A/CN.4/SER.A/1986/Add.1 (Part 2)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1986

Volume II
Part Two

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

UNITED NATIONS

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UNITED NATIONS
New York, 1987

NOTE

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

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

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

Volume I: summary records of the meetings of the session;
Volume II (Part One): reports of special rapporteurs and other documents considered during the session;
Volume II (Part Two): report of the Commission to the General Assembly.

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

A/CN.4/SER.A/1986/Add.1 (Part 2)

UNITED NATIONS PUBLICATION

Sales No. E.87.V.8 (Part II)

ISBN 92-1-133298-2
(complete set of two volumes)
ISBN 92-1-133297-4 (Part II)
ISSN 0082-8289

00900P

CONTENTS

DOCUMENT A/41/10*

Report of the International Law Commission on the work of its thirty-eighth session (5 May-11 July 1986)

CONTENTS

* Initially distributed as *Official Records of the General Assembly, Forty-first Session, Supplement No. 10.*

ABBREVIATIONS

ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
PCIJ	Permanent Court of International Justice

*
* *

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

NOTE CONCERNING QUOTATIONS

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

Chapter I

ORGANIZATION OF THE SESSION

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

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

A. Membership

3. The Commission consists of the following members:

Chief Richard Osuolale A. AKINJIDE (Nigeria);
Mr. Riyadh 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 Manuel LACLETA MUÑOZ (Spain);
Mr. Ahmed MAHIOU (Algeria);
Mr. Chafic MALEK (Lebanon);
Mr. Stephen C. MCCAFFREY (United States of America);
Mr. Frank X. NJENGA (Kenya);
Mr. Motoo OGISO (Japan);
Mr. Syed Sharifuddin PIRZADA (Pakistan);
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);
Mr. Paul REUTER (France);
Mr. Willem RIPHAGEN (Netherlands);
Mr. Emmanuel J. ROUKOUNAS (Greece);
Sir Ian SINCLAIR (United Kingdom of Great Britain and Northern Ireland);
Mr. Sompong SUCHARITKUL (Thailand);
Mr. Doudou THIAM (Senegal);
Mr. Christian TOMUSCHAT (Federal Republic of Germany);
Mr. Nikolai A. USHAKOV (Union of Soviet Socialist Republics);
Mr. Alexander YANKOV (Bulgaria).

B. Officers

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

Chairman: Mr. Doudou Thiam;

First Vice-Chairman: Mr. Julio Barboza;

Second Vice-Chairman: Mr. Alexander Yankov;

Chairman of the Drafting Committee: Mr. Willem Riphagen;

Rapporteur: Mr. Motoo Ogiso.

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as chairman of the Commission, and the special rapporteurs. The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 1945th meeting, on 14 May 1986, set up for the present session a Planning Group to consider matters relating to the organization, programme and methods of work of the Commission and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Julio Barboza (Chairman), Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Leonardo Díaz González, Mr. Khalafalla El Rasheed Mohamed Ahmed, Mr.

Constantin Flitan, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. Satya Pal Jagota, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Motoo Ogiso, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Sir Ian Sinclair and Mr. Christian Tomuschat. The Group was open-ended and other members of the Commission were welcome to attend its meetings.

C. Drafting Committee

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

D. Secretariat

7. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary 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

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

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

9. The Commission considered all the items on its agenda except item 8, "Relations between States and international organizations (second part of the topic)", to which reference is made in section A of chapter VIII of the present report, but as explained in the same chapter (para. 252 below), it was unable to give adequate consideration to several topics due to lack of time. The Commission held 50 public meetings (1940th to 1989th meetings). In addition, the Drafting Committee of the Commission held 36 meetings, the Enlarged Bureau of the Commission held four meetings and the Planning Group of the Enlarged Bureau held three meetings.

Chapter II

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. Introduction

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

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

12. From its thirty-second session to its thirty-seventh session (1985), the Commission received six further reports of the Special Rapporteur,[3] which contained draft articles arranged in five parts, as follows: part I (Introduction); part II (General principles); part III (Exceptions to State immunity); part IV (State immunity in respect of property from attachment and execution); and part V (Miscellaneous provisions).

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

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

B. Consideration of the topic at the present session

15. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/396),[5] which, among other matters, set out, or proposed certain changes in, the draft articles that were still under consideration by the Commission and which had not yet been referred to the Drafting Committee, namely: *Part I (Introduction)*: "Use of terms" (art. 2, para. 2); "interpretative provisions" (art. 3, para. 1); "Jurisdictional immunities not within the scope of the present articles" (art. 4); "Non-retroactivity of the present articles" (art. 5); *Part V (Miscellaneous provisions)*: "Immunities of personal sovereigns and other heads of State" (art. 25); "Service of process and judgment in default of appearance" (art. 26); "Procedural privileges" (art. 27); "Restriction and extension of immunities and privileges" (art. 28).[6]

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

[2] *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10), hereinafter referred to as *Materials on Jurisdictional Immunities ...*

[3] These six further reports of the Special Rapporteur are reproduced as follows:

Second report: *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1;

Third report: *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1;

Fourth report: *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357;

Fifth report: *Yearbook ... 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1;

Sixth report: *Yearbook ... 1984*, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2;

Seventh report: *Yearbook ... 1985*, vol. II (Part One), p.21, document A/CN.4/388.

[4] For a full historical review of the Commission's work on the present topic, see *Yearbook ... 1985*, vol. II (Part Two), pp. 51 *et seq.*, paras. 205-247.

[5] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[6] For the texts of these draft articles, see the eighth report of the Special Rapporteur (A/CN.4/396), chap. I, sect. C.

16. The Special Rapporteur's eighth report also contained proposals for articles to be included in a part VI (Settlement of disputes) and a part VII (Final provisions) for future consideration by the Commission in finalizing the draft articles.

17. At its 1968th to 1972nd meetings, from 17 to 20 June 1986, the Commission, having considered the report of the Drafting Committee on the draft articles referred to it, provisionally adopted the following provisions: *Part I (Introduction)*: "Use of terms" (art. 2, para. 2); "Interpretative provisions" (art. 3, para. 1); "Privileges and immunities not affected by the present articles" (art. 4); "Non-retroactivity of the present articles" (art. 5); *Part II (General principles)*: "State immunity" (art. 6); *Part III ([Limitations on] [Exceptions to] State immunity)*: "Cases of nationalization" (art. 20); *Part IV (State immunity in respect of property from measures of constraint)*: "State immunity from measures of constraint" (art. 21); "Consent to measures of constraint" (art. 22); "Specific categories of property" (art. 23); *Part V (Miscellaneous provisions)*: "Service of process" (art. 24); "Default judgment" (art. 25); "Immunity from measures of coercion" (art. 26); "Procedural immunities" (art. 27); "Non-discrimination" (art. 28).

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

19. The Commission renumbered draft articles 12 to 20, adopted at its previous sessions (see para. 13 above), as draft articles 11 to 19.

20. At its 1972nd meeting, on 20 June 1986, the Commission adopted on first reading the whole set of draft articles on the topic. The texts are reproduced in section D.1 of the present chapter.

21. At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles set out in section D.1 of the present chapter, through the Secretary-General, to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General not later than 1 January 1988.

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

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

The International Law Commission,

Having adopted provisionally the draft articles on jurisdictional immunities of States and their property,

Desires to express to the Special Rapporteur, Mr. Sompong Sucharitkul, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on jurisdictional immunities of States and their property.

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

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

Part I

INTRODUCTION

Article 1. Scope of the present articles[7]

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[8]

1. For the purposes of the present articles:

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

(*b*) "commercial contract" means:

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

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

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

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

[7] Provisionally adopted by the Commission at its thirty-fourth session; for the commentary, see *Yearbook ... 1982,* vol. II (Part Two), pp. 99-100.

[8] The Commission provisionally adopted paragraph 1 (*a*) at its thirty-fourth session, during its discussion of article 7 on the modalities for giving effect to State immunity; for the commentary, see *Yearbook ... 1982,* vol. II (Part Two), p. 100.

The Commission provisionally adopted paragraph 1 (*g*) (now paragraph 1 (*b*)) at its thirty-fifth session, during its discussion of article 12 (now article 11) on commercial contracts; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35.

The Commission provisionally adopted paragraph 2 at its present session; for the commentary, see subsection 2 below.

Article 3. Interpretative provisions[9]

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

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

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

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

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

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

Article 4. Privileges and immunities not affected by the present articles[10]

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

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

(*b*) persons connected with them.

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

Article 5. Non-retroactivity of the present articles[11]

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

PART II

GENERAL PRINCIPLES

Article 6. State immunity[12]

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

Article 7. Modalities for giving effect to State immunity[13]

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

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

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

Article 8. Express consent to the exercise of jurisdiction[14]

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

(*a*) by international agreement;

(*b*) in a written contract; or

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

Article 9. Effect of participation in a proceeding before a court[15]

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[16]

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 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.

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[9] The Commission provisionally adopted paragraph 1 at its present session; for the commentary, see subsection 2 below.

The Commission provisionally adopted paragraph 2 at its thirty-fifth session, during its discussion of article 12 (now article 11) on commercial contracts; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36.

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

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

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

[13] Provisionally adopted by the Commission at its thirty-fourth session; for the commentary, see *Yearbook ... 1982*, vol. II (Part Two), pp. 100-107.

[14] Provisionally adopted by the Commission at its thirty-fourth session; for the commentary, *ibid.*, pp. 107-109.

[15] Provisionally adopted by the Commission at its thirty-fourth session; for the commentary, *ibid.*, pp. 109-111.

It was suggested that the word "sole", in the introductory part of paragraph 2, might be deleted. However, in the practice of some States, steps taken on the merits of a case would be considered as a waiver of immunity. The Commission therefore decided to retain the word "sole", which could be re-examined on second reading.

[16] Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

PART III

[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY[17]

Article 11. Commercial contracts[18]

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 12. Contracts of employment[19]

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 13. Personal injuries and damage to property[20]

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

Article 14. Ownership, possession and use of property[21]

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

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[17] Title provisionally adopted by the Commission at its present session; for the commentary, see subsection 2 below.

[18] Originally article 12, provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), pp. 25-34.

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

[19] Originally article 13, provisionally adopted by the Commission at its thirty-sixth session; for the commentary, see *Yearbook ... 1984*, vol. II (Part Two), pp. 63-66.

During the discussion in the Sixth Committee, the suggestion was made—with gathering support from developing countries—that the requirement in paragraph 1 that the employee be "covered by the social security provisions which may be in force in that other State" was not necessary. It might unduly discriminate between countries having social security systems and those not having such systems. The wording could be amended so as to provide an additional indication of the intention or consent of the State which has employed local staff abroad in a particular case not to invoke its immunity in respect of that contract of employment. See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly" (A/CN.4/L.398), para. 381.

[20] Originally article 14, provisionally adopted by the Commission at its thirty-sixth session; for the commentary, see *Yearbook ... 1984*, vol. II (Part Two), pp. 66-67.

[21] Originally article 15, provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38.

The text originally adopted included a paragraph 3, which appeared to be necessary and useful to ensure the integrity of State immunities in respect of the "premises of a diplomatic or special or other official mission or ... consular premises" as well as "the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission". These provisions are no longer necessary in view of the adoption of articles 21 and 22, and particularly of article 4, paragraph 1, which in fact reserves the applicability of existing régimes under the various conventions in force, especially the 1961 Vienna Convention on Diplomatic Relations (art. 31, para. 1 (*a*)) (see footnote 46 below).

Article 15. Patents, trade marks and intellectual or industrial property[22]

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

(*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 16. Fiscal matters[23]

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

Article 17. Participation in companies or other collective bodies[24]

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

(*a*) has 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 18. State-owned or State-operated ships engaged in commercial service[25]

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

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

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

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

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

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

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

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

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

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

Article 19. Effect of an arbitration agreement[26]

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

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

(*b*) the arbitration procedure;

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 20. Cases of nationalization[27]

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

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21. State immunity from measures of constraint[28]

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

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

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

Article 22. Consent to measures of constraint[29]

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

(*a*) by international agreement;

(*b*) in a written contract; or

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

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under

[22] Originally article 16, provisionally adopted by the Commission at its thirty-sixth session; for the commentary, see *Yearbook ... 1984*, vol. II (Part Two), pp. 67-69.

[23] Originally article 17, provisionally adopted by the Commission at its thirty-sixth session; for the commentary, *ibid.*, pp. 69-70.

[24] Originally article 18, provisionally adopted by the Commission at its thirty-sixth session; for the commentary, *ibid.*, pp. 70-72.

[25] Originally article 19, provisionally adopted by the Commission at its thirty-seventh session; for the commentary, see *Yearbook ... 1985*, vol. II (Part Two), pp. 61-63.

[26] Originally article 20, provisionally adopted by the Commission at its thirty-seventh session; for the commentary, *ibid.*, pp. 63-64.

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

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

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

part IV of the present articles, for which separate consent shall be necessary.

Article 23. Specific categories of property[30]

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

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

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

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

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

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

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

PART V

MISCELLANEOUS PROVISIONS

Article 24. Service of process[31]

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

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

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

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

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

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

(ii) by any other means.

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

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

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

Article 25. Default judgment[32]

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

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

Article 26. Immunity from measures of coercion[33]

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

Article 27. Procedural immunities[34]

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

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

Article 28. Non-discrimination[35]

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

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

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

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

2. TEXTS OF DRAFT ARTICLES 2 (PARA. 2), 3 (PARA. 1), 4 TO 6 AND 20 TO 28, WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-EIGHTH SESSION

PART I

INTRODUCTION

. . .

Article 2. Use of terms

1. For the purposes of the present articles:

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

(*b*) "commercial contract" means:

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

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

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

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

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

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

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

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

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

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

Commentary

Paragraph 1 (a)

(1) The commentary to paragraph 1 (*a*), adopted by the Commission at its thirty-fourth session, is contained in the report of the Commission on the work of that session.[36]

(2) In addition, with regard to the term "judicial functions", it should be noted that such functions vary under different constitutional and legal systems. Judicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the development of a legal proceeding, or at the final stage of enforcement of judgments. Such judicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to a legal proceeding. Although judicial functions are determined by the internal organizational structure of each State, the term does not, for the purposes of the present articles, cover the administration of justice in all its aspects, which, at least under certain legal systems, might include other functions related to the appointment of judges.

Paragraph 1 (b)

(3) The commentary to paragraph 1 (*b*), adopted by the Commission at its thirty-fifth session, is contained in the report of the Commission on the work of that session.[37]

Other definitions

(4) Article 2 contains no other definitions, earlier proposals by the Special Rapporteur having been withdrawn because they were considered to be superfluous.

Paragraph 2

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

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

Article 3. Interpretative provisions

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

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

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

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

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

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

Commentary

Paragraph 1

(1) This is an interpretative provision as distinct from a definitional or use-of-term provision as in article 2. There was no need to define, as such, the term "State", but in view of the different jurisprudential approaches to the meaning of "State" for the purposes of jurisdictional immunities, it was considered useful to spell out the special understanding of what this expression comprehends for the purposes of the present articles. The general terms used in describing "State" should not imply that the provision is an open-ended formula. Paragraph 1 should be understood in the light of its object and purpose, namely to identify those entities or persons entitled to invoke the immunity of the State where a State can claim immunity and also to identify certain instrumentalities and subdivisions of a State entitled to invoke immunity when performing acts in the exercise of sovereign authority. Accordingly, in the context of the present articles, the expression "State"

[36] See footnote 8 above.

[37] *Ibid.*

should be understood as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity.

(2) The first category includes the State itself, acting in its own name and through its various organs of government, however designated, such as the sovereign or head of State, the head of Government, the central Government, the various ministries and government departments, ministerial or sub-ministerial departments, offices or bureaux, as well as subordinate organs and missions representing the State, including diplomatic missions and consular posts, permanent missions and delegations.[38] The use of the expression "various organs of government" is intended to include all branches of government and is not limited to the executive branch only.

(3) The second category covers the political subdivisions of a federal State or of a State with autonomous regions which are entitled to perform acts in the exercise of the sovereign authority of the State. As has been seen in the commentary to paragraph 3 of article 7, not every political subdivision of a State enjoys the immunity of the State, especially if it does not perform acts in the exercise of "sovereign authority", which seems to be the nearest equivalent to the French expression *prérogatives de la puissance publique*.[39] State immunity is recognized for such political subdivisions as may be endowed with international legal personality or capacity to perform acts of sovereign authority in the name or on behalf of the State. The case-law has not been uniform on the extent of the immunity granted, nor on the circumstances in which immunity is recognized or the types of political subdivisions which enjoy some measure of State immunity. It is relatively clear, however, that subdivisions of the State at the administrative level of local or municipal authorities do not normally perform acts in the exercise of the sovereign authority of the State, and as such do not enjoy State immunity.[40]

(4) The third category comprises agencies and instrumentalities[41] of the State, but only in so far as they are entitled to perform acts in the exercise of the sovereign authority of the State. Beyond or outside the sphere of acts performed by them in the exercise of that authority, they do not enjoy any jurisdictional immunity.

(5) The fourth and last category of beneficiaries of State immunity encompasses all the natural persons who are authorized to represent the State in all its manifestations, as comprehended in the three categories mentioned in paragraph 1 (*a*), (*b*), and (*c*). Thus sovereigns and heads of States acting in their public capacity would be included in this category as well as in the first category, being in the broader sense organs of the Government of the State. Other such representatives include heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, acting in their representative capacity.[42] In actual practice, proceedings may be instituted not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities.[43]

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

Paragraph 2

(7) The commentary to paragraph 2 is contained in the report of the Commission on the work of its thirty-fifth session.[44] The expression "that State" in this paragraph refers exclusively to the State claiming immunity and not to the State of the forum. Paragraph 2 was provisionally adopted by the Commission at its thirty-fifth session, during its discussion of article 12 (now article 11) on commercial contracts.

Article 4. Privileges and immunities not affected by the present articles

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

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

(*b*) persons connected with them.

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

Commentary

(1) The original purpose of article 4[45] was to preclude the possibility of overlapping between the present articles and certain existing conventions dealing with the status, privileges, immunities and facilities of specific categories of representatives of Governments. It consisted of one paragraph listing the existing régimes of diplomatic and consular immunities which should continue to apply unaffected by the present articles. Historically, diplomatic immunities under customary international law were the first to be considered ripe for codification, as indeed they were in the 1961 Vienna Convention on Diplomatic Relations.[46] The immunities

[38] See the commentary to article 7 and the authorities cited, *Yearbook ... 1982*, vol. II (Part Two), pp. 100-107.

[39] For the jurisprudence cited, *ibid.*

[40] For the decisions cited, *ibid.*

[41] For the meaning of the term "instrumentalities" and the illustrations cited, see para. (15) of the commentary to article 7, *ibid.*, pp. 104-105.

[42] See paras. (8) and (16) of the commentary to article 7, *ibid.*, pp. 102 and 105.

[43] See paras. (17)-(21) of the commentary to article 7, *ibid.*, pp. 105-107; and, for example, *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975) (*The All England Law Reports, 1975*, vol. 3, p. 961).

[44] See footnote 9 above.

[45] Originally submitted by the Special Rapporteur in his second report, document A/CN.4/331 and Add.1 (see footnote 3 above), paras. 49-54.

[46] United Nations, *Treaty Series*, vol. 500, p. 95.

of sovereigns and other heads of State are another classic example of immunities enjoyed under customary international law. These immunities were earlier the subject of an article proposed by the Special Rapporteur,[47] and are now covered by paragraph 2 of article 4. Both paragraphs are intended to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the present articles.

Paragraph 1

(2) The original text of article 4 contained specific references to various international instruments having different degrees of adherence and ratification. Mention was made of the following missions and persons representing States:

(i) diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations;[48]

(ii) consular missions under the 1963 Vienna Convention on Consular Relations;[49]

(iii) special missions under the 1969 Convention on Special Missions;[50]

(iv) the representation of States under the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character;[51]

(v) permanent missions or delegations of States to international organizations or their organs in general;[52]

(vi) internationally protected persons under the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[53]

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

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

(*b*) persons connected with such missions.

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

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

(5) Article 4 is intended to leave existing special régimes unaffected, especially with regard to persons connected with the missions listed. Their immunities may also be regarded, in the final analysis, as State immunities, since the immunities enjoyed by them belong to the State and can be waived at any time by the State or States concerned.

Paragraph 2

(6) Paragraph 2 is designed to introduce an express reference to the immunities extended under existing international law to foreign sovereigns and other heads of State in their private capacities, *ratione personae*. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with in article 3. Article 3, paragraph 1 (*a*) and (*d*), cover the various organs of the Government of a State and State representatives, including heads of State, irrespective of the system of government. The reservation in article 4, paragraph 2, therefore refers exclusively to private acts or personal privileges and immunities which are recognized and accorded in the practice of States and whose status is in no way affected by the present articles. The existing customary law is left untouched.[54]

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

Article 5. Non-retroactivity of the present articles

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

[47] Draft article 25, submitted by the Special Rapporteur in his seventh report, document A/CN.4/388 (see footnote 3 above), paras. 119-125.

[48] See footnote 46 above; see also the various bilateral consular agreements.

[49] United Nations, *Treaty Series*, vol. 596, p. 261.

[50] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

[51] United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

[52] See, for example, the 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15), the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261) and the relevant regional conventions.

[53] *Ibid.*, vol. 1035, p. 167.

[54] For the jurisprudence in this connection, see the Special Rapporteur's seventh report, document A/CN.4/388 (see footnote 3 above), paras. 119-125.

Commentary

(1) Under article 28 of the 1969 Vienna Convention on the Law of Treaties,[55] non-retroactivity is the rule in the absence of any provision in the present articles to the contrary. The question nevertheless arises as to the nature and extent of the non-retroactive effect of the application of the present articles. It is necessary to determine a precise point in time at which the articles would apply as between the States which have accepted their provisions. The Commission has decided to select a time which is relatively precise, by providing that the principle of non-retroactivity applies to proceedings instituted prior to the entry into force of the articles as between the States concerned.

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

PART II

GENERAL PRINCIPLES

Article 6. State immunity

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

Commentary

(1) Article 6 as provisionally adopted by the Commission at its thirty-second session had a commentary containing an extensive survey of the judicial, governmental and legislative practice of States.[56] The commentary to the earlier article 6 is still generally applicable, except for the passages dealing with the formula adopted then and the dual approach to the formulation of immunity as a right and also as imposing a duty. The second aspect of that approach is now fully covered in article 7, on the modalities for giving effect to State immunity.

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

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

PART III

[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Commentary to part III

The Commission could not agree on whether "Limitations on State immunity" or "Exceptions to State immunity" was more appropriate as the title of part III. It finally decided to place both "Limitations" and "Exceptions" in square brackets and to consider the matter further on second reading in the light of the comments and observations of Governments. Some members of the Commission were, however, of the view that, whatever title was eventually adopted, "limitations on" or "exceptions to" State immunity constituted an integral feature of a unitary principle of State immunity rather than a rule or series of rules independent of the principle. Other members took a dif-

[55] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

[56] See *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157.

ferent view. Like article 6, the title of part III is not intended to express any preference between the divergent doctrinal interpretations of the immunities of States.

. . .

Article 20. Cases of nationalization

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

Commentary

Article 20 is a general reservation provision, applicable to any question regarding possible extra-territorial effects of any measure of nationalization taken by a State affecting property, movable or immovable, industrial or intellectual. It is generally understood that nationalization, within the context of this article, is a measure taken by a State in the exercise of its sovereign authority.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Commentary to part IV

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

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

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

Article 21. State immunity from measures of constraint

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

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

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

Commentary

(1) Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Article 21 clearly defines the rule of State immunity in its second phase, concerning property, particularly measures of execution as a separate procedure from the original proceeding.

(2) The practice of States has evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from jurisdiction.[57] Whatever the theories, the fact remains that the question of execution does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgment in favour of the plaintiff. Immunity from execution may be viewed, therefore, as the last fortress, the last bastion of State immunity. If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (*par in parem imperium non habet*), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property. Such a possibility does not exist even in international litigation, whether by judicial settlement or arbitration.[58]

[57] See the jurisprudence cited in the Special Rapporteur's seventh report, document A/CN.4/388 (see footnote 3 above), paras. 73-77.

[58] See, for example, in the *Socobelge* case, the judgment of the PCIJ of 15 June 1939 concerning the arbitral awards of 3 January and 25 July 1936 (*P.C.I.J., Series A/B, No. 78*, p. 160), and the decision of 30 April 1951 of the Tribunal civil of Brussels (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), p. 244).

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

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

(5) The word "State" in the expression "proceeding before a court of another State" refers to the State where the property is located, regardless of where the substantive proceeding takes place. Thus, before any measures of constraint are implemented, a proceeding to that effect should be instituted before a court of the State where the property is located. Of course, in some special circumstances, such as under a treaty obligation, no further court proceeding may be required for execution once there is a final judgment by a court of another State party to the treaty.

(6) The principle of immunity here is subject to two conditions which, if either is met, would result in non-immunity: (*a*) if the property is specifically in use or intended for use by the State for commercial [non-governmental] purposes; (*b*) if the property has been allocated or earmarked by the State for the satisfaction of the claim. Subparagraph (*a*) further provides that, for there to be no immunity, the property must have a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed.

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

(8) The term "non-governmental" is between square brackets, as the views of members of the Commission on this point are still divergent. Some insist on the term being retained for the provision to be acceptable, while others have been equally insistent on its deletion. A similar situation has already arisen in connection with ships under article 18.[59]

(9) Under subparagraph (*b*), the property can be subject to measures of constraint only if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding. This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability.[60]

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

Article 22. Consent to measures of constraint

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

(*a*) by international agreement;

(*b*) in a written contract; or

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

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

Commentary

Paragraph 1

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

[59] See paras. (6) and (7) of the commentary to that article (originally article 19), *Yearbook ... 1985*, vol. II (Part Two), pp. 61-62.

[60] For the case-law, international opinion, treaties and national legislation dealing with immunity from measures of constraint, see the Special Rapporteur's seventh report, document A/CN.4/388 (see footnote 3 above), paras. 33-82.

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

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

Paragraph 2

(4) Paragraph 2 makes more explicit the requirement of separate consent for the taking of measures of constraint under part IV. Consent under article 8 of part II does not cover any measures of constraint but is confined exclusively to immunity from the jurisdiction of a court of a State in a proceeding against another State.[61]

Article 23. Specific categories of property

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

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

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

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

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

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

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

Commentary

Paragraph 1

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

(2) This protection is deemed necessary and timely in view of the alarming trend in certain jurisdictions to attach or freeze assets of foreign States, especially bank accounts,[62] assets of the central bank[63] or other *instrumenta legati*[64] and specific categories of property which equally deserve protection. Each of these specific categories of property cannot be presumed to be in use or intended for use for commercial [non-governmental]

[61] For a more detailed account of the judicial and treaty practice of States and government contracts, see the Special Rapporteur's seventh report, document A/CN.4/388 (see footnote 3 above), paras. 85-102. In some jurisdictions, for example in Switzerland, execution is based on the existence of a sufficient connection with Swiss territory (*Binnenbeziehung*). See, for example, *Greek Republic* v. *Walder and others* (1930) (*Recueil officiel des arrêts du Tribunal fédéral suisse, 1930,* vol. 56, p. 237; *Annual Digest of Public International Law Cases, 1929-1930* (London), vol. 5 (1935), p. 121, case No. 78); J.-F. Lalive, "Swiss law and practice in relation to measures of execution against the property of a foreign State", *Netherlands Yearbook of International Law, 1979* (Alphen aan den Rijn), vol. X, p. 160; and I. Sinclair, "The law of sovereign immunity: Recent developments", *Collected Courses of The Hague Academy of International Law, 1980-II* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, p. 236. See also Lord Denning's observations in the *Thai-Europe* case (1975) (*loc. cit.* (footnote 43 above), pp. 963 *et seq.*). On the requirement of a separate or second consent to execution, see the judgment of the Court of Appeal of Aix-en-Provence in *Banque d'Etat tchécoslovaque* v. *Englander* (1966) (*Annuaire français de droit international, 1967* (Paris), vol. 13, p. 825; *International Law Reports* (London), vol. 47 (1974), p. 157)—however, this judgment was set aside by the Court of Cassation (1969) (*Journal du droit international* (Clunet) (Paris), vol. 96 (1969), p. 923; *International Law Reports* (Cambridge), vol. 52 (1979), p. 335); and *Clerget* v. *Représentation commerciale de la République démocratique du Viet Nam* (1969) (*Annuaire français de droit international, 1970,* vol. 16, p. 931).

[62] See, for example, *Birch Shipping Corp.* v. *Embassy of Tanzania* (1980) (United States of America, *Federal Supplement,* vol. 507 (1981), p. 311, at p. 313); the decision of 13 December 1977 of the Federal Constitutional Court of the Federal Republic of Germany in *X* v. *Republic of the Philippines* (United Nations, *Materials on Jurisdictional Immunities* ..., p. 297); and *Alcom Ltd.* v. *Republic of Colombia* (1984) (*The All England Law Reports, 1984,* vol. 2, p. 6).

[63] See, for example, *Hispano Americana Mercantil S.A.* v. *Central Bank of Nigeria* (1979) (*Lloyd's Law Reports, 1979,* vol. 2, p. 277; reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., p. 449); *Re Royal Bank of Canada and Corriveau et al.* (1980) (*Dominion Law Reports, 3d Series,* vol. 117 (1981), p. 199); *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica* (1982) (United States of America, *Federal Reporter, 2d Series,* vol. 676 (1982), p. 47); and *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977) (*The All England Law Reports, 1977,* vol. 1, p. 881).

[64] See, for example, the *Romanian legation* case (1949) (*Revue hellénique de droit international* (Athens), vol. 3 (1950), p. 331); and, in a case concerning a contract of employment at the Indian Embassy in Berne, J. Monnier, "Note à l'arrêt de la première Cour civile du Tribunal fédéral du 22 mai 1984 dans l'affaire S. contre Etat indien", *Annuaire suisse de droit international* (Zurich), vol. 41 (1985), p. 235.

purposes, since, by its very nature, such property must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations.

(3) Property listed in paragraph 1 (*a*) is intended to be limited to that which is in use or intended for use for the "purposes" of the State's diplomatic functions. This obviously excludes property, for example bank accounts, maintained by embassies for commercial purposes. It also excludes property which may have been, but is no longer, in use or intended for use for diplomatic or cognate purposes. The expressions "missions" and "delegations" also include permanent observer missions and observer delegations within the meaning of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[65]

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

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

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

Paragraph 2

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

PART V

MISCELLANEOUS PROVISIONS

Article 24. Service of process

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

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

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

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

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

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

(ii) by any other means.

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

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

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

Commentary

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

(2) Article 24 relates to a large extent to the domestic rules of civil procedure of States. It takes into account the difficulties involved if States are called upon to modify their domestic rules of civil procedure. At the same time, it does not provide too liberal or generous a régime of service of process, which could result in an excessive number of judgments in default of appearance by the defendant State. The article therefore proposes a middle ground so as to protect the interests of the defendant State and those of the individual plaintiff.

Paragraph 1

(3) Paragraph 1 is designed to indicate the normal ways in which service of process can be effected when a proceeding is instituted against a State. A hierarchy is proposed to give priority to certain means, taking into account the element of reliability of each. The parties to the proceeding can make a special arrangement, or, in the absence of such an arrangement, a binding international convention can be followed, failing which diplomatic channels might afford a solution. Failing the foregoing, transmission by registered mail or other means can be adopted, provided that such means are permitted by the law of the State of the forum and the law of the State in whose territory service of process is to be effected. The variety of means available ensures the widest possible flexibility, while protecting the interests of the parties concerned.

[65] See footnote 51 above.

Paragraphs 2 and 3

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

Paragraph 4

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

Article 25. Default judgment

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

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

Commentary

Paragraph 1

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

Paragraph 2

(2) Paragraph 2 is designed to ensure effective communication with the State concerned and to allow adequate opportunities to the defendant State to apply to have a default judgment set aside, whether by way of appeal or otherwise. If any time-limit is to be set for applying to have a default judgment set aside, another period of not less than three months must have elapsed before any measure can be taken in pursuance of the judgment.

Article 26. Immunity from measures of coercion

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

Commentary

Article 26 relates to measures of coercion requiring a State to perform or refrain from performing a specific act on pain of suffering a monetary penalty, known in some legal systems under the name *astreinte*. It provides for immunity from any court order for specific performance carrying with it the coercive measure of a pecuniary penalty for non-performance of the order. The word "coercion" is chosen for its breadth and covers all kinds of injunctions.

Article 27. Procedural immunities

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

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

Commentary

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

Paragraph 1

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

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

Paragraph 2

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

Article 28. Non-discrimination

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

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

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

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

Commentary

(1) After prolonged discussion, the Commission agreed to adopt a text for article 28 based on the analogy of article 47 of the 1961 Vienna Convention on Diplomatic Relations[66] and other corresponding conventions. A certain degree of flexibility was considered desirable for those marginal instances where a restrictive application of the present articles might be adopted by the State of the forum in respect of another State because that other State had adopted the same restrictive application of the articles to the State of the forum. This reciprocal treatment, resulting in restrictive application of the articles, is not to be taken as a discriminatory measure against the other State adopting the same restrictive application.

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

[66] See footnote 46 above.

Chapter III

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

A. Introduction

23. The Commission began its consideration of the topic "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.

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

25. At its thirty-first session, in 1979, the Commission appointed Mr. Alexander Yankov Special Rapporteur for the topic and entrusted him with the preparation of a set of draft articles for an appropriate legal instrument.

26. From its thirty-second session (1980) to its thirty-seventh session (1985), the Commission considered the six reports submitted by the Special Rapporteur,[67] which contained, among other matters, draft articles on the topic.

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

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

(*b*) The Commission had referred to the Drafting Committee draft articles 36 to 43 submitted by the Special Rapporteur in his sixth report. However, because of pressure of work, the Drafting Committee had not been able to consider these draft articles before the end of the Commission's thirty-seventh session.[68]

B. Consideration of the topic at the present session

28. At the present session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/400).[69] The seventh report contained revised texts of and explanations concerning draft articles 36, 37, 41, 42 and 43, entitled "Inviolability of the diplomatic bag" (art. 36); "Exemption from customs duties, dues and taxes" (art. 37); "Non-recognition of

[67] The six reports of the Special Rapporteur are reproduced as follows:

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.4/347 and Add.1 and 2;

Third report: *Yearbook ... 1982,* vol. II (Part One), p. 247, document A/CN.4/359 and Add.1.

Fourth report: *Yearbook ... 1983,* vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4;

Fifth report: *Yearbook ... 1984,* vol. II (Part One), p. 72, document A/CN.4/382;

Sixth report: *Yearbook ... 1985,* vol. II (Part One), p. 49, document A/CN.4/390.

[68] For a full historical review of the Commission's work on the topic, see *Yearbook ... 1985,* vol. II (Part Two), pp. 28 *et seq.*, paras. 164-177.

[69] Reproduced in *Yearbook ... 1986,* vol. II (Part One).

States or Governments or absence of diplomatic or consular relations" (art. 41); "Relation of the present articles to other conventions and international agreements" (art. 42); and "Optional declaration of exceptions to applicability in regard to designated types of couriers and bags" (art. 43). The seventh report also included the text of and explanations concerning a new draft article 39, entitled "Protective measures in case of *force majeure*", combining and replacing former draft article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag) and draft article 40[70] (Obligations of the transit State in case of *force majeure* or fortuitous event).[71]

29. The Commission considered the Special Rapporteur's seventh report at its 1948th to 1951st meetings, from 20 to 23 May 1986. After hearing the introduction by the Special Rapporteur, the Commission discussed the revised texts of draft articles 36, 37, 41, 42 and 43, as well as the text of new draft article 39, and decided to refer them to the Drafting Committee.

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

31. Also at its 1980th meeting, on 2 July 1986, the Commission adopted on first reading the whole set of draft articles on the topic. The texts are reproduced in section D.1 of the present chapter.

32. At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles set out in section D.1 of the present chapter, through the Secretary-General, to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General not later than 1 January 1988.

[70] For the texts of former draft articles 39 and 40, submitted by the Special Rapporteur in his sixth report, see *Yearbook ... 1985*, vol. II (Part Two), p. 33, footnotes 130 and 131.

[71] For the revised texts of these draft articles, see the seventh report of the Special Rapporteur (A/CN.4/400).

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

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

The International Law Commission,

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

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

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

1. Texts of the draft articles provisionally adopted by the Commission on first reading[72]

Part I

GENERAL PROVISIONS

Article 1. Scope of the present articles

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

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.

[72] For the commentaries to articles 1 to 7 (now article 8), provisionally adopted by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*; for the commentaries to article 8 (now article 7), provisionally adopted at the thirty-fifth and thirty-sixth sessions, and to articles 9 to 17, 19 and 20, provisionally adopted at the thirty-sixth session, see *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*; for the commentary to paragraph 2 of article 12 (from which paragraph the Commission decided at its thirty-seventh session to remove the square brackets appearing in the text provisionally adopted at the thirty-sixth session) and the commentaries to articles 18 and 21 to 27, provisionally adopted at the thirty-seventh session, see *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.* For the commentaries to articles 28 to 33, see subsection 2 below.

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, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

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

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

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

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

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

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

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

(6) "mission" means:

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

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

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

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

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

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

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

Article 4. Freedom of official communications

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

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

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

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

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

Article 6. Non-discrimination and reciprocity

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

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

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

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

PART II

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

Article 7. Appointment of the diplomatic courier

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

Article 8. Documentation of the diplomatic courier

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

Article 9. Nationality of the diplomatic courier

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

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of 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 accorded to the diplomatic courier

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

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

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

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

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

Article 15. Freedom of movement

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

Article 16. Personal protection and inviolability

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

Article 17. Inviolability of temporary accommodation

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

2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State 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.

PART III

STATUS OF THE DIPLOMATIC BAG

Article 24. Identification of the diplomatic bag

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

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

Article 25. Content of the diplomatic bag

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

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

Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport

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

Article 27. Facilities accorded to the diplomatic bag

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

Article 28. Protection of the diplomatic bag

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

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

Article 29. Exemption from customs duties, dues and taxes

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

PART IV

MISCELLANEOUS PROVISIONS

Article 30. Protective measures in case of force majeure *or other circumstances*

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

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

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

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

Article 32. Relationship between the present articles and existing bilateral and regional agreements

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

Article 33. Optional declaration

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

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

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

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

2. TEXTS OF DRAFT ARTICLES 28 TO 33, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-EIGHTH SESSION*

PART III

STATUS OF THE DIPLOMATIC BAG

. . .

Article 28. Protection of the diplomatic bag

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

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

Commentary

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

Paragraph 1

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

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

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

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

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

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* In the commentaries to the following articles, the four multilateral conventions on diplomatic and consular law concluded under the auspices of the United Nations,

1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95),

1963 Vienna Convention on Consular Relations (*ibid.*, vol. 596, p. 261),

1969 Convention on Special Missions (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125),

1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87), hereinafter referred to as "1975 Vienna Convention on the Representation of States",

are referred to as the "codification conventions".

violable wherever it may be" appear between square brackets.

(7) The other bracketed element in paragraph 1 is the phrase "and shall be exempt from examination directly or through electronic or other technical devices". Some members of the Commission felt that the inclusion of this phrase was necessary as the evolution of technology had created very sophisticated means of examination which might result in the violation of the confidentiality of the bag, means which were at the disposal of only the most developed States. Other members, invoking the security interests of the receiving or transit States and certain characteristics of today's international relations, felt that the possibility, in exceptional cases, of subjecting the bag to security checks by means of scanning with electronic or other technical devices was of fundamental importance to ensure the safety of international communications and to prevent abuses regarding the contents of diplomatic bags. In the view of those members, the inclusion of the phrase was incompatible with the balanced solution that paragraph 2 was intended to achieve. The point was also made that bags and other luggage which had not been scanned would not be accepted by many airlines.

Paragraph 2

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

(9) Some members of the Commission felt that a provision of this nature could give rise to disputes, as sending States might, in their turn, claim that requests for opening the bag on the presumption of its contents being unlawful were motivated by a desire to violate the confidentiality of those contents. Other members felt that the principle of reciprocity would act as an effective barrier against possible abuse by the receiving State in requesting the opening of the bag.

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

(11) The words "or transit" also appear between square brackets because some members of the Commission could not accept the extension to the transit State of the rights accorded by the paragraph to the receiving State.

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

Article 29. Exemption from customs duties, dues and taxes

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

Commentary

(1) There is no specific provision in the codification conventions concerning the exemption from customs duties, dues and taxes of the diplomatic bag. The present provision is based on the consideration that the bag and its contents are articles for the official use of missions, consular posts and delegations, since, according to the definition provided in article 25, the diplomatic bag "may contain only official correspondence, and documents or articles intended exclusively for official use". Taking the foregoing into

account, the sources for this provision are article 36 of the 1961 Vienna Convention on Diplomatic Relations, article 50 of the 1963 Vienna Convention on Consular Relations, article 35 of the 1969 Convention on Special Missions and articles 35 and 65 of the 1975 Vienna Convention on the Representation of States.

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

(3) As to the exemptions provided for in article 29, they cover customs and other fiscal dues and taxes levied by the transit or receiving State on the import or export of goods. The exemptions also concern related charges for customs clearance or other formalities, such as those necessary in some States to assure the exempt status of a given object or article. The exemptions are granted in accordance with the laws and regulations of the States concerned and may cover national, regional or municipal dues and taxes, as provided for in the domestic rules and regulations of the receiving or transit State. However, the exemptions from customs duties and related charges, as well as other dues and taxes levied by the transit or receiving State, do not include charges for storage, cartage, transportation, postage or similar services rendered in connection with the transmission or delivery of the diplomatic bag. Some of these charges for services, such as postage or transportation, could be waived, but only on the basis of reciprocal arrangements between the sending State and the receiving or transit State.

PART IV

MISCELLANEOUS PROVISIONS

Article 30. Protective measures in case of force majeure *or other circumstances*

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

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

Commentary

(1) Article 30 deals with certain obligations on the part of the receiving or transit State when *force majeure* or other circumstances: (*a*) prevent the diplomatic courier or any person to whom the diplomatic bag has been entrusted under article 23, including any member of the crew of a ship or aircraft in commercial service, from maintaining custody of the bag; or (*b*) involve a diversion of the courier or the bag from their scheduled itinerary into the territory of an unforeseen transit State.

Paragraph 1

(2) Paragraph 1 refers to the case where *force majeure* or other circumstances, such as death, serious illness or an accident, prevent the courier, the captain of a ship or aircraft in commercial service to whom the diplomatic bag has been entrusted, or any other member of the crew from maintaining custody of the bag. The exceptional character of the circumstances involved and the significance of the protected interests warrant the adoption on the part of the receiving or transit State of special measures of protection of the safety of the diplomatic bag. This obligation must be considered as an expression of international co-operation and solidarity by States in the promotion of diplomatic communications and derives from the general principle of the freedom of communication contemplated in article 4. It was made clear in the Commission that this paragraph was not intended to cover the case of loss of or mishaps to the diplomatic bag transmitted by postal service or by any mode of transport (art. 26), since in such cases it was for the service charged with the transmission to assume responsibility under the special circumstances envisaged in the present paragraph.

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

(4) Two clarifications were made in the Commission with regard to the conditions under which the above-mentioned obligations might arise for the receiving State and the transit State. First, it is understood that such obligations can arise only when the receiving or transit State has knowledge of the existence of the special circumstances referred to in paragraph 1. Secondly, in the case of a bag entrusted to the captain of a ship or aircraft, the obligation would arise for the

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

Paragraph 2

(5) The source of the provision set out in paragraph 2 is to be found in article 40, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, article 54, paragraph 4, of the 1963 Vienna Convention on Consular Relations, article 42, paragraph 5, of the 1969 Convention on Special Missions, and article 81, paragraph 5, of the 1975 Vienna Convention on the Representation of States.

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

(7) The 1961 Vienna Convention on Diplomatic Relations was the first multilateral treaty to establish the rule of transit passage of the members of a diplomatic mission and their families, as well as of the diplomatic courier and the diplomatic bag, whose presence in the territory of the transit State is due to *force majeure* (art. 40, para. 4). By analogy with this provision, the unforeseen transit State is under an obligation to accord to the diplomatic courier and the diplomatic bag in transit the same inviolability and protection as are accorded by the receiving State. Similar rules are contained in the other codification conventions listed in paragraph (5) of the present commentary.

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

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

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

Commentary

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

(2) The rules relating to the legal effect of the non-recognition of a State or Government or of the absence or severance of diplomatic or consular relations contained in the above-mentioned codification conventions are applicable to the status of the diplomatic courier and the diplomatic bag. The importance and significance of the functions of the courier and the purpose of the bag as practical means for the operation of official communications of States justify special protection and treatment irrespective of problems of recognition of States or Governments or the existence or absence of diplomatic or consular relations. The proper functioning of official communications is in the interest of the maintenance of international co-operation and understanding and should therefore be facilitated, even in the exceptional circumstances contemplated in article 31. The article refers both to "non-recognition" and to "non-existence of diplomatic or consular relations" because recognition, whether of States or of Governments, does not necessarily imply the establishment of diplomatic or consular relations.[73]

(3) Article 31 speaks of "non-recognition of the sending State", although it does not specify by whom, and refers to "the non-existence of diplomatic or consular relations" without specifying between whom. Several alternative formulations were considered which, briefly stated, connected the two above-mentioned expressions to a relationship between sending State and "receiving State", or between sending State and "host State", or between sending State and both "receiving State and host State". The question of the relationship between sending State and transit State was also considered. In the end, for reasons related to the need both to obtain a consensus on the formulation and to achieve economy of drafting and consistency throughout the draft, the Commission opted for the present wording of the article, on the understanding that the commentary would elaborate on its actual scope.

[73] See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (Sales No. E.75.V.12), pp. 52-53, para. (7) of the commentary to draft article 79.

(4) First, the article refers to the non-recognition of the sending State by the State in whose territory an international conference is held or the headquarters of an international organization is established, and to the non-existence (absence, suspension or interruption) of relations between them. It is thus designed to provide for the legal protection of the diplomatic courier and the diplomatic bag in official communications between the sending State and its permanent missions or observer missions to international organizations and its delegations to international meetings, whether conferences or organs of international organizations. Secondly, the article also covers the protection of couriers and bags between the sending State and a special mission it may send to another State for the purpose of establishing diplomatic or consular relations. Several members of the Commission were of the view that the article also purported to afford protection to couriers and bags passing through a transit State which did not recognize the sending State or its Government or which did not maintain diplomatic or consular relations with the sending State. Some members of the Commission, however, had reservations about extending the scope of the article to the transit State when the latter did not recognize the sending State or its Government.

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

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

Article 32. Relationship between the present articles and existing bilateral and regional agreements

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

Commentary

(1) The most immediate precedents for the present provision are article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations and article 4 (*a*) of the 1975 Vienna Convention on the Representation of States.

(2) The purpose of article 32 is to reserve the position of existing bilateral or regional agreements regulating the same subject-matter as the draft articles and it should be interpreted in the light of article 30, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties.[74] By means of this legal connection a safeguard clause is established in respect of the rights and obligations of States deriving from those agreements. It was made clear in the Commission that the word "regional" should not be understood in a purely geographical sense, but was really intended to denote any non-bilateral treaty on the same subject-matter other than the four codification conventions.

(3) As to the relationship between the present articles and the four codification conventions, it should be noted that the main purpose of the elaboration of the present articles was the establishment of a coherent and uniform régime governing the status of the courier and the bag. The present articles will therefore complement the provisions on the courier and the bag contained in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The desired harmonization and uniformity of the rules governing the legal régime of official communications through the diplomatic courier and the diplomatic bag are sought by means of the progressive development and codification of additional specific provisions further regulating the matter. The present articles do not purport to amend the above-mentioned conventions. Nevertheless, in the view of some members of the Commission, the application of some of the provisions of those conventions may be affected because of the complementary character of the present articles, which harmonize and develop the rules governing the legal régime of the courier and the bag.

(4) One member of the Commission stated that the wording of the present article was unacceptable for two reasons: (*a*) it gave to the words "regional agreements" a connotation beyond their natural interpretation; (*b*) it might be construed as meaning that the texts of the four codification conventions were being affected or modified by the present articles.

(5) There was a consensus in the Commission to the effect that the provision in article 6, paragraph 2 (*b*), of the present draft made it possible to dispense with the adoption of an additional paragraph to cover the relationship between the present articles and future agreements relating to the same subject-matter, particularly if account was taken of article 41 of the 1969 Vienna Convention on the Law of Treaties. It should therefore be understood that, in accordance with article 6, paragraph 2 (*b*), 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, supplementing, extending or amplifying the provisions

[74] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

thereof, provided that such new provisions are not incompatible with the object and purpose of the present articles and do not affect the enjoyment of the rights or the performance of the obligations of third States.

Article 33. Optional declaration

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

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

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

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

Commentary

(1) Notwithstanding the main purpose of the elaboration of the present articles pointed out in paragraph (3) of the commentary to article 32 above, namely the establishment of a coherent and uniform régime governing the status of the courier and the bag, a number of views expressed by members of the Commission and representatives in the Sixth Committee of the General Assembly led the Commission to introduce some flexibility into the draft which would permit States to designate the categories of couriers and bags to which they did not intend to apply the articles. As already indicated in paragraphs (3) and (9) of the commentary to article 3,[75] the detailed listing of the different kinds of couriers and bags covered by the concepts of "diplomatic courier" and "diplomatic bag" defined in article 3 was intended to show clearly that a State, by an appropriate declaration, could reduce the extent of the obligation it assumed by limiting the sphere of application of the present articles to only certain categories of couriers and bags. It was felt that States should be given a clear choice to apply the future articles to those categories of couriers and corresponding categories of bags which they deemed appropriate. Furthermore, as pointed out in paragraph (2) of the commentary to article 1,[76] many States are not parties to all four of the codification conventions, and one of them, the 1975 Vienna Convention on the Representation of States, has not yet entered into force. These reasons have led the Commission to include in the draft the present article 33, which is based on article 298 of the 1982 United Nations Convention on the Law of the Sea.[77] It is hoped that the inclusion of this provision will facilitate the acceptance of the draft articles by States.

(2) It was made clear in the Commission that the optional declaration referred to in article 33 did not constitute a reservation, but was the implementation of an agreed option, with respect to the various provisions, at the disposal of States parties, or States wishing to become parties, to the present articles. One member raised the question whether such a provision detracted from the effort to harmonize the law in this area.

(3) One member of the Commission considered that the inclusion of article 33 could make it possible for States unilaterally to modify the legal régimes established by the four codification conventions to which they were parties.

Paragraph 1

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

(5) A declaration made under paragraph 1 must be in writing and may refer to "any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraph 1 (1) and (2) of article 3". A double limitation is thus placed on the object of the declaration. On the one hand, the categories of couriers and bags referred to in the paragraph may not be arbitrarily created by the State formulating the declaration: they may include only couriers and bags within the meaning of each of the codification conventions, 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. On

[75] *Yearbook ... 1983*, vol. II (Part Two), pp. 55-56.

[76] *Ibid.*, p. 54.

[77] *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.

the other hand, the declaration should refer to a category of courier and to the "corresponding" category of bag. This prevents the splitting up of legal régimes, precluding, for instance, declarations which might intend to make the present articles applicable to the consular courier but not to the consular bag, or vice versa. Thus the categories of couriers and bags chosen for non-applicability of the present articles must correspond with each other.

Paragraph 2

(6) Paragraph 2 deals with the publication and entry into force of the optional declaration. The publication of the declaration is ensured by means of its communication to the depositary of the articles, who will act in accordance with article 77, paragraph 1 (*e*), of the 1969 Vienna Convention on the Law of Treaties. Copies of the declaration will thus be circulated not only to parties to the future treaty, but also to "States entitled to become Parties to the present articles". The above procedure also follows the provisions of article 7, paragraph 4, of the 1978 Vienna Convention on Succession of States in Respect of Treaties,[78] concerning declarations on temporal application of the Convention.

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

Paragraph 3

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

Paragraph 4

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

[78] United Nations, *Juridical Yearbook 1978* (Sales No. E.80.V.1), p. 106.

Chapter IV

STATE RESPONSIBILITY

A. Introduction

34. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft 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.[79]

35. At its thirty-second session, in 1980, the Commission provisionally adopted on first reading *part 1* of the draft articles, on the "Origin of international responsibility".[80]

36. At the same session, the Commission also began its consideration of *part 2* of the draft articles, on the "Content, forms and degrees of international responsibility".

37. From its thirty-second session to its thirty-seventh session (1985), the Commission considered six reports submitted by the Special Rapporteur, Mr. Willem Riphagen, on part 2 of the draft articles.[81]

38. By the end of its thirty-seventh session, in 1985, the Commission had reached the following stage in its work on the preparation of part 2 of the draft articles. It had: (*a*) provisionally adopted draft articles 1 to 5 on first reading;[82] (*b*) referred draft articles 6 to 13 to the Drafting Committee; (*c*) referred draft articles 14 to 16 to the Drafting Committee on the understanding that any comments the Drafting Committee might wish to make on those articles would be taken into consideration by the Special Rapporteur in preparing his future reports to the Commission. By the end of the Commission's thirty-seventh session, the Drafting Committee had not been able to consider draft articles 6 to 16 because of pressure of work.[83]

39. At the thirty-seventh session, on the basis of the sixth report of the Special Rapporteur, the Commission also began, with a preliminary exchange of views, its consideration of *part 3* of the draft articles, on the "'Implementation' (*mise en œuvre*) of international responsibility and the settlement of disputes". In his sixth report, the Special Rapporteur proposed a general plan for part 3 of the draft articles.[84]

B. Consideration of the topic at the present session

40. At its present session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/397 and Add.1).[85] The report consisted of two sections: section I contained the draft articles, together with commentaries, of part 3 of the draft;[86] section II

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[79] *Yearbook ... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

[80] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[81] The six reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330;

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

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

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

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 1, document A/CN.4/380;

Sixth report: *Yearbook ... 1985*, vol. II (Part One), p.3, document A/CN.4/389.

[82] For the texts of articles 1 to 5 provisionally adopted on first reading, see below, sect. C of the present chapter.

[83] For the texts of draft articles 6 to 16 referred to the Drafting Committee, see *Yearbook ... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

[84] For a full historical review of the Commission's work on the topic, *ibid.*, pp. 19 *et seq.*, paras. 102-163.

[85] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[86] These draft articles read as follows:

"*Article 1*

"A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor."

"*Article 2*

"1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

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

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

"*Article 3*

"1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles, by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in

(*Continued on next page.*)

(which was neither introduced nor discussed at the present session) concerned the first stage of the preparation of the second reading of part 1 of the draft articles and dealt with the written comments of Governments on the articles of part 1.

41. In presenting section I of his seventh report, the Special Rapporteur, referring in general to his sixth report, stressed the interrelationship between the three parts of the draft articles on State responsibility, and also between (*a*) the source and content of the primary rules, (*b*) the secondary rules of State responsibility, (*c*) the machinery for implementation and (*d*) the actual force of the machinery, as elements of one system of law.

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

43. Articles 6 to 16 of part 2 of the draft articles, which had been referred to the Drafting Committee, enumerated a number of unilateral reactions to an internationally wrongful act alleged to have been committed. These unilateral reactions ranged from a demand for reparation *lato sensu* (arts. 6 and 7), to measures by way of reciprocity (art. 8) and measures by way of reprisal (art. 9), to "additional rights and obligations" (arts. 14 and 15). Such unilateral reactions could involve an increasing number of States. The reactions were all disruptive in the sense that, in themselves, they tended to involve intervention in the internal and external af-

(Footnote 86 continued.)

respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

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

"*Article 4*

"If, under paragraph 1 of article 3, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

"(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (*b*) of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

"(*b*) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

"(*c*) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of part 2 of the present articles may set in motion the procedure specified in the annex to part 3 of the present articles by submitting a request to that effect to the Secretary-General of the United Nations."

"*Article 5*

"No reservations are allowed to the provisions of part 3 of the present articles, except a reservation excluding the application of article 4 (*c*) to disputes concerning measures taken or intended to be taken under article 9 of part 2 of the present articles by an alleged injured State, where the right allegedly infringed by such a measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes."

"*Annex*

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

"2. When a request has been made to the Secretary-General under article 4 (*c*) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

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

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

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

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

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

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

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

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

"4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

"5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

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

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

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

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

fairs of the other State, to deviate from the rule *pacta sunt servanda* and to set aside other rules of friendly relations and co-operation between States. Their justification lay in the veracity of the allegation that an internationally wrongful act had been committed and in the degree to which such an act itself disrupted the system involved.

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

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

46. In order to limit that danger, part 3 of the draft articles proposed a minimum of organizational arrangements in connection with the substantive rules of State responsibility. Draft articles 1 to 5 and the annex of part 3 closely followed the relevant provisions of the 1969 Vienna Convention on the Law of Treaties,[87] the 1982 United Nations Convention on the Law of the Sea[88] and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[89]

47. The Commission considered the Special Rapporteur's proposals for part 3 of the draft articles at its 1952nd to 1956th meetings, from 26 to 30 May 1986.

48. Some members of the Commission were of the view that it was not certain that providing for obligatory referral of the dispute to the ICJ, even in the particular cases covered by draft article 4, subparagraphs (*a*) and (*b*), of part 3, was acceptable. In that connection, it was recalled that a certain number of States had not accepted as obligatory the jurisdiction of the ICJ. Those members referred to the principle of the freedom of choice by the parties of the means of peaceful settlement of their dispute.

49. Other members pointed out that the draft articles submitted by the Special Rapporteur for part 3 had a limited scope: compulsory conciliation was provided for only in the situation in which countermeasures had been taken and thus the danger of escalation arose; the compulsory jurisdiction of the ICJ was limited to cases in which a State alleged that a measure of reciprocity or reprisal overstepped the limits imposed by a rule of *jus cogens*, and cases in which additional rights and obligations entailed by the alleged commission of an international crime were invoked. Those members considered the compulsory character of the dispute-settlement procedures in these limited cases a necessary corollary of part 2, providing for unilateral reactions, and expected most States to be willing to accept such procedures as part of a convention on State responsibility.

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

51. As regards the individual draft articles and the annex of part 3, some members stated that it should be made clear that draft articles 1 and 2 did not exclude other communications between States concerning an alleged or threatened breach of an international obligation, prior to the notifications mentioned in those articles.

52. Some members doubted the necessity for two separate notifications, as provided for in draft article 1 and draft article 2, paragraph 1. Other members pointed out that the alleged author State should be put on notice as regards the measures required of it by the injured State, since article 6 of part 2 of the draft, as proposed, envisaged several measures. It was also pointed out that, particularly "in cases of special urgency", the two notifications could be embodied in one and the same communication to the alleged author State.

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

54. Several members stated that they would prefer the word "wishes", in draft article 1 and draft article 2, paragraph 1, to be replaced by a stronger expression, such as "decides" or "intends".

55. With regard to draft article 3, paragraph 1, it was observed that the obligation to settle a dispute through the peaceful means indicated in Article 33 of the Charter of the United Nations would obviously arise before any countermeasures were considered or notified. On the other hand, this obligation did not suspend the right of the injured State to take countermeasures, subject to article 10 of part 2 of the draft.

56. Some members suggested that the draft articles of part 3 should deal with the question of "prescription" of the rights of the injured State, as had been indicated in paragraph 101 of the preliminary report submitted by the Special Rapporteur at the Commission's thirty-

[87] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

[88] *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.

[89] A/CONF.129/15.

second session.[90] One member expressed the opposite view.

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

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

59. It was generally recognized that, in the course of any dispute-settlement procedure under draft article 4, the "third party" would have to deal not only with the question of interpretation and application of the particular articles of part 2 mentioned in article 4, but also with "incidental" questions necessarily arising in such procedures with respect to other articles of part 2, the articles of part 1, the application or the interpretation of the primary rules involved, and, indeed, questions of fact. Some members suggested that this should be clarified in the text of draft article 4 itself.

60. Several members drew attention to the necessity, at some stage, of harmonizing the envisaged dispute-settlement procedures with the implementation procedures to be adopted within the framework of the two related topics being considered by the Commission, namely the draft Code of Offences against the Peace and Security of Mankind and international liability for injurious consequences arising out of acts not prohibited by international law.

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

62. With regard to draft article 5, one member considered the exception to the non-admissibility of reservations too broadly worded. Some other members considered the text acceptable and even necessary, while still other members would have preferred the question of the admissibility or non-admissibility of reservations to be left to a future diplomatic conference on the draft articles.

63. At the conclusion of its discussion, the Commission decided to refer draft articles 1 to 5 and the annex of part 3 to the Drafting Committee.

64. However, due to the exceptional shortening of the Commission's session, the Drafting Committee was not able to consider these texts.

65. At the Commission's 1980th meeting, on 2 July 1986, the Chairman of the Drafting Committee reported on the progress of work in the Drafting Committee on the draft articles on State responsibility. The Drafting Committee had devoted five meetings at the present session to article 6 of part 2 of the draft,[91] but, due to lack of time, it had not been possible for the Committee successfully to conclude its work on that draft article.[92]

C. Draft articles on State responsibility

Part 2. Content, forms and degrees of international responsibility

TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION[93]

Article 1

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

Article 2

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

Article 3

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

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[90] *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

[91] See footnote 83 above.

[92] However, progress had been made in the consideration of draft article 6. The Drafting Committee had reached a consensus on the revised introductory phrase of paragraph 1 ("The injured State is entitled to require the State which has committed an [internationally wrongful act] [international delict] to ...") and on the opening words of paragraph 1 (*a*) ("discontinue the act ..."); and a large measure of consensus had been reached on revised texts of paragraph 1 (*c*) ("subject to paragraph 2 [and to article 7], re-establish the situation as it existed before the act") and paragraph 1 (*d*) ("take appropriate measures designed to avoid repetition of the act"). There had been no consensus, however, on a revised text for the concluding phrase of paragraph 1 (*a*) ("adopt appropriate measures in order to reduce the continuing effects of the act"), nor on a revised text of paragraph 1 (*b*) ("take appropriate measures of a disciplinary or penal character against the persons who have perpetrated the act, as provided for in its internal law"). A large measure of consensus had been reached on paragraph 2 of the article.

[93] As a result of the provisional adoption of article 5 at its thirty-seventh session, the Commission decided to modify articles 2, 3 and 5, provisionally adopted at the thirty-fifth session (see *Yearbook ... 1985*, vol. II (Part Two), p. 20, para. 106), 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 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.

Chapter V

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

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

67. On the basis of the reports of the Special Rapporteur, the Commission, at its second session, in 1950, adopted a formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[94] and submitted those principles, with commentaries, to the General Assembly; then, at its sixth session, in 1954, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind[95] and submitted it, with commentaries, to the General Assembly.[96]

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

69. By its resolution 3314 (XXIX) of 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression.

70. By its resolution 36/106 of 10 December 1981, the General Assembly invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.

71. At its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic. From its thirty-fifth session (1983) to its thirty-seventh session (1985), the Commission considered three reports submitted by the Special Rapporteur.[97]

72. By the end of its thirty-seventh session, in 1985, the Commission had reached the following stage in its work on the topic. It was of the opinion that the draft code should cover only the most serious international offences. These offences would be determined by reference to a general criterion and also to the relevant conventions and declarations on the subject. As to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on that point, because of the political nature of the problem of the international criminal responsibility of States. As to the implementation of the code, since some members considered that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requested the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals.[98] The General Assembly was requested to indicate whether such a jurisdiction should also be competent with respect to States.[99]

73. Moreover, the Commission stated that it was its intention that the content *ratione personae* of the draft code should be limited at the current stage to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. As to the first stage of its work on the draft code, the Commission, in accordance with General Assembly resolution 38/132 of 19 December 1983, intended to begin by drawing up a provisional list of offences, while bearing in mind the drafting of an introduction summarizing the general principles of inter-

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[94] *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

[95] *Yearbook ... 1954*, vol. II, pp. 150-152, document A/2693, paras. 49-54.

[96] The texts of the 1954 draft code and of the Nürnberg Principles are reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18, and p. 12, para. 45, respectively.

[97] These three reports are reproduced as follows:
First report: *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/364;
Second report: *Yearbook ... 1984*, vol. II (Part One), p. 89, document A/CN.4/377;
Third report: *Yearbook ... 1985*, vol. II (Part One), p. 63, document A/CN.4/387.

[98] On the question of an international criminal jurisdiction, see *Yearbook ... 1985*, vol. II (Part Two), pp. 8-9, para. 19 and footnotes 16 and 17. See also footnote 131 below.

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

national criminal law relating to offences against the peace and security of mankind.

74. As regards the content *ratione materiae* of the draft code, the Commission intended to include the offences covered by the 1954 draft code, with appropriate modifications of form and substance which it would consider at a later stage. As of the thirty-sixth session, in 1984, a general trend had emerged in the Commission in favour of including in the draft code colonialism, *apartheid* and possibly serious damage to the human environment and economic aggression, if appropriate legal formulations could be found. The notion of economic aggression had been further discussed at the thirty-seventh session, in 1985, but no definite conclusions were reached. As regards the use of nuclear weapons, the Commission had discussed the problem at length, but intended to examine the matter in greater depth in the light of any views expressed in the General Assembly. With regard to mercenarism, the Commission considered that, in so far as the practice was used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constituted an offence against the peace and security of mankind. The Commission considered, however, that it would be desirable to take account of the work of the *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. With regard to the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc. and the hijacking of aircraft, the Commission considered that these practices had aspects which could be regarded as related to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission recognized that it was an international crime under customary international law. It doubted, however, whether in the present international community the offence could be such as to constitute a threat to the peace and security of mankind.[100]

75. At its thirty-seventh session, in 1985, the Commission considered the Special Rapporteur's third report, in which he specified the category of individuals to be covered by the draft code and defined an offence against the peace and security of mankind. The Special Rapporteur examined the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft code and possible additions to those paragraphs. He also proposed four draft articles relating to those offences, namely: "Scope of the present articles" (art. 1); "Persons covered by the present articles" (art. 2); "Definition of an offence against the peace and security of mankind" (art. 3); and "Acts constituting an offence against the peace and security of mankind" (art. 4).[101]

76. At the same session, the Commission referred draft article 1, the first alternative of draft article 2 and both alternatives of draft article 3 to the Drafting Committee. It also referred both alternatives of section A of draft article 4, concerning "The commission [by the authorities of a State] of an act of aggression", to the Drafting Committee, on the understanding that the Committee would consider them only if time permitted and that, if the Committee agreed on 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. Owing to lack of time, the Drafting Committee was not able to take up the draft articles referred to it by the Commission.[102]

B. Consideration of the topic at the present session

77. At its present session, the Commission had before it the Special Rapporteur's fourth report on the topic (A/CN.4/398).[103] The fourth report was divided into five parts as follows: part I: Crimes against humanity; part II: War crimes; part III: Other offences (related offences); part IV: General principles; part V: Draft articles.

78. The Commission considered the topic at its 1957th to 1967th meetings and at its 1969th meeting, from 2 to 16 June and on 18 June 1986. It discussed the first four parts of the Special Rapporteur's report. The result of the discussion is recorded in section C of the present chapter.

79. The set of draft articles submitted by the Special Rapporteur in part V of his report contained revised texts of the draft articles submitted at the Commission's thirty-seventh session[104] and a number of new draft articles.[105] The Commission decided to postpone detailed consideration of the draft articles until its next session.

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[100] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65.

[101] For the texts of these draft articles, see *Yearbook ... 1985*, vol. II (Part Two), pp. 14-18, footnotes 40, 46-50, and 52-53.

[102] For a detailed account of the Commission's work on the topic at its thirty-seventh session, *ibid.*, pp. 11 *et seq.*, paras. 34-101; for a fuller review of its earlier work on the topic, *ibid.*, pp. 7 *et seq.*, paras. 11-33.

[103] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[104] See footnote 101 above.

[105] The draft articles submitted by the Special Rapporteur read as follows:

"CHAPTER I

"INTRODUCTION

"PART 1. DEFINITION AND CHARACTERIZATION

"Article 1. Definition

"The crimes under international law defined in the present Code constitute offences against the peace and security of mankind."

"Article 2. Characterization

"The characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the internal order. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization."

"PART II. GENERAL PRINCIPLES

"Article 3. Responsibility and penalty

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

"Article 4. Universal offence

"1. An offence against the peace and security of mankind is a universal offence. Every State has the duty to try or extradite any

(*Continued on next page.*)

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

(*Footnote 105 continued.*)

perpetrator of an offence against the peace and security of mankind arrested in its territory.

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

"*Article 5. Non-applicability of statutory limitations*

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

"*Article 6. Jurisdictional guarantees*

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

"*Article 7. Non-retroactivity*

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

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

"*Article 8. Exceptions to the principle of responsibility*

"Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:

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

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

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

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

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

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

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

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

"*Article 9. Responsibility of the superior*

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

"CHAPTER II

"OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

"*Article 10. Categories of offences against the peace and security of mankind*

"Offences against the peace and security of mankind comprise three categories: crimes against peace, crimes against humanity and war crimes or [crimes committed on the occasion of an armed conflict]."

"PART I. CRIMES AGAINST PEACE

"*Article 11. Acts constituting crimes against peace*

"The following constitute crimes against peace:

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

"(*a*) *Definition of aggression*

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

"(ii) *Explanatory note.* In this definition, the term 'State':

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

"(*b*) includes the concept of a 'group of States', where appropriate.

"(*b*) *Acts constituting aggression*

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

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

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

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

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

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

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

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

"(*c*) *Scope of this definition*

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

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

1. Crimes against humanity

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

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

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

"(*a*) fomenting or tolerating 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.

"4. The undertaking, assisting 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*) *Definition of terrorist acts*

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

"(*b*) *Terrorist acts*

"The following constitute terrorist acts:

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

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

"(iii) any act calculated to endanger the lives of members of the public through fear of a common danger, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against 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.

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

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

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

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

"7. The forcible establishment or maintenance of colonial domination.

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

"A mercenary is any person who:

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

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

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

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

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

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

"Part II. Crimes against humanity

"*Article 12. Acts constituting crimes against humanity*

"The following constitute crimes against humanity:

"1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

"(i) killing members of the group;

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

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

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

"(v) forcibly transferring children from one group to another group.

"2. First alternative

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

"2. Second alternative

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

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

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

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

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

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

"(*c*) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

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

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

(*Continued on next page.*)

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

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

(*Footnote 105 continued.*)

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

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

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

"PART III. WAR CRIMES

"*Article 13. Definition of war crimes*

"FIRST ALTERNATIVE

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

"(*b*) Within the meaning of the present Code, the term 'war' means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

"SECOND ALTERNATIVE

"(*a*) *Definition of war crimes*

"Any serious violation of the conventions, rules and customs applicable to international or non-international armed conflicts constitutes a war crime.

"(*b*) *Acts constituting war crimes*

"The following acts, in particular, constitute war crimes:

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

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

"PART IV. OTHER OFFENCES

"*Article 14*

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

"A. FIRST ALTERNATIVE

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

"A. SECOND ALTERNATIVE

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

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

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

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

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

84. In connection with the *meaning of the word "crime"*, the Special Rapporteur pointed to an evolution in the substance of the term in the expression "crime against humanity". In the Charter of the Nürnberg Tribunal, for example, it had not necessarily covered the most serious acts. It had been a general expression covering all categories of criminal acts and had been synonymous with an offence. In most cases the acts had been crimes, but sometimes the term had covered lesser offences or even petty offences. For example, Law No. 10 of the Allied Control Council for Germany[106] (art. II, para. 1 (*c*)) had defined crimes against humanity as being *atrocities* and *offences*. From this standpoint, the draft articles submitted by the Special Rapporteur narrowed the scope of the code by covering only the most serious offences, those found at the top of the scale.

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

86. In the Special Rapporteur's view, the only element which seemed to be unanimously accepted was *motive*. All writers, all resolutions, all judicial decisions agreed

[106] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

that what characterized a crime against humanity was the motive, in other words the intention to harm a person or group of persons on the grounds of race, nationality, religion or political opinions. The Charter of the Nürnberg International Military Tribunal,[107] the Charter of the International Military Tribunal for the Far East[108] and Law No. 10 of the Allied Control Council all emphasized this aspect.

87. The Special Rapporteur went on to consider the content of a crime against humanity in the 1954 draft code. He pointed out that there were two characteristics in the case of the 1954 draft. First, it rendered the concept of a crime against humanity autonomous by detaching it from the concept of belligerence. Next, it was possible to distinguish two categories: *genocide* (art. 2, para. (10)) and other *inhuman acts* (art. 2, para. (11)). Whereas a crime against humanity under the Charter of the Nürnberg Tribunal could be committed only on the occasion of an armed conflict, the 1954 draft code, by eliminating the element of belligerence, had considerably broadened the scope of the concept of a crime against humanity. The second characteristic might seem questionable, since genocide formed part of "inhuman acts", and it could well be asked why it should be assigned a separate place. The Special Rapporteur's view was that the authors of the 1954 draft code had wished to emphasize the special intention underlying this crime. The approach seemed to be well founded and the Special Rapporteur therefore proposed that the 1954 text should be retained.

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

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

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

91. Some members of the Commission argued that crimes against humanity should not be confined solely to those based on ethnic, racial, religious or political considerations: other considerations could also be involved, including private gain. Many crimes committed by private individuals were based on private gain, and groups of individuals, particularly if such groups were powerful in terms of numbers or means, could commit criminal acts of such a character that the acts could be ranked as crimes against humanity.

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

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

93. In his report, the Special Rapporteur proposed that, since the various international instruments declaring *apartheid* to be an offence had already been listed in his second report,[109] *apartheid* should be expressly referred to in the draft code. The Special Rapporteur's view was that *apartheid*'s specific aspects, the particular form it took and the fact that it was based on a constitution and a system of government made it a crime which had particular features and which should be dealt with as such in the code. The definition of *apartheid* proposed by the Special Rapporteur (draft article 12, para. 2) consisted of two alternatives: the first merely referred to article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*;[110] the second fully reproduced the provisions of that article.

94. Different views were expressed in the Commission on the inclusion of *apartheid* in the draft code. Although the condemnation of that practice did not give rise to any reservations and was generally endorsed by the Commission, some members expressed doubts with respect to the way in which the definition of that crime should be formulated. Some members who were not in favour of a definition containing a mere *renvoi* said that the body of the article should, in so far as was possible, include the definitions contained in the relevant conventions and provisions. Other members did not regard conventions to which there had been few accessions as an acceptable basis, stating that the Commission had to draft an instrument on which broader agreement could be reached. It was also maintained that, even though certain acts committed in pursuance of the policy of *apartheid* were inhuman enough to be referred to in the draft code, there might be some overlapping with genocide and inhuman acts. It would therefore be necessary to identify the acts committed in pursuance of the policy of *apartheid* which were specific to that policy and which were not already included in the category of inhuman acts. Some members of the Commission took the view that the provision on *apartheid* had to be

[107] United Nations, *Treaty Series*, vol. 82, p. 279.

[108] *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

[109] Document A/CN.4/377 (see footnote 97 above), para. 44 (3) and footnote 34; see also *Yearbook ... 1984*, vol. II (Part Two), p. 15, para. 50 (14) and footnotes 47 and 48.

[110] United Nations, *Treaty Series*, vol. 1015, p. 243.

worded in such a way as to refer only to the country which instigated that policy, while other members thought that the wording should be general enough to refer to such an institution wherever it existed. One member of the Commission suggested that the accomplices of the crime of *apartheid* should include the authorities of a foreign State which, on the grounds of economic interests, supported the State which practised it.

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

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

97. The Commission discussed the place to be assigned to certain offences in the draft code.

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

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

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

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

102. Some members proposed the inclusion in the draft code of trafficking in children and women, and slavery.

II. War crimes

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

1. *Terminology problems*

104. The Special Rapporteur said that terminology problems arose primarily in connection with the expression "laws and customs of war". War is no longer lawful. Reference could not, therefore, be made to the "laws and customs of war" or to "war crimes", for war itself was a crime. In the traditional sense, war pitted State against State. It was an act of State sovereignty. Nowadays it could pit State entities against non-State entities, such as national liberation movements. In view of that aspect of the problem, draft article 13 submitted by the Special Rapporteur consisted of two alternatives: in the first, the word "war" was to be understood as meaning any "international or non-international armed conflict", as defined by the 1949 Geneva Conventions and Additional Protocol I of 1977; in the second, the word "war" was used with a new definition.

105. Several members of the Commission took the view that the traditional expressions "war crimes" and "violation of the laws or customs of war" should be retained, even if war had become a wrongful act under international law. They were commonly used terms, and wars continued to exist despite their prohibition. Furthermore, they pointed out that not all the laws and customs of war had been codified. Hence the need for a law relating to war and to the problems it still involved.

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

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

2. *Substantive problems*

108. Under the heading of substantive problems, the Special Rapporteur stated that it was not always easy to draw a distinction between a war crime and a crime against humanity, since there was no clear-cut dividing line between the two concepts. The same act could, at the same time, constitute a war crime and a crime against humanity. Voluntary homicide and murder committed in time of peace could constitute crimes against humanity if they came within the definition of such crimes. If they were committed in time of war, they could also constitute war crimes. The Special Rapporteur pointed out that the advantage of that dual characterization was that it had in fact been possible to punish acts committed during the Second World War that might otherwise have gone unpunished. He also pointed out that concurrent offences were, moreover,

not a phenomenon characteristic only of the topic under consideration, but also existed in internal law, although that did not prevent those offences from being classified in separate categories.

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

3. *Problems of methodology*

110. Under the heading of problems of methodology, the Special Rapporteur raised the question whether the definition of war crimes should be of a general nature, such as that used in the 1954 draft code, which referred to "acts in violation of the laws or customs of war" (art. 2, para. (12)); whether there should be an enumeration, which might be incomplete; or whether use should be made of an intermediate method consisting of a general definition illustrated by a non-exhaustive enumeration. In the Special Rapporteur's view, any one of those methods was possible, but the last two raised a problem because the law of war was based not only on existing conventions, but also on "the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience". This was the wording of article 1, paragraph 2, of Additional Protocol I of 1977[111] to the 1949 Geneva Conventions, and was only a reformulation of the Martens provision contained in the preamble to the 1907 Hague Convention[112] and stating that the law of war was not confined to written law, but was also based on principles, usages and considerations of humanity.

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

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

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

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

III. Other offences against the peace and security of mankind

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

1. *Complicity*

116. The Special Rapporteur stressed that the problem arising in international law in connection with the concept of complicity was that of its content, which was not necessarily the same as in internal law. He therefore dealt with the two aspects of complicity, (*a*) in internal law, and (*b*) in international law.

(a) *Complicity in internal law*

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

(b) *Complicity in international law*

118. The Special Rapporteur pointed out that complicity could have a limited or an extended meaning in international law as well. Examples of extended complicity included concealment and the responsibility of military leaders. The Special Rapporteur drew attention to various cases, including the *Funk* case,[113] in which the

[111] United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95.

[112] Convention (IV) respecting the Laws and Customs of War on Land (J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), pp. 101-102).

[113] See *Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, 14 November 1945-1 October 1946)* (Nürnberg, 1947-1949), vol. I, p. 306; see also H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle, en application de la loi n° 10 du Conseil de contrôle allié* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 377.

accused had been Minister of Economics of the Third Reich and President of the Reichsbank, which had received deposits consisting of valuables having belonged to prisoners and victims. The Nürnberg Tribunal had stated that Funk "either knew what was being received [by the Reichsbank] or was deliberately closing his eyes to what was being done". In the *Pohl* case,[114] moreover, the United States Military Tribunal had stated: "the fact that Pohl himself did not actually transport the stolen goods to the Reich ... does not exculpate him. This was a broad criminal program, requiring the co-operation of many persons ... Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation *even in the after-phases** of the action makes him *particeps criminis* in the whole affair."

119. The Special Rapporteur noted that the complicity of military leaders was also referred to in the *Yamashita* case.[115] In that case, the United States Supreme Court had stated: "The question ... is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result." The Court's answer to that question had been affirmative. The Tokyo Tribunal had delivered a similar judgment:[116] "It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment ...". Furthermore, in the *Hostage* case,[117] the United States Military Tribunal had stated that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about".

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

121. Complicity of the superior was included as a separate offence in article 9 of the draft articles submitted by the Special Rapporteur in his fourth report.

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

2. Complot *and conspiracy*

123. In his report, the Special Rapporteur explained that *complot* could have two meanings. On the one hand, it could be limited, as in some internal laws, to acts affecting the authority of the State or the integrity of national territory (art. 86 of the French Penal Code, for example). On the other hand, it could also mean any common plan against individuals or groups of individuals and could imply the idea of collective responsibility, as in the case of "conspiracy", a concept according to which any act committed by a participant in a *complot* was attributable to all the others, quite apart from the responsibility of each one for his own acts.

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

125. As to the question whether the concept of *complot* could entail collective responsibility—something that would bring it close to the concept of conspiracy—the Special Rapporteur pointed out in his report that the specific nature of the offences in question might warrant a special régime outside the usual rules of law, particularly since the enforcement of penalties would thus be more effective. The offences in

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[114] See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949)* (Washington (D.C.), U.S. Government Printing Office, 1949-1953), case No. 4, vol. V, p. 989; see also Meyrowitz, *op. cit.*, pp. 377-378.

[115] See United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43; and *United States Reports* (Washington, D.C.), vol. 327 (1947), pp. 14-15.

[116] United Nations War Crimes Commission, *Law Reports of Trials ...*, vol. XV, p. 73.

[117] *Trials of War Criminals ..., op. cit.* (footnote 114 above), case No. 7, vol. XI, p. 1303.

question were not ordinary ones and such a special régime was already applied in cases such as that of the rule of imprescriptibility. The Special Rapporteur also noted that collective responsibility for such offences, which nearly always involved collective participation or a group phenomenon, offered the advantage of making penalties more effective. The Nürnberg International Military Tribunal had restricted the application of collective responsibility to crimes against peace and had rejected it for war crimes and crimes against humanity.

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

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

3. *Attempt*

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

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

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

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

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

IV. General principles

133. After the overall account of acts which might constitute offences against the peace and security of mankind, the Special Rapporteur took up the general principles. He pointed out that it was not evident, at first sight, that all the principles applied with equal force to all the cases, and that that could be verified by a study of the general principles. The Special Rapporteur believed that the principles could be divided into several categories according to whether they related to:

The juridical nature of an offence against the peace and security of mankind;

The official position of the offender;

The application of criminal law in time;

The application of criminal law in space;

The determination and extent of responsibility;[118]

Exceptions to criminal responsibility.

1. *Principles relating to the juridical nature of an offence against the peace and security of mankind*

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

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

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

2. *Principles relating to the official position of the offender*

137. The Special Rapporteur pointed out that the principles relating to the official position of the offender were, first, the principle of criminal responsibility, in other words the attributability of a criminal act to a particular individual considered to be its author (embodied in article 3 of the draft articles); next, since the offender

[118] Although the question of exculpatory pleas and extenuating circumstances, which is inextricably linked to the determination and extent of responsibility and at the same time to exceptions to criminal responsibility, was referred to under this heading by the Special Rapporteur in his fourth report (A/CN.4/398, paras. 177-184), it was not discussed in detail in the Commission. The observations made by members of the Commission on this question are summarized in paragraph 182 of the present report. The Special Rapporteur and the Commission will revert to the question of exculpatory pleas and extenuating circumstances at a later stage in their work on this topic.

was also a human being, the principle relating to the jurisdictional guarantees to which he had a right when answering before any court for the acts of which he was accused (article 6 of the draft articles).

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

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

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

140. Referring to the non-retroactivity of criminal law, the Special Rapporteur discussed the scope of the rule *nullum crimen sine lege* in international law. He pointed out that, according to one view, that rule was not applicable in international law, but that, according to another, it was. The Special Rapporteur observed that the controversy between commentators on the law of Nürnberg had now died down. Article 11, paragraph 2, of the Universal Declaration of Human Rights[119] provided: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. ..." The European Convention on Human Rights,[120] which reproduced approximately the same formulation in article 7, paragraph (1), added in paragraph (2): "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of the law ...". The Special Rapporteur therefore believed that the rule *nullum crimen sine lege* was now accepted in international law and applied to both treaty law and general international law. It was the subject of article 7 of the draft articles submitted by the Special Rapporteur.

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

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

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

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

145. Other members expressed doubt about the general applicability of the rule. Their doubts were based, among other considerations, on the small number of accessions to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[121] and on the difficulty of obtaining evidence many years after an alleged offence had been committed.

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

146. Referring to the principles relating to the application of criminal law in space, the Special Rapporteur described the different systems known in internal law: the system of *territoriality* of criminal law, which gave jurisdiction to the courts of the place of the crime; the system of *personality* of criminal law, which was based on nationality rather than on the place of the crime; the *universal system*, which gave jurisdiction to the court of any place where the offender was arrested; and finally the system of *international criminal jurisdiction*. In draft article 4 submitted by the Special Rapporteur, he had opted for universal jurisdiction in the absence of an international criminal jurisdiction, but he reserved the possibility of establishing such an international jurisdiction.

147. Some members of the Commission expressed reservations regarding the system of universal jurisdiction. It was pointed out that territoriality was the rule and universality the exception. According to one member of the Commission, the scope of the provisions of the Conventions on genocide and on *apartheid* was limited to those crimes alone. Among the members doubting the general applicability of universal jurisdiction, some emphasized the difficulties connected with extradition, means of obtaining evidence, contradictory judgments, etc. Other members who expressed doubts concerning that system spoke in favour of the establishment of an international criminal jurisdiction as the most appropriate and most coherent system of implementing the code.

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

[119] General Assembly resolution 217 A (III) of 10 December 1948.

[120] Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, p. 221).

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

5. *Principles relating to exceptions to criminal responsibility*

149. The Special Rapporteur also referred to the scope of criminal responsibility. He pointed out that, although in principle every wrongful act engaged the criminal responsibility of its author, there could be exceptions to that rule. There were circumstances which relieved an act of its character as a criminal offence. These were circumstances which, in certain legal systems, were known as "justifying facts".

150. The Special Rapporteur explained that, in some legal systems, the exceptions to criminal responsibility could have two sources: a *legal* source and a source in *judicial practice*. A distinction was made between justifying facts based on law and causes of non-attributability deriving from judicial decisions. Since the rule was that there must be a legal basis for every offence, by virtue of the principle *nullum crimen sine lege*, any exception to that rule must likewise have a legal basis. In those systems which depended on written law, the rigidity of the rule had led legal writers and judicial organs to go beyond the narrow confines thus defined and seek solutions better suited to the complex realities of criminal responsibility. There were situations for which the law made no provision, in which convicting a person would be an injustice, even if such conviction appeared irreproachable in the strictly legal sense. Consequently, legal writers and judicial organs had elaborated, within these legal systems, a whole theory of penal justification, invoking the concepts of will, good faith and the legal capacity of the author.

151. The Special Rapporteur indicated that, in other legal systems, less attached to written law, that distinction was not of great importance, since the legal element in the definition of an offence was not necessarily based on written law. Written law did not play a preponderant part and the judge, having more freedom of action, himself created the law according to the circumstances and the needs of society. In the Special Rapporteur's opinion, those systems came close, in their method, to the process of developing international law, in which written law did not predominate. Moreover, the exceptions to criminal responsibility in international law had a purely jurisprudential origin. Those exceptions were as follows:

Coercion, state of necessity and *force majeure*;
Error;
Superior order;
Official position of the perpetrator of the offence;
Self-defence and reprisals.

(a) *Coercion, state of necessity and* force majeure

152. The Special Rapporteur explained in his report that these concepts had differences and points in common in internal law. Under certain systems, the distinction between coercion and state of necessity depended on the fact that necessity, unlike coercion, gave the author of the act which constituted a crime a choice. He was not inexorably bound to commit the act, and he committed the act to avoid committing another act, which he considered more dangerous or more harmful to himself or others.

153. As to *force majeure*, it was closer to coercion, in that it consisted in the intervention of a force external to the author of the act, from which he could escape only by committing the act. In both cases—*force majeure* and coercion—the author had no other choice, whereas the state of necessity did leave him a choice.

154. The Special Rapporteur added, however, that those distinctions were not recognized in other legal systems. Moreover, whatever the conceptual differences between those notions might be, they were subject to the same basic conditions. According to the Special Rapporteur, there must be:

(*a*) a grave and imminent peril from which the author could escape only by committing the act which constituted the crime;

(*b*) no act attributable to the author which contributed to the emergence of that peril;

(*c*) no disproportion between the interest sacrificed and the interest protected.

155. After stating these conditions, the Special Rapporteur referred to the judicial decisions on which they were based. In the *Einsatzgruppen* case,[122] the tribunal had stated that "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. ... No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." In other words, as the Special Rapporteur pointed out, coercion could be accepted if there was a grave and imminent peril to life or physical integrity. In the *I. G. Farben* case,[123] the tribunal had decided that "the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative."

156. Similarly, in the *Flick* case,[124] defendants who had not only obeyed instructions, but also, on their own initiative, requested an abnormal increase in the number of workers assigned to them were found guilty.

157. The Special Rapporteur concluded that fault on the part of the defendant thus removed all justification.

158. Referring to the condition of proportionality, the Special Rapporteur observed that it had been formulated in the *Krupp* case[125] as follows: "... in all fairness it must be said that in any view of the evidence the defendants, in a concentration camp, would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death, great bodily harm from starvation, and the relentless air raids upon the armament plants; to say nothing of involuntary servitude and the other indignities which they suffered. The disparity in the

[122] *Trials of War Criminals ..., op. cit.* (footnote 114 above), case No. 9, vol. IV, p. 480.

[123] *Ibid.*, case No. 6, vol. VIII, p. 1179; cited in Meyrowitz, *op. cit.* (footnote 113 above), p. 404.

[124] *Trials of War Criminals ...*, case No. 5, vol. VI, p. 1202; Meyrowitz, *op. cit.*, p. 404.

[125] *Trials of War Criminals ...*, case No. 10, vol. IX, p. 1446; Meyrowitz, *op. cit.*, pp. 404-405.

number of the actual and potential victims is also thought provoking."

159. Some members of the Commission were in general agreement with the above-mentioned distinction drawn by the Special Rapporteur. One member suggested that, in the case of coercion, it should be specified that the author of the crime must have had no other means of escaping from the peril in question. Some members established and analysed relations between coercion and superior order.

160. With regard to *force majeure*, another member thought that that exception had no place in the draft code. An individual could not be charged under criminal law with the consequences of a case of *force majeure*.

(b) *Error*

161. The Special Rapporteur raised the question whether error could be included in the category of justifying facts. He pointed out that there could be two kinds of error: error of law, which consisted in misrepresentation of a rule of law; and error of fact, which consisted in misrepresentation of a material fact.

162. The Special Rapporteur considered that error based on misrepresentation of a rule of law would be difficult to reject in international law, owing to the nature of the rules of international law and their sources. In the *High Command* case,[126] the tribunal had expressed the view that a military commander "cannot be held criminally responsible for a mere error in judgment as to disputable legal questions". Similarly, in the *I. G. Farben* case,[127] the tribunal had stated: "As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles."

163. One member of the Commission considered that error should not even be included in the case of war crimes, since the code was intended to punish the most serious offences. Another member thought that error of law remained admissible, especially in customary international law, which was not precisely codified; that should also be the case for *jus cogens*, which applied to inter-State relations and could not be invoked in criminal law. Another member considered that, in many cases, error of fact removed the seriousness of the offence.

(c) *Superior order*

164. The Special Rapporteur raised the question whether superior order constituted an autonomous justifying fact. He noted that superior order sometimes merged with coercion, in which case it was not the order but the coercion accompanying it which constituted the justifying fact, and that compliance with the order sometimes merged with complicity if the order was manifestly illegal. Finally, an order might be obeyed in good faith because its wrongfulness was not manifest. In the last case, the justifying fact was not the order itself, but error.

165. The Special Rapporteur added that, in regard to the relationship between superior order and coercion, the Nürnberg International Military Tribunal had stated: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[128]

166. The relationship between the order and error was evoked in the *Hostage* case,[129] with regard to the responsibility of Field Marshal List. The tribunal had stated: "One who distributes, issues or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character."

167. Similarly, in the *High Command* case,[130] the tribunal had emphasized with regard to Field Marshal von Leeb and the other defendants that "it becomes necessary to determine not only the criminality of an order in itself but also ... whether or not such an order was criminal on its face".

168. The Special Rapporteur concluded from these findings that superior order was not in itself a justifying fact. Compliance with a wrongful order could eliminate responsibility only if it was due to error or coercion.

169. Some members of the Commission stressed the difficulty of establishing the moment when compliance with an order given by a superior ceased to be lawful. This was a very delicate question because disobedience was itself an offence under military law. Nevertheless, they agreed that compliance with a manifestly wrongful order could engage criminal responsibility. One member wondered whether the threat of a grave, imminent and irremediable peril deriving from the order received did not vary according to whether the traditional discipline in the environment considered was more or less rigorous. In the case of a junior officer, freedom of choice would be extremely limited and the rigidity of discipline could be an extenuating circumstance.

(d) *The official position of the perpetrator*

170. In his report, the Special Rapporteur emphasized that the official position of the perpetrator was not an accepted exception and need not be commented on at length. He pointed out that the Charter of the Nürnberg Tribunal had already rejected the official position of the perpetrator of an offence against the peace and security of mankind, not only as a justifying fact, but even as an exculpatory plea or extenuating circumstance. In some respects, it should even be an aggravating circumstance, in so far as it could be regarded as an abuse of power.

(e) *Self-defence*

171. In the Special Rapporteur's view, the exception of self-defence provided for in Article 51 of the Charter

[126] *Trials of War Criminals ...*, case No. 12, vol. XI, p. 511.

[127] *Ibid.*, case No. 6, vol. VIII, p. 1138.

[128] *Trial of the Major War Criminals ..., op. cit.* (footnote 113 above), vol. I, p. 224.

[129] *Trials of War Criminals ..., op. cit.* (footnote 114 above), case No. 7, vol. XI, p. 1271; cited in Meyrowitz, *op. cit.*, p. 398.

[130] *Trials of War Criminals ...*, case No. 12, vol. XI, p. 512; Meyrowitz, *op. cit.*, pp. 398-399.

of the United Nations applied only in the case of aggression. Its sphere was *jus ad bellum*. In *jus in bello*, attack was as legitimate as defence, provided the conditions of the law of war were respected.

172. With regard to self-defence, several members of the Commission emphasized that a careful distinction should be drawn between self-defence by a State and self-defence by an individual. In the opinion of some members, the only self-defence applicable could be self-defence by an individual, since the subjects of the draft code were individuals. Other members pointed out that self-defence in the case of aggression did not always constitute an exception to the principle of the criminal responsibility of individuals. An individual, whether a military serviceman or a civilian, could quite easily violate the laws of war or commit inhuman acts even though the State was acting in accordance with its right of self-defence.

173. For his part, the Special Rapporteur pointed out that, in the case of aggression, the responsibility of the State did not preclude the criminal responsibility of individuals acting in the name or on behalf of the State, and such responsibility could be ruled out only in a case of properly established self-defence.

(f) *Means of defence based on reprisals*

174. In the Special Rapporteur's opinion, reprisals could take place in peacetime or in wartime. In peacetime, defence based on armed reprisals was not admissible. In wartime, defence based on reprisals was not admissible if the reprisals were carried out in violation of the laws and customs of war.

175. These cases of inadmissibility resulted from the fact that reprisals merged sometimes with aggression if they were carried out in peacetime, and sometimes with a war crime if they took place in the course of an armed conflict and were carried out in violation of the laws and customs of war.

176. In short, the Special Rapporteur's view was that the prohibition of reprisals, since it was not general in *jus in bello*, meant that reprisals could be justified in all instances in which they were not prohibited. Yet the prohibition of reprisals, in the framework of Additional Protocol I of 1977, was only sectoral in nature; it applied solely to reprisals directed against the sick and the wounded, civilian populations, prisoners of war, and civilian or cultural objects.

177. One member of the Commission thought that the draft code should expressly stipulate that armed reprisals were contrary to international law.

178. Summarizing his statement on the scope of justifying facts, the Special Rapporteur came to the conclusion that they were not all the same in scope and that their scope varied according to the nature of the offence in question. Accordingly:

(*a*) Self-defence could be invoked only in the case of aggression;

(*b*) No justifying fact seemed to be admissible with regard to crimes against humanity, because of the motives which inspired such crimes and from which they were inseparable (racial, ethnic, national, religious or political motives). In addition, the requirement of proportionality between the act committed and the situation from which the perpetrator was seeking to escape was difficult to fulfil in the case of a crime against humanity, in view of the mass nature of such crimes, their systematic character, their repetitiveness or their continuity;

(*c*) Justifying facts could be invoked with respect to a war crime, provided, of course, that the war crime in question did not at the same time constitute a crime against humanity.

179. The comments of members of the Commission have been set out under each exception considered. With regard to the formulation of these exceptions in the draft code, some members emphasized that the relevant provisions should be drafted positively and clearly indicate the circumstances in which the exception applied.

180. As to the responsibility of a superior, a few members of the Commission were of the opinion that the question could be settled by applying the concept of complicity and that a separate article was not required.

181. Other members, however, thought that the question of the responsibility of a superior could not be assimilated to that of complicity. They failed to see how complicity could be applied to acts by a superior, particularly when it was the conduct of organs of the State that was involved.

182. One member of the Commission would have liked the draft code to deal also with concurrent offences, extenuating circumstances and exculpatory pleas. Lastly, other members wondered whether mental disorder or minority could not also constitute justifying facts. With regard to extenuating circumstances and exculpatory pleas, one member of the Commission shared the Special Rapporteur's view that, since the criminal consequences of a crime against peace had not yet been considered, the time had not yet come to deal with such questions. In addition, he had doubts regarding the applicability of internal criminal laws to offences under international law.

V. Draft articles

183. In introducing his fourth report, the Special Rapporteur indicated that the draft articles covered the whole of the topic and that draft articles 1, 2 and 3, submitted at the previous session, had been reworded to take account of the comments made. He also pointed out that the draft no longer contained a definition of an offence against the peace and security of mankind, in view of the controversy to which the earlier definition had given rise; only an enumeration of the acts constituting such an offence was now given. The new draft article 1 was therefore based on that method. Similarly, any reference to political organs and any element that would encroach on the domain of the judge had been removed from the definition of aggression proposed in the original draft. In addition, the definitions of offences were, as far as possible, established on the basis of existing conventions, the texts of which were sometimes reproduced in full. A more general alternative was also proposed, however, to enable the

Commission to choose between or combine texts. The general principles had emerged either from existing instruments (Universal Declaration of Human Rights, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nürnberg Principles, etc.), or from the judicial precedents of international courts. Some principles applied to some offences more than to others, but they were none the less formulated in a quite general fashion in the draft articles.

184. Some general opinions were expressed on the draft articles in the course of the Commission's discussion. Certain specific suggestions regarding the draft articles were also provisionally made. Some members were of the view that the title of the topic in English should speak of "crimes" instead of "offences", as did the French and Spanish texts. The tripartite division into crimes against peace, crimes against humanity and war crimes was supported by most members for historical reasons, even though, in some instances, overlapping between the three categories was possible. It was emphasized that, as far as possible, the draft code should be very precise, particularly with regard to the characterization of the offences.

C. Conclusions

185. After engaging in an in-depth general discussion of parts I to IV of the Special Rapporteur's fourth report, concerning the offences and the general principles, the Commission decided to defer consideration of the draft articles to future sessions. In the mean time, the Special Rapporteur could recast the draft articles in the light of the opinions expressed and the proposals made by members of the Commission at the present session, as reflected in the corresponding summary records, and the views that would be expressed in the Sixth Committee of the General Assembly at its forty-first session. The Commission again discussed the problem of the implementation of the code, when it considered the principles relating to the application of criminal law in space. It would examine carefully any guidance that might be furnished on the various options set out in paragraphs 146-148 of the present report. In this regard, the Commission would remind the General Assembly of the conclusion contained in paragraph 69 (*c*) (i) of the report of the Commission on the work of its thirty-fifth session, in 1983.[131]

[131] The conclusion formulated in paragraph 69 (*c*) (i) of the Commission's report on its thirty-fifth session (*Yearbook ... 1983*, vol. II (Part Two), p. 16) read as follows:

"(*c*) With regard to the implementation of the code:

"(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;".

Chapter VI

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

A. Introduction

186. At its thirtieth session, in 1978, the Commission included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.

187. From its thirty-second session (1980) to its thirty-sixth session (1984), the Commission considered the five reports submitted by the Special Rapporteur.[132] The reports sought to develop a conceptual basis for the topic and included a schematic outline and five draft articles. The schematic outline was contained in the Special Rapporteur's third report, submitted to the Commission at its thirty-fourth session, in 1982. The five draft articles were contained in the Special Rapporteur's fifth report, submitted to the Commission at its thirty-sixth session, in 1984, and were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

188. At its thirty-sixth session, in 1984, the Commission also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 international organizations to ascertain, among other matters, whether obligations which States owe to each other and discharge as members of international organizations could, to that extent, fulfil or replace some of the procedures referred to in the schematic outline;[133] and a study prepared by the Secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".[134]

189. At its thirty-seventh session, in 1985, the Commission appointed Mr. Julio Barboza Special Rapporteur, following the death of Mr. Robert Q. Quentin-Baxter. At the same session, the Special Rapporteur submitted his preliminary report (A/CN.4/394),[135] but the Commission was unable to discuss it. The Commission expressed the hope that the Special Rapporteur might wish to submit a second report to the Commission at its thirty-eighth session, to be discussed together with his preliminary report.[136]

B. Consideration of the topic at the present session

190. At its present session, the Commission had before it the preliminary report (A/CN.4/394) and the second report (A/CN.4/402)[137] of the Special Rapporteur. The two reports were introduced together, since the Special Rapporteur had been unable to introduce his preliminary report orally at the Commission's thirty-seventh session, and were considered by the Commission at its 1972nd to 1976th meetings, from 20 to 26 June 1986. As the preliminary report had been intended only to analyse what had been done prior to its submission, in 1985, and to indicate what the Special Rapporteur intended to do in his second report, the discussion focused almost exclusively on the second report.

191. The Special Rapporteur had indicated his intention of taking the schematic outline prepared by the previous Special Rapporteur,[138] as amended by him in his fourth report,[139] as the raw material for his work, since the outline had met with sufficiently broad acceptance both in the Commission and in the General Assembly. However, owing to the shortening of its present session, the Commission was able to allocate only a few meetings to consideration of the topic, and many members were unable to make statements, so that the opinions expressed are only a partial reflection of the Commission's views.

192. The Special Rapporteur was of the opinion that a number of points needed to be reconsidered in order to remove some of the ambiguities of the topic and lay the foundations for its uninterrupted development. These points were discussed by the Special Rapporteur in his second report, which contained a review and critical analysis of the schematic outline and, in particular, of

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[132] The five reports of the previous Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

[133] The replies to the questionnaire, prepared by the previous Special Rapporteur with the assistance of the Secretariat, appear in *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

[134] Document A/CN.4/384, to appear in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

[135] *Yearbook ... 1985*, vol. II (Part One), p. 97.

[136] *Yearbook ... 1985*, vol. II (Part Two), p. 72, paras. 291-292.

For a full historical review of the Commission's work on the topic, see *Yearbook ... 1984*, vol. II (Part Two), pp. 73 *et seq.*, paras. 215-257.

[137] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[138] *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109.

[139] Document A/CN.4/373 (see footnote 132 above), paras. 63-64.

its dynamics. In his second report, the Special Rapporteur also tried to find answers to the questions arising out of such ambiguities as well as to some of his other concerns.

193. The first question related to the unity of the topic, which, because it had two components, namely prevention and reparation, appeared to constitute two separate topics. In earlier reports, the previous Special Rapporteur had attempted to establish the unity of the topic by linking prevention and reparation, which constituted a "continuum". From a formal standpoint, he had thus emphasized that both aspects of the topic fell within the domain of primary rules. Although the present Special Rapporteur did not rule out that idea, he found that the concept of "injury" in the sense of material harm constituted the cement of that "continuum": injury in that sense, whether as injury which had already occurred or as potential injury, which was the equivalent of risk, was the focus of the entire topic.

194. In order to counteract the idea that prevention had nothing to do with liability and did not really form part of the topic, the Special Rapporteur had, on the basis of the discussion of the meaning of the English terms "responsibility" and "liability", reached the conclusion that, since the Spanish term *responsabilidad* and the French term *responsabilité* had the same meaning as the two English terms, they could be used to refer to the duties incumbent on any person living in society. He therefore concluded that those terms referred not only to the secondary obligation arising out of a breach of a primary obligation, but also to the latter obligation itself, with the result that obligations of prevention would be within the scope of the topic.

195. Another concern of the Special Rapporteur in his second report was to define the scope of the topic, if only provisionally. He had accepted, as a point of departure, that the topic related primarily to the duties of the source State to avoid, minimize or repair any appreciable or tangible physical transboundary loss or injury caused by an activity involving risk. However, the Special Rapporteur did not rule out the possibility of modifying this scope if the development of the topic made it desirable.

196. It was observed in the second report that obligations were an important element of the dynamics of the schematic outline. In that connection, a critical analysis was made to identify all the interrelated obligations referred to in the schematic outline. It had then to be determined whether those obligations, or some of them, were by nature part of what was known as "soft law", or whether they were imperfect merely because, according to the schematic outline, they did not give rise to any right of action. The analysis drew attention to "combined" obligations which would lead to the establishment of a régime and contribute to prevention, to obligations which would lead to reparation, as well as to a pure obligation of prevention (section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline).

197. In the view of the Special Rapporteur, it was also necessary to consider the operation of the obligation of reparation and its basis in international law. The investigation inevitably led to liability for risk, known in English as "strict liability". From what the present Special Rapporteur had been able to gather from earlier work, the basis for the obligation of reparation was multifaceted. On the one hand, it had the same basis as obligations of prevention, since considerable efforts had been made to define both concepts; on the other hand, further efforts had been made, perhaps without actually saying so, to base it on the quasi-contractual and quasi-customary aspects of shared expectations. But ultimately, in the view of the Special Rapporteur, it could not be denied that its main basis was simply "strict" liability. The operation of the obligation of reparation was subject to two conditions: the existence of shared expectations, which indicated its derivation; and negotiation, which involved a number of factors leading to a balancing of interests, including the reasonable nature of the conduct of the source State, the means available to it to prevent injury, the expenses incurred for that purpose and the usefulness of the activity in question to the affected State. The amount payable by way of compensation might thus be smaller than that paid in similar circumstances as a result of the commission of a wrongful act. That was, moreover, in keeping with international practice, which often set a limit on amounts payable in such circumstances, and also with what was provided in internal law in such cases.

198. Still with regard to the operation of the obligation of reparation, the Special Rapporteur had found that the idea of bringing into play factors mitigating the automatic operation of strict liability was basically correct, since the aim was to establish a general régime. He proposed changes in respect of "shared expectations" in order to retain some of the objective elements of their definition and thus avoid the problems to which their characterization would give rise. He also suggested that other mitigating factors, such as a régime of exceptions, might be included in the system.

199. As to the basis for the obligation, the Special Rapporteur considered that a clarification should be made: it was not logical to base the obligation of reparation both on its identity with prevention and on strict liability. Although there had been objections to strict liability, it had been stated in support of it, first, that it was not a monolithic concept, since it involved different degrees of strictness, and, when combined with the above-mentioned mitigating factors, became a sufficiently flexible instrument; and, secondly, that it was not certain that it did not have a basis in international law. Failure to provide compensation for transboundary injury caused by a hazardous activity in the territory of a State could be based only on a theory of sovereignty which did not take account of the interdependence that was becoming more and more characteristic of international life and which would be contrary to the principle of the sovereign equality of States because it would overlook the other aspect of State sovereignty, namely that every State was entitled to use its own territory without any outside interference.

200. The Special Rapporteur considered that the most important principle contained in the schematic outline was that enunciated in section 5, paragraph 1, which was based on Principle 21 of the Declaration of the United Nations Conference on the Human En-

vironment[140] and was intended to ensure that activities in the territory of a State could be conducted with as much freedom as was compatible with the interests of other States. Two equally important principles, which were closely associated with the first, were that of prevention (section 5, paragraph 2) and that of reparation (section 5, paragraph 3).

201. In his second report, the Special Rapporteur set a limit: he would work only on the basis of the schematic outline as amended by the previous Special Rapporteur in his fourth report. This meant that none of the innovations contained in the five draft articles submitted in the previous Special Rapporteur's fifth report would be considered at the present session and that the discussion thus would not deal with such important questions as whether the topic covered "situations" as well as "activities". It also meant that the arguments put forward were necessarily of a very general nature.

202. The discussion of the above-mentioned points in the Commission can be summarized as follows.

203. With regard to the unity of the topic, there was some express acceptance of, and no formal objection to, the view expressed in the Special Rapporteur's second report that injury in the sense of material harm was the topic's real unifying link. Some members of the Commission regarded prevention as an essential part of the topic and as being even more important than reparation.

204. The discussion appeared to lend support to the idea that the focus of the topic should be activities involving risk. Some members suggested that a decision should be taken on the activities to be referred to in the future articles. The view was expressed that the topic should be confined to ultra-hazardous activities (low probability of an accident that might cause catastrophic damage), but that view was not shared by other members, one of whom said that it was difficult to define such activities, that it was not clear what distinguished them from other activities involving risk and that activities which were regarded as ultra-hazardous at an early stage of their development—as had initially been the case with the driving of automobiles on the public highway—might cease to become so, and vice versa. The Special Rapporteur saw no convincing reason to make principles as important as those on which the topic was based—for example, the principle that an innocent victim should not be left to bear his loss or injury—applicable exclusively to activities that were as uncertain as "ultra-hazardous" activities.

205. One member of the Commission, who would have preferred the topic to concentrate on ultra-hazardous activities, specifically suggested that account should not be taken of many activities, such as those giving rise to pollution, in particular where the source State was aware, or should have been aware, of the nature of such activities and of means of preventing their harmful effects. Allowing such activities to cause injury in or to other States would be directly wrongful and would thus fall within the topic of State responsibility. Since that idea did not attract much support, the Special Rapporteur pointed out that he would continue to work on the basis that the topic should cover all activities involving risk.

206. Some members of the Commission suggested that the topic should be extended to include injury caused in areas beyond national jurisdiction and mentioned the pollution of outer space, considered by some to be part of the natural human environment. Another member referred, in this context, to areas forming part of the common heritage of mankind according to contemporary international law. As regards the scope of the topic and the obligations to inform and to negotiate, it was found necessary to explain that, in the opinion of the Special Rapporteur, the term "transboundary" did not only refer to injury caused in neighbouring countries, but covered any injury caused beyond national frontiers, whether the source State and the affected State were contiguous or not.

207. Referring to the obligations to inform and to negotiate, the question was raised by one member of the Commission as to who should be informed by a State in whose territory an ultra-hazardous activity was beginning—such activities being the only ones he considered worth taking into account, since they could affect all mankind. With whom should the State negotiate in such circumstances? And where the activities of ships under the control of a particular State were concerned, who should be informed of the risks they might entail? What should be negotiated with whom? The Special Rapporteur pointed out that such cases were, in reality, infrequent and marginal. The countries that might be affected would not be very difficult to identify, for they would be those in the same region as the source State. Depending on the nature of the activity concerned, a State might sometimes relieve itself of the obligation to inform and negotiate by convening an international conference or by taking very general measures, although that might perhaps not relieve a source State of its obligations to neighbouring States, since the measures usually adopted by such conferences were simply basic measures. The situation would be rather like that in internal law in which dangerous activities by an industrial plant, for example, might require an operating licence, which would be granted only if certain precautions were taken, but in which liability was not precluded if injury was caused.

208. Moreover, in the view of the Special Rapporteur, the location of the activity in question was bound to be of decisive importance. If it were near the frontier of another country, there would be no doubt that the source State should inform that country of its intention to begin the activity in question and negotiate with that country everything concerning a régime of prevention and, possibly, reparation. The Special Rapporteur drew attention to three cases cited in his second report (A/CN.4/402, footnote 40 (*d*)): a nuclear plant for the generation of electricity at Dukovany (Czechoslovakia), situated 35 kilometres from the Austrian border; a plant of the same type at Rüti in the upper Rhine valley, in Swiss territory near the Austrian border; and a refinery

[140] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

in Belgium near the border with the Netherlands. In all three cases there had been negotiations regarding the safety of the plants, and in the case of Belgium and the Netherlands it had been mentioned that it was an accepted principle in Europe that, before initiating any activity which might cause injury to neighbouring States, the source State must negotiate with them.

209. As regards ships, the Special Rapporteur was of the view that the countries which might be affected by their operation must be informed and the corresponding régimes negotiated with them. There were many examples. The nuclear-powered vessels *Savannah* and *Otto Hahn* had been the source of many bilateral agreements between, on the one hand, the United States of America and the Federal Republic of Germany, and, on the other hand, the countries whose ports the vessels were required to enter. The major conventions on the marine transport of oil and on international liability for damage caused by objects launched into space were also good examples. Lastly, when certain States had made nuclear tests in the atmosphere, they had given public warning of the risks involved, established safety zones and warned shipping, and in one case, for example, the United States had made an *ex gratia* payment where injuries had been sustained by the crew of the *Fukuryu Maru*. The relevant treaty had finally put an end to those tests by prohibiting them, so that in the end the source States had provided information and negotiated a régime of prohibition.

210. As regards the obligation to negotiate, which in the schematic outline did not give rise to any right of action when violated, the solution proposed by the Special Rapporteur was simply to delete the relevant provision, so that the possible consequences of a breach of that obligation would be governed by the provisions of general international law. A few members of the Commission said they would prefer that obligation not to be made a "strict" obligation. Others, however, were in favour of providing for penalties in the corresponding articles. Since, as indicated above (para. 191), the opinions expressed were only a partial reflection of the Commission's views, the matter should be considered further.

211. Various members referred to the role of international organizations in the co-operation necessary for the mechanisms proposed in the schematic outline. A few members even believed that the role of international organizations should be examined not only from that point of view, but also in the light of the fact that they might become subject to rights and obligations. The Special Rapporteur agreed to continue this line of investigation, which had been deliberately held over until the later stages of the work. The Commission decided that the questionnaire sent to certain intergovernmental organizations should be reviewed to see whether it was necessary to bring it up to date and send it out again to the same organizations or to a selection of others.

212. A few members drew attention to the fact that some States, particularly among the developing countries, were not in a position to know everything that was going on in their territories, which were sometimes enormous, and suggested that the Commission should therefore reconsider the question of assigning liability to such States for the activities of individuals of which they might be unaware. It was asked, in that connection, whether it would not be appropriate to revert to the concept of the "acting State" instead of the "source State". It was stated that to provide exceptions to the obligation to make reparation was inappropriate because, in the schematic outline, that obligation was already subject to too many conditions. Furthermore, it was suggested that the apportionment of the costs of prevention was unfair because the affected State gained nothing, but rather lost, through the activities with which the topic was concerned.

213. A number of members asked that, in future work on the topic, special account should be taken of the needs of the developing countries and what suited them. It was pointed out that they were sometimes unable to control the activities of powerful foreign companies established in their territory and that, consequently, so long as power was in the hands of such companies, it would be dangerous to assign responsibility for transboundary injury to those States. It was also said that a study should be made of the liability of countries exporting activities involving a high degree of technology to countries of the third world, whose internal legislation often did not impose the necessary measures and precautions or the responsibilities inherent in the handling of dangerous things and in injury caused by such things.

214. One member of the Commission suggested that the draft should contain mandatory provisions on fact-finding machinery and the settlement of disputes. Another expressed opposition to the idea put forward in the second report that compensation should depend on the existence of a principle of compensation in the internal law of both countries—the source country and the affected country—because many developing countries did not have such principles in their national legislation. That member thought it would be sufficient for the principle to be contained in the law of the source State, even if it was not to be found in that of the affected State.

215. The Special Rapporteur, without expressing his views at the current stage on the specific solutions suggested, noted that they coincided with the common concern of the speakers: namely that very special account should be taken of the needs of the developing countries and of what measures would suit them, as well as of the fact that they ran the greatest risk of being affected by technological innovations, which were an element of danger in many modern activities. Moreover, that was the view he had expressed in his preliminary report and he was still of that view.

216. A number of members supported the Special Rapporteur's proposal that, at some stage in the study of the topic, it should be suggested to the General Assembly that the word "acts", in the title of the topic, be replaced by "activities", so that all the language versions would be aligned with the French. There was no opposition to this proposal or to the basic reasoning by which the Special Rapporteur justified the change.

217. With regard to the obligation to make reparation and the basis for it, there were various expressions of

support. One member expressed opposition to the idea of an obligation to make reparation based upon strict liability. Another member, referring to the very extensive and catastrophic damage that could be caused by certain activities which, in his opinion, might affect the whole of mankind, appeared to take the view that such difficult cases belonged to the sphere of co-operation between States as members of the international community rather than to that of liability, so that the obligation to make reparation might be set aside.

218. In summing up the discussion, the Special Rapporteur noted one aspect to which he attached the greatest importance, namely that the objections raised by some members to the solutions proposed in the second report, especially those relating to the obligations to inform and to negotiate, were not directed against the underlying principles, but related to the accompanying procedural difficulties.

219. Finally, although the short time assigned to the topic had not been sufficient for a full debate, the Commission considered that, in his next report, the Special Rapporteur should begin the drafting of articles developing the ideas put forward.

Chapter VII

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction

220. The Commission included the topic "Non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international watercourses.[141] At that session, the Commission set up a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, which submitted a report proposing the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee at the same session and appointed Mr. Richard D. Kearney Special Rapporteur for the topic.

221. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States[142] to the questionnaire[143] which the Secretary-General had circulated to Member States, as well as a report submitted by the Special Rapporteur.[144] 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.[145]

222. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission. Mr. Schwebel made a statement to the Commission at its thirtieth session, in 1978, and at the thirty-first session, in 1979, submitted his first report.[146]

223. Mr. Schwebel submitted a second report containing six draft articles at the Commission's thirty-second session, in 1980.[147] 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.

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.

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[141] *Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

[142] *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.

[143] 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.

[144] *Yearbook ... 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

[145] *Yearbook ... 1976*, vol. II (Part Two), p. 162, para. 164.

[146] *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

[147] *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

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.

224. As further recommended by the Drafting Committee, the Commission, at its thirty-second session, accepted a provisional working hypothesis as to what was meant by the term "international watercourse system". The hypothesis was contained in a note which read as follows:

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.

225. The Commission did not consider the topic at its thirty-third session, in 1981, due to the resignation from the Commission of Mr. Schwebel upon his election to the ICJ. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic. Also at that session, the third report on the topic prepared by Mr. Schwebel[148] was circulated.

226. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.[149] The report contained, as a basis for discussion, an outline for a draft convention 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 the question of an international watercourse system as a shared natural resource.

227. At its thirty-sixth session, in 1984, the Commission had before it the second report by Mr. Evensen.[150] It contained the revised text of the outline for a draft convention on the law of the non-navigational uses of international watercourses, comprising 41 articles arranged in six chapters. The Commission focused its discussion on draft articles 1 to 9[151] and questions related thereto and decided to refer those draft articles to the Drafting Committee for consideration in the light of the debate.[152] Due to lack of time, however, the Drafting Committee was unable to consider those articles at the thirty-sixth session.

228. At its thirty-seventh session, in 1985, the Commission appointed Mr. Stephen C. McCaffrey Special Rapporteur to succeed Mr. Evensen, who had resigned from the Commission upon his election to the ICJ, and requested him to prepare a preliminary report indicating the status of the topic to date and lines of further action.

229. The Special Rapporteur accordingly submitted to the Commission, at its thirty-seventh session, a preliminary report[153] reviewing the Commission's work on the topic to date and setting out his preliminary views as to the general lines along which the Commission's work on the topic could proceed. The Special Rapporteur's recommendations in relation to future work on the topic were: first, that draft articles 1 to 9, which had been referred to the Drafting Committee in 1984 and which the Committee had been unable to consider at the 1985 session, be taken up by the Drafting Committee at the 1986 session and not be the subject of another general debate in plenary session; and, secondly, that the Special Rapporteur should follow the general organizational structure provided by the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic.

230. The Commission considered the Special Rapporteur's preliminary report at its thirty-seventh session. There was general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed. Emphasis was placed on the importance of continuing the work on the topic with the minimum loss of momentum, in the light of the

[148] *Yearbook ... 1982*, vol. II (Part One), p. 65, document A/CN.4/348.

[149] *Yearbook ... 1983*, vol. II (Part One), p. 155, document A/CN.4/367.

[150] *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[151] Articles 1 to 9, constituting chapters I and II of the revised outline for a draft convention submitted by Mr. Evensen, were entitled:

Chapter I. Introductory articles: Explanation (definition) of the term "international watercourse" as applied in the present Convention (art. 1); Scope of the present Convention (art. 2); Watercourse States (art. 3); Watercourse agreements (art. 4); Parties to the negotiation and conclusion of watercourse agreements (art. 5);

Chapter II. General principles, rights and duties of watercourse States: General principles concerning the sharing of the waters of an international watercourse (art. 6); Equitable sharing in the uses of the waters of an international watercourse (art. 7); Determination of reasonable and equitable use (art. 8); Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States (art. 9).

For the texts of these articles, see *Yearbook ... 1984*, vol. II (Part Two), pp. 89 *et seq.*, footnotes 288, 290, 291, 292, 295, 296, 300, 301 and 304.

[152] It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (see para. 224 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see para. 223 above) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report (see *Yearbook ... 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250).

[153] *Yearbook ... 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

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. At the same time, it was recognized that the subject was a difficult and sensitive one and that the Commission's task was to find solutions that were fair to all interests and thus generally acceptable. Attention was drawn to the fact that no consensus had been reached at the thirty-sixth session, in 1984, 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, and that members of the Commission would, of course, be free to comment on those views.[154]

B. Consideration of the topic at the present session

231. At its present session, the Commission had before it the second report of the Special Rapporteur on the topic (A/CN.4/399 and Add.1 and 2).[155]

232. In the report, the Special Rapporteur, after reviewing the status of the Commission's work on the topic, set out his views on draft articles 1 to 9 as submitted by the previous Special Rapporteur,[156] which were before the Drafting Committee,[157] and discussed the legal authority supporting those views. The report also contained a set of five draft articles concerning procedural rules applicable in cases involving proposed new uses of watercourses.[158]

233. The Commission considered the second report of the Special Rapporteur at its 1976th to 1980th meetings, from 26 June to 2 July 1986.

234. In presenting his second report, the Special Rapporteur drew the Commission's attention to four points concerning draft articles 1 to 9 which he had raised in the report and on which he considered the Commission could profitably focus during the limited time it had at its disposal for consideration of the topic. These four points were: (*a*) whether the Commission could, for the time being at least, defer the matter of attempting to define the term "international watercourse" and base its work on the provisional working hypothesis which it had accepted in 1980 (see para. 224 above); (*b*) whether the term "shared natural resource" should be employed in the text of the draft articles; (*c*) whether an article concerning the determination of reasonable and equitable use should contain a list of factors to be taken into account in making such a determination, or whether those factors should be referred to in the commentary; (*d*) whether the relationship between the obligation to refrain from causing appreciable harm to other States using the international watercourse, on the one hand, and the principle of equitable utilization, on the other, should be made clear in the text of an article. In addition, the Special Rapporteur invited the Commission's general comments on the draft articles contained in his second report, recognizing that there was insufficient time for them to be considered thoroughly at the present session.

235. Due to lack of time, not all members of the Commission were able to comment on the second report of the Special Rapporteur.

236. With regard to the question of defining the term "international watercourse", most members who addressed the issue favoured deferring such a definition until a later stage in the work on the topic. Some of these members expressed a specific preference for the "system" approach or indicated that the possibility of using such an approach should not be excluded at the present stage of the work on the topic, while other members were of the view that the "international watercourse" concept would be satisfactory. Some members pointed out that the working hypothesis adopted by the Commission in 1980 was based on acceptance of the system concept proposed by Mr. Schwebel and that, if the hypothesis was now accepted as valid for the purpose of guiding work on the topic, that signified acceptance of the hypothesis as a whole and with the same content as was given to it in 1980. Some members stated that they were not in favour of the "system" approach. The Special Rapporteur concluded that the Commission should, for the time being, defer the matter of defining the term "international watercourse".

237. Members of the Commission who addressed the issue were divided on whether the term "shared natural resource" should be used in the text of the draft articles. Some members were of the view that it was a progressive concept that aptly described hydrologic reality and the legal implications to be derived therefrom, and that it should be included in the text; others believed that the term had become too controversial to be a constructive and generally acceptable component of the draft. Many members on both sides of the issue recognized, however, that effect could be given to the legal principles underlying the concept without using the term itself in the draft articles. The Special Rapporteur expressed the view that, in the light of the discussion, the latter might prove to be the wisest course for the Commission to follow.

238. There was also a division of views on the question whether a list of factors to be taken into consideration in determining what amounted to reasonable and equitable use of an international watercourse should be set out in the text of an article. Some members were of the view that the obligation to utilize the waters of an international watercourse in a reasonable and equitable manner would be devoid of content without an indication of its meaning in the form of an indicative list of

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[154] For a full historical review of the Commission's work on the topic, see *Yearbook ... 1985*, vol. II (Part Two), pp. 68 *et seq.*, paras. 268-290.

[155] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[156] See footnote 151 above.

[157] At the present session, there was insufficient time for the Drafting Committee to take up these articles.

[158] Draft articles 10 to 14, entitled: Notification concerning proposed uses (art. 10); Period for reply to notification (art. 11); Reply to notification; consultation and negotiation concerning proposed uses (art. 12); Effect of failure to comply with articles 10 to 12 (art. 13); Proposed uses of utmost urgency (art. 14).

factors. Other members believed that the factors did not reflect legal rules and therefore had no place in an article. Still other members considered that, if the factors were to be included, they should be arranged in order of priority, or that an indication should be provided as to how to resolve conflicts between them.

239. The Special Rapporteur concluded that this question would have to be given careful consideration but supported the suggestion by some members that the Commission should strive for a flexible solution, which might take the form of confining the factors to a limited indicative list of more general criteria.

240. The final point on which the Special Rapporteur particularly solicited the views of the Commission concerned the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other. As the Special Rapporteur had explained in his second report, the problem here was that an equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", in the sense of unmet needs, for one or more States using the watercourse, but not entail a legal "injury" or be otherwise wrongful. This was due to the fact that an international watercourse might not always be capable of fully satisfying the competing claims of all the States concerned. The object of an equitable allocation was to maximize the benefits, while minimizing the harm, to the States concerned. Thus, where there was, for example, insufficient water in a watercourse to satisfy the expressed needs or claims of the States concerned, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse that was, in fact, equitable.

241. Members of the Commission who addressed this point recognized the relationship between the two principles in question, but were divided on how to express it in the draft articles. Some members preferred a simple reference to the obligation not to cause appreciable harm, while others supported a formulation which would provide that such harm could not be caused unless it were allowable pursuant to the equitable utilization of the watercourse in question. Still others preferred to use the term "harm" without qualification. The Special Rapporteur concluded that, as members of the Commission seemed to be in basic agreement on the manner in which the two principles were interrelated, it would be the task of the Drafting Committee to find an appropriate and generally acceptable means of expressing that interrelationship.

242. In the course of their comments on the Special Rapporteur's report, some members of the Commission expressed views concerning the form which the Commission's work on the topic should take. With the exception of one member, who doubted the utility of the Commission's present approach to the topic, those members who addressed this subject supported the "framework agreement" approach that had already been endorsed by both the Commission and the Sixth Committee of the General Assembly. The thrust of that approach was to elaborate draft articles setting forth the general principles and rules governing the non-navigational uses of international watercourses, in the absence of agreement among the States concerned, and to provide guidelines for the management of international watercourses and for the negotiation of future agreements. The Special Rapporteur indicated that, in his view, it would be appropriate to proceed first with the formulation of draft articles setting forth legal principles and rules; the Commission could turn next to the consideration of a possible set of guidelines concerning institutional mechanisms and other aspects of international watercourse management that were not strictly required by international law, but which were highly desirable components of an overall régime governing the non-navigational uses of international watercourses.

243. Finally, those members of the Commission who spoke on the topic commented generally on the five draft articles contained in the Special Rapporteur's report. Those draft articles contained rules applicable in cases in which a State contemplated a new use, including an addition to or alterations of an existing use, of an international watercourse, where such a new use might cause appreciable harm to other States using the watercourse. The Special Rapporteur indicated his intention to give the articles further consideration in the light of the constructive comments made by members of the Commission.

Chapter VIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Relations between States and international organizations (second part of the topic)

224. The Special Rapporteur, Mr. Leonardo Díaz González, submitted to the Commission his third report on the topic "Relations between States and international organizations (second part of the topic)" (A/CN.4/401).[159] The Commission was unfortunately unable, due to lack of time, to consider the topic at the present session.

B. Programme and methods of work of the Commission

245. The Planning Group of the Enlarged Bureau was established by the Commission at its 1945th meeting, on 14 May 1986, to review the programme and methods of work of the Commission.

246. The Planning Group was composed of Mr. Julio Barboza (Chairman), Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Gaetano Arangio-Ruiz, Mr. Mikuin Leliel Balanda, Mr. Leonardo Díaz González, Mr. Khalafalla El Rasheed Mohamed Ahmed, Mr. Constantin Flitan, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. Satya Pal Jagota, Mr. Ahmed Mahiou, Mr. Chafic Malek, Mr. Motoo Ogiso, Mr. Paul Reuter, Mr. Emmanuel J. Roukounas, Sir Ian Sinclair and Mr. Christian Tomuschat. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

247. The Planning Group held three meetings, on 15 May, 20 June and 2 July 1986, and considered questions relating to the organization of work of the session of the Commission, the Drafting Committee, documentation and other matters.

248. The Enlarged Bureau considered the report of the Planning Group on 3 July 1986. On the basis of the proposals made by the Planning Group, the Enlarged Bureau recommended to the Commission that paragraphs 249 to 261 below be included in the report of the Commission to the General Assembly. That recommendation was adopted by the Commission at its 1982nd meeting, on 7 July 1986.

Organization of work

249. At the beginning of its present session, the Commission, noting the recommendations of the General Assembly in paragraph 3 of its resolution 40/75 of 11 December 1985, organized its work in such a manner as to allow for completion of the consideration on first reading of the draft articles on two topics: "Jurisdictional immunities of States and their property" and "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

250. The Commission recognized that, at its thirty-ninth session, in 1987—the first year of the term of office of the members of the Commission to be elected by the General Assembly at its forty-first session, in 1986—the Commission would undoubtedly consider the question of the organization of its work for the coming sessions, in the light of general objectives and priorities at that time, taking into account relevant General Assembly resolutions. In particular, it might be anticipated that, at its thirty-ninth session, the Commission would deal with the matter of how available time could best be allocated between the topics in its current programme of work, with a view to concentrating its attention on those topics on which most progress could be achieved before the conclusion of the term of office of its members.

251. The Commission also felt that it would be useful if it were to reaffirm its decision, recorded in its earlier reports, that a special rapporteur for a topic who was re-elected a member of the Commission by the General Assembly should continue as special rapporteur for that topic unless and until the Commission, as newly constituted, should decide otherwise.

Duration of the session

252. While fully recognizing the serious financial circumstances which led to its usual 12-week session being reduced, this year, to a 10-week session, the Commission felt that it should emphasize that the nature of its work on the codification and progressive development of international law, as envisaged in the Charter, as well as the magnitude and complexity of the topics on its agenda, made it essential that its annual sessions be of at least the usual 12-week duration. It was not possible for the Commission at its present session, due to lack of time, to make significant progress on the topic "State responsibility", nor to give adequate consideration to the topic "International liability for injurious consequences arising out of acts not prohibited by international law" or the topic "The law of the non-navigational uses of international watercourses". Furthermore, it was not possible for the Commission to give any consideration to the topic "Relations between States and international organizations (second part of the topic)". Also due to lack of time, several members of the Commission who wished to address the topics that were in fact discussed by the Commission had to forgo making statements and were thus unable to offer their comments with a view to assisting the special rap-

[159] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

porteurs in their work. Finally, the Commission faced serious difficulties in the examination of draft articles. It was not in a position fully to examine the substance of draft articles submitted by a special rapporteur prior to their referral to the Drafting Committee; nor was it in a position fully to examine draft articles reported back by the Drafting Committee. In view of these time constraints, the Commission is fearful that, in the future, unless the usual duration of its sessions is restored, significant headway will be made only if some concentration of its efforts takes place. The consequence of this could be that not every one of the topics on the Commission's agenda would be considered at any one session.

Summary records

253. The Commission wishes to reaffirm the fundamental importance of the continuance of the present system of summary records, which constitutes an essential element of its procedures and methods of work and of the process of codification and progressive development of international law. The work performed by the Commission consists essentially in elaborating drafts of international legal norms on various topics of international law, which often serve as the basis for the preparation of international conventions at international conferences of plenipotentiaries convened by the General Assembly. The formulation of such drafts is, in most cases, the result of detailed, thorough and analytical discussions in the Commission. It is often only after studying the discussions in the Commission, which as a whole represents the principal legal systems of the world, that a particular formulation can be properly understood or interpreted, its origin traced and its interrelationship with other rules of international law ascertained. From this follows the importance of continuing the present system of summary records. It is not without significance that the summary records of each session of the Commission are eventually published in edited form in the *Yearbook* of the Commission, thus comprising an integral part of the documentation of the Commission. The records of the Commission constitute the *travaux préparatoires* of the relevant provisions of a convention, the drafts for which are prepared by the Commission. The summary records of the Commission also have their utility for international adjudications and settlements. The ICJ has, in fact, referred to them on a number of occasions in applying and interpreting international conventions concluded on the basis of draft articles prepared by the Commission.

Drafting Committee

254. At the present session, the Drafting Committee was established and held its first meeting as early as the second day of the session. The Committee held a total of 36 meetings, a record number considering the two-week reduction in the length of the session. This made it possible for the Commission to complete its first reading of the draft articles on two topics: "Jurisdictional immunities of States and their property" and "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". The Commission felt, as it did at its previous session, that it would be useful to reaffirm the desirability of the Drafting Committee being established and meeting as early as possible at each session, to enable the Committee to deal with draft articles referred to it at the particular session as well as any others left pending from previous sessions.

Documentation

255. While appreciating the efforts made by the special rapporteurs to complete their reports to the Commission as early as possible, and the efforts made by the Secretariat to have those reports distributed in time, the Commission wished to reiterate the continuing importance of the early submission of the reports of the special rapporteurs and the distribution of all pre-session documentation as far in advance of the beginning of each session as possible.

256. The Commission noted with satisfaction that, due to the diligence of the Secretariat and, in particular, the Department of Conference Services, the summary records of the discussions in the Sixth Committee of the General Assembly in 1985 relating to the report of the Commission had been issued as early as possible. This had enabled the Codification Division of the Office of Legal Affairs to prepare and make available to members of the Commission at an early date the topical summary of those discussions. The Commission wished to emphasize the importance of such practice being maintained in the future, both with a view to facilitating the work of the special rapporteurs and from the point of view of enabling all its members to undertake the necessary studies prior to the opening of the session.

257. The Commission expressed its appreciation to the Secretariat, and in particular to the Department of Conference Services, for the efforts made to expedite publication of the *Yearbook of the International Law Commission*. As noted in previous reports of the Commission, the timely and regular publication of the *Yearbook* was important, particularly as the summary records of the annual sessions of the Commission, the reports of the special rapporteurs and studies prepared by the Secretariat appeared in final form in the *Yearbook*. The Commission welcomed the assurance of the Secretariat that it would make every effort to ensure that a satisfactory schedule of publication for the *Yearbook* was established and maintained in future years.

258. The Commission requested the Secretariat to ensure that the new, fourth edition of the publication *The Work of the International Law Commission*, currently being prepared by the Secretariat, was published in 1987. The updated publication, which would contain brief histories of the topics considered by the Commission, the texts of drafts prepared by the Commission and the texts of conventions adopted recently on the basis of those drafts (including the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations), would be of great value, for it was a basic work of reference used extensively in the diplomatic and academic fields.

Other matters

259. The Commission took note of, and requested its Chairman to reply in an appropriate manner to, a communication from the Under-Secretary-General for Political and Security Council Affairs drawing the attention of the Commission to General Assembly resolutions 40/3 and 40/10 of 24 October and 11 November 1985, relating, respectively, to the "International Year of Peace" and the "Programme of the International Year of Peace".

260. The Commission also took note of, and requested its Chairman to reply in an appropriate manner to, a communication dated 24 January 1986 from the Secretary-General seeking reductions in conference expenditures wherever possible and prudent, and a communication dated 28 February 1986 from the Chairman of the Committee on Conferences on necessary economies in documentation. The Commission is mindful of the importance of utilizing the conference time and services made available to it as economically and as fully as possible and has put into effect certain measures of economy, including a reduction in the length of its annual report and certain changes in the times of its meetings, to accommodate present limitations in available conference services. The Commission has always endeavoured in the past to make maximum use of the conference time and services made available, and at its present session virtually achieved that goal.

261. The Commission agreed that it should keep on its agenda for future sessions the review of the status of its programme and methods of work.

C. Co-operation with other bodies

262. The Commission was represented at the December 1985 session of the European Committee on Legal Co-operation in Strasbourg by Sir Ian Sinclair, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission.

263. The Commission was represented at the January 1986 session of the Inter-American Juridical Committee in Rio de Janeiro by the outgoing Chairman of the Commission, Mr. Satya Pal Jagota, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Seymour J. Rubin. Mr. Rubin addressed the Commission at its 1980th meeting, on 2 July 1986; his statement is recorded in the summary record of that meeting.

264. The Commission was represented at the February 1986 session of the Asian-African Legal Consultative Committee in Arusha by Mr. El Rasheed Mohamed Ahmed, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. B. Sen. Mr. Sen addressed the Commission at its 1958th meeting, on 3 June 1986; his statement is recorded in the summary record of that meeting.

D. Date and place of the thirty-ninth session

265. The Commission decided to hold its next session at the United Nations Office at Geneva from 4 May to 24 July 1987.

E. Representation at the forty-first session of the General Assembly

266. The Commission decided that it should be represented at the forty-first session of the General Assembly by its Chairman, Mr. Doudou Thiam.

F. International Law Seminar

267. Pursuant to General Assembly resolution 40/75 of 11 December 1985, the United Nations Office at Geneva organized the twenty-second session of the International Law Seminar during the present session of the Commission. The Seminar is intended for advanced students of international law and junior professors or government officials who normally deal with questions of international law in the course of their work. Twenty-four candidates of different nationalities and mostly from developing countries, selected by a committee under the chairmanship of Mr. José M. Lacleta Muñoz, as well as three observers participated in this session of the Seminar.

268. The session of the Seminar was held at the Palais des Nations from 20 May to 6 June 1986, under the direction of Mr. Philippe Giblain.

269. During the three weeks of the session, the participants in the Seminar attended the meetings of the Commission. In addition, a number of lectures were given at the Seminar, some of them delivered by members of the Commission on the following subjects: Chief Akinjide: "Mercenarism and international law"; Mr. Francis: "Enhancing the effectiveness of the principle of non-use of force in international relations"; Mr. Jagota: "The work of the International Law Commission"; Mr. Koroma: "Legal aspects of the Lomé III Convention"; Mr. Riphagen: "State responsibility"; Mr. Roukounas: "International treaties whose entry into force and termination are uncertain"; Mr. Sucharitkul: "Jurisdictional immunities of States and their property"; Mr. Tomuschat: "The Human Rights Committee"; Mr. Yankov: "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

270. The participants in the Seminar were also received at the headquarters of ICRC, following a lecture on international humanitarian law and public international law.

271. At the end of the Seminar, Mr. Doudou Thiam, Chairman of the Commission, presented the participants with a certificate testifying to their participation in the twenty-second session of the Seminar.

272. None of the costs of the Seminar were borne by the United Nations, which is not asked to contribute to the travel or living expenses of the participants. The

Commission noted with appreciation that the Governments of Austria, Denmark, Finland and the Federal Republic of Germany had made fellowships available to participants from developing countries. With the award of those fellowships, it was possible to achieve adequate geographical distribution of participants and bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. In 1986, fellowships were awarded to 10 participants. Of the 499 candidates, representing 115 nationalities, accepted as participants in the Seminar since its inception in 1964, fellowships have been awarded to 240.

273. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable young lawyers, and especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission wishes to draw attention to the fact that, due to a shortage of funds, if adequate contributions are not forthcoming, the holding of the twenty-third session of the International Law Seminar in 1987 may be in doubt. The Commission therefore appeals to all States to contribute, in order that the Seminar may continue.

CHECK-LIST OF DOCUMENTS OF THE THIRTY-EIGHTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/395	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 6 above, para. 8.
A/CN.4/396 [and Corr.1]	Eighth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	Reproduced in *Yearbook ... 1986*, vol. II (Part One).
A/CN.4/397 [and Corr.1 and 2] and Add.1 [and Add.1/Corr.1]	Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur	*Idem.*
A/CN.4/398 [and Corr.1-3]	Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	*Idem.*
A/CN.4/399 and Add.1 and 2	Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	*Idem.*
A/CN.4/400	Seventh report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	*Idem.*
A/CN.4/401	Third report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	*Idem.*
A/CN.4/402 [and Corr.1, 2 and 4]	Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	*Idem.*
A/CN.4/L.398	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly	Mimeographed.
A/CN.4/L.399 [and Corr.1]	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee: titles of parts II and III of the draft; articles 2 to 6 and 20 to 28	Texts reproduced in *Yearbook ... 1986*, vol. I, summary records of the 1968th meeting, 1969th meeting (paras. 68 *et seq.*), 1970th and 1971st meetings, and 1972nd meeting (paras. 1-21).
A/CN.4/L.400	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Titles and texts adopted by the Drafting Committee: titles of the four parts of the draft; articles 28 to 33	*Idem*, summary record of the 1980th meeting, paras. 52 *et seq.*
[A/CN.4/L.401]		[Not used.]
A/CN.4/L.402	Draft report of the International Law Commission on the work of its thirty-eighth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Forty-first Session, Supplement No. 10* (A/41/10). For the final text, see p. 5 above.
A/CN.4/L.403 and Add.1 and 2 [and Add.2/Corr.1]	*Idem:* chapter II (Jurisdictional immunities of States and their property)	*Idem*, see p. 7 above.
A/CN.4/L.404 and Add.1	*Idem:* chapter III (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	*Idem*, see p. 23 above.
A/CN.4/L.405 and Add.1	*Idem:* chapter IV (State responsibility)	*Idem*, see p. 35 above.
A/CN.4/L.406 and Add.1	*Idem:* chapter V (Draft Code of Offences against the Peace and Security of Mankind)	*Idem*, see p. 40 above.
A/CN.4/L.407 and Add.1	*Idem:* chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law)	*Idem*, see p. 55 above.
A/CN.4/L.408 and Add.1	*Idem:* chapter VII (The law of the non-navigational uses of international watercourses)	*Idem*, see p. 60 above.
A/CN.4/L.409	*Idem:* chapter VIII (Other decisions and conclusions of the Commission)	*Idem*, see p. 64 above.
A/CN.4/SR.1940-A/CN.4/SR.1989	Provisional summary records of the 1940th to 1989th meetings	Mimeographed. The final text appears in *Yearbook ... 1986*, vol. I.

Printed at United Nations, Geneva
87-40723 (GE.87-60827)
September 1987–3,250

00900P

United Nations publication
Sales No. E.87.V.8 (Part II)

ISBN 92-1-133298-2
(complete set of two volumes)
ISBN 92-1-133297-4 (Part II)
ISSN 0082-8289