation*

Article 34. *Conciliation*

Article 35. *Functions and tasks of the Conciliation Commission*

Article 36. *Effects of the report of the Conciliation Commission. Sharing of costs*

Article 37. *Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal*

Article 38. *Binding effect of adjudication*

CHAPTER VI. FINAL PROVISIONS

Article 39. *Relationship to other conventions and international agreements*

278. The Commission considered the second report at its thirty-sixth session.<sup>270</sup> On the suggestion of the Special Rapporteur, the Commission focused its discussion on draft articles 1 to 9 and questions related thereto. Special attention was given to issues relating to the general approach suggested by the Special Rapporteur, in particular the elimination from the draft articles of the "system" concept, and the replacement, in the revised draft article 6 submitted by the Special Rapporteur, of the words "the watercourse system and its waters are . . . a shared natural resource" by the words "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". A summary of the main trends of the debate on these issues, as well as on other aspects of the second report, was included in the report of the Commission on the work of its thirty-sixth session for the information of the General Assembly.<sup>271</sup> At the conclusion of its consideration of the topic, the Commission decided to refer to the Drafting Committee draft articles 1 to 9 contained in the second report, for consideration in the light of the debate.<sup>272</sup> Owing to a lack of time, the Drafting Committee was unable to consider those articles at the thirty-sixth session.

**B. Consideration of the topic at the present session**

279. At the present session, at its 1910th meeting, on 25 June 1985, the Commission appointed Mr. Stephen C. McCaffrey Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, owing to the resignation from the Commission of Mr. Jens Evensen upon his election to the ICJ. The Commission also requested the new Special Rapporteur to prepare a preliminary report indicating the status of the topic to date and lines of further action.

280. The Special Rapporteur accordingly submitted a preliminary report (A/CN.4/393)<sup>273</sup> in which he reviewed the Commission's work on the topic to date, emphasizing the discussion thereon in the Commission and in the Sixth Committee of the General Assembly in 1984, and indicated his preliminary views as to the general lines along which the Commission's work on the topic could proceed.

281. The Special Rapporteur's recommendations concerning further work on the topic were: first, that draft articles 1 to 9, which had been referred to the Drafting Committee in 1984, should be taken up by that Committee at the thirty-eighth session, in 1986, and not be the subject of another general debate in plenary session; and, secondly, that the Special Rapporteur should follow the

<sup>270</sup> *Yearbook . . . 1984*, vol. I, pp. 95 *et seq.*, 1831st meeting and 1832nd meeting (paras. 1-16); pp. 230 *et seq.*, 1853rd meeting (paras. 3 *et seq.*) to 1857th meeting; and pp. 264 *et seq.*, 1859th and 1860th meetings.

<sup>271</sup> *Yearbook . . . 1984*, vol. II (Part Two), pp. 88 *et seq.*, paras. 281 *et seq.*

<sup>272</sup> It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis adopted by the Commission at its thirty-second session, in 1980 (see paragraph 272 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see paragraph 271 above), and the texts of articles 1 to 9 submitted by the Special Rapporteur in his first report (*Yearbook . . . 1983*, vol. II (Part One), pp. 68 *et seq.*, footnotes 245 to 250).

<sup>273</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One).

general organizational structure provided by the outline for a convention proposed by the previous Special Rapporteur in elaborating further draft articles on the topic (see paragraph 277 above).

282. With regard to his first recommendation, the Special Rapporteur pointed out that it would be appropriate that he provide in his second report a concise statement of his views concerning the articles referred to the Drafting Committee in 1984. He suggested that the Commission's work might be most effectively expedited if, in 1986, any discussion in plenary of the issues covered by those articles were directed, in principle, to any responses there might be to the views expressed on them in the Special Rapporteur's second report.

283. Concerning his second recommendation, the Special Rapporteur noted that the outline for a convention, if not all the draft articles, submitted by the previous Special Rapporteur seemed broadly acceptable as a general framework and basis for future work. He therefore proposed to follow, for the time being at least, the general organizational structure provided by the outline in elaborating further draft articles. Since all the articles contained in chapters I and II of the outline had been referred to the Drafting Committee in 1984, the next issues to be addressed would be those covered by chapter III. Accordingly, the Special Rapporteur indicated his intention to take up at least some of those issues and to seek to present in his second report a set of draft articles on them which would be of manageable size and scope. However, he also indicated his readiness to include in that report any observations or proposals relating to other specific issues which the Commission, as a result of its discussion of the topic at its thirty-seventh session, might request him to formulate.

284. The Commission, at its present session, considered the preliminary report of the Special Rapporteur at its 1928th meeting, on 17 July 1985.

285. There was general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed with the work on the topic.

286. Members of the Commission generally expressed support for and confidence in the Special Rapporteur's intention, indicated in his preliminary report, to build as much as possible on the progress already achieved, aiming at further concrete progress in the form of the provisional adoption of draft articles.

287. Emphasis was placed on the importance of continuing with the work on the topic with minimum loss of momentum, in light of the need to complete the work in the shortest time possible. It was recognized that the Commission must make every effort to reach acceptable solutions, especially in view of the urgency of the problems of fresh water, which were among the most serious confronting mankind.

288. At the same time, it was recognized that the subject was a difficult and sensitive one and that the Commission's task was to find solutions that were fair to all interests and thus generally acceptable. Confidence was however expressed that the Commission, with the assistance of the Special Rapporteur, would be able to bring its work on the topic to an early, speedy and successful conclusion without a break in continuity.

289. Attention was drawn to the fact that no consensus had been reached at the thirty-sixth session on some of the major issues raised by articles 1 to 9 which had been referred to the Drafting Committee at that session, 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 second report, a concise statement of his views on the major issues raised by articles 1 to 9.

290. In his summing-up, the Special Rapporteur expressed his appreciation to members of the Commission for their support and approval of his proposals concerning the future course of the Commission's work on the law of the non-navigational uses of international watercourses. He confirmed his intention to proceed along the lines indicated in his preliminary report, and endorsed by the Commission, with a view to expediting progress on the topic in a practical and efficient manner.

## Chapter VIII

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. International liability for injurious consequences arising out of acts not prohibited by international law

291. The Commission reviewed the situation arising from the untimely death of Mr. Robert Q. Quentin-Baxter, Special Rapporteur for the topic "International liability for injurious consequences arising out of acts not prohibited by international law". The Commission appointed Mr. Julio Barboza Special Rapporteur for the topic at its 1910th meeting, on 25 June 1985, and requested him to prepare a preliminary report indicating the status of the work done so far on the topic and the lines on which he intended to proceed.

292. The new Special Rapporteur submitted his preliminary report (A/CN.4/394)<sup>274</sup> to the Commissions. The Commission noted the report with appreciation, but could not discuss it at its thirty-seventh session. The Commission expressed the hope that the Special Rapporteur might wish to present a second report which, together with his preliminary report, would be discussed by the Commission at its thirty-eighth session, in 1986.

#### B. Programme and methods of work of the Commission

293. The Planning Group of the Enlarged Bureau of the Commission was established by the Commission at its 1893rd meeting, on 4 June 1985, to review the programme and methods of work of the Commission.

294. The Planning Group was composed of Mr. Khalafalla El Rasheed Mohamed Ahmed (Chairman), Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Julio Barboza, Mr. Leonardo Díaz González, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. Abdul G. Koroma, Mr. Chafic Malek, Mr. Frank X. Njenga, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Nikolai A. Ushakov.

295. The Planning Group held three meetings, on 6 and 27 June and 12 July 1985, and considered questions relating to the organization of the work of sessions of the Commission, the Drafting Committee, documentation and other matters.

296. The Enlarged Bureau considered the report of the Planning Group on 19 July 1985. On the basis of proposals made by the Planning Group, the Enlarged Bureau recommended to the Commission that paragraphs 297 to 306 below be included in the report of the Commission to

the General Assembly. That recommendation was adopted by the Commission at its 1933rd meeting, on 23 July 1985.

#### *Organization of work of sessions of the Commission*

297. The Commission confirmed the view it had expressed in its report on the work of its thirty-sixth session<sup>275</sup> that it should, in so far as possible and in the light of all relevant factors and allowing also for the necessary flexibility, consider at each session how available time might best be allocated between the topics on its current programme, having regard in particular to the topics on which most progress could be achieved before the conclusion of its present term of membership in 1986. The Commission recognized, nevertheless, as it had also done at the thirty-sixth session, that all topics on the present programme of the Commission might need to be considered, however briefly, at an annual session of the Commission.

298. The Commission decided that, at its thirty-eighth session, in 1986, it should continue its work on all the topics on its current programme, but in so doing bear in mind the clear desirability of achieving as much progress as possible in the preparation of draft articles on specific topics before the conclusion of the present five-year term of membership in the Commission in 1986.

299. In that connection, the Commission hopes to complete, before the conclusion of the present term of membership, the first reading of draft articles on two topics, namely, "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and "Jurisdictional immunities of States and their property". The Commission also acknowledges that it would be highly desirable to complete a first reading of parts 2 and 3 of the draft articles on the topic "State responsibility". The Commission will make every effort to achieve these goals.

#### *Drafting Committee*

300. The Commission, having in view the number of draft articles already referred and likely to be referred to the Drafting Committee, emphasized the importance of the Drafting Committee being convened as early as possible in the course of a session of the Commission. The

<sup>274</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One).

<sup>275</sup> *Yearbook . . . 1984*, vol. II (Part Two), p. 105, para. 386.

Commission noted with appreciation that, at its present session, the Drafting Committee had been established and had convened its first meeting early in the session and had reduced its backlog from previous sessions of the Commission. The Commission is of the view that the practice of the earliest possible establishment and convening of the Drafting Committee should be followed at future sessions of the Commission, in order to enable the Committee to deal with draft articles referred to it at that particular session as well as any other draft articles left pending. The Commission also wished to note, as it had done at its thirty-sixth session,<sup>276</sup> that it was open to the Commission as well as to the Drafting Committee, if they deemed it appropriate, to establish a working group for consideration of a particular matter, as had actually on occasion been done in the past on an *ad hoc* basis.

#### Documentation

301. The Commission expressed appreciation for the efforts made by the special rapporteurs to complete their reports for the Commission as early as possible, and for the efforts made by the Secretariat to have all pre-session documentation distributed to the members of the Commission in due time. The Commission wished, however, to reiterate the great importance of early submission of the reports of the special rapporteurs and early distribution of all pre-session documentation, as far in advance of the commencement of a session of the Commission as possible. The Commission welcomed the readiness of the Secretariat to continue to examine ways in which the distribution of pre-session documents to members of the Commission might be further expedited.

302. The Commission noted with appreciation that, following special efforts by the Secretariat, including in particular the United Nations Department of Conference Services, the summary records of discussions in the Sixth Committee of the General Assembly in 1984 relating to the report of the Commission had been issued early. That had enabled the Codification Division of the Office of Legal Affairs to prepare and make available to members of the Commission a most helpful topical summary of the discussions (A/CN.4/L.382) 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 the necessary studies prior to the convening of a session of the Commission.

303. The Commission noted that there had been delays in the publication of the *Yearbook of the International Law Commission* owing to causes of a technical nature. The Commission wishes to draw attention to the fact that the summary records of the annual sessions of the Commission, the reports of the special rapporteurs and the studies prepared for the Commission by the Secretariat appear in final form only in the *Yearbook*. Thus delays in the publication of the *Yearbook* entail delays in the availability of such materials to the Commission, the Sixth Committee of the General Assembly, States Members of the United Nations and others following the work of the Commission. The Commission was particularly con-

cerned at the delay of almost two years in the publication of volume II (Part One) of the *Yearbook*, which seemed to the Commission rather excessive, and wished the Secretariat to consider how such delays could as far as possible be reduced.

304. The desirability of an updating and reissuance of the publication entitled *The Work of the International Law Commission*<sup>277</sup> was considered by the Commission. The publication contained brief histories of the topics considered by the Commission, as well as the texts of drafts prepared by the Commission and of conventions adopted on the basis of drafts prepared by the Commission. The publication had proved, in the Commission's opinion, an extremely useful work of reference. The Commission requested the Secretariat to examine the possibility of having the publication, which was currently in its third (1980) edition, updated and reissued as soon as possible.

#### Other matters

305. The Commission expressed appreciation to the Codification Division of the United Nations Office of Legal Affairs for the valuable assistance provided by the Division in the preparation of background studies and pre-session documentation, the servicing of sessions of the Commission and the compilation of post-session documentation. The Commission also expressed its appreciation to the other offices of the Secretariat, in particular the Department of Conference Services, for all the unfailing assistance provided to the Commission at the present session.

306. The Commission agreed that it should continue at future sessions to keep on its agenda the review of the status of its programme and methods of work.

### C. Co-operation with other bodies

#### 1. ARAB COMMISSION FOR INTERNATIONAL LAW

307. The Arab Commission for International Law was represented at the thirty-seventh session of the Commission by Mr. Iyadh Ennaifer of the Legal Department of the League of Arab States. Mr. Ennaifer addressed the Commission at its 1931st meeting, on 19 July 1985.

308. In his statement, Mr. Ennaifer referred to the work of the Arab Commission for International Law and noted that it was also concerned with certain subjects that were being considered by the International Law Commission, such as: jurisdictional immunities of States and their property, the draft Code of Offences against the Peace and Security of Mankind, the law of the non-navigational uses of international watercourses, and relations between States and international organizations. The procedure followed by the Arab Commission for International Law included the appointment of a special rapporteur for each subject under consideration, and it was on the basis of the reports of the special rapporteurs that substantive discussions took place. The recommendations of the Arab Commission for International Law were submitted to the Council of the League of Arab States. The work of the

<sup>276</sup> *Ibid.*, p. 106, para. 389.

<sup>277</sup> United Nations publication, Sales No. E.80.V.11.



Arab Commission for International Law was of assistance to Governments of States members of the League of Arab States in preparations for discussions at the General Assembly of the United Nations and at international legal conferences. The harmonization of the national legislation of countries members of the League of Arab States was one of the objectives of the work of the Arab Commission for International Law. Such work included, for example, the necessary harmonization of national laws in the light of the provisions of the 1982 United Nations Convention on the Law of the Sea. Co-operation with the International Law Commission was a matter to which the Arab Commission for International Law attached great importance.

## 2. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

309. The Commission was represented at the February 1985 session of the Asian-African Legal Consultative Committee, in Kathmandu, by Mr. Sompong Sucharitkul, who attended the session as Observer for the Commission and addressed the Committee on behalf of the Commission.

310. The Asian-African Legal Consultative Committee was represented at the thirty-seventh session of the Commission by the Secretary-General of the Committee, Mr. B. Sen. Mr. Sen addressed the Commission at its 1903rd meeting, on 14 June 1985.

311. In his statement to the Commission, Mr. Sen recalled developments in the membership and activities of the Committee since the Committee's establishment in 1956, following the Asian-African conference in Bandung. The membership of the Committee, composed initially of seven countries, had grown over the years to the present membership of 40 countries, with two permanent observers. Until 1967, the Committee had confined its work to matters of a strictly legal and consultative nature. Subsequently, it had been called upon to furnish advice to its newly independent member countries on the formulation of policies on a variety of legal subjects, including: diplomatic relations; sovereign immunities; extradition; status of aliens; dual nationality; enforcement of foreign judgments; refugees; international rivers; and State responsibility. The Committee had also been required to consider subjects that were before the Commission, and thus a co-operative relationship between the Commission and the Committee had been established. Over the period 1968 to 1979, the emphasis of the Committee's activities had moved to assisting its member countries in preparations for international conferences, including the Third United Nations Conference on the Law of the Sea and the United Nations Conference on the Human Environment. The Committee, in the years following 1980, when it had been accorded observer status at the General Assembly, began to assist its member countries in the field of economic co-operation and in matters of co-operation with the United Nations and its organs, such as UNCTAD, UNIDO and UNCITRAL, as well as the World Bank. The Committee had prepared standard commodity contracts, made contributions to UNCTAD meetings on shipping, and had worked with UNCITRAL. The Committee had assisted in meetings of a promotional nature between investors and prospective countries for investment. The Committee valued its co-operative relationship with the

Commission and each year prepared for its member countries notes and comments on questions before the Sixth Committee of the General Assembly, including the report of the Commission. While all topics under consideration by the Commission were clearly of importance and of great interest to the Committee, the Committee was particularly interested in the law of the non-navigational uses of international watercourses and the jurisdictional immunities of States and their property. The Committee looked forward to the Commission's adoption of draft articles on those two topics.

312. The Commission, having a standing invitation to send an observer to sessions of the Asian-African Legal Consultative Committee, requested its Chairman, Mr. Satya Pal Jagota, to attend the next session of the Committee or, if he were unable to do so, to designate another member of the Commission for the purpose.

## 3. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

313. The Commission was represented at the November 1984 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.

314. The European Committee on Legal Co-operation was represented at the thirty-seventh session of the Commission by the Deputy Director of the Legal Division of the Council of Europe, Mr. Ferdinando Albanese. Mr. Albanese addressed the Commission at its 1915th meeting, on 1 July 1985.

315. In his statement to the Commission, Mr. Albanese noted that the European Committee on Legal Co-operation, which had prepared the European Convention on State Immunity, was interested in the work of the Commission on the topic of jurisdictional immunities of States and their property. The European Convention on State Immunity had entered into force on 11 June 1976 and there were six States parties to the Convention. An additional Protocol to the Convention, providing for procedures for settlement of disputes concerning enforcement of a judgment against a State party to the Protocol and for the interpretation and application of the Protocol, had entered into force on 22 May 1985 and had been ratified by five States. The Committee had also completed preparation of a draft European convention on recognition of the legal personality of international non-governmental organizations. The purpose of the convention was to facilitate the work of non-governmental organizations at the international level. A number of questions of public international law were also under consideration in the Committee of Experts on Public International Law. Those questions included reciprocity in application of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations; the process of multilateral treaty-making; the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts; and the draft international convention against the recruitment, use, financing and training of mercenaries, which was under study by an *ad hoc* committee of the United Nations. The Committee of Experts would also be examining matters that were likely to arise at the 1986 United Nations Conference on the

Law of Treaties between States and International Organizations or between International Organizations. The Committee wished to co-operate as much as possible with the Commission and the United Nations. The Committee's work in the legal field was undertaken in the interests not only of States members of the Council of Europe but also of the international community as a whole, because regional activities in the legal field eventually facilitated the work of the United Nations in the progressive development of international law and its codification.

316. The Commission, having a standing invitation to send an observer to sessions of the European Committee on Legal Co-operation, requested its Chairman, Mr. Satya Pal Jagota, to attend the next session of the Committee or, if he were unable to do so, to designate another member of the Commission for the purpose.

#### 4. INTER-AMERICAN JURIDICAL COMMITTEE

317. The Commission was represented at the January 1985 session of the Inter-American Juridical Committee in Rio de Janeiro by Mr. Alexander Yankov, who attended the session as Observer for the Commission and addressed the Committee on behalf of the Commission.

318. The Inter-American Juridical Committee was represented at the thirty-seventh session of the Commission by Mr. Manuel A. Vieira, member of the Inter-American Juridical Committee. Mr. Vieira addressed the Commission at its 1908th meeting, on 21 June 1985.

319. In his statement to the Commission, Mr Vieira noted that the work of the Inter-American Juridical Committee included matters of private international law as well as of public international law. The Committee's work in the codification of private international law had been substantial and had led to the adoption, within the last 10 years, of 18 treaties. In the field of public international law, the Committee had recently completed its preparation of drafts of two international conventions: a draft Inter-American convention prohibiting the use of certain weapons and methods of combat, and a draft convention on disaster relief. The Committee had further, at the request of the General Assembly or other organs of OAS, undertaken studies or given opinions on a number of questions of public international law and other legal matters, including the following: study of possible amendment of the OAS Charter, of the Pact of Bogotá and of the Inter-American Treaty of Reciprocal Assistance; study of the question of coercive measures of an economic and political character under article 19 of the OAS Charter; study of procedures for the peaceful settlement of disputes under the OAS Charter as well as possible steps for their promotion, updating and extension; review of principles, other than those set out in the OAS Charter, that should govern relations between States; preparation of a catalogue on the interpretation and application of the provisions of the OAS Charter by the organs of OAS; encouragement of OAS member States to participate in measures against drug abuse; and collection of information on progress made by OAS member States in the development of their judicial systems. The Committee had conducted an annual course in international law, which in 1985 had included a special tribute to the United Nations in honour of the fortieth anniversary of the signing of the Charter of the United Nations. Mr. Vieira emphasized the import-

ance the Inter-American Juridical Committee placed on its co-operative relationship with the Commission and the care with which the work of the Commission was followed by the Committee.

320. The Commission, having a standing invitation to send an observer to sessions of the Inter-American Juridical Committee, requested its Chairman, Mr. Satya Pal Jagota, to attend the next session of the Committee or, if he were unable to do so, to designate another member of the Commission for the purpose.

#### D. Date and place of the thirty-eighth session

321. The Commission decided to hold its next session at the United Nations Office at Geneva from 5 May to 25 July 1986.

#### E. Representation at the fortieth session of the General Assembly

322. The Commission decided that it should be represented at the fortieth session of the General Assembly by its Chairman, Mr. Satya Pal Jagota.

#### F. Gilberto Amado Memorial Lecture

323. With a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission, it had been decided in 1971 that a memorial should take the form of a lecture to which the members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

324. The Gilberto Amado Memorial Lecture was made possible in 1985 in view of a generous contribution from the Government of Brazil. The Commission established an informal consultative committee, early in its present session, composed of Mr. Carlos Calero Rodrigues, Mr. Ahmed Mahiou, Mr. Edilbert Razafindralambo, Mr. Paul Reuter and Mr. Nikolai A. Ushakov, to advise on the necessary arrangements. A seventh Gilberto Amado Memorial Lecture, followed by a dinner, took place on 20 June 1985. The lecture, which was delivered by Professor Georges Abi-Saab of the Graduate Institute of International Studies, Geneva, was entitled "Reflections on the contemporary processes of developing international law". The Commission hopes that, as on the six previous occasions, the text of the lecture will be printed in English and French and so made available to the largest possible number of specialists in the field of international law.

325. The Commission expressed its gratitude to the Government of Brazil for its generous contribution, which enabled the Gilberto Amado Memorial Lecture to be held in 1985. The Commission requested its Chairman to convey its gratitude to the Government of Brazil.

#### G. International Law Seminar

326. Pursuant to General Assembly resolution 39/85 of 13 December 1984, the United Nations Office at Geneva organized the twenty-first session of the International Law Seminar during the thirty-seventh session of the

Commission. The Seminar is intended for advanced students of international law and junior professors or government officials who normally deal with questions of international law in the course of their work.

327. A selection committee met on 28 March 1985 to select the participants in the current session of the Seminar from among over 60 candidates. The committee consisted of Mr. P. Gibrain, Director of the Seminar, Mr. L. Ferrari Bravo, former Chairman of the Sixth Committee of the General Assembly of the United Nations; Mr. A. Boisard (UNITAR) and Mr. G. Ramcharan (Centre for Human Rights). Twenty-four candidates, all of different nationalities and mostly from developing countries, were selected. In addition, a UNITAR fellowship holder and two observers were admitted to that session of the Seminar.

328. During the session of the Seminar, which was held at the Palais des Nations from 3 to 21 June 1985, the participants had access to the facilities of the United Nations library. They were given copies of basic documents necessary for following the discussions of the Commission and the lectures of the Seminar, and were also able to obtain, or to purchase at reduced cost, United Nations printed documents that were unavailable or difficult to find in their countries of origin.

329. During the three weeks of the session, the participants in the Seminar attended the meetings of the Commission. In addition, the following eight members of the Commission gave lectures, followed by discussions: Mr. A. Yankov, "The work of the International Law Commission—introduction to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier"; Mr. W. Riphagen, "Introduction to the question of State responsibility"; Mr. M. Ogiso, "Some aspects of the codification of international law"; Mr. J. Barboza, "International liability for injurious consequences arising out of acts not prohibited by international law"; Mr. D. Thiam, "Some considerations on offences against the peace and security of mankind"; Mr. M. L. Balanda, "The field of application *ratione personae* of the draft code of offences and the international criminal liability of States and other legal entities"; Mr. S. Sucharitkul, "Jurisdictional immunities of States and their property"; Mr. L. Díaz González, "Relations between States and international organizations".

330. In addition, talks were given by Mr. F. Verhagen on the activities of the Office of the United Nations Disaster Relief Co-ordinator, by Mr. C. Lopez-Polo on the activities of the Economic Commission for Europe in the environmental field, and by Mr. Kurt Herndl and Mr. G. Ramcharan on trends and developments in the inter-

national protection of human rights. Mr. C. Swinarski (ICRC) spoke to the Seminar on the question of international humanitarian law as a branch of public international law. After the last-mentioned talk, the participants in the Seminar visited the headquarters of ICRC, where they were received by Mr. J. Moreillon, Director for General Affairs of the ICRC. As at the last three sessions of the Seminar, participants were also officially received by the City of Geneva, in the Alabama Room of the Hôtel de Ville. During the reception, Mr. R. Vieux, Chief of Protocol of the City of Geneva, gave a talk on the international aspects of Geneva.

331. Mr. C. A. Fleischhauer, Under-Secretary-General, Legal Counsel of the United Nations, had personal talks with the participants in the Seminar during the session. At the end of the session, Mr. Satya Pal Jagota, Chairman of the International Law Commission, and Mr. E. Suy, Director-General of the United Nations Office at Geneva, presented participants with a certificate testifying to their diligent work at the twenty-first session of the Seminar.

332. None of the costs of the Seminar were borne by the United Nations, which was not asked to contribute to the travel or living expenses of the participants. The Governments of Austria, Denmark, the Federal Republic of Germany and Finland made fellowships available to participants from developing countries. With the award of those fellowships, it was possible to achieve an adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. In 1985, fellowships were awarded to 17 participants. Of the 475 participants, representing 113 nationalities, who have been accepted since the beginning of the Seminar, fellowships have been awarded to 230.

333. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable young lawyers, and especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters at Geneva. It should be noted that, owing to the small number of applications received from Asia, that region could not be equitably represented at this session of the Seminar.

334. The Commission wishes to invite attention to the fact that, owing to a shortage of funds, and if adequate contributions are not forthcoming, the holding of the twenty-second session of the International Law Seminar in 1986 may become difficult. The Commission therefore appeals to all States to contribute, in order that the holding of the twenty-second session of the Seminar in 1986 may prove feasible.

## CHECK-LIST OF DOCUMENTS OF THE THIRTY-SEVENTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/384	Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law, prepared by the Secretariat	Mimeographed.
A/CN.4/385	Provisional agenda	<i>Idem.</i> For the agenda as adopted, see p. 6 above, para. 9.
A/CN.4/386	Filling of casual vacancies in the Commission (article 11 of the statute) : note by the Secretariat	Reproduced in <i>Yearbook . . . 1985</i> , vol. II (Part One).
A/CN.4/386/Add.1	<i>Idem</i> — Addendum to the note by the Secretariat : list of candidates and curricula vitae	Mimeographed.
A/CN.4/387 [and Corr.1]	Third report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in <i>Yearbook . . . 1985</i> , vol. II (Part One).
A/CN.4/388 [and Corr.1]	Seventh report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem.</i>
A/CN.4/389 [and Corr.1]	Sixth report on the content, forms and degrees of international responsibility (part 2 of the draft articles) ; and “Implementation” ( <i>mise en œuvre</i> ) of international responsibility and the settlement of disputes (part 3 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	<i>Idem.</i>
A/CN.4/390 [and Corr.1]	Sixth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yan-kov, Special Rapporteur	<i>Idem.</i>
A/CN.4/391 and Add.1 [and Add.1/Corr.2]	Second report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	<i>Idem.</i>
A/CN.4/392 and Add.1 and 2	Draft Code of Offences against the Peace and Security of Mankind : observations of Member States and intergovernmental organizations received pursuant to General Assembly resolution 39/80	<i>Idem.</i>
A/CN.4/393	Preliminary report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	<i>Idem.</i>
A/CN.4/394	Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.382	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly	Mimeographed.
A/CN.4/L.383 and Add.1-3	Relations between States and international organizations (second part of the topic). The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities : supplementary study prepared by the Secretariat	<i>Idem.</i>
A/CN.4/L.384	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee : articles 28 to 32, 34 and 35	Texts reproduced in <i>Yearbook . . . 1985</i> , vol. I, summary records of the 1911th to 1913th meetings.
A/CN.4/L.386	Draft report of the International Law Commission on the work of its thirty-seventh session : chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10)</i> . For the final text, see p. 5 above.
A/CN.4/L.387 and Add.1	<i>Idem</i> : chapter II (Draft Code of Offences against the Peace and Security of Mankind)	<i>Idem</i> , see p. 7 above.
A/CN.4/L.388 and Add.1	<i>Idem</i> : chapter IV (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i> , see p. 28 above.
A/CN.4/L.389 and Add.1 [and Add.1/ Corr.1] and Add.2 and 3	<i>Idem</i> : chapter V (Jurisdictional immunities of States and their property)	<i>Idem</i> , see p. 51 above.

Document	Title	Observations and references
A/CN.4/L.390 and Add.1	<i>Idem</i> : chapter III (State responsibility)	<i>Idem</i> , see p. 19 above.
A/CN.4/L.391	<i>Idem</i> : chapter VI (Relations between States and international organizations (second part of the topic))	<i>Idem</i> , see p. 65 above.
A/CN.4/L.392	<i>Idem</i> : chapter VII (The law of the non-navigational uses of international watercourses)	<i>Idem</i> , see p. 68 above.
A/CN.4/L.394 and Add.1-3	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i> , see p. 72 above.
A/CN.4/L.395	Draft articles on State responsibility (part 2 of the draft articles). Text adopted by the Drafting Committee : article 5	Text reproduced in <i>Yearbook ... 1985</i> , vol. I, summary record of the 1929th meeting, para. 26.
A/CN.4/L.396	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Text adopted by the Drafting Committee : article 23	<i>Idem</i> , 1930th meeting, para. 27.
A/CN.4/L.397	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee : articles 19 and 20	<i>Idem</i> , 1931st meeting, para. 12.
A/CN.4/SR.1875- A/CN.4/SR.1939	Provisional summary records of the 1875th to 1939th meetings of the International Law Commission	Mimeographed. The final text appears in <i>Yearbook ... 1985</i> , vol. I.









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